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Late Editor of the American and English Railroad Cases and the American and English Corporation Cases.

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TABLE OF TITLES AND DEFINITIONS.

See index for numerous sub-titles and definitions contained in the notes.

-
- | | |
|---|--|
| <p>Obiter Dictum, 1
 Object, 1
 Objection, 2
 Obligation, 2
 Obligation of a Contract, 4
 Obligatory Writing, 4
 Oblige, 5
 Obligee, Obligor, 5
 OBLITERATION. See Alteration of Instruments, Cancel; Wills.
 OBSCENITY, 5
 Obsolete, 12
 OBSTRUCTING JUSTICE. 13
 OBSTRUCTION. See Impede; Logs and Lumber; Mandamus.
 Obtain, 26
 Obvious, 27
 Occasion, Occasioned, etc., 27
 Occupancy, 28
 Occupant, Occupier, 29
 Occupation, 31
 Occupy, Occupied, 32
 Occur, 34
 Of, 34
 Offense, Offender, Offending, 36
 Offensive, 38
 Offer, 38
 OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, 39
 OFFICERS OF MUNICIPAL CORPORATIONS. See Public Officers.
 OFFICIAL BONDS. See Bonds; Officers of Private Corporations.
 Offspring, 178
 Oil, 178
 Old, 180
 Oleomargarine, 180
 Omission, 182
 Omnibus, 182
 On, 183
 Once, 189
 One, 189
 Onerous, 190
 Only, 191</p> | <p>Onus—Onus Probandi, 192
 Open (to begin), 192
 OPEN AND CLOSE, 'RIGHT TO, 194
 Open Commission, 209
 Opera, 212
 Operate, Operating, 213
 Operation, 213
 Operative, 214
 OPINIONS. See Character; Expert and Opinion Evidence; Wills.
 OPINIONS OF THE ATTORNEYS GENERAL.
 See Attorney General.
 Opinions of the Justices, 215
 Opportunity, 217
 Opposite, 217
 Oppression, 218
 OPTIONS. See Contract; Gambling Contracts; Vendor and Vendee.
 Or, 218
 Ordain, 223
 ORDERS, 223
 ORDINANCES, 235
 Ordinary, 271
 Ore-Leave, 274
 Organize, 274
 Original—Originally, 274
 Ornament, 276
 Ornery, 277
 Orphan, 277
 Other, 278
 Others, 285
 Otherwise, 285
 Ounce, 289
 Ouster, 289
 Out, 289
 Outfit, Outfitter, 290
 Outgoings, 291
 Out-House, 291
 Outlawry—Outlaw, 293
 Outrage, 293
 Outstanding, 294
 Outward Mark, 294
 Over, 294
 Overdraw, 295</p> |
|---|--|

TABLE OF TITLES AND DEFINITIONS.

- Overdue, 295
- Overplus, 296
- Overrate, 296
- OVERSEER.** See Poor Laws; Road Officers.
- Overt, 296
- Overtaking Vessel, 297
- Overwhelming Proof, 297
- Owe, 297
- Owelty, 297
- Owing, 297
- Own; Owned, 298
- Owner, 299
- Ownership, 306
- OYSTERS,** 306
- Package; Packages, 308
- Packer, 309
- Packing Jury, 309
- Paintings, 309
- PALACE CARS.** See Sleeping Cars
- Palmistry, 309
- Pandects (in Civil Law), 310
- Panel, 310
- Paper; Papers, 310
- Par, 311
- Parallel, 311
- Paraphernal, 312
- Paraphernalia, 312
- Parcel, 313
- PARCENARY (ESTATE IN),** 313
- PARDON,** 317
- PARENT AND CHILD,** 331
- Pari Delicto, 406
- Parish, 406
- PARKS AND PUBLIC SQUARES,** 407.
- PARLOR CARS.** See Sleeping Cars
- Parochial Church, 418
- Parol, 418
- PAROL AGREEMENTS.** See Verbal Agreements
- PAROL EVIDENCE,** 419
- Pars, 467
- Part, 467
- Partaker, 468
- PARTIAL LOSS.** See Fire Insurance; Marine Insurance
- Particeps Criminis, 469
- Participate, 469
- Particular, 469
- PARTICULARS, BILL OF.** See Bill of Particulars.
- PARTIES TO ACTIONS,** 470
- PARTITION,** 660
- PARTNERSHIP,** 824

THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

OBITER DICTUM—See note 1.

OBJECT.—The thing aimed at, the end sought to be accomplished;² whatever is presented to the mind as well as what is presented to the senses; whatever, also, is acted or operated upon affirmatively, or intentionally influenced by anything done, moved, or applied thereto.³

1. When a question is presented by a bill in equity, urged and relied upon in the argument, and passed upon by the court in the opinion, it cannot with reason be said that the point was not involved and the opinion of the court on the question is *obiter dictum*. Buchner v. Chicago etc. R. Co., 90 Wis. 264.

Dicta are opinions of a judge which do not embody the resolution or determination of the court, and made without argument or full consideration of the point; are not the professed deliberate determinations of the judge himself. *Obiter dicta* are such opinions uttered by the way, not upon the point or question pending, as if turning aside for the time from the main topic of the case to collateral subjects. *Rohrback v. Germania F. Ins. Co.*, 62 N. Y. 47, 58. See also *DICTA*, 5 Am. & Eng. Encyc. of Law 661.

2. And. L. Dict.

3. *Wells v. Shook*, 8 Blatchf. (U. S.) 257.

Object Synonymous with Subject.—“Objects charged with internal tax” is equivalent to “subjects of taxation.” *Wells v. Shook*, 8 Blatchf. (U. S.) 257. An attempt has been made by some to draw a distinction, because the act of congress used the word “object,” while most of the State constitutions use the word “subject.” We have seen that the

constitutions of Michigan and New Jersey use the word “object,” and as the former State is the home of Mr. Cooley, that eminent jurist, in stating the purpose of all these provisions, would most likely have seen and stated the distinction, if one in fact exists. Moreover, if any distinction is to be made, it seems to me that the word “object,” in the connection in which it is used, is obviously of broader significance than the word “subject.” “Object” may be used as having the sense of “effect”—the thing intended to be accomplished, not the means by which it is to be accomplished, which is properly the “subject.” For instance, the object of the act in question was to confer the elective franchise on females; its subject was the subject matter on which, in accomplishing that object, the legislative will operated, namely, the section of the Code defining the qualifications of electors. I do not, however, lay particular stress on the use of the word “object” instead of “subject” in our organic act. For all practical purposes the words are synonymous, as indicated by Mr. Cooley. *Harland v. Territory*, 3 Wash. Ter. 131.

“Object of the Action” Defined and Distinguished from the “Subject of the Action.”—The “subject of action” cannot be the “object of the action.” The

OBJECTION—(See also BILL OF EXCEPTIONS, vol. 2, p. 218; MASTER IN EQUITY, vol. 14, p. 942; TENDER; TRIAL).—See note 1.

OBLIGATION—(See also LIABLE, vol. 13, p. 290; MORAL OBLIGATION; BONDS, vol. 2, p. 448; DEBT, vol. 5, p. 143).—In a general sense, a binding; a legal recognition of a person's engagement or undertaking; an enforceable duty, assumed or imposed.² In a stricter sense and much more common in practical jurisprudence, a sealed instrument containing an engagement or promise. It includes bonds and other writings similarly enforceable, but not having the form and all the characteristic incidents of bonds.³

"This word has two well defined legal meanings: one is where it is a name given to the contract itself; the other includes those cases where it refers to the duty imposed upon a person in connection with his contract, to perform it, or to a liability arising from his contract, or from his actionable tortious conduct. The

"subject of action" must exist prior to the creation of the causes of action which are to be united; for the causes of action are such as "arise out of" transactions "connected with" the "subject of action." But the "object of action" is only brought into existence by the commencement of the action itself, long after both the "subject of action" and the "causes of action" have had an existence. The "object of the action" is the thing sought to be attained by the action. It is the remedy demanded, the relief prayed for, and is no part of the "subject of action" or the "cause of action." *Scarborough v. Smith*, 18 Kan. 406.

"Object or Refuse."—Where a testator devised a copyhold estate to A, "upon this express condition, that A should, within three months after testator's death, convey three specific leasehold messuages to A's three sisters, and if he should 'object or refuse' to make such conveyances" the devise to A to be void, and the estate to go to A's three sisters—*held*, that the words "object or refuse" do not necessarily express a positive act. It was assumed by the devisee that the grandson would convey if he did not object. That does not imply a request on the other side. *Doe v. Crisp*, 8 A. & E. 779; s. c., 35 E. C. L. 526. See also REFUSE.

1. When counsel "objected" to an instruction of the trial judge the court *held*, that the word objected should be regarded as having the same significance as "excepted." *Elsner v. Supreme*

Lodge Knights & Ladies of Honor, 98 Mo. 640.

2. Abb. L. Dict. See also *Blair v. Williams*, 4 Litt. (Ky.) 65.

A valid, subsisting obligation may be said to consist of a legal debt, and the remedy to enforce it. *Cocke v. Hoffman*, 5 Lea (Tenn.) 112.

"Obligation" is sometimes used as equivalent to "legal liability" or "legal duty." *Crandall v. Bryan*, 15 How. Pr. (N. Y.) 48; *Jefery v. Underwood*, 1 Ark. 112.

In its most extensive sense, synonymous with duty. And. L. Dict.; *Crandall v. Bryan*, 15 How. Pr. (N. Y.) 55, 56; *Sibillrud v. Minneapolis etc. R. Co.*, 29 Minn. 60.

In its common acceptance it will embrace every duty imposed by the law, whether such be the creature of a statute, of a record, of a recognizance, of a sealed instrument, or of a simple contract. *Elasser v. Haines*, 52 N. J. L. 10.

3. Abb. L. Dict. See also *Elasser v. Haines*, 52 N. J. L. 10; *State v. Campbell*, 103 N. Car. 344.

"'Obligation' is a word of his own nature of a large extent; but it is commonly taken in the common law for a bond containing a penalty, with condition for payment of money or to do or suffer some act or thing, etc., and a bill is most commonly taken for a single bond without condition." (Co. Litt. 172 a.) *Ryland v. Delisle*, 38 L. J., P. C. 67; *L. R.*, 3 P. C. 17.

An obligation is defined to be a deed

first class formerly covered only sealed instruments, wherein the obligor was bound under a penalty to do a certain thing; but more recently it has been frequently extended to all written contracts."¹

in writing, whereby one man doth bind himself to another to pay a sum of money or do some other thing. *Shep. Touch.*, tit. Obligation, p. 367; *Com. Dig.*, tit. Obligation (B).

A deed whereby a man binds himself under a penalty to do a thing. *Hargroves v. Cook*, 15 Ga. 321. See also *Smith v. Ellington*, 14 Ga. 383.

"Obligation," when taken in its legal sense, means a bond, or other writing in the nature of a bond, such as statutes, merchant and staple, recognizances, etc. If we take the word in its popular signification, as an act by which a person becomes bound to or for another, or to perform something, it will embrace every conceivable liability, written or unwritten, by which one man may be bound to another, and in regard to which there may be a several liability. To give it this extensive signification would produce serious mischief and disorder in the administration of the law. *Strong v. Wheaton*, 38 Barb. (N. Y.) 616.

1. *Exchange Bank v. Ford*, 7 Colo. 314. Obligation has also a very broad and comprehensive legal significance, and embraces all instruments of writing, however informal, whereby one party contracts with another for the payment of money or for the delivery of specific articles. *State v. Campbell*, 103 N. Car. 344. See also *Morrison v. Lovejoy*, 6 Minn. 353; *Sinton v. Carter Co.*, 23 Fed. Rep. 535; 538.

Equivalent to Liability.—In an Ohio statute, which provides that attachment may issue when the defendant has "fraudulently or criminally contracted the debt, or incurred the obligation on which suit is about to be or has been brought," obligation is equivalent to liability. *Sturdevant v. Tuttle*, 22 Ohio St. 111.

Not an Obligation but a Testamentary Paper.—"Md., September 4th, 1884.—At my death, my estate or my executor pay to July Ann Cover the sum of three thousand dollars. Columbus Cover. Witness: David Engel of P. [Seal.]" The above instrument was held to be a testamentary paper and not an obligation for the payment of money, and no recovery could be had thereon. *Cover v. Stern*, 17 Md. 449.

In Statute.—Obligation, as used in the

Delaware act declaring that "an obligation or written contract of several persons shall be joint and several, unless otherwise expressed," does not apply to a negotiable promissory note. *Gale v. Myers*, 4 Houst. (Del.) 546.

The words, bonds or other obligations, in a statute do not include promissory notes. *Rippon v. Townsend*, 1 Bay (S. Car.) 445.

Obligation, as used in the Pennsylvania act of 1850, declaring that the assignees of an insolvent bank shall receive in payment of debts due the bank, "its own notes and obligations and the checks of its depositors at par," does not apply to a protested draft. *Basehore v. Rhodes*, 85 Pa. St. 44.

Whenever the word "obligation" is used in a statute as the name of a contract, as it is in the sections now under consideration, an agreement in writing sealed or unsealed is referred to. Where in a legislative provision, it is used with reference to legal duty or liability, such duty or liability may arise from an oral or written contract, or in some instances from actionable tortious conduct. *Exchange Bank v. Ford*, 7 Colo. 314.

"False, forged, and counterfeited obligation of the United States" occurring. *Rev. St. U. S.*, § 5431. Coin is not an obligation of the United States, but is the thing itself—money. *United States v. Owens*, 37 Fed. Rep. 115.

The term obligation, in a statute providing that persons severally liable on the same obligation or instrument, etc., may be included in the same action at the plaintiff's option, should be construed in its legal meaning. Such a provision does not embrace causes of action not evidenced by a writing. In the legal sense, "obligation" means a bond, or other writing in the nature of a bond, such as statutes merchant and staple, recognizances, etc. If the word in such an enactment is taken in its popular signification, of any act by which a person becomes bound to or for another, or to perform something, the statute will embrace every conceivable liability, written or unwritten, by which one man may be bound to another, and in regard to which there may be a several liability; which is not intended and would be inconvenient. *Strong v. Wheaton*, 38 Barb. (N. Y.) 616.

OBLIGATION OF A CONTRACT—(See also CONSTITUTIONAL LAW, vol. 3, p. 741).—Is that duty of performing it which is recognized and enforced by the laws. The law which binds parties to a contract to perform their agreement.¹

OBLIGATORY, WRITING—(See also BOND, vol. 2, p. 448; OBLIGATION).—The words "writing obligatory" mean a written contract under seal.²

Obligation (as used in New Jersey statute of limitations declaring that every action of debt upon "any obligation, with condition to pay money alone . . . shall be," etc.) means an instrument under seal. *Elasser v. Haines*, 52 N. J. L. 10.

A due bill is an "obligation" within the meaning of Code of North Carolina, § 1064, making an "order, bill of exchange, bond, promissory note, or other obligation," the subject of larceny. *State v. Campbell*, 103 N. Car. 344.

In New York Code, as used § 179 of the Code, subd. 4, it is not used in its strict sense of special contract, but is equivalent to the words "legal liability" or "legal duty." *Crandall v. Bryan*, 15 How. Pr. (N. Y.) 48; s. c., 5 Abb. Pr. (N. Y.) 162.

1. *Curran v. State*, 15 How. (U. S.) 319; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 197; *Pugh v. Bussell*, 2 Blackf. (Ind.) 397. "The obligation of a contract" is found in the terms of the agreement, sanctioned by moral and legal principles. *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) *572.

The natural obligation of contracts is co-extensive with the duty of performance. *Ogden v. Saunders*, 12 Wheat. (U. S.) 213. See also *Wachter v. Farnachon*, 62 Wis. 122. See also *McCracken v. Hayward*, 2 How. (U. S.) 609.

The legal tie which imposes a necessity of doing or abstaining from a particular act, as distinguished from the imperfect obligation arising from gratitude, charity, or other moral duties binding upon conscience but having no legal remedy for their enforcement. This latter is the essence of the legal obligation. *State v. Carew*, 13 Rich. L. (S. Car.) 508; *Moore v. Holland*, 16 S. Car. 29; *Wood v. Wood*, 14 Rich. L. (S. Car.) 154.

Obligation of a contract consists in the power and efficacy of the law which applies to and enforces performance of a contract, or the payment of an equivalent for its nonperformance. The ob-

ligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract. *Ogden v. Saunders*, 12 Wheat. (U. S.) 213.

The law is the source of the obligation, and the extent of the obligation is defined by the law in use at the time the contract is made. *Townsend v. Townsend*, Peck (Tenn.) 13.

The obligation of a contract may be defined as consisting in those duties and liabilities which are imposed on the contracting parties by the law which is in force at the time of the making of the contract, as the legal result of the terms of their contract. *Kirtland v. Moulton*, 41 Ala. 554.

The word "obligation" in its origin imports compulsion—the tying or binding one against or irrespective of his consent. . . . The contract is the occasion, but it is not the efficient cause of obligation. When the promise has been made, if the law commands its performance, and makes the command effectual by methods of actual compulsion, it is the combination of these—the command and the constraining force—which constitute the obligation of the contract, the compulsory efficiency which the law annexes to it. *Wood v. Wood*, 14 Rich. L. (S. Car.) 154.

A contract is an agreement between two or more persons to do or not to do a particular thing; and the obligation of a contract is found in the terms in which that contract is expressed, and it is the duty thus assumed by the contracting parties respectively to perform the stipulations of such contract. *Barlow v. Gregory*, 31 Conn. 265.

By the obligation is meant the means which, at the time of its creation, the law affords for its enforcement. *Louisiana v. Police Jury*, 111 U. S. 716. See also *Louisiana v. New Orleans*, 102 U. S. 203. See also *Rader v. Township of Union*, 44 N. J. L. 260; *Munday v. Rahway*, 43 N. J. L. 345.

2. "So far, therefore, from the phrase 'writing obligatory' having acquired a

OBLIGE.—See note 1.

OBLIGEE, OBLIGOR.—Obligee is he to whom an obligation or bond is given.² Obligor, he who enters into a bond or obligation.³

OBLITERATION.—See ALTERATION OF INSTRUMENTS; CANCEL, vol. 2, p. 718; WILLS.

OBSCENITY—(See also DISORDERLY HOUSE; EXPOSURE OF PERSON; LEWD AND LASCIVIOUS COHABITATION).

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|--|---------------------------------------|
| I. Definition, 5. | IV. Obscene Matter Not Importable, 9. |
| II. In Criminal Law, 6. | V. The Indictment, 10. |
| III. Obscene Matter in U. S. Mails, 7. | VI. Evidence, 12. |

I. DEFINITION.—Obscenity is such indecency as is calculated to promote the violation of the law and the general corruption of morals.⁴ It is applied to language spoken, written, or printed, and to pictorial productions, and includes what is foul or indecent, as well as what is immodest or calculated to excite impure desires.⁵ The question as to what constitutes the offence

popular sense, as contended for, it is scarcely ever used, except in pleading and in legislation, when the writers intend the utmost precision of language." *Watson v. Hoge*, 7 Yerg. (Tenn.) 350. See also *Clark v. Phillips*, Hempst. (U. S.) 294; *Stull v. Wilcox*, 2 Ohio St. 573; *Van Santwood v. Sandford*, 12 Johns. (N. Y.) 198.

"A 'writing obligatory' is a bond, or some written obligation under seal. It is a term that is never applied to simple contracts, though they may be in writing." *Luna v. Mohr*, 3 N. Mex. 56.

1. "Every act that causes damage to another *obliges* him to repair it." Civil Code La. art. 2315. "The meaning of this is that under our law the wrong done by one human being to another, or to his estate, creates an obligation, *i. e.*, brings at once into existence the relation of debtor and creditor between the wrongdoer and the injured party." *United States v. New Orleans*, 17 Fed. Rep. 487.

2. And. L. Dict.

The person in favor of whom some obligation is contracted, whether such obligation be to pay money or to do or not to do something. *Bouv. L. Dict.*

The words "obligee and payee" have a technical and definite meaning, as used in the New Jersey act relative to promissory notes, bonds, etc., and apply only to notes, bonds, or bills, whether such

notes, bonds or bills are given for the payment of money or for the performance of covenants and conditions, and not to mortgages. *Hall v. Byrne*, 2 Ill. 142.

3. And. L. Dict.

The person who has engaged to perform some obligation. *Bouv. L. Dict.* "Obligor," according to its technical sense, signifies the maker of a bond or writing obligatory, but from the context of the writing it may be shown to have a different meaning, as in *Thompson v. Johnson*, the word was held to mean all persons obligated to the doing or forbearing of an act. *Thompson v. Johnson*, 40 N. J. L. 223.

4. 2 Whart. Crim. Law, § 1431; 2 *Bouv. L. Dict.*, Obscenity.

The words "manifestly *designed to corrupt* the morals of youth," as used in Tex. Penal Code, art. 343, refer to the intention of the person making and publishing the composition, not to the meaning of the composition on its face. *Smith v. State*, 24 Tex. App. 1.

5. And. L. Dict., Obscene; *United States v. Loftis*, 12 Fed. Rep. 673; *s. c.*, 8 Sawy. (U. S.) 194; *Worcester's Dictionary*.

The test is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of the sort may fall. A

of obscenity arises in two connections, viz: in criminal prosecutions under the common law and State statutes, and in prosecutions for a violation of the United States statutes regarding the mailing and importation of obscene matter.

II. IN CRIMINAL LAW.—Obscenity committed in certain ways was an offence indictable at common law, and the statutes passed upon the subject, therefore, only operate as an enlargement of the scope of the term and define it more specifically;¹ they create no new offence. One may be guilty of obscenity in many ways; as the definition describes the offence may be committed by language, spoken,² written,³ or printed;⁴ by pictorial productions,⁵ or by mere action of the party otherwise—*e. g.*, by indecent exposure of his person, etc.⁶ It is essential to constitute the offence that there should have been some publicity of the obscene language or matter; one who prints and keeps for his own diversion vulgar pictures or obscene productions is not guilty of the offence unless he exhibits them.⁷ But the motive of the party is no

book need not have words which are in themselves obscene in order to be obscene. Regard is had to the idea conveyed by the words used in any substantial part of the publication. "Obscenity" is that form of indecency which is calculated to promote general corruption of morals. "Lewdness," that which has a tendency to excite lustful thoughts. *United States v. Bennett*, 16 Blatchf. (U. S.) 362.

1. *Com. v. Sharpless*, 2 S. & R. (Pa.) 101; s. c., 7 Am. Dec. 632; *Com. v. Holmes*, 17 Mass. 336; *Reg. v. Bradlaugh*, L. R., 2 Q. B. Div. 569; s. c., L. R., 3 Q. B. Div. 607; 1 Bishop's *Crim. Law*, § 500.

Statutes against obscenity should receive a reasonable construction. *Thomas v. State*, 103 Ind. 419.

In the case of *Dillard v. State*, 41 Ga. 278, a man intending illicit intercourse asked a woman "to go to bed with him," and such language was considered "vulgar and obscene." The court said: "We cannot think that the legislature was aiming solely at the words, without reference to the thoughts or ideas the words are intended to convey. There is not a single word in the language, however coarse, low or vulgar, that may not be, and is not often used to convey proper and decent ideas, and it is a mawkish and really an indelicate and immodest sensitiveness that blushes at a word which may be used obscenely, but which the occasion and the context shows not to be so used. . . . The words are not only obscene in the idea which they convey and the

insult they include, but the very terms are obscene and vulgar."

2. *Bell v. State*, 1 Swan (Tenn.) 42; *Henderson v. State*, 63 Ala. 193.

The offence may be committed by singing in a public place an obscene song. *State v. Porte*, 106 N. Car. 736.

3. Thus, where N. J. act of March 29th, 1878, makes it an offence to send an indecent letter to a female against her consent, and such a letter was sent to a woman in an enclosure addressed to her husband, it was held that the offence was within the statute. *Larison v. State*, 49 N. J. L. 256; s. c., 60 Am. Rep. 606.

4. The statute 20 and 21 Vict., ch. 83, provides additional powers for the suppression of the trade in obscene books, prints and pictures. Under this statute it is a misdemeanor to procure indecent prints with intent to publish them. *Dugdale v. Reg.* (in error), 1 El. & Bl. 425; *Dears. C. C.* 64; 17 Jur. 546; 22 L. J., M. C. 50.

5. *Fuller v. People*, 92 Ill. 182.

6. See EXPOSURE OF PERSON, 7 Am. & Eng. Encyc. of Law 534.

7. *Dugdale v. Reg.*, 1 El. & Bl. (Eng.) 425; 17 Jur. 546; 22 L. J., M. C. 50.

Abusive, insulting or vulgar language uttered in a public highway, near enough to the prosecutor's premises to be distinctly heard, and actually heard by a member of his family, is uttered in her presence within the meaning of Ala. Code, § 4203. *Henderson v. State*, 63 Ala. 193.

The slightest exhibition, however, will

palliation or excuse where there has been a publication of obscene matter or an utterance of similar language.¹

Whether the matter published is too obscene to be placed upon the record or not is a question of law, not of fact, and therefore for the court to determine;² though a different rule applies as to whether the language, prints or pictures are such as to make the defendant guilty. This latter is a question of fact and for the jury.³

III. OBSCENE MATTER IN THE MAILS.⁴—The United States Rev. Stats., § 3893, provide that “every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and every article or thing designed or intended for the prevention of conception or procuring of abortion; and every article or thing intended or adapted for any indecent or im-

suffice. Thus, the sale of an obscene print to a person in private, he having in the first instance requested that such prints should be shown to him, his object being to prosecute the seller, is a sufficient publication to sustain the charge. *Reg. v. Carlile*, 1 Cox C. C. 229.

1. 1 Bishop's Crim. Law, § 309. See also *Reynolds v. United States*, 98 U. S. 145; *United States v. Anthony*, 11 Blatchf. (U. S.) 200.

Copies of a pamphlet of an obscene nature were seized under 20 and 21 Vict., ch. 83. The publisher did not keep or sell the pamphlet for the sake of gain, nor to prejudice good morals, but for a purpose which he considered to be good. *Held*, that the object of the publisher did not alter the character of his act, the natural consequence of which he must be taken to have intended; and the natural consequence being one which would make the publication of the pamphlet a misdemeanor, and in the opinion of the justices who ordered the seizure proper to be prosecuted as such, the seizure was right. *Reg. v. Hicklin*, 16 W. R. 801; 37 L. J., M. C. 89; 3 L. R., Q. B. 360; 11 Cox C. C. 19; s. c., nom. *Reg. v. Wolverhampton* (recorder), 18 L. T., N. S. 395.

One Mackey was indicted for selling a new edition of the book, which was still obscene, though some of the most offensive passages had been omitted. At the trial this book was not read, but was taken as read. S published a substantially correct report of Mackey's trial, in which, however, he set out the whole of the new edition of the book. *Held*, that the publication of the report setting out the new edition of the book was a misdemeanor; that the obvious

consequence of it would be to corrupt the public morals, and that S, however pure his motives, must be taken to have intended the consequences of his act. *Steele v. Brannan*, 20 W. R. 607; 26 L. T., N. S. 509; 31 L. J., M. C. 85; 7 L. R., C. P. 261.

It was held also that the report was not privileged as being a fair report of a trial in a court of competent jurisdiction; and that copies of the report were rightly ordered to be destroyed.

A herbalist, who publicly exposes and exhibits in his shop, on a highway, a picture of a man naked to his waist and covered with eruptive sores, so as to constitute an exhibition offensive and disgusting, is guilty of a nuisance, although there is nothing immoral or indecent in the picture, and his motive was innocent. *Reg. v. Grey*, 4 F. & F. 73.

2. *Smith v. State*, 24 Tex. App. 1; *McNair v. People*, 89 Ill. 441.

3. *People v. Muller*, 32 Hun (N. Y.) 209.

It was there held that the photographs should be exhibited to the jury. Also, that the fact that said photographs were copies of pictures exhibited in other countries constituted no defence. *S. P. United States v. Davis*, 38 Fed. Rep. 326.

The question is for the jury under instructions from the court as to the meaning of the words. *United States v. Clarke*, 38 Fed. Rep. 500. Yet in the case of *Smith v. State*, 24 Tex. App. 1, it is said that where the composition is a written or printed one it is in the province of the court to determine whether it is really obscene.

4. See also *POSTAL LAWS*, Am. and Eng. Encyc. of Law.

moral use; and every written or printed card, letter, circular, book, pamphlet, advertisement or notice of any kind giving information directly or indirectly, where or how, or of whom or by what means any of the hereinbefore mentioned articles, etc., may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails, nor delivered from any postoffice or by any letter carrier. A violation of this statute is made punishable by fine or imprisonment, or both.¹ This act is constitutional and violates no rights guaranteed by the constitution.² Prior to the amendment of September, 1888, written communications of a personal and private nature sent from one person to another, under cover of a sealed envelope, on which nothing but the address is written, were not embraced within the prohibitions.³ The words "obscene, lewd, lascivious and indecent," as used in the statute, have the same meaning as is given them at common law in prosecutions for obscene libel. The test is whether the tendency of the matter to deprave and corrupt the minds and the morals of those open to lascivious influences.⁴ The statute does not apply to what is merely profane, abusive or coarse,⁵ but it applies to everything of an indecent character, whether extracts from a standard work

1. A fine of \$5,000 or less, and imprisonment for not more than five years. U. S. Rev. Stat. § 3893.

But, it is provided that this does not authorize any person to open any letter or sealed matter of the first class, not addressed to himself. § 3893.

2. United States v. Bennett, 16 Blatchf. (U. S.) 338; *Ex parte* Jackson, 14 Blatchf. (U. S.) 245; s. c., 96 U. S. 727.

3. United States v. Huggett, 40 Fed. Rep. 636. See also United States v. Mathias, 36 Fed. Rep. 892; United States v. Chase, 135 U. S. 255. These latter decisions were rendered upon the statute of July, 1876, which made it a misdemeanor to deposit in the mails any obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character," or any "letter upon the envelope of which" indecent language is written or printed.

4. United States v. Clarke, 38 Fed. Rep. 500; United States v. Clarke, 38 Fed. Rep. 732.

A "lewd" book, pamphlet, or paper, within the meaning of the statute, is one that describes dissolute or unchaste acts, scenes, or incidents, or one the reading whereof, by reason of its contents, is calculated to excite

lustful and sensual desires in those whose minds are open to such influences, and the word "lascivious," is considered as synonymous with the word "lewd." United States v. Clarke, 38 Fed. Rep. 732.

If the effect of pamphlets and papers sent through the mails, as a whole, would be to deprave and corrupt the minds of those into whose hands they might come, whose minds are open to such influences, or to excite lustful or sensual desires, they are obscene and lewd, whether such effect on the minds of readers is produced by single passages or portions of them, or by many passages or portions. United States v. Clarke, 38 Fed. Rep. 732.

5. United States v. Smith, 11 Fed. Rep. 663. *Ex parte* Doran, 32 Fed. Rep. 76.

Therefore a letter, although exceedingly coarse and vulgar, and grossly libelous—imputing to the person addressed an atrocious crime—but which has no tendency to excite libidinous thoughts, or to corrupt the morals of those whose minds are open to such influences, is not "obscene, lewd, or lascivious," within the meaning of the first clause of section 3893 of the United States Revised Statutes, defining non-mailable matter. United States v. Wightman, 29 Fed. Rep. 636.

upon medicine or surgery, intended for general circulation,¹ or a postal card imputing illicit intercourse to a person other than the one to whom it is addressed,² or a quack medical advertisement of articles intended to cause abortion, etc.,³ or a mere private communication.⁴ The offence against the statute is committed by mailing a newspaper with a single obscene article in it, although the remaining articles may be unobjectionable.⁵ The fact that the publications were sent in the real or supposed interest of science, philosophy, or morality is immaterial,⁶ nor is it any defence that the matter was sent to a fictitious address,⁷ or that the medicine mailed was ineffective.⁸

IV. OBSCENE MATTER NOT IMPORTABLE.—By section 2491 of the Revised Statutes all articles, prints, etc., of an obscene character are forbidden to be imported.⁹ A violation of this provision forfeits the articles in question and the forfeiture of articles *not* obscene in the same invoice or package with those which are cannot be remitted.¹⁰ Pictures to come within this statute must be so indecent as to corrupt public morals; they must be something more than coarse and vulgar.¹¹ Any officer, agent, or employee of the government who violates or in any way aids or abets any violation of this section or that concerning the mails is made subject to fine or imprisonment or both.¹²

1. *United States v. Chesman*, 19 Fed. Rep. 497; *Com. v. Landis*, 8 Phila. (Pa.) 453.

In the first case cited (*United States v. Chesman*) an illustrated pamphlet on impotency, containing extracts from standard medical works, but indecent and obscene, was held to come within the statutory prohibition.

2. *United States v. Pratt*, 2 Am. L. T. Rep., N. S. 228.

3. Gould and Tucker's Notes on Rev. Stat. U. S., § 3893.

4. For example, a postal card containing words ordinarily called profane, expressions too vulgar for the court to quote, which indecency was disguised by means of an initial letter; slang words assailing the character of the addressee, and a defamatory political epithet is a violation of the act prohibiting the mailing of postal cards of an indecent, scurrilous, or defamatory character. *United States v. Davis*, 38 Fed. Rep. 326. See also as to private letters. *United States v. Huggett*, 40 Fed. Rep. 636.

5. *United States v. Harman*, 38 Fed. Rep. 827.

6. *United States v. Slenker*, 32 Fed. Rep. 691.

One may have what views on religion he pleases, and publish the same,

but not in connection with obscene matters sent through the mails. *United States v. Bennett*, 16 Blatchf. (U. S.) 336, 360-62, 366-69.

7. *Bates v. United States*, 11 Biss. (U. S.) 70.

8. Where pills designed to prevent conception were sent through the mail it was no defence to show that the pills were worthless for that purpose. *Bates v. United States*, 11 Biss. (U. S.) 70. *United States v. Bott*, 11 Blatchf. (U. S.) 346.

9. The articles, etc., forbidden are substantially the same as those prohibited from the mails by § 3893.

The pleadings must be carefully drawn, and there can be no condemnation if the verdict does not find facts enough to warrant it. *United States v. One Case of Stereoscopic Slides*, 1 Sprague (U. S.) 467. See also Gould & Tucker's Notes on Rev. Stat. U. S. 565.

10. Gould & Tucker's Notes on Rev. Stat. U. S., § 2491; S. T. D. 7616.

11. 12 Pittsb. L. J. 220; Gould & Tucker's Notes on Rev. Stat. U. S., §§ 2491, 3893.

12. A fine of not more than \$5,000 and an imprisonment of not more than ten years.

V. THE INDICTMENT.—The general requisites of an indictment have been treated in a previous article.¹ In the case of an indictment for uttering obscene language or dealing in obscene books it should set forth the language or printed matter *in hæc verba* as in indictments for forgery or libel; but this may be dispensed with and the obscene character of the language or publication be described in more general terms, if it be so gross in character that spreading it upon the record would be an offence against decency.² This latter provision, however, is not intended to do away with the accuracy always required for indictments; the principle that every person accused should be informed clearly of the nature of the charge against him is always to be strictly adhered to.³ There

1. INDICTMENTS, 10 Am. & Eng. Encyc. of Law 450, *et seq.*

2. State v. Brown, 27 Vt. 619. See also People v. Hallenbeck, 52 How. Pr. (N. Y.) 502; Thomas v. State, 103 Ind. 419; United States v. Clarke, 38 Fed. Rep. 500; Com. v. Holmes, 17 Mass. 336.

This same doctrine is thus set forth: "In framing an indictment for 'printing, having in possession, and giving away an obscene and indecent pamphlet,' the supposed obscene matter must be set out, unless the publication is in the hands of the defendant, or out of the power of the prosecution, or the matter is too gross and obscene to be spread upon the records of the court, either of which facts, if existing, should be averred as an excuse for failing to set out the same, and whether such matter is obscene or not is a question of law and not of fact. And where the averment would apply equally well to one of many pamphlets, the indictment is defective, inasmuch as the offence charged should be so stated that the judgment on the trial could be pleaded in bar in another prosecution." *McNair v. People*, 89 Ill. 441.

Thus an indictment charging the use of profane and vulgar language on a certain day "and on divers other days in a public street, and in the presence and hearing of divers persons then and there assembled, and then and there repeating the same, to the evil example and common nuisance, etc.," is sufficient. *State v. Brewington*, 84 N. Car. 783.

An indictment for having in possession an obscene drawing need not describe in what the obscenity consists. *Fuller v. People*, 92 Ill. 182.

An indictment for introducing obscene pictures into a school need not

particularly describe the pictures. *State v. Pennington*, 5 Lea (Tenn.) 506.

3. In the famous case of *Rex v. Bradlaugh* it was held that in an indictment for the publication of an obscene book it is not sufficient to describe the book by its title only, without setting out any of the words charged as obscene. The defect is not cured by a verdict of guilty, and is available either as ground for a motion in arrest in judgment, or for reversal upon error. *Bradlaugh v. Reg.*, 3 L. R., Q. B. Div. 607; 38 L. T., N. S. 118; 26 W. R. 410, C. A.; reversing *Reg. v. Bradlaugh*, 2 L. R., Q. B. Div. 569; 46 L. J., M. C. 286.

An indictment for publishing obscene language must identify the paper, at least, by some general description. *Com. v. Wright*, 139 Mass. 382.

An indictment for an indecent publication which sets out the composition *in hæc verba* need not allege the circumstances connected with its publication. *Smith v. State*, 24 Tex. App. 1.

As to an indictment for publishing an obscene newspaper, see *People v. Girardin*, 1 Mich. 90; *State v. Hanson*, 23 Tex. 232; *Com. v. Holmes*, 17 Mass. 336.

An indictment under Alabama Code, § 4200, which charges that the defendants "by rude and indecent behavior, or by profane or obscene language, wilfully disturbed females, members of the society, at the fair grounds in or near the city of Montgomery, met for the purpose of instruction," etc., is defective for not charging the said females were met "in public assembly." *Smith v. State*, 63 Ala. 55.

An indictment for "making an indecent exposure of his person, by making an uncovered exhibition of his privates," is a sufficient allegation of the commis-

must, of course, be no variance between the allegations in the bill of indictment and the proof to sustain them.¹ A *scienter* must always be alleged, it being a matter of substance, not of form.²

sion of a public indecency. *Arderly v. State*, 56 Ind. 328.

It is not necessary, under N. Y. Laws, 1873, ch. 777—punishing the publication of obscene literature—to state in the indictment the age of the person accused. *People v. Justices of Special Sessions*, 10 Hun (N. Y.) 224.

An indictment for uttering, writing, and publishing a lewd and indecent paper was in the following language, viz: "Did utter, write, and publish a certain obscene, lewd, and indecent paper and writing, which said paper was enclosed in a sealed envelope and deposited in the postoffice of the United States, at said town of Catskill, for mailing and delivery; and said envelope being then and there addressed by the words following, that is to say, 'Mrs. Mary T. Westmore, Catskill, N. Y.'." It was held that the indictment could not be upheld. There should be some general description of the writing. It is not necessary to copy the paper or minutely describe the print, but it is necessary to give a general description thereof and to aver their general tendency; sufficient information should be suggested to put the defendant on enquiry as to her defence, and the subject of the obscenity should be stated. *People v. Hallenbeck*, 52 How. Pr. (N. Y.) 502.

In all cases of obscenity by indecent exposure the indictment must aver exposure and offence to the community generally; mere private indecency is not indictable at common law. 2 Whart. Cr. L., §§ 1431, 1432.

Indictments for Mailing Obscene Matter.—An indictment for mailing "a certain obscene, lewd, and lascivious paper and publication of an indecent character, called Lucifer," did not further particularize or identify it, neither the date being given nor the title of the article, nor its general tenor or purport. *Held*, that the indictment was defective and demurrable. *United States v. Harmon*, 34 Fed. Rep. 872.

An indictment under U. S. Rev. Stat., § 3892, for depositing in the mails obscene matter, contained a count describing the paper mailed as "a certain obscene . . . paper, print, and publication, of an indecent character, beginning with the words following, to-wit: 'As long as there is life there is

hope,' and then and there contained in a paper wrapper having thereon the address . . . following: 'W. E. Deer, Bluff Mills, Indiana, via Waveland,' but which paper is so obscene as to be offensive," etc. The paper, being produced, proved to be a form of circular prepared by the defendant for circulation through the mails. Several days before the trial the defendant craved and obtained oyer of the indecent paper in question. It was held that, under the circumstances, the description of the paper was sufficient. *United States v. Clarke*, 40 Fed. Rep. 325. See also *United States v. Clarke*, 38 Fed. Rep. 500; *Larison v. State*, 49 N. J. L. 256; s. c., 60 Am. Rep. 606.

1. 10 Am. and Eng. Encyc. of Law, INDICTMENT, 556. Thus an indictment on Mass. St. 1862, ch. 168, § 1, alleging that the defendant printed and published obscene pictures of naked girls, is not sustained by proof of nakedness only above the waist. *Com. v. Dejardin*, 126 Mass. 46; s. c., 30 Am. Rep. 652.

But a mere technical variance not affecting substantial rights between the paper proved and that set out in the information, is not fatal. *Thomas v. State*, 103 Ind. 419. See also *Bell v. State*, 1 Swan (Tenn.) 42.

Proof of Identity of Obscene Article.—If, on the trial of an indictment for publishing an obscene snuff-box, a witness proves that the defendant exhibited to him the box produced on the trial, or a box exactly similar, this is not sufficient, if the witness cannot identify the very box exhibited to him. *Rex v. Rosenstein*, 2 C. & P. 414.

2. *United States v. Slenker*, 32 Fed. Rep. 694; *United States v. Wightman*, 29 Fed. Rep. 636; *United States v. Carll*, 105 U. S. 611; *Com. v. Boynton*, 12 Cush. (Mass.) 499; INDICTMENT, 10 Am. & Eng. Encyc. of Law.

An indictment under U. S. Rev. St. § 3893, for depositing obscene matter in the mail was held defective in not averring knowledge of the obscenity of the matter. It is immaterial that the indictment follows the language of the statute, and an averment that defendant knowingly deposited, etc., is not an equivalent of the omitted averment. *United States v. Slenker*, 32 Fed. Rep.

VI. EVIDENCE.—To warrant a conviction under the statute against mailing obscene matter it must be proved, 1st, that the defendant or his agent deposited or caused to be deposited the paper in question in the postoffice for mailing; 2nd, that the defendant knew of the objectionable matter in the paper; 3rd, that the paper is indecent.¹ Evidence of the contents of sealed letters must be obtained otherwise than by their being opened by persons to whom they are not addressed; a search-warrant, issued as required by the fourth amendment to the federal constitution, is necessary.² Decoy letters may be used to detect violations of the statute, and the fact that postoffice inspectors used such test or decoy letters to bring to justice a person suspected of mailing obscene literature does not discredit their testimony.³ That a letter sent was written by the defendant may be shown by proof of his handwriting in the usual way; or by other proof.⁴ The gravamen of the offence, however, is the sending; it is immaterial who wrote it; and where there is no direct proof of sending, evidence as to handwriting is immaterial.⁵

OBSOLETE.—See note 6.

691. This case is directly contradicted by that of *United States v. Clark*, 37 Fed. Rep. 106, and principle seems to sustain this latter case. See also *United States v. Bennett*, 16 Blatchf. (U. S.) 338.

1. *United States v. Bebout*, 28 Fed. Rep. 522; *Bates v. United States*, 11 Biss. (U. S.) 70; s. c., 10 Fed. Rep. 92; *United States v. Clark*, 37 Fed. Rep. 106.

Proof that the defendant deposited the matter in the mail, not by his own hand but by that of another. *Bates v. United States*, 11 Biss. (U. S.) 70.

2. *Ex parte Jackson*, 96 U. S. 727; s. c., 14 Blatchf. (U. S.) 245.

3. *United States v. Slenker*, 32 Fed. Rep. 694, cases, PAUL, J.; *United States v. Wightman*, 29 Fed. Rep. 636, cases, and note.

As to decoy letters see also *United States v. Whittier*, 5 Dill. (U. S.) 35; *Bates v. United States*, 10 Fed. Rep. 92, note; *United States v. Bott*, 11 Blatchf. (U. S.) 346; *United States v. Foy*, 1 Curt. (U. S.) 364; *United States v. Pond*, 2 Curt. (U. S.) 265; *United States v. Cottingham*, 2 Blatchf. (U. S.) 470; *United States v. Rapp*, 30 Fed. Rep. 818. See also **POSTAL LAWS**.

4. But it is not proper to call as an expert to prove such handwriting an officer detailed by the postoffice department to collect the facts in the case, and who had hunted up the testimony, and busied himself in the inception and

prosecution of the case. *United States v. Mathias*, 36 Fed. Rep. 892.

To corroborate the testimony of a former witness, it is proper that the signature of defendant to other letters should be identified by other witnesses. *Thomas v. State*, 103 Ind. 419.

A witness who shows himself acquainted with defendant's handwriting may refer to other papers in his possession to refresh his memory; this not being a comparison of handwritings. *Thomas v. State*, *supra*.

Guilty knowledge on the part of defendant must be proved; for this purpose it is proper to admit in evidence another letter written by defendant. *Thomas v. State*, *supra*.

On a trial upon an indictment for sending an obscene letter through the mails, an expert in handwriting may be asked to compare the letter charged in the indictment with one already in evidence for another purpose, acknowledged by defendant to have been written by him, and to say if in his opinion they both came from the same hand.

5. *Thomas v. State*, 103 Ind. 419.

6. It must be a strong case to justify the court in deciding that an un repealed act is obsolete and invalid. It will not say that such a case may not exist where there has been a non-user for a great number of years; where, from a change of time and manners, an ancient sleeping statute would do great mischief if suddenly brought into ac-

OBSTRUCTING JUSTICE—(See also ARREST, vol. 1, p. 719; ASSAULT, vol. 1, p. 778; CONTEMPT OF COURT, vol. 3, p. 777; CRIMINAL CONSPIRACY, vol. 4, p. 582; EMBRACERY, vol. 6, p. 507; ESCAPE, vol. 6, p. 844; INDICTMENT, vol. 10, p. 450; OFFICERS; PERJURY; PRISONS; WITNESSES).

I. Obstructing an Officer, 13.

1. *What Officer May Not be Resisted*, 13.

2. *Warrant or Notice of Authority of Officer Serving Process*, 15.

3. *Kinds of Resistance*, 16.

(a) *Resistance to Process Against the Person*, 16.

(b) *Resistance to Process Against Property, etc.*, 18.

4. *Effect of Resistance*, 20.

5. *Indictment; Information*, 21.

6. *Evidence*, 24.

II. Obstructing Attendance of Witness, 25.

I. OBSTRUCTING AN OFFICER—1. What Officer May Not be Resisted.

—The offence of resisting an officer in the performance of his official functions is not confined to officers *de jure* but extends to officers *de facto* as well, as the question of the appointment and authority of the officer is properly tested in other ways.¹

tion; where a long practice inconsistent with it has prevailed, and, especially, where from other and later statutes it might fairly be inferred that, in the apprehension of the legislature the old one was not in force. *Wright v. Crane*, 13 S. & R. (Pa.) 452.

It is contrary to the spirit of our institutions to revive, without notice, a penal statute grown obsolete by long disuse, especially when the general current of legislation shows the statute to have been regarded by the legislature as no longer in force. *Hill v. Smith*, 1 Morr. (Iowa) 79. See also *Snowden v. Snowden*, 1 Bland Ch. (Md.) 556.

"A positive statute, unrepealed, can never be repealed by non-user alone. *Respublica v. Commrs.*, 4 Yeates (Pa.) 181, 218; *Com. v. Hoover*, 1 P. A. Browne App. (Pa.) 28; *Wright v. Crane*, 13 S. & R. (Pa.) 447. The disuse of a law is at most only presumptive evidence that society has consented to such a repeal. However this presumption may operate on an unwritten law, it cannot, in general, act upon one which remains as a legislative act on the statute book, because no presumption can set aside a certainty. A written law may indeed become obsolete when the object to which it was intended to apply, or the occasion for which it was enacted, no longer exists. 1 P. A. Browne App. 28." *Bouv. L. Dict.* But see *Jurisd. Court Chan.* 13; 1 Harr. Pro. Chan. 200; 2 Hall. Mid. Ages 156; 2 Com. Dig. 371; *Money v.*

Leach, 3 Burr. 1755; *Regina v. Ballevoes de Bewdley*, 1 F. Wms. 223, cited in *Snowden v. Snowden*, 1 Bland Ch. (Md.) 555.

In a Will.—The word obsolete, written on the margin of a will by the testator, but not signed by him or by anyone for him in the manner prescribed by statute, will not act as a revocation. *Lewis v. Lewis*, 2 W. & S. (Pa.) 455.

Private Corporation.—From total non-observance of the statutes of a private foundation, a repeal of them has been presumed. *Attorney General v. Middleton*, 2 Ves. Sen. 330.

1. On an indictment for murder, the defendant was allowed to interpose the defence that he was an officer *de facto* and held to be entitled to protection to the extent that others were bound to respect his official character while making an arrest. And where he believed he was a deputy constable by right, he should be treated so, and the uncommunicated intention of a constable that he should not act in the above capacity, is inadmissible in evidence to affect the consideration of official status. *State v. Dierberger*, 90 Mo. 369.

So, although a minor is not eligible to the office of constable, yet, where he has been appointed special constable and is attempting to make an arrest, to resist him is as much an offence as though he were a constable *de jure*. *Lloyd v. State*, 79 Ala. 39.

So, where a marshal, under void appointment, supposed he was acting not

So, one is justified in assisting a *de facto* officer.¹ Of course, where the office has ceased to exist, or has never existed, this does not hold.² Generally speaking, all officers executing judicial process come within the reason of the rule against resistance, and have the power of calling on others to assist them in the discharge of their duties.³

as marshal, but as special constable. *State v. Watson*, 66 Iowa 670.

On an indictment for murder of a constable it is sufficient to show that he was *known to act* as constable. His appointment need not be produced. *Rex v. Gordon*, 1 Leach 515.

And the defendant, in an indictment for resisting a constable, is not entitled to show that the officer had not taken the oath of office or given the security required by law; it being sufficient that he was an officer *de facto*. *Seemle*, the rule would be otherwise in a private action brought by the officer for the assault, and clearly so where he sues for fees or sets up a title to property by virtue of his office, as this can be done only by an officer *de jure*. *People v. Hopson*, 1 Den. (N. Y.) 574. And see *Heath v. State*, 36 Ala. 273. At the trial of an indictment for aiding a prisoner to escape from custody the rejection of evidence to show that the marshal making the arrest was conditionally appointed, or elected, is not error, where the evidence shows that he acted as a marshal *de facto*. *Robinson v. State*, 82 Ga. 535.

But a *de facto* officer being one who discharges the duties of an office under color of title, it was held in *Creighton v. Com.*, 83 Ky. 142, that one who, having been elected to an office, assumed its duties without having qualified or attempted to qualify, was without color of title, and not a *de facto* officer, and accordingly might be resisted. This decision was under a statute declaring that the office "should be considered vacant," unless the officer duly qualified. See also *Short v. Symmes*, 150 Mass. 298.

A defendant in a civil suit is not warranted in assuming that a person *acting* as an execution officer is a naked trespasser, and in resisting a seizure of his, if such person is armed with a proper warrant and his appointment is apparently legal. *State v. Brooks*, 39 La. Ann. 817.

To break up a justices' court in a violent manner is an unlawful act, even if the person acting as justice is not

duly commissioned and is proceeding unlawfully. *State v. Boies*, 34 Me. 235.

1. *Soudant v. Wadhams*, 46 Conn. 218; *Reed v. Rice*, 2 J. J. Marsh. (Ky.) 44; s. c., 19 Am. Dec. 122; *McMahan v. Green*, 34 Vt. 69; s. c., 80 Am. Dec. 665. See also *Forrist v. Leavitt*, 52 N. H. 481.

But where the party making the arrest is not a known public officer but only assumes to act in the particular case by special appointment, persons aiding the supposed officer are bound to know whether he is authorized to make the arrest or not; and if he is a trespasser for want of authority, those aiding him are also trespassers. *Dietrich v. Schaw*, 43 Ind. 175.

Where the officer is a known one, a private person cannot refuse to act until he shall be satisfied that the officer is acting legally, or within the scope of his office. *Firestone v. Rue*, 71 Mich. 377; s. c., 15 Am. St. Rep. 266.

2. The office of inspector of the customs ceasing with that of the collector who appoints him, an indictment for resisting such inspector after the resignation of the collector and before his appointment to office by the succeeding collector cannot be sustained. *United States v. Wood*, 2 Gall. (U. S.) 361. See also *Creighton v. Com.*, 83 Ky. 142; *Ex parte Snyder*, 64 Mo. 58.

3. A sheriff is a conservator of the peace, who may and should "arrest all persons, with their abettors, who oppose the execution of process." *KENT*, C. J., in *Coyles v. Hurtin*, 10 Johns. (N. Y.) 85. So a constable. *Levy v. Edwards*, 1 Car. & P. 40. And one who refuses to assist the constable is indictable. *Comfort v. Com.*, 5 Whart. (Pa.) 437.

A special deputy of the sheriff executing an arrest is an "officer of the State" within Ala. Code, § 4137, making it an offence to resist an officer in the execution of process. *Andrews v. State*, 78 Ala. 483.

So it is an offence against the Conn. statute to obstruct an indifferent person deputed to serve a writ of attachment,

2. Warrant or Notice of Authority of Officers Serving Process.—The questions when an officer may or may not arrest without a warrant; when, in the latter case, he is or is not obliged to show it, and what kind of notice of an officer's authority the person arrested or resisting must have, as well as the law on these subjects applicable to private persons, have been discussed elsewhere.¹ Additional cases on these points, with reference to the right of resistance, are given in the note.²

while in the performance of his duty. *State v. Moore*, 39 Conn. 244.

One who knowingly and wilfully resists a receiver acting under an order of a court of competent jurisdiction, and having in his possession a properly certified copy of the order, is guilty, under Pa. Code, § 3960, of resisting "a person authorized by law . . . to execute a legal order." *State v. Rivers*, 64 Iowa 729.

Interfering with an overseer of a public road when working on a road is not resisting an officer or other authorized person in serving any duly legal writ or process, within Tenn. Code, § 4771; *Maverty v. State*, 10 Lea (Tenn.) 729. But see *contra* in Ohio, *Woodworth v. State*, 26 Ohio St. 196.

Resistance to a special custodian employed by a U. S. marshal, though such custodian be not a regularly appointed sworn deputy, is resistance to the marshal. *United States v. McDonald*, 8 Biss. (U. S.) 439. And see *United States v. Tinklepaugh*, 3 Blatchf. (U. S.) 425; *State v. Oliver*, 2 Houst. (Del.) 585.

But resisting one deputized by a justice of the peace to serve process is not "hindering an officer in the execution of his office" within section five of the Vt. act for the punishment of inferior crimes. *State v. McOmber*, 6 Vt. 215. See *State v. Watson*, 66 Iowa 679.

A tax *fi. fa.* signed merely by the name of an individual, without any official designation, is not a legal process, and a resistance to levy under it by a constable, does not render one guilty of resisting an officer in executing a legal process. *Short v. State*, 79 Ga. 550.

1. See ARREST (Criminal Cases), vol. I, p. 732-4.

2. The officer to whom the warrant is addressed must be the one to execute it; so, where a commissioner of sewers by warrant addressed to A, authorized a distress of K's goods, and A handed the warrant to B, and B handed it to C,

who entered and was ejected and assaulted by K, who was summoned for an assault on C, it was held that as the warrant was addressed to A, C had no authority to execute it, and was rightly turned out by K. *Symonds v. Kurtz*, 61 L. T., N. S. 559. See also *People v. McLean*, 68 Mich. 480, n. 8, *infra*.

The charge of resisting an officer in the execution of process is not sustained by evidence that he was arresting without a warrant. *State v. Lovell*, 23 Iowa 304; *Jones v. State*, 60 Ala. 99. See *People v. Nash*, 1 Idaho 206, where it was held that one may be convicted of resisting and assaulting an officer while in the discharge of his official duty, though it is neither alleged nor proved that he was armed with process or attempting to serve process at the time.

An officer who is engaged in searching for a supposed offender in order to secure his arrest without a warrant, is not discharging his official duty, and resistance to him is not the subject of indictment. *United States v. Goure*, 4 Cranch (C. C.) 488.

Resistance to a warrant valid on its face is indictable, though the libel was not sufficient to authorize the issue of such warrant. *United States v. Tinklepaugh*, 3 Blatchf. (U. S.) 425.

That the person resisting must know the official character of the officer arresting, and that this fact must be stated in the indictment, see *State v. Carpenter*, 54 Vt. 551; *United States v. Tinklepaugh*, 3 Blatchf. (U. S.) 425; *State v. Gilbert*, 21 Ind. 474; *Com. v. Kirby*, 2 Cush. (Mass.) 577; *State v. Downer*, 8 Vt. 429; s. c., 30 Am. Dec. 482; *State v. Smith*, 11 Oregon 205; *Horan v. State*, 7 Tex. App. 183; *State v. Maloney*, 12 R. I. 251. But it has been held that where the statute has omitted the word "knowingly," the indictment is not defective for lack of such statement. *Putnam v. State*, 49 Ark. 449.

3. Kinds of Resistance—(a) *Resistance to Process Against the Person*.—This subject, as far as *arrests* are concerned, has been fully treated of elsewhere;¹ but additional cases are cited in the note.² In the same way, resistance to an order to remove

In *State v. Freeman*, 8 Iowa 428; s. c., 74 Am. Dec. 317, it was held that, in serving a writ an officer will be presumed to have discharged his duty, and where the party resisting the officer relies on the fact that he omitted to declare his authority, this is proper matter of defence, and need not be set forth in the indictment. And that the refusal of an officer to exhibit his warrant is no excuse for committing an assault and battery on him, see *Com. v. Hewes*, 1 Brew. (Pa.) 348.

Persons interfering with an arrest by an officer under criminal process, not knowing that he is an officer and acting in the discharge of his duty, but interfering with the intention of quelling a fight, if they use more force than is necessary for that purpose, are liable to an indictment for an assault. *Com. v. Cooley*, 6 Gray (Mass.) 350.

If, in an indictment, on which the defendant has been convicted for an assault on an officer in the discharge of his duties and hindering and obstructing him therein, there is no sufficient allegation of the defendant's knowledge of the official character of the person assaulted, this is not a ground for arresting the judgment, but only for sentencing defendant for the simple assault. *Com. v. Kirby*, 2 Cush. (Mass.) 577.

If a person ejected from a court room by a U. S. marshal knew that the order for her removal was directed to the marshal, it is immaterial that the court addressed it to the clerk, if he immediately changed it to the marshal. *United States v. Terry*, 42 Fed. Rep. 317.

The offence of combining to oppose the execution of a warrant issued by a justice of the peace is indictable, even if the nature of the warrant is not known. *United States v. O'Neal*, 2 Cranch (C. C.) 183.

And a warrant will be presumed to be good and the officer authorized to serve it until the contrary appears. *Kernan v. State*, 11 Ind. 471.

Where a statute directs that the person arrested shall be informed of the offence charged against him, and of the nature of the warrant, a failure to do so will justify resistance. *Hamlin v. Com.* (Ky. 1889), 12 S. W. Rep. 146.

But where a special constable deputed to execute a warrant of arrest did not exhibit it nor say that he had it, resistance was held not to be justifiable, if defendants knew that the constable had the warrant. *State v. Dula*, 100 N. Car. 423.

Upon an indictment under U. S. Rev. Stat. § 5398, making it an offence to resist or obstruct the service of process of a court of the U. S., it appeared that certain Indians were committed by a U. S. commissioner, charged with the murder of one M, to the custody of defendant, keeper of a county jail, and that defendant refused to deliver them to the marshal when ordered, the defence being that it did not appear from the papers that M was a white man, and that the homicide occurred on an Indian reservation; it appearing, however, that the defendant knew these facts and also knew that the case was within the jurisdiction of the U. S. courts. *Held*, that he was properly convicted. *United States v. Martin*, 17 Fed. Rep. 150.

An indictment at common law charging the defendant with rescuing property that had been distrained by a sheriff for public dues from a bailee to whose safe-keeping the sheriff had committed it, but not charging that the defendant knew in what right the bailee held it, was *held* fatally defective. *Israel's Case*, 4 Leigh (Va.) 675.

It is not an offence to rescue a prisoner from the hands of a private person, unless the person rescuing knows that the prisoner was under arrest for felony or misdemeanor. *State v. Hilton*, 26 Mo. 199.

1. See 1 Am. & Eng. Encyc. of Law 755-758, and cross reference.

2. It may be convenient to divide these cases into two groups: those where resistance has been held illegal, and those where it has been regarded as justifiable, or where no resistance is held to have been made.

Illegal Resistance.—One who violently resists a lawful arrest commits an assault. *Com. v. Kirby*, 2 Cush. (Mass.) 577; *Reg. v. Mabel*, 9 Car. & P. 474; *State v. Hooker*, 17 Vt. 658.

And encouraging another to resist

is an indictable offence. *White v. Edmunds*, Peake 89.

But in an indictment for resisting an officer, violence need not be shown. *Roddy v. Hinnegan*, 43 Md. 490; *United States v. Smith*, 1 Dill. (U. S.) 212; *Woodworth v. State*, 26 Ohio St. 196.

And threats, with present ability and apparent intention to execute them, may well constitute resistance. *State v. Welch*, 37 Wis. 196. Otherwise of mere threats unaccompanied by force. *State v. Welch*, 37 Wis. 196. And see *United States v. Lowry*, 2 Wash. (U. S.) 169.

In *United States v. Lukins*, 3 Wash. (U. S.) 335, it was said *obiter* that refusal to obey was resistance. This was disapproved of in *State v. Welch*, 37 Wis. 196.

One who resists an officer in making an arrest cannot justify on the ground that the person arrested was not guilty of the offence for which the arrest was made. *Montgomery v. Sutton*, 67 Iowa 497. But see *State v. Cuthbert*, T. U. P. Charlt. (Ga.) 13. Nor that the *mittimus* does not comply in all respects with the statute. *State v. Armistead*, 106 N. Car. 639. Nor that the motive was the officer's personal chastisement. *United States v. Keen*, 5 Mason (U. S.) 453.

The constitutional right to bear arms will not justify one in taking up arms and approaching an officer, who is properly engaged in the discharge of his duty in arresting an offender, in a manner calculated to intimidate the officer; nor will it justify such person in resisting an attempt of the officer to disarm him. *Ogles v. Com.* (Ky. 1889), 11 S. W. Rep. 816.

One is guilty of resisting an officer in his attempt to execute a warrant against another, where both were armed with guns and, though the defendant did not threaten to shoot, the other did, and they both rode away together. *Pierce v. State*, 17 Tex. App. 232.

So, where a person not concerned in the violation of the law obstructs a police officer while the latter is enquiring into the circumstances in order to enable him to ascertain the offender, the arrest of the former by the officer is justifiable. *Roddy v. Finnegan*, 43 Md. 490.

A mis-description of the offence in a warrant against defendant, who, on its return, was adjudged to pay a fine and costs, from which judgment he did

not appeal, does not justify him and others in resisting an officer with process for his arrest, issued to enforce the judgment. *State v. Dula*, 100 N. Car. 423.

An officer who, being informed that a man is "going through" another, arrests the former, who makes no resistance, on the accusation of robbery, thereby lawfully apprehends him, within the meaning of the N. Y. Code Crim. Proc., § 179, authorizing an officer to make an arrest without a warrant during the night-time, where he has reason to believe that the person arrested has committed a felony, so as to render a third person who assaults such officer liable to indictment under N. Y. Penal Code, § 218, subd. 5; *People v. Ryan*, 28 N. Y. St. Rep. 489.

A statute providing for the punishment of any person "who shall by force or menaces of bodily harm or by other unlawful means, set any one at liberty who is in custody after a lawful arrest," etc., applies to the rescue of a prisoner confined in jail as well as to one in the actual custody of an officer. *Hillian v. State*, 50 Ark. 523.

Going to a house where the officer was staying, and asking the latter if he had a warrant, and snatching this away while the officer was trying to read it, and then refusing to go before the justice who issued it, were held to constitute the offence of resistance under Code Ala. 1886, § 3974. *King v. State*, 89 Ala. 43.

It is no defence to an assault in opposing a lawful arrest by an officer without a warrant, that the latter neglecting his duty, did not afterwards make complaint against the defendant for the offence for which he was arrested. *Com. v. Tobin*, 108 Mass. 426; s. c., 11 Am. Rep. 375.

The advising a person against whom the sheriff has a precept, and whom he is about to arrest, to draw a line on the ground and to forbid the officer to pass it, and asserting that if the sheriff passed the line and the person killed him, the law was on the person's side, will support an indictment against the adviser for impeding the officer in the execution of his office. *State v. Caldwell*, 2 Tyler (Vt.) 212.

Resistance Held Justifiable or Not to Have Been Made.—It is lawful to resist an illegal arrest, and a third person may interfere to prevent it. *Alford v. State*, 8 Tex. App. 545; *State v. Nimbush*, 9 S. Car. 399.

a person from court is indictable.¹

(b) *Resistance to Process Against Property, etc.*—Where an officer comes to attach goods as the property of a third person, it appears to be the better rule that the real owner cannot resist the attachment, if it is made in good faith, as the question of

But this resistance should be without "excessive violence." *State v. Belk*, 76 N. Car. 10; *Rafferty v. People*, 69 Ill. 111; s. c., 18 Am. Rep. 601.

In *Harland v. Howard*, 57 Hun (N. Y.) 113, 115, it is said: "It is a familiar principle that a man has the right to protect his liberty by using all the force necessary."

An act which in its remote consequences only prevent the officer from doing his duty does not "impede a public officer in the execution of his office;" as, where a man takes from a justice of the peace a writ and refuses to give it back, thereby stopping proceedings in the cause, he does not commit the statutory offence, whatever may be the common law liability. *State v. Lovett*, 3 Vt. 110.

Where one resisted by threats a demand made upon his father by election judges to answer questions they had no right to put, he was held not to have committed the statutory offence of threatening an officer of the elections "in the discharge of his duty," because the judges in putting the questions were not in the discharge of their duty. *Com. v. Gibbs*, 4 Dall. (U. S.) 253.

A person who remonstrates with an officer, or demands his number, is not indictable upon the charge of obstructing the officer. *Com. v. Sheriff*, 3 Brew. (Pa.) 343.

A person not duly summoned to aid in making an arrest may be lawfully resisted. *Hamlin v. Com.* (Ky. 1889), 12 S. W. Rep. 146.

To constitute the offence of giving "aid" to an offender after the commission of a felony, as described by a statute, there must be a guilty intent, and a mere incidental statement to one who had committed a felony that a warrant was about to be issued for his arrest, made without any intention of enabling him to escape, is not sufficient. *State v. Fry*, 40 Kan. 311.

Where a private detective, without a warrant, forcibly seized a person for the purpose of detaining him until the order of arrest could be served on him by the proper officer, it was held that, although the order of arrest was subse-

quently served, while defendant was detained on a charge of assault committed in breaking away from the detective, there was an abuse of process, for which the order should be set aside. *Harland v. Howard*, 57 Hun (N. Y.) 113.

On a trial of an information for resisting an arrest, it appeared that a warrant was issued for defendant's arrest for an assault and battery, and was delivered to the sheriff; that the sheriff, keeping possession of the warrant, went with his deputy to find defendant, directing the deputy to go into one house while he went to another place eighty feet distant. The deputy found defendant, told him he had a warrant for him, and that he arrested him; whereupon the defendant drove the deputy out of the house at the point of his revolver; the sheriff who had the warrant was not in sight or hearing. Held, that the evidence would not support the information. *People v. McLean*, 68 Mich. 480. See *Symonds v. Kurtz*, 61 L. T., N. S. 559, note 6, *supra*.

Defendant, an innkeeper, having an escaped felon in his house, to the policeman who had remarked: "You scoundrel, how dare you harbor a felon?" said: "You had better go and find him," but did nothing. The policeman went upstairs and saw the felon make his escape from the window. Held, that this was no evidence of an obstructing of the felon's apprehension. *Reg. v. Green*, 8 Cox Cr. Cas. 441.

A person may rightfully resist the attempt of another to enter his house for the purpose of illegally arresting him; and if resistance by lawful means results in the death of the assailant, it is excusable homicide; if by unlawful means, but without malice, it is manslaughter; if by unlawful means, prompted by hate and malice, and death in cold blood is intended, it is murder in the first degree. *State v. Scheele*, 57 Conn. 307; s. c., 14 Am. St. Rep. 106.

1. *United States v. Terry*, 41 Fed. Rep. 771. And see *Reg. v. Stanbury Eardley*, 49 J. P. 551.

No amount of feeling, exasperation

property can be tested in some other way.¹ There are, however, decisions to the contrary.² Resistance must be active: merely taking charge of a debtor's property, keeping it out of the officer's view, and refusing when called on by the officer to produce it, is not sufficient.³ Interference with goods that have been already attached comes within the offence of obstructing process;⁴ as does any obstruction to pointing out or receiving possession

or resentment can justify such resistance; but unnecessary force or violence used by the officer may be resisted by force sufficient to overcome it. *United States v. Terry*, 42 Fed. Rep. 317.

1. *Braddy v. Hodges*, 99 N. Car. 319; *People v. Hall*, 31 Hun (N. Y.) 404; *State v. Richardson*, 38 N. H. 208; s. c., 75 Am. Dec. 173; *State v. Fifield*, 18 N. H. 34; *United States v. McDonald*, 8 Biss. (U. S.) 439; *Faris v. State*, 3 Ohio St. 159; *State v. Downer*, 8 Vt. 424; s. c., 30 Am. Dec. 482; *Merritt v. Miller*, 13 Vt. 416; *State v. Buchanan*, 17 Vt. 573.

In *State v. Miller*, 12 Vt. 437, the rule appears to be confined to forcible and violent resistance on the part of the owner, it being held that the latter may take any peaceable means to prevent the attachment or to regain the goods, and that the same facts which would make an entire stranger guilty of obstructing the officer, would not, in all cases, render the owner guilty.

If resistance is made, the persons resisting cannot prove, in defence, on trial of an indictment therefor, that the process on which the attachment was about being made, was sued out by the connivance of the plaintiff and defendant therein, and of the officer, and was intended to be used by them for the purpose of placing the property attached, belonging to one of the respondents, in the hands of insolvent and irresponsible persons, so as to deprive the owner of his property, or fraudulently compel him to repay money in order to regain the possession of it. *State v. Buchanan*, 17 Vt. 573.

If the officer acts in bad faith or without reasonable grounds for his belief, the rule is otherwise. *United States v. McDonald*, 8 Biss. (U. S.) 439.

2. *Oliver v. State*, 17 Ark. 508; *Com. v. Kennard*, 8 Pick. (Mass.) 133. And see *Com. v. Donahue*, 148 Mass. 529.

So it has been held that a reasonable resistance may be made to a levy on exempt property. *People v. Clements*, 68 Mich. 655.

3. *Crumpton v. Newman*, 12 Ala. 199; s. c., 46 Am. Dec. 251.

So a mere threat is not sufficient; but, when used by a person forcibly retaining possession, it may make the offence complete. *United States v. Lowry*, 2 Wash. (U. S.) 169.

A conviction upon an indictment for resisting an officer cannot be had where it appears that defendant repeatedly replaced a fence that the officer was trying to take down, in order that he might carry away an article that he supposed he had a right to remove under the execution, which right defendant denied, the officer, moreover, having no right to remove the article, and the defendant neither threatening violence to the officer nor laying hands upon him, but only threatening to continue to replace the fence as often as the officer should take it down. *Smith v. People*, 99 Ill. 445.

Where an officer was about to seize, under a valid writ of replevin, a pair of colts running at large in a field, and the defendants, by throwing up their hands and throwing sticks at the colts, frightened them so that the officer was unable to capture them; and, later, when the officer had left the premises to obtain assistance, the defendants took the colts away so that he could not find them—held, that these facts did not constitute the offence of resisting an officer, as defined in Wis. Rev. Stat., ch. 167, § 18; *State v. Welch*, 37 Wis. 196.

4. *United States v. McDonald*, 8 Biss. (U. S.) 439, where holding attached property after seizure was held to be a part of the execution of process.

C, under-bailiff of a county court, having levied upon goods on the premises of D, in execution of a warrant, was left in possession of the goods, and not having been provided with any food, went to a public house a mile distant to obtain some, taking his warrant with him. On his return D, to prevent his re-entering the premises, assaulted him. Held, that D was liable to conviction under 9 and 10 Vict., ch. 95, §

of land on which a writ is to be executed.¹ Obstructing coroners in their duties is likewise indictable;² so of revenue officers.³ And such offences as destroying officers' notices, interfering with police signal systems, and many others, come under the general head of obstructing justice.⁴

4. Effect of Resistance.—The law as to death resulting from resistance, either to the officer or to the person resisting, has been

114, C being "in the execution of his duty" when returning. *Coffin v. Dyke*, 48 J. P. 757.

If an attempt to rescue property under seizure is the result of a sudden impulse of passion excited by the supposed injury inflicted by the officers upon defendant's mother, a conviction is not warranted; but the defendant's subsequent attempt to prevent the removal of the goods by threats and violent conduct may be considered by the jury as showing his original purpose and a connection between all his transactions. *United States v. Ford*, 33 Fed. Rep. 861.

But re-capturing property on Sunday, seized on that day by an officer under a writ of replevin, is not a resistance to the officer in discharge of his duty, as he has no authority to make a seizure on that day by virtue of such a writ. *Bryant v. State*, 16 Neb. 651.

In *Farris v. State*, 14 Lea (Tenn.) 295, it was held that an indictment for resisting an officer in the execution of process would not lie where the offence is merely a trespass without violence after the levy.

In *State v. Sotherlen*, Harp. (S. Car.) 414, it was held not indictable to rescue goods in execution from a constable on whom no assault is made.

Ga. Code, § 4476, making it a criminal offence knowingly and wilfully to obstruct, resist or oppose a sheriff attempting to execute process, was held not to cover a case where a sheriff had levied on oxen and left them in a field under the care of an agent, and the owner privately took them in the sheriff's absence, and removed them from the county. *Davis v. State*, 76 Ga. 16.

So, one breaking a pound and liberating a cow put here by the city marshal in obedience to a city ordinance, is not within an ordinance punishing those who oppose the marshal in executing such ordinances. *Mayor of Rome v. Omburg*, 22 Ga. 67.

1. *United States v. Doyle*, 6 Sawy. (U. S.) 612, where the fact that the marshal was not upon the land de-

scribed in the writ, but near the line on the adjoining land, waiting the result of a conference then going on with the party to be put in possession, was held to make no difference.

2. Preventing a coroner from holding an inquest is an indictable offence. *Rex v. Soleguard*, Andr. 231; *Rex v. Proby*, 1 Ld. Henry 250; *Reg. v. Stevenson*, 13 Q. B. D. 331.

Where the captain of a man-of-war, mistaking his legal duty, had prevented the coroner from holding an inquest on the body of a man hanged on his ship, the court, granting an information, declined to take any measures against the boatswain, who had taken part in the affair under the captain's order. *Rex v. Soleguard*, Andr. 231.

3. Where a vessel, instead of heeding the signals of a revenue cutter to slacken her speed, keeps it up and continues to increase the distance between them, so that the revenue officers cannot come aboard, the master is guilty of hindering an officer in his effort to board the ship, under U. S. Rev. Stat., §§ 3068, 3088, if he was in control of her movements at the time. Where he stood on the bridge of the vessel watching the pursuit, he is responsible for the movements of the vessel. *The Barrecounta*, 42 Fed. Rep. 160.

4. Defendant was indicted for wilfully and maliciously tearing down a sheriff's advertisement under the New Jersey statute declaring that anyone who shall wilfully and maliciously take down, etc., any notice, advertisement, etc., legally and publicly set up by any officer, before the time to which it relates, shall be deemed guilty of a misdemeanor. *Held*, that defendant might show want of evil intent. *Folwell v. State*, 49 N. J. L. 31.

The fact that one has replevied property seized by a tax collector will not exempt him from indictment for tearing down the officer's notice of sale, before expiration of the day of sale. *Laulds v. People*, 66 Ill. 211.

Interference with police signal systems made punishable by fine or im-

stated elsewhere.¹ Some additional cases are cited in the note.²

5. Indictment, Information.—The official character of the resisted person, his authority to act in the particular instance, and the legality of the process, should in some way appear on the face of the indictment, though they need not be particularly described.³

prisonment or both. Act of Mass., 1888, ch. 291, p. 232.

1. See *ARREST*, Am. & Eng. Encyc. of Law 755; *HOMICIDE*, Am. & Eng. Encyc. of Law 552, 587.

2. Forcible resistance to an officer, which results in his death, would imply malice aforethought only when the persons resisting had knowledge of his official capacity. *State v. Zeibart*, 40 Iowa 169.

Killing an officer attempting to make an unlawful arrest is unjustifiable, in the absence of a reasonable apprehension of bodily harm. *State v. Cantieny*, 34 Minn. 1.

And a peace officer, in order to arrest one for a misdemeanor, cannot kill him, unless the offender resists to such an extent as to place the officer in danger of loss of life or great bodily harm. *Dilger v. Com.* (Ky. 1899), 11 S. W. Rep. 651.

Under the common law and § 2878 of the Mississippi Code, it is lawful to kill a fleeing felon when he cannot otherwise be taken, but the necessity for such killing is for the jury. *Jackson v. State*, 66 Miss. 89; s. c., 14 Am. St. Rep. 542.

On a trial for murder by killing one of the constable's *posse* while resisting arrest, an instruction that, if the defendants believed the arrest to be a pretext by deceased and others to disarm them and inflict bodily harm, they might resist by any means in their power, was held defective in not saying that if the jury found deceased was present in good faith, under a lawful summons to assist, but defendants had reason to believe that the constable and some others of the *posse* were making the arrest with the above intent, and that deceased and those present who were lawfully disposed would fail to protect them, then defendants might resist, and, if necessary, kill the constable or other unlawful assailants, and if, in doing this with reasonable precaution they should kill deceased accidentally, they should be acquitted. *Minniard v. Com.*, 87 Ky. 213.

Where one had acted as constable and had arrested defendant before, and

the latter submitted without resistance and acknowledged himself prisoner, but killed a bystander who was called by constable to assist him in disarming defendant, the officer having recently been re-elected and having taken the oath of office, it was held that defendant could be convicted of murder, whether or not the officer had fully qualified. *State v. McMahan*, 103 N. Car. 379.

3. *State v. Roberts*, 52 N. H. 492; *State v. Hooker*, 17 Vt. 658; *Com. v. Doherty*, 103 Mass. 443; *Bowers v. People*, 17 Ill. 373; *State v. Moore*, 39 Conn. 244; *Pierce v. State*, 17 Tex. App. 232; *Hill v. State*, 43 Tex. 329; *McGraw v. State*, 17 Tex. App. 613.

The case of an assault differs somewhat from that of mere resistance, less fulness being required in the indictment in the former case. *State v. Burt*, 25 Vt. 373; *State v. Belk*, 76 N. Car. 10. And see *State v. Hailey*, 2 Strobbh. (S. Car.) 73; *Com. v. Delehan*, 148 Mass. 254.

The indictment should recite the writ. *State v. Henderson*, 15 Mo. 486. But see *Slicker v. State*, 13 Ark. 397; *Com. v. Lee*, 107 Mass. 207, *infra*.

Where the statutory offence is that of resisting an officer "while serving or attempting to serve or execute the process," etc., of a court, an indictment which alleges merely that the officer resisted was "in the due and legal execution of his office" is insufficient. *State v. Johnson*, 42 La. An. —; s. c., 7 So. Rep. 588; *State v. Beasom*, 40 N. H. 367.

But in *Bowers v. People*, 17 Ill. 373, an averment that the officer was in the "due execution of his duty as constable" and "attempting to serve a lawful process" was held to declare sufficiently the validity of the process and the authority to serve it.

And it is sufficient to designate the party assaulted as "then and there being a collector of tax of said town" without alleging that he was duly authorized to serve, etc. *State v. Roberts*, 52 N. H. 492; *State v. Cassady*, 52 N. H. 500. And saying, "then and there" is unnecessary. *Murphy v. State*, 55 Ala. 252.

Where the process is issued by a court of limited jurisdiction, the indictment must show that the court, in issuing it, acted within the sphere of its authority.¹ An indictment for resisting an officer of the United States while serving process must distinctly charge three facts: first, that a legal process was issued by a court of the United States; second, that such process was in the hands of a United States officer; and third, that the defendant knowingly and wilfully resisted him; and it need charge nothing else.² As to

In an indictment for rescuing goods, the ownership thereof and the process on which they are held, should be alleged. *Reg. v. Lilly*, 7 Mod. 63.

The rendition of the judgment upon which the execution issued need not be stated. *State v. Dickerson*, 24 Mo. 365.

An indictment for attempting forcibly to rescue need not state the process on which the prisoner was held in custody, nor the particular circumstances of the case. *Com. v. Lee*, 107 Mass. 207. But see *State v. Hilton*, 26 Mo. 199, where it was held that the indictment in such a case was defective unless it stated the cause of the arrest of the person rescued, and whether the person arresting him was a public officer or a private person.

In an indictment for rescuing cattle while being driven to pound, all the facts constituting the legal grounds for the distress must be particularly set forth. *State v. Barrett*, 42 N. H. 466.

Where, upon the trial of an indictment for resisting a deputy sheriff in the discharge of his duty, it appeared that the prisoner resisted an officer directed by a justice of the peace to remove the prisoner from the court room, held that the order and the resistance thereto need not be stated in the indictment. *State v. Copp*, 15 N. H. 212.

In *Bish. Dir. and Forms*, p. 462 n., it is said: "Undoubtedly the fact that the officer was proceeding in due form of law should, in some way, appear in averment. But established principles will permit the pleader, at his election, either to say he was, or to set out facts from which the court can see as of law that he was. . . . There is no one analogy in the law of criminal pleading from which the setting out at large of the process would be required, though it is often done."

And in 2 *Bish. Crim. Proc.*, §. 888, it is said: "Where the officer, having the authority to act without process, had none, plainly no averment of any is required. And it appears that, if the pro-

cess is executed, and the charge is, for example, that he had an arrested prisoner in custody, there is no need of mentioning by what process held. But where, when obstructed, he was serving a process, on the validity of which the lawfulness of his doings and the unlawfulness of the resistance depended, it and the attendant facts must be so far averred as to show the defendant to be *prima facie* guilty. This setting out must be more or less minute according to the requirements of the particular case."

The indictment need not allege that the writ of *habeas corpus* which the officer was attempting to execute was duly returned. *State v. Ferry*, 61 Vt. 624.

An allegation that the officer was attempting to execute a writ of *habeas corpus* "by attempting to apprehend the body of" a certain person, sufficiently sets forth the manner in which he was attempting to execute it. *State v. Ferry*, 61 Vt. 624.

An indictment is not bad for duplicity in charging an assault upon a sheriff and that by the assault he was impeded in the execution of his official duties. *State v. Ferry*, 61 Vt. 624.

In an indictment for assaulting and obstructing a police officer in the discharge of his duty, an allegation that the assault was made with a dangerous weapon may be rejected as surplusage. *Com. v. Delehan*, 148 Mass. 254.

Such an indictment will support a general verdict of guilty, and such a verdict is equivalent to a finding of an assault upon the officer in the discharge of his duty. *Com. v. Delehan*, 148 Mass. 254.

1. *Cantrill v. People*, 8 Ill. 356; *United States v. Stowell*, 2 Curt. (U. S.) 153; *People v. McLean*, 68 Mich. 480; *Marshall v. Standard*, 24 Mo. App. 192.

2. *United States v. Tinklepaugh*, 3 Blatch. (U. S.) 425. And see *State v. Hailey*, 2 Strobb. (S. Car.) 73.

whether defendant's knowledge of the official character need be averred, see notes 1 and 2, p. 15. The method of obstruction should be set out.¹ The indictment should be substantially in the words of the statute.² For decisions on some special indictments, see note.³ The indictment for refusing to assist an offi-

1. *State v. Hailey*, 2 Strobb. (S. Car.) 73; *State v. Downer*, 8 Vt. 429; s. c., 30 Am. Dec. 482; *Horan v. State*, 7 Tex. App. 183; *State v. Maloney*, 12 R. I. 251; *Lamberton v. State*, 11 Ohio 282. But this need not be done with great particularity. *McQuoid v. People*, 8 Ill. 76; *United States v. Batchelder*, 2 Gall. (U. S.) 15; *State v. Fifield*, 18 N. H. 34; *State v. Copp*, 15 N. H. 212.

An information for obstructing an officer charging that defendant at a certain time and place "did knowingly and wilfully obstruct, resist and oppose a certain constable . . . in his lawful act . . . to maintain, preserve and keep the peace," which alleges no acts or facts constituting the obstruction, nor the acts of the officer in the performance of which he was obstructed, charges no offence. *People v. Hamilton*, 71 Mich. 340.

Where in an indictment for assaulting and resisting a deputy sheriff in the execution of his duty, the obstruction was alleged indefinitely and insufficiently, but there was nothing in the allegation concerning it from which, in any way, a justification of the assault could be inferred, it was held that the allegation of the obstruction might be regarded as surplusage, and that the indictment might stand as an ordinary indictment for an assault, without a battery, upon an officer in the execution of his duty. *State v. Hailey*, 2 Strobb. (S. Car.) 73. And see *Baker v. State*, 4 Ark. 56.

An indictment for using contemptuous language to a magistrate in the discharge of his official duties, should set forth the words spoken, and the day and month; and that the magistrate was exercising his official functions. *United States v. Beale*, 4 Cranch (C. C.) 313.

In an indictment for assaulting and obstructing a police officer in the discharge of his duty, an allegation that the assault was made with a dangerous weapon may be rejected as surplusage; and under such indictment a general verdict of guilty may be rendered, which would be a finding of an assault upon the officer in the discharge of his duty. *Com. v. Delehan*, 148 Mass. 254.

And see *State v. Webster*, 39 N. H. 96; *Com. v. Cooley*, 6 Gray (Mass.) 350.

2. *Com. v. Armstrong*, 4 Pa. Co. Ct. Rep. 5. And see *People v. Rounds*, 67 Mich. 482; *State v. Ferry*, 61 Vt. 624; *Com. v. Delehan*, 148 Mass. 254.

It was held in *United States v. Batchelder*, 2 Gall. (U. S.) 15, sufficient to say, in the words of the statute, that the defendant "did with force and arms violently and unlawfully resist, prevent and impede," etc., but the later cases consider something further necessary. See *Lamberton v. State*, 11 Ohio 282, and note 1, *supra*.

3. An allegation that the prisoner attempted to protect the principal from arrest, as well as that he concealed him, was held not to amount to such a distinct charge of an attempt to resist an officer as to render the indictment bad for duplicity. *State v. Smith*, 24 Tex. 285.

A mistake in the name of the officer resisted does not constitute a fatal variance under Iowa Code, § 4302. *State v. Flynn*, 42 Iowa 164.

In an indictment for a rescue it must be averred that an order for bail was made. An averment that the writ was "duly marked for bail" was held not sufficient. *State v. Dunn*, 25 N. J. L. 214.

An information alleging an arrest on warrant of one charged with larceny and that, while making the arrest, the defendant knowing that the officer had a warrant to make the arrest, and was endeavoring to make it, did beat, assault, abuse and resist the officer while executing the process, was held good. *State v. Gilbert*, 21 Ind. 474.

Where an information charged that defendant "did obstruct, resist and oppose" the officer "in the lawful execution of his office in attempting to arrest respondent for being then and there drunk and disturbing the peace." At the time of the alleged offence, drunkenness was not an offence recognized by statute or ordinance. Held that the words "being drunk" might be treated as a surplusage, and that the information substantially complied with the act making it a felony to "obstruct, resist

cer should set out his authority, the lawfulness of his acts, his command and the defendant's refusal.¹

6. Evidence.—Parol evidence is sufficient to show the officer's official character, and he may himself testify.² The presumption is that he discharged his duty.³ The process and warrant, if there is one, should be produced,⁴ and it does not seem absolutely essential that his return should be written on the warrant.⁵ The return of a rescue is conclusive evidence of such fact.⁶ A descriptive averment in the indictment must be proved as laid, but may be disregarded when its omission would not affect the charge against the prisoner.⁷ Evidence of a previous escape is

and oppose officers in their lawful acts, attempts and efforts to maintain, preserve and keep the peace." *Peeples v. Rounds*, 67 Mich. 482.

If it is alleged in an indictment for an assault on a sheriff that the sheriff, at the time of the assault and impeding, had in his hands a writ of execution against the respondent, which issued on civil process, and that he was about to execute the same by arresting thereon the body of the respondent, it was held not necessary to allege that he had demanded of the respondent payment of the sum due on the execution, nor to allege the place at which the execution was delivered to the sheriff. *State v. Hooker*, 17 Vt. 658.

An indictment for resisting arrest was held good, though it failed to charge that the warrant was in the officer's possession at the time, and failed to show to whom the warrant was delivered by the magistrate. *State v. Estis*, 70 Mo. 427.

In an indictment for a rescue it was held that the principals, arrested under the warrant upon which the indictment was predicated, must first be tried and convicted before the rescuers could be tried or punished. *State v. Guthbert*, T. U. P. Charlt. (Ga.) 13.

Where an indictment contains matter negating any offence, of course no punishment can follow. *Rex v. Osmer*, 5 East 304, 308. For forms of indictment, see Bish. Dir. & Forms, §§ 836, 843.

1. *State v. Shaw*, 3 Ired. (N. Car.) 532; *State v. Nail*, 19 Ark. 563; *Comfort v. Commonwealth*, 5 Whart. (Pa.) 437; *Reg. v. Sherlock*, L. R., 1 C. C. 20. For forms, see Bish. Dir. & Forms, §§ 844-847.

2. *State v. Zeibart*, 40 Iowa 169; *Oliver v. State*, 17 Ark. 508; *Com. v. McCue*, 16 Gray (Mass.) 226.

And the officer is a competent witness in an action for damage arising from the rescue to show by whom it was committed. *Buckminster v. Applebee*, 8 N. H. 546.

In a prosecution for resisting an inspector of customs, a warrant of the surveyor appointing him to such office is not sufficient evidence of his appointment to support such indictment, the collector being the only person authorized by law to make such appointments. *United States v. Phelps*, 4 Day (Conn.) 468.

A conviction for resisting an officer cannot be sustained where the evidence fails to show that the person resisted was an officer, or that any offence was committed which would authorize an arrest. *Merritt v. State*, (Miss. 1889) 5 So. Rep. 386.

Generally speaking, the official character may be proved by showing that the officer acted as such, and evidence of this may be by parol. *United States v. Sears*, 1 Gall. (U. S.) 215; *State v. Zeibart*, 40 Iowa 169; *Rex v. Gordon*, 1 Leach 515.

For the proof of official character, see OFFICERS. See also 1 Bish. Crim. Proc., §. 1130; 2 *ibid.*, §. 891.

3. *Putman v. State*, 49 Ark. 449; *State v. Freeman*, 8 Iowa 428; s. c., 74 Am. Dec. 317; in which cases it was held that his failure to do so was a matter of defence.

4. *People v. Muldoon*, 2 Park. Cr. (N. Y.) 13; *Scott v. State*, 3 Tex. App. 103.

5. See *State v. Moore*, 39 Conn. 244; 2 Bish. Crim. Proc., §. 892.

6. *Buckminster v. Applebee*, 8 N. H. 546.

7. *State v. Copp*, 15 N. H. 212, where it was held that an averment that the sheriff was "legally appointed and duly qualified" was descriptive, and must be

admissible.¹ For decisions in particular cases see note.²

II. OBSTRUCTING ATTENDANCE OF WITNESS.—It is likewise a substantive offence to prevent a witness from attending or from testifying;³ even if threats are the means used,⁴ or calumnious attacks,⁵ and whether the attempt is successful or not.⁶ The indictment need not set out the record of the case in which the

proved. See to the same effect, *State v. Sherburne*, 59 N. H. 99.

1. *Putman v. State*, 49 Ark. 449.

On the trial of an indictment containing a single count for one offence of assault and battery and resisting an officer in the execution of process, the prosecution, after proving an assault and one act of resistance cannot give evidence of a similar offence committed at another time. *People v. Hopson*, 1 Den. (N. Y.) 574.

2. On the trial of an indictment for a riotous assault upon an officer while serving a legal precept on A, charged with larceny in another State and with being a fugitive from justice, the defendants cannot give evidence that B, who claimed the custody of A as a fugitive slave, had declared, and that the officer knew B had declared, that A had not committed larceny, and that the charge was made merely for the purpose of getting A into his custody, so that he might be taken home. *Com. v. Tracy*, 5 Met. (Mass.) 536.

An allegation that an officer has one in custody to be examined on a charge of larceny is sustained by proof that it was of a larceny in another State, and that the examination was to be with a view to his surrender as a fugitive from justice. *Com. v. Tracy*, 5 Met. (Mass.) 536.

Where defendant, under indictment for resisting an officer, alleges that she did not knowingly and wilfully resist the officer in the execution of an order to remove her from the court room, because she was rendered unconscious by the opinion of the court then being pronounced, the jury may consider the fact that she entered the court room with a loaded revolver to hear the decision in a case to which she was a party. *United States v. Terry*, 42 Fed. Rep. 317.

Where defendant snatched the warrant from the hands of the officer and refused to go before the justice who issued it, held that it was proper to exclude evidence offered by defendant for the purpose of showing that he proposed the next morning to go before

some other justice. *King v. State*, 89 Ala. 43.

3. *Com. v. Feely*, 2 Va. Cas. 1; *State v. Carpenter*, 20 Vt. 9; *Com. v. Reynolds*, 14 Gray (Mass.) 87; s. c., 74 Am. Dec. 665; *State v. Ames*, 64 Me. 386; *R. v. Loughran*, 11 Crawf. & D. (C. C.) 79; *Martin v. State*, 28 Ala. 71.

4. *Shaw v. Shaw*, 31 L. J., Mat. Cas. 35; *Lechmere Charleton's Case*, 2 My. & Cr. 316; *Smith v. Lakeman*, 26 L. J. Cr. 305; *Littler v. Thompson*, 2 Beav. 129.

5. *R. v. Onslow*, 12 Cox (C. C.) 356.

6. *State v. Ames*, 64 Me. 386; *State v. Carpenter*, 20 Vt. 9.

One who prevents a witness from appearing against a felon at his trial, though guilty of a misdemeanor, is not an accessory in the felony. *Reg. v. Chapple*, 9 Car. & P. 355; *Robert's Case*, 3 Inst. 139.

A witness may move to attach a person maliciously and knowingly preventing him from attending. *Cameron v. Lightfoot*, 2 Will. Bl. 1193; *Magnay v. Burt*, 5 Q. B. 394.

A was charged with violating a United States law. B was a witness for the prosecution, and, after the examination before the commissioner, was bound over to appear as a witness before the grand jury three months afterwards. A caused a fraudulent criminal charge to be brought against B, and the latter was arrested, and by the corrupt connivance of a justice of the peace, was committed under a sentence of imprisonment for six months. One of the objects of the conspirators in the fraudulent charge was to prevent B from appearing and testifying before the grand jury. Held, that the justice was properly proceeded against in the U. S. circuit court by an indictment charging him with corruptly and unlawfully endeavoring to influence, obstruct and impede the due administration of justice, etc. *United States v. Kindred*, 4 Hughes (U. S.) 493.

Defendant was held guilty of violating U. S. Rev. St., § 5399 when he beat one summoned as a witness before a U. S. commissioner for the purpose of intimidating or influencing him in giving

witness was cited to appear;¹ nor need it allege on whose behalf the witness was summoned, nor that his testimony was material.² Nor is it necessary to set out the particular means employed; it is rather the nature of the offence that the accused is entitled to be informed of in the indictment.³

OBSTRUCTION.—See *IMPEDE*, vol. 9, p. 959; *LOGS AND LUMBER*, vol. 13, p. 1037; *MANDAMUS*, vol. 14, p. 206.

OBTAIN.—See note 4.

his testimony. *United States v. Kee*, 39 Fed. Rep. 603.

Where one, in the interest of a party to a cause, tries to entrap or corrupt an adverse witness, and the evidence suggests that he was sent on some mission to the witness by an attorney of the party whose interest he sought to promote, the court may charge the jury on the question whether his authority, if he had any, was pure or impure; whether it was limited to the use of proper means to right ends, or extended to the means actually used and to improper ends. *Savannah etc. R. Co. v. Holland*, 82 Ga. 257.

One appearing as a witness before the grand or petit jury to give his testimony must be called and his testimony heard, whether he has been summoned or not; he is therefore a witness within the meaning of Rev. St. of La., §. 880, providing for the punishment for any one attempting to intimidate any witness in a criminal case in any of the stages of prosecution. *State v. Tisdale*, 41 La. Ann. 338. And see *Reg. v. Flavell*, 14 Q. B. D. 364; *Cutler v. Wright*, W. N. (1890) 28.

1. *State v. Carpenter*, 20 Vt. 9. And see *Rex v. Lawley*, 2 Stra. 904.

2. *Com. v. Reynolds*, 14 Gray (Mass.) 87; s. c., 74 Am. Dec. 665.

"Matter of this sort, which is mere inducement may be given more in general than the gist of the charge." 2 Bish Cr. Proc., § 897.

3. *State v. Ames*, 64 Me. 386.

An indictment alleging that A unlawfully furnished to B, for the use of C, money to induce C unlawfully to absent himself as witness on the trial of an indictment against A, *held* bad in not alleging that B paid or offered to pay to C said money to induce him to absent himself. *State v. Baller*, 26 W. Va. 90; s. c., 53 Am. Rep. 66.

One who aided, incited and advised a witness not to permit an attachment to be served upon him as a defaulting

witness, is indictable for aiding, inciting and advising a witness not to answer a subpoena. In such a case, a conviction will not be set aside merely because the indictment charged, by way of inducement, that the witness had been subpoenaed and made no mention of the attachment, provided it sufficiently charged the essential fact that the accused counselled the witness not to appear and aided him to avoid the officer. *Perrow v. State*, 67 Miss. 365.

For what is sufficient certainty in an information; see *Com. v. Feeley*, 2 Va. Cas. 1.

For a form of indictment, see Bish. Dir. & Forms, § 328.

4. "The word 'obtain' (in § 88, 24 & 25 Vict., ch. 96) means an obtaining by the offender from the owner, with an intent on the part of the offender to deprive the owner permanently and entirely of the thing obtained; and it includes cases in which things are obtained by a contract which is obtained by a false pretence, unless the obtaining under the contract is remotely connected with the false pretence." *Steph. Cr.* 267. See also *Rosc. Cr.* 449.

The word "obtain," in statute against obtaining under false pretences, seems to mean not so much a defrauding or depriving another of his property as the obtaining of some benefit to the party. *People v. General Sessions*, 13 Hun (N. Y.) 400; *Regina v. Garrett*, 1 Sears C. C. 242. See also *FALSE PRETENCES*, vol. 7, p. 705.

"**Obtaining Credit.**"—An undischarged bankrupt "obtains credit" for goods, within § 31, Bankry Act 1883, when he obtains them and does not pay their price; although nothing may be said about credit, or any term of credit, and although there may be no stipulation for credit, and the purchase of goods ostensibly a cash one at the time of the transaction. *R. v. Peters*, 16 Q. B. D. 636; 34 W. R. 399; 16 Cox, C. C. 36; *Rex v. Juby*, 3 T. R. 211.

OBVIOUS—(See also APPARENT, vol. 1, p. 615).—Synonymous with apparent.¹

OCCASION; OCCASIONED, Etc.—See note 2.

Obtain a Patent.—The primary meaning of "obtain" a patent is the original obtaining from the crown; but a context (*e. g.*, as in § 1, 5 & 6 Wm. IV., ch. 83) may make it to mean "the becoming possessed, either by original grant, by assignment, or by any other title." *Russell v. Ledsam*, 16 L. J. Ex. 145; 14 M. & W. 588; 16 Ib. 633; 1 H. L. Cas. 687. See also *Spilsbury v. Clough*, 2 Q. B. 466.

Obtained Judgment.—The question which arose in *Goodman v. Robinson* (18 Q. B. D. 332) was whether the assignee of a judgment debt was a person who has "obtained" the judgment for the purpose of getting a garnishee order under Ord. 45, R. 1, R. S. C., or was that provision only applicable to the person who individually obtained the judgment? It was held that the assignee was such a person. But the assignee of a judgment debt is not a person who has obtained judgment within the meaning of section 419 Eng. Banking Act of 1883. This latter act is in the nature of a penal statute, and the word "obtain" is construed strictly. *Ex parte Woodall*, 53 L. J., Ch. 966; 13 Q. B. D. 479; *Ex parte Blanchett*, 17 Q. B. D. 303.

1. Stormouth's Eng. Dict.

In remarking upon an instruction which had been asked for and refused in the trial court, HUNTINGTON, J., said: "The word obvious might have received different interpretations by different jurors. Some of them might have supposed it meant the highest attainable certainty; others, that it was to be understood as meaning absolute certainty, to the exclusion of all doubt; and others might suppose it meant reasonable certainty." *Stone v. Stevens*, 12 Conn. 229.

In an Insurance Policy.—A person exposes himself to "obvious risk" of injury, within an exception in an accident policy (1), if the risk is obvious to him at the time he exposes himself to it; or (2) if it would be obvious if he were paying reasonable attention to what he is doing. *Cornish v. Accident Ins., L. R.*, 23 Q. B. D. 453.

An Obvious Imitation Within a Patent Law.—An "obvious" imitation within section 58, Patents Registration Act, 1883, does not mean obvious to the un-

educated or unskilled eye, but obvious to a judge or jury sitting as experts. *Mitchell v. Henry*, 15 Ch. D. 181; *Grafton v. Watson*, 50 L. T. 420; 51 Ib. 141.

In the expression "obvious imitation" in a patent act, "obvious" does not mean obvious at a glance to the uneducated and unskilled eye, but obvious to a judge or jury, with the assistance of experts; and the test is not merely to look at the two designs side by side (though that is one element of comparison), but consideration should also be given to what would be the effect supposing they were seen at different times or looked at a little distance off. *Winslow on Artistic Copyright* 77, and cases cited.

Where the merit of a copyrighted design for a range door lay in attaching the moulding to the door instead of to the fire cover, another design differing from the above only in that the moulding on the door overlapped the moulding on the front of the range, was held an "obvious imitation" of the former design and an infringement of it. *Walker v. Hecla Co.*, 15 Ct. Sess. Cas. (Sc.) 4th ser. 660.

2. A man cannot be convicted of an assault "occasioning bodily harm" on his wife by reason of his communicating to her a venereal disease, of which he was aware and she unaware. *Reg. v. Clarence*, 59 L. T., N. S. 780.

A loss by fire cannot be said to be "occasioned" by camphene, within an exception in a policy, because a fire originating independently of that article is rendered less controllable and more destructive by it. Camphene must be the primary cause of the loss in order to absolve the company from responsibility. But it is not necessary that the fire which produces the loss should have been originated by camphene. If the fire, although it existed, would have been wholly innocuous but for its having come in contact with the camphene, the loss which ensues may properly be said to have been caused by camphene. *Harper v. New York City Ins. Co.*, 22 N. Y. 447, 447.

Where the husband, without other consideration, conveys land in trust that it shall be conveyed to his wife, and the trustee, without consideration,

OCCUPANCY—(See also OCCUPY; OCCUPANT; OCCUPANCY; vol. 3, p. 171, TITLE BY USE AND OCCUPATION).—Occupation or occupancy is said to arise out of “actual possession and manurance of the land;” actual control of corporeal property.¹

conveys to the wife accordingly, the conveyance to the wife is “occasioned by the payment or pledge of the property of the husband,” within the meaning of those terms in a statute authorizing the wife to hold to her separate use property conveyed to her during marriage. *Vogt v. Ticknor*, 48 N. H. 242.

When delay in the sale of personal property is caused by an injunction, and the depreciation in the salable value of the property is an incident of the delay, the loss, within the meaning of a statute, is held to be “occasioned” by the injunction. *Meysenburg v. Schlieper*, 48 Mo. 426.

An injury to a horse is not “occasioned by plunging (within a carrier’s exemption) if the animal is made to plunge by actionable negligence. Per *FITZ GIBBON, L. J. Sheridan v. Mid. Great Western R.*, 24 L. R., Ir. 173.

“As Occasion Shall Require.”—When A conferred authority on B “to accept for me and in my name bills drawn or charged on me by my agents or correspondents, as occasion shall require,” C, a partner of A, drew a bill upon him for partnership purposes, which B accepted; and the question was whether B was authorized under the above power to accept the bill drawn by C. It was held that he had not, and that the words “as occasion shall require” “do not vary the question.” *Atwood v. Munnings*, 7 B. & C. 278; 1 A. E., C. L. 44.

1. Vin. Abr. “occupancy,” H. See further Co. Litt. 249b; Abb. L. Dict.

The words “possession” and “occupancy,” as used in § 216 of the *Illinois* revenue act (Rev. Stat. 1874, p. 895), are clearly convertible, and the word actual qualifies each. *Taylor v. Wright*, 121 Ill. 455.

“Occupancy and possession,” say the court in *Waters v. People*, 21 Ill. 178, “when applied to land are merely synonymous, and may, in contemplation of law, exist in the same manner by and through a tenancy. See also *Redfield v. Utica etc. R. Co.*, 25 Barb. (N. Y.) 58; *Bishop of Nesqually v. Gibbon* (Wash. Ter.), 21 Pac. Rep. 315; *Smith v. Sanger*, 4 N. Y. 577; *Walters v. People*, 18 Ill. 194; 65 Am. Dec. 730.

“Occupation” and “possession” are

used in contrast in §§ 18 and 26, Reform Act, 1832 (2 W. IV, ch. 45); and whilst under the latter section an owner of a rent charge in fee would be entitled to qualify for a county vote, after having been for the prescribed time in the actual “possession” of the rent charge, yet if being only entitled for life he is, by the circumstances, driven to claim as for its “actual and bona fide occupation” under section 18, then he will fail, because a rent charge is incapable of such occupation. *Druitt v. Christchurch*, 12 Q. B. D. 365.

By the term “occupation” is meant, use or tenure. *Fleming v. Maddox*, 30 Iowa 242.

“The word ‘occupation’ may be so used in connection with other expressions, or under peculiar facts of a case, as to signify a residence. But ordinarily, the expressions ‘occupation,’ ‘*possessio pedis*,’ ‘subjection to the will and control,’ are employed as synonymous terms, and as signifying actual possession.” *MORTON, J.*, in *Lawrence v. Fulton*, 19 Cal. 688; *McKenzie v. Brandon*, 71 Cal. 211. See also *Plume v. Seward*, 4 Cal. 96; *Jackson v. Halsted*, 5 Cow. (N. Y.) 219; *Jackson v. Woodruff*, 1 Cow. (N. Y.) 285; *Mourilyan v. Labalmondiere*, 1 El. & E. 533; *Jackson v. Shoonmaker*, 2 Johns. (N. Y.) 234; *People v. Ambrecht*, 11 Abb. Pr. (N. Y.) 97; *Bailey v. Irby*, 2 Nott. & M. (S. Car.) 343.

Occupation includes possession as its primary element, but it also includes something more: Legal possession does not of itself constitute occupation. The owner of a vacant house is in possession. If, however, he furnishes it and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in the year. *Reg. v. St. Pancross Assmt. Co.*, 2 Q. B. Div. 588.

Occupancy implies the exclusion of everyone else from enjoyment. *Redfield v. Utica etc. R. Co.*, 25 Barb. (N. Y.) 54.

“Occupancy and Occupation” as Used in Statute.—Stocking a great pond with a new species of fish, and closing the outlet with a wire screen, constitute an

OCCUPANT; OCCUPIER—(See also OCCUPANCY; OCCUPY).—Occupier is one who is in the use and enjoyment of a thing. He may be the occupier by virtue of a lawful contract, either express or implied, or without any contract. The occupier is, in general, bound to make the necessary repairs to the premises he occupies. The cleansing and repairing of drains and sewers, therefore, is *prima facie* the duty of him who occupies the premises.¹ "Occupant," one who has the actual use or possession of a thing.²

occupancy of the pond for purposes of artificially cultivating and maintaining fish therein, within the meaning of the Massachusetts statute of 1869, § 384. Com. v. Weatherhead, 110 Mass. 175.

Six persons were joint lessees of a house which they and others used for political purposes, and the lessees when in London frequented the premises, partly transacting the business of the association and partly transacting their own affairs. *Held*, that the lessees occupied the house as tenants within the meaning of 2 Wm. IV, ch. 45, § 27. Luckett v. Bright, 2 C. B. 195. See also Rex v. Ditcheat, 9 B. & C. 176; Rex v. St. Nicholas, 5 B. & Ad. 219.

In a Devise.—"Occupation" (as a condition in a devise) "is not living and residing" (per LORD ELDON, *Fillingham v. Bromley*, T. & R. 536); and if in any given case it means "residing," that does not involve a continual personal living in the house. And so a devise of the "free use" (*Cook v. Gerrard*, 1 Saund. 181, 186e) or of the "use and occupation" (*Whitcomb v. Lamb*, 13 L. J. Ex. 205; s. c., 12 M. & W. 813; *Rabbeth v. Squire*, 24 L. J., Ch. 203; s. c., 19 Bea. 70; *Mannox v. Greener*, L. R., 14 Eq. 456) of land, passes an estate with the right to let or assign it, and is not confined to a personal use and occupation, unless the context clearly calls for that limited construction (*Maclaren v. Stainton*, 27 L. J., Ch. 442; 4 Jur., N. S. 199; *Stone v. Parker*, 29 L. J., Ch. 874); 1 Jarm. 798; *Rex v. Eatington*, 4 T. R. 181.

In a contract where there was a stipulation "to finish said house ready for occupancy," the court refused to determine that omission to build a water closet was, as a matter of law, a breach of the contract, but left it, as a question of fact, to the jury whether a water closet was reasonably necessary to fit the house for "occupancy." *Cunningham v. Washburn*, 119 Mass. 224.

1. Bouv. L. Dict. See also *Fleming*

v. Maddox, 30 Iowa 242; *Russell v. Shenton*, 3 Q. B. 449.

The tenant, though absent, is, speaking generally, the "occupier" of premises (*Rex v. Poynder*, 1 B. & C. 178); but a servant, or other person who may be there *virtute officii*, is not an occupier. *Clark v. St. Mary*, Bury St. Edmunds; 1 C. B., N. S. 23; *Bent v. Roberts*, 3 Ex. D. 66; *R. v. Spurrell*, L. R., 1 Q. B. 72.

If an owner is driving his cattle, or if, with his consent, his cattle are being driven, along a road leading to a level crossing on a railway, such an owner is an "occupier" of the road, and therefore of "adjoining land" to the railway within § 68, 8 Vict., ch. 20 (*Vh.*, § 47). But if the cattle are being driven without the owner's consent he is not such an "occupier." Per *ESHER*, M. R., *Charman v. S. E. R.*, 21 Q. B. D. 524; *Manchester S. & L. R. v. Wallis*, 14 C. B. 213.

"Occupier" in its strict legal sense means one who is qualified to maintain an action for a trespass. *Shepherd v. Bradford*, 16 C. B., N. S. 378; 111 E. C. L. 378. See also *King v. Sutton*, 3 Ad. & E. 597.

2. Webster followed in *People v. Ambrecht*, 11 Abb. Pr. (N. Y.) 101; Bouv. L. Dict.; *Bangor v. Rowe*, 57 Me. 439; *Redfield v. Utica etc. R. Co.*, 25 Barb. (N. Y.) 54.

"Occupant" implies that a person is in the actual *bona fide* possession of a lot as a resident. One who has never had actual possession cannot be an occupant. *Hussey v. Smith*, 1 Utah Ter. 129.

To constitute one an occupant, he must have the actual use or possession of the land. There must be a subjection of the land to the will and control of the claimant. *Lechler v. Chapin*, 12 Nev. 65; 3 Op. Atty. Gen. 126, 182.

The term used, however, is "occupant," and to be an occupant it is not necessary that he should have his home upon the premises; and there is no rea-

son why a person living upon his own lands, cultivating and raising crops upon other lands not his own, situated in the same township, should not be liable to have such lands assessed to him as an occupier, the same as if he actually resided upon them. *Tweed v. Metcalf*, 4 Mich. 586. See also *Burroughs v. Goff*, 64 Mich. 468.

The owners of three lots constructed an aqueduct from a spring on one of them to the respective buildings on each lot, but did not define their rights to the use of the water. Subsequently all the lots were owned by the same person, and he conveyed one of them, which for about nine years had been occupied by the plaintiff, to the plaintiff. The grantor defined the extent of the supply of water to be as much as had been the custom of the occupants of said lot to draw. The word "occupants" in this connection, instead of "owners," evidently was intended to refer to those who were or had been in occupancy of the premises as tenants, and was not intended to refer to any ancient use customary with the original owners. *Wright v. Newton*, 130 Mass. 552.

A city held not to be "occupant" of that portion of a street which has been set apart by ordinance as a stand for market wagons during certain hours of the day, so as to be liable under an ordinance for charges of repaving the street. *Bixler v. Hagan*, 42 Mo. 367.

Under Code of Civ. Proc. Cal. § 542, providing that the sheriff in levying attachment upon real estate, should serve upon the occupant of the property the attachment papers, occupant is not used in its ordinary sense of one who occupies or takes possession, but in view of the promptness required it must have been intended that the occupant could be easily discovered, in fact, some one visibly occupying the property. The provision as to the occupant is a direction to the officer as to posting when he goes upon the land to complete his levy. If he find an occupant he must serve the papers upon him, if he cannot find an occupant, he must post them in a conspicuous place on the land. *Davis v. Baker*, 72 Cal. 494.

Occupant Distinguished from Owner.

—In *Bangor v. Rowe*, 57 Me. 439, it was held that occupant was one who was in actual possession of a thing or had the use thereof, whereas the right of the owner is more extended than that of him who only has the use of a thing.

Occupant Distinguished from Settlers.

—In the one case residence is requisite, in the other it is not, for occupancy may consist of cultivation and use, without actual residence or may be by tenancy. *People v. State Treasurer*, 7 Mich. 369.

In *New York Rev. Stat.* (3rd ed.) 707, by actual occupant in designating the individual against whom the action might be brought, was intended no more than the tenant in possession, as that term was used in the former practice in ejectment cases. *People v. Ambrecht*, 11 Abb. Pr. (N. Y.) 101.

The word "occupant," as used in § 1810, Rev. Stats. of Wisconsin, has the same meaning as when used in other statutes, such as relate to taxation, partition, fences and highways, and, as in common parlance, means "one in actual possession." *Veerhusen v. Chicago etc. R. Co.*, 53 Wis. 689.

The placing of a few stacks of hay by a person on a tract of land actually occupied by another, and enclosing the stacks by boards to protect them from the rains, there being no agreement to pay rent, the owner and occupant, however, consenting to the placing of the stacks on the land, is not sufficient to put the owner of the hay in the actual possession or occupancy of the land or any part thereof, within the meaning of section 216, of chapter 129 of the Revised Statutes, entitled "Revenue," and a purchaser of the land for taxes is not required to serve a notice of his purchase on such person stacking his hay on the premises. *Drake v. Ogden*, 128 Ill. 603.

By "occupant," as used in the *California* act of 1869, in relation to forcible entry and detainer, a person having "peaceable and undisturbed possession" is meant, and it is not necessary that he should be present in person. *Shelby v. Houston*, 38 Cal. 411.

In Statute.—"Occupant" and "party in possession," as used by the Nevada legislature in the act in regard to the "selection and sale of lands," etc., are not strictly synonymous. "Occupant" means one dwelling upon and occupying a part of a tract of land; but does not necessarily imply that the party is in possession of the whole. *O'Neale v. Cleveland*, 3 Nev. 485.

When a mortgagee of a mill property makes an entry under his mortgage title, upon the premises, and demands of the tenant, holding by parol lease from the mortgagor, to attorn to him, and the tenant assents to such demand,

OCCUPATION—(See also BUSINESS, vol. 2, p. 669; EMPLOYMENT, vol. 6, p. 637; ORDINARY TRADE; PROFESSION).—(a) Actual possession of real property.¹ (b) Employment at a particular business; engagement; vocation; calling; trade.² "The principal business of one's life; vocation; calling; trade; the business which a man follows to procure a living or obtain wealth."³

such entry and attornment are quite sufficient to make the mortgagee the "occupant" of the mill, within *Massachusetts* Rev. St., ch. 11, § 24, which provides that, when a person whose land is flowed by a mill-dam has obtained a verdict for damages caused thereby, he "may maintain an action of assumpsit or debt therefor, in the court of common pleas, against the person who shall own or occupy the mill when the action is brought." *Abbot v. Upham*, 13 Met. (Mass.) 172.

Occupant, in a law providing for the erection of partition fences between adjoining lands, and for a division of expenses between the occupants, means something more than boarding or living on the premises. A person may have his home on a place, and still have no right or power to place any fence or other erection upon it; and the statute was not intended to apply to a person having no lawful right to make erections. To be an occupant in the sense of this statute, one must be in possession, and have the use and control of the land. His connection with the property must be such that it would be proper and consistent for him, if he so willed, to fence voluntarily. *Carpenter v. Vail*, 36 Mich. 226.

"Occupant of the land" means *actual occupant*, as used in the statute, respecting the laying out of highways. *People v. Allegany Co.*, 36 How. Pr. (N. Y.) 544.

The agent of the owner of a mill, who, by the terms of the owner's lease to another, is given a general oversight over the operations of the mill, is not an "occupant" within the meaning of the statute, which provides that for certain specified offences, when committed by any person in the employ of the "occupant," such occupant shall be held liable in the same penalty as the employee. *State v. Coe*, 72 Me. 456.

1. See OCCUPANCY.

2. And. L. Dict.; *Schuchardt v. People*, 99 Ill. 506; 39 Am. Rep. 34.

3. Webster followed in *Tuton v. Sanoner*, 3 H. & N. 280, 282. See also

Allen v. Thompson, 1 H. & N. 15; *Sharpe v. McIlhenry*, 18 Co. Ct. Rep. 211, 217; 57 L. T., N. S. 606, 612.

The object of § 10, sub-section 2, of the Bills of Sale act, 1878, in requiring that a bill of sale shall describe the "occupation" of the grantor as well as his residence, is to identify him; and if the description gives a true indication of his profession, business or calling in life by which he can be identified, although he may not be actively carrying on such profession, business or calling at the date of the bill of sale, it is a sufficient compliance with the sub-section. *KAY, J.*, 1887, *Sharp v. Brown*, L. R., Ch. Div. 428, 450.

Where a widow, besides being possessed of a farm, carried on the business of a grocer and licensed vintner, it was held that a description of her as "widow and farmer" in the registration of a bill of sale was an insufficient description of her "occupation." *In re Fitzpatrick*, 19 L. R., Ir. 206. *MILLER, J.*, said: "The same authorities" [*i. e.*, every acknowledged dictionary in the English language] "would sanction as an accurate definition of the word 'occupation'—'the business which a man follows to gain a living or obtain wealth.' It likewise could not be said that, within such a definition (if a true one), the occupation of a man would be accurately described by setting forth one business alone out of two or more which he followed to gain a living or obtain wealth . . . CHIEF BARON KELLY . . . stated in the case of *Lucken v. Hamlyn*, 21 L. T., N. S. 366 . . . 'that the word "occupation" in the corresponding English act, meant the trade or calling by which the maker of the bill of sale ordinarily seeks to gain his livelihood.' "

In Life Insurance Policy.—In an insurance policy, where there is a question as to the occupation of the applicant, it is not a satisfactory answer to describe himself as esquire, where he follows the trade of an ironmonger, though such a mis-description will not vitiate the policy. *Perrins v. Marine*

OCCUPY; OCCUPIED—(See also OCCUPANCY; OCCUPANT).—To hold in possession; to hold or keep for use—as to occupy an apartment.¹

& Gen. Trav. Co., 2 E. & E. 317; 105 E. C. L. 316.

The occupation of the insured, which it is his duty to disclose, is that business which he is engaged in at the time his application is made, and not that trade to which he was apprenticed in his youth. Thus, where the applicant had for many years been a farmer, but at the time of his application was following the calling of a slave taker, a dangerous occupation, it is a fatal mis-description to call himself a farmer. *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 478.

Where a clerk in a railroad office obtained a policy of insurance, describing himself therein as such clerk, and afterwards, without the consent of the insurance company, changed his occupation to that of brakeman, it was held that the change was a breach of warranty and vitiated the policy. *Northwestern Mut. L. Ins. Co. v. Amerman*, 119 Ill. 329.

See also LIFE INSURANCE, vol. 13, p. 635.

1. And. L. Dict.; Webster's Dict., followed in *Missionary Soc. v. Dallas*, 107 U. S. 343. Occupy and its inflections may well enough be used in the sense of possess; occupancy and occupant for assuming property which has no owner; occupation and occupier for the more general idea of possession. Abb. L. Dict.

"The term 'occupy,' in legal acceptance, implies actual use, possession and cultivation." *Jackson v. Sill*, 11 Johns. (N. Y.) 202; *Phillipsburgh v. Bruck*, 37 N. J. Eq. 486. See also *United States v. Soule*, 30 Fed. Rep. 920.

Occupied is synonymous with possessed. *Evans v. Foster* (Tex. 1890), 15 S. W. Rep. 170.

Occupy, in its primary and most familiar sense, is equivalent to possess, and implies a tenure somewhat continued and permanent. A reservation, in a deed of timber lands upon a stream, of a right to "occupy the shore" for the purpose of securing lumber, may well be construed to entitle the grantor not merely to moor his rafts against the land granted for temporary stops, but also to pile or stack his lumber on the land near the stream for convenient periods. *Lacy v. Green*, 84 Pa. St. 514.

To occupy is to possess, not constructively but actually. It is derived from *ob* and *capio*—to lay hold of—and means to possess by having hold of or being actually upon the thing possessed, continuously and exclusively. *Dalles City v. Missionary Soc.*, 6 Fed. Rep. 370.

In the conveyance to B in fee of a cottage in which A then resided, there was a proviso that it should be lawful for A "to live in, inhabit, dwell in and occupy the said cottage with the appurtenances as he heretofore has done and now does, for and during the term of his natural life"—held, that an estate for life was reserved to A. *KENYON, C. J.*, said: "If this question had depended on the first words of the proviso, I should have thought they would have been satisfied by determining that only a liberty to inhabit the cottage was given to A; but the word 'occupy' carries the interest reserved still further, and shows that the whole estate was intended to be reserved to him." *Rex v. Eatington*, 4 T. R. 181.

Under How. St. *Michigan*, § 8503, which provides that "if distinct lots be occupied as one parcel," they may be sold together on foreclosure sale; two adjoining lots of farm land, so situated as naturally to constitute one farm, one of which lots is partially fenced and cultivated, while the other is unfenced and unimproved, may be sold together, where there is nothing to show that they were not in fact used as one farm. *Harris v. Creveling* (Mich. 1890), 45 N. W. Rep. 85.

In a Guarantee.—B guaranteed the payment of A's rent "so long as said A shall occupy said premises." Held, that the word "occupy" was used not simply in the narrower sense of actual or personal occupancy, "but also in the larger sense of tenancy actually existing under the lease. Such use of the word is not uncommon." *Morrow v. Brady*, 12 R. I. 131.

In a Lease.—Permitting persons to use small portions of land for growing potatoes, is a breach of a stipulation in a lease of a farm not to "suffer to be occupied by any other person" without consent. *Greenslade v. Tapscott*, 3 L. J. Ex. 328; 4 Tyr. 566.

By a devise to the testator's widow of

the house and lot "occupied by me," a way which the testator had opened through other of his lands for the accommodation of a barn he had erected on the lot devised to his widow did not pass, the words "occupied by me" being merely descriptive of the subject matter of the devise, and not effective to convey the private way. *Fettors v. Humphreys*, 19 N. J. Eq. 478.

"Premises occupied" by a grantor of a bill of sale, § 7, 17 & 18 Vict., ch. 36, meant not merely premises of which he is tenant, but premises actually under his control. *Robinson v. Briggs*, L. R. 6 Ex. 1.

In Homestead Law.—The word "occupied," as used in *Minnesota* homestead law, was held to mean not "use—tenure possession,"—but the occupancy of the homestead by the debtor as a residence. *Tellotson v. Millard*, 7 Minn. 523. See also *Folsom v. Carll*, 5 Minn. 333. As used in the homestead exemption act, it cannot apply to a public street or alley whereof the debtor owns the fee. *Weisbrod v. Daenicke*, 36 Wis. 73.

"Occupied as a Residence."—This term, in the statute exempting homesteads, means that the premises shall be the home of the party claiming a homestead right. Temporary absence by the party and his family, without acquiring another home, is not an abandonment of the right. *Potts v. Davenport*, 79 Ill. 455.

The occupancy required by the statute to protect a homestead may be by a tenant for the benefit of the widow and minor children. *Brinkerhoff v. Everett*, 38 Ill. 263.

Tax Laws.—Occupied (as used in a statute exempting from taxation, property occupied by a charitable corporation) includes a case of recent purchase followed by diligent present preparations to build and occupy for the purposes of the institution. *New England Hospital v. Boston*, 113 Mass. 518. See also *Trinity Church v. Boston*, 118 Mass. 164.

A firm piling lumber upon a wharf, and paying wharfage for the privilege, does not "occupy" the wharf for the purpose of taxation under the Maine statute. *Stockwell v. Brewer*, 59 Me. 289; *Campbell v. Mocias*, 33 Me. 419.

And where lumber was piled at a railway station for transit merely, it was held that the owner did not "occupy" the grounds within the sense of a *Michigan* statute allowing personal property to be taxed at the place the owner "occu-

pies or hires a store, mill, . . . storage, etc. *Monroe v. Greennoe*, 54 Mich. 9.

Within the meaning of a tax law, the owner of land may be in occupation of it by his tenant; so that "unoccupied" will mean "untenanted." *State v. Reinhardt*, 31 N. J. L. 218.

Occupied and unoccupied, as used in policies of insurance, are always construed with reference to the character of the building, the purposes for which it is designed, and the uses contemplated by the parties as expressed in the contract. *And. L. Dict.* Thus the occupancy of a dwelling, of a barn, and of a mill is in each case essentially different in its scope and character, and the construction must have reference thereto. *Sonneborn v. Manufacturers' Ins. Co.*, 44 N. J. L. 220; 43 Am. Rep. 365. See also *Kimball v. Monarch Ins. Co.*, 70 Iowa 513.

In *Herrman v. Adriatic F. Ins. Co.*, 45 N. Y. Super. Ct. 394, the court said: "The meaning of the word 'unoccupied' necessarily varies with its use in different policies, and to determine it correctly in a particular instance regard must be had to the intention of the parties as expressed by the particular policy, and the subject matter in respect to which the term is used." And see cases there cited. See also FIRE INSURANCE, vol. 7, p. 1036.

In Statute.—In the sense of § 6 of the *New Jersey* tax law of 1886, "occupied" means that there must be such an occupation or possession of land as to enable the tenant or possessor, without the aid of a paper title, to maintain an action for trespass upon it. *State v. Abbott*, 42 N. J. L. 113.

The 17 & 18 Vict., ch. 36, § 7, enacts that personal chattels shall be deemed to be in the "apparent possession" of the grantor of a bill of sale, so long as they shall remain or be in or upon any house, land or other premises "occupied" by him. *Held*, that the "occupation" referred to in this section is actual *de facto* occupation. The grantor of a bill of sale, which was not registered, was tenant of rooms where the goods comprised in it were placed, but he resided elsewhere. Having made default in paying the sum secured, he gave the keys of the room to the grantee, who opened the rooms and put his own name on some of the goods. None, however, were removed, and an execution at the suit of a judgment creditor against the grantor was afterwards levied on them.

OCCUR.—The word "occur" means to happen in its general and most popular sense.¹

OF.—See note 2.

Held, that the grantor did not "occupy" the rooms within the meaning of 17 & 18 Vict., ch. 36, § 7, and that the goods were not to be deemed in his "apparent possession," and that the bill of sale was therefore valid as against the execution creditor. *Robinson v. Briggs*, L. R., 6 Ex. 1.

In a Warrant.—A warrant directing an officer to search for certain liquors in a certain dwelling house, described as the premises occupied by the plaintiff, does not justify a forcible entry into the plaintiff's barn, adjoining his dwelling house. *Jones v. Fletcher*, 41 Me. 254.

1. *Johnson v. Humboldt Ins. Co.*, 91 Ill. 95.

"After a loss shall occur," in a policy of insurance, refers to the time when liability becomes fixed by proofs of loss, etc., when the insurer may lawfully be compelled to pay the amount of the loss. *Hay v. Star F. Ins. Co.*, 77 N. Y. 243.

"Occur" and "Accrue" Distinguished.—See ACCRUE, vol. 1, p. 142, n.

2. Where the ground for divorce is that the husband has been absent more than three years "without being heard of," it is not a sufficient compliance with the statute to prove that he has not been heard from within that time. *Fellows v. Fellows*, 8 N. H. 160.

An alteration of a bond, correcting it, by substituting in it the word "to" for "of," was held immaterial, both because it did not alter the meaning and construction of the bond and because the condition was absurd with "of" in the place of "to." *United States v. Hatch*, 1 Paine (U. S.) 336.

"Of" Equivalent to After.—"Of" is sometimes the equivalent of "after"—*e. g.*, "within 21 days of the execution." § 3, 17 Geo. III, ch. 26; *Ex parte Fallon*, 5 T. R. 283; *Williams v. Burgess*, 12 A. & E. 635.

"Of" Equivalent to "At."—"My estate of A."—In a devise in these words it was *held*, that "of" was equivalent to "at," and that the devise could not, by extrinsic evidence, be extended to property out of though contiguous to A. *Doe d. Chichester v. Oxenden*, 3 Taunt. 147. But for this construction it has been suggested that "the distinction between a devise of 'my estate of A,'

and a devise of 'my estate called A' is not very perceptible." 1 Jarm. 428.

"Of" Equivalent to "Belonging To."—"Of," as meaning "belonging to"—*e. g.*, "burial ground of any parish," § 18, 18 & 19 Vict., ch. 128, means one that is parish property, not one that is merely in the parish. *Rex v. St. John, Westgate*, 2 B. & S. 703.

The infirmity "of" a county is equivalent to "the property of" or "belonging to" the county. *Davis v. State*, 38 Ohio St. 506.

"Of" Meaning "By."—A deed after mentioning, in the description of one parcel of land conveyed, a county road, conveyed also "all the land situate and lying north of the road aforesaid, bounded north of the heirs of M. C's land, and west on 'another road distinctly identified.'" It was held that the words "bounded north of the heirs of M. C's land" must be construed as defining the northern boundary of the premises granted; either upon the ground that the word "of," in the clause, was used in its obsolete, but perfectly grammatical, meaning of "by," as in the familiar examples, "seen of men," "led of the spirit," "tempted of the devil," or upon a presumption that the scrivener inadvertently repeated "of," which he had used correctly in previous boundaries, instead of substituting "on," as he should have done, conformably to a change of expression, and as he properly did in the boundary next following. *Hannum v. Kingsley*, 107 Mass. 355.

"Of" Equivalent to "Manufactured By."—"Of," in a contract to sell goods of another, was held equivalent to "manufactured by another," in *Powell v. Horton* 2 Bing. N. C. 668.

Of a Place.—"Of" a place, imports dwelling; and is ordinarily taken to mean that the person spoken of dwells at the place named. *Dwar*, 675. See also *Reg. v. Rotherham*, 42 E. C. L. 806; *Reg. v. Justius*, 12 L. J. R., N. S., M. C. 37; *Reg. v. Flockton*, 2 A. & E. 539; 42 E. C. L. 797. See, however, per LITTLEDALE, J., *R. v. Toke*, 8 A. & E. 232.

An averment that a person named is "of" a specified county sufficiently imports that he is a resident of that

county. *Porter v. Miller*, 3 Wend. (N. Y.) 329.

Of in the Sense of Owed to.—An assignment which directed the assignee to pay the respective debts "of" the creditors of the assignor, was sustained as meaning not the payment of debts owed by the creditors, but payment of debts owed to the creditors by the assignor. *Pine v. Rikert*, 21 Barb. (N. Y.) 469, 475.

Of The Body.—"The distinction between heirs *of* the body and heirs *on* the body, must be attended to: where 'heirs *of* the body of the husband begotten by him *on* the body of the wife' are spoken of, the heirs intended are the heirs of the body of the husband, but they are restricted by the words 'on the body of the wife' to a particular class of the heirs of the body of the husband, namely, those that he has by her. 'Heirs begotten by the husband *of* the body of the wife,' means 'heirs *of* the body of the wife,' but they are restricted to the heirs begotten by the husband. On the other hand, 'heirs begotten by the husband *on* the body of the wife,' means the heirs of their two bodies, because the word 'heirs' is not applied to the one more than the other." *Elph.* 235.

If an estate be limited by deed to husband and wife and the heirs *on* the body of the wife by the husband to be begotten, both have an estate-tail. But if the remainder be limited to the heirs *of* the body of the wife by the husband to be begotten, the estate-tail vests in the wife solely. *Denn v. Gillot*, 2 T. R. 431.

Of the Clock.—This expression indicates "mean as opposed to solar time, but a question might arise as to whether it means local mean time or the mean time commonly observed at any given place. London time, or, as it is called, railway time, is now very generally observed, and there is a difference of more than 20 minutes between London and Cornwall. Local mean time, is the natural meaning." *Steph. Cr.* 247, n. 2. See, however, *Curtis v. Marsh*, 3 H. & N. 866; 4 Jur., N. S. 1112.

"Of and Concerning."—In an action for libel, the declaration stated that the plaintiff was an attorney and had been employed as vestry clerk in the parish of A, and stated several other matters of fact, and then alleged that the defendant falsely and maliciously published of and concerning the matters aforesaid,

the libel, etc." *HOLROYD, J.*, said: "That is a general allegation, which is not to be considered as extending to all and every the matters aforesaid. In the case of *Rex v. Thorne*, the libel was alleged to be "of and concerning" the government. That was considered not to import that it was of and concerning every branch of the government; but that it was of and concerning some one branch of the government. But there it was also alleged to be of and concerning the employment of the king's troops; that was held not to import that it was "of and concerning the general employment of all troops," but it was held that the allegation was sustained by proof of a libel of and concerning any part of the king's troops. *May v. Brown*, T. T. 1824, 3 B. & C. 113.

In an action on an award the declaration stated the award to be made "of and concerning the premises" held. Upon these pleadings, as the award was expressly made "of and concerning the premises," the court would intend that the arbitrator had adjudicated upon all matters referred to him; and that, if he had not done so, the omission should have been shown by plea. *Perry v. Mitchell*, 12 M. & W. 802. See also *Dunn v. Walters*, 9 M. & W. 296.

"Of and concerning the plaintiff," held sufficiently specific in a declaration for libel, except perhaps in very special cases. *Hays v. Brierly*, 4 Watts (Pa.) 392.

"Of My Name and Blood."—Vol. 2, p. 42 n.

The Preposition "of" May be Disregarded Under Certain Circumstances.—Mr. Bishop, in his work on Statutory Crimes, at § 200, says: "Equally in strict interpretation as in liberal, the object is simply to ascertain the true legislative will, to arrive at which is the end of all interpretation. A rendering so strict as to defeat this will is never admissible." At § 212 it is further said: "It is not a violation of the rule of strict construction to give the words of a statute a reasonable meaning according to the intent of the makers, disregarding captious objections, and even the demands of an exact grammatical propriety." Again, at § 243, it is said: "However desirable a correct use of the English language may be, the courts have no jurisdiction to enforce it on the legislature. Therefore, as already seen, when the legislative meaning is plain, the

OFFENCE—OFFENDER—OFFENDING.

OFFENCE; OFFENDER; OFFENDING—(See also CRIMINAL LAW, vol. 4, p. 641; JEOPARDY, vol. 11, p. 926).—A breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights; a punishable violation of law; a crime; also, sometimes, a crime of the lesser grade; a misdemeanor.¹

Any crime or act of wickedness. The word is used as a genus, comprehending every crime and misdemeanor, or as a species, signifying a crime, not indictable, but punishable summarily or by the forfeiture of a penalty. Offences are divided into three classes, viz, treasons, felonies or major offences; and misdemeanors, or minor offences.²

exact grammatical construction and propriety of language may be disregarded, even in a penal statute. The conjunction 'and' will be read as 'or,' and 'or' as 'and,' when the sense obviously requires." At § 215 the author correctly states the ruling in the case of *Worrell v. State*, 12 Ala. 732, as follows: "An *Alabama* act made it punishable 'to buy, sell or receive from any store' certain things without his master's consent. And it was held to be infringed by a sale to the store, for its obvious meaning should not be defeated by the inaccurate use of a preposition." In speaking of the case of the *State v. Acuff*, 6 Mo. 54, the author further says: "In the following statute of *Missouri*, the second 'of' printed in italics is rejected in the construction, 'if any guardian of any white female, under the age of eighteen years, or of any other person to whose care or protection any such female shall have been confided, shall defile her, by carnally knowing her;" etc., and thus its penalties extend to persons in care who are not guardians as well as to those who are."

In the case of *Zorger v. Greensburgh*, 60 Ind. 1, this court decided that an ordinance of the city of Greensburgh, making it an offence to be found associating with certain characters "in a public place, street, alley, common, or within said city limits," meant and should be construed to mean and read "in any public place, street, alley, or common within said city," thus making the conjunction "or" precede instead of follow the word "common." See also *Clare v. State*, 68 Ind. 17; *Matter v. Campbell*, 71 Ind. 512. We have thus referred to the rules of construction, and cited authorities to show that the preposition "of" above mentioned, may be disre-

garded in order to render the statute intelligible, and give to it such an interpretation as will carry out the intention of the legislature in its enactment. *Indianapolis v. Huegle*, 115 Ind. 581.

1. Abb. L. Dict.

2. Wharton Cr. Law.

The doing that which a penal code forbids to be done, or omitting to do what it commands. In this sense, it is nearly synonymous with crime. In a more confined sense, it may be considered as having the same meaning with misdemeanor; but it differs from it in this, that it is not indictable, but punishable summarily by the forfeiture of a penalty. *Bouv. L. Dict.*

An offence in its legal signification, means the transgression of a law. *State v. Whittemore*, 50 N. H. 245.

An act committed against a law, or omitted where the law requires it, and punishable by it. *Illies v. Knight*, 3 Tex. 314.

See also *People v. Hanrahan*, 75 Mich. 611; *People v. Police Commissioners*, 39 Hun (N. Y.) 507; *Wragg v. Penn Township*, 94 Ill. 18; *Moore v. Illinois*, 14 How. (U. S.) 19; *State v. Oleson*, 26 Minn. 516; *Reg. v. Sutcliffe*, 13 A. & E. 833.

Where a police officer had, previous to his appointment, been found guilty of intoxication in a police court and fined five dollars, it was held that he had been found guilty of a "crime." *People v. French*, 102 N. Y. 583.

Offences for the violation of municipal ordinances to which a penalty, such as fine or imprisonment is attached, are criminal offences.

The terms "crime," "offence," and "criminal offence" are all synonymous and ordinarily used interchangeably, and include any breach of law estab-

OFFENCE—OFFENDER—OFFENDING.

lished for the protection of the public, as distinguished from an infringement of mere private rights for which a penalty is imposed or punishment inflicted in any judicial proceeding. As said in *State v. Cantieny*, 34 Minn. 1, the term includes any punishable violation of law, the doing that which a penal law forbids or omitting to do what it commands, and hence includes all violations of municipal ordinances punishable by fine or imprisonment. A municipal ordinance is as much a law for the protection of the public as is a criminal statute of the State, the only difference being that the one is designed for the protection of the municipality and the other for the protection of the whole State, and in both cases alike the punishment is imposed for the violation of a public law. *State v. West*, 42 Minn. 147.

The affidavit and proof required by the Gen. Stat. (*Massachusetts*), ch. 124, § 5, before a person may be arrested in a civil action, is not a charge of an "offence" to which the debtor is "held to answer," within the twelfth article of the Declaration of Rights. *In re Frost*, 127 Mass. 550.

The removal of an attorney from the bar is not a criminal procedure in which the party has a right, under the constitution of *Massachusetts*, to a full, formal and substantial description of the offence charged. *Randall Petitioner*, 11 Allen 473; *Randall v. Brigham*, 7 Wall. (U. S.) 523.

Defined by Statute.—In the *New York Rev. Stat.* it is declared that the words "crime" and "offence," when used in the statute, shall be construed to mean any offence for which any criminal punishment may by law be inflicted." 3 R. S. N. Y., pt. 4, ch. 1, tit. 7, § 32, p. 702. And in the Penal Code, § 33, a crime is defined as follows: "An act of omission forbidden by law and punishable upon conviction," among other ways by "fine." *People v. French*, 102 N. Y. 583.

In an Indictment.—Where an offence consists in an omission to do some act, the indictment must show how the defendant's obligation to perform that act arises, unless it is a duty annexed by law to the office which the defendant sustains. *Stark Cr. Pl.* 180; *Rex v. Holland*, 5 T. R. 623. See also *State v. Hageman*, 13 N. J. L. 320.

"Contempt of Court."—Contempt of court is not an "offence" within the

meaning of *United States Statutes*, using that word.

"A contempt" is "*sui generis*" and is "especially provided for in separate acts, and is not intended to be included in the ordinary general provisions embraced within the Criminal Code or system." SAWYER, J., *In re Terry*, 37 Fed. Rep. 651.

Contempt of court in a civil action is not an "offence" within § 19, Extradition act (1870), 33 & 34 Vict., ch. 52. *Pooley v. Whetham*, 15 Ch. D. 435.

Offender.—When a statute provides that if any person shall, contrary to the intent of the act or right of the author, etc., represent or cause to be represented without the consent in writing of the author or other proprietor, at any place of dramatic entertainment within the limits of the act, any such production as aforesaid or any part thereof, every such offender shall be liable, etc. An offender within the meaning of this provision is one who presents such a representation, without the consent of the author, although he has no *scienter* of the author's property right. *Lee v. Simpson*, 3 G. & S. 882.

Person So Offending.—The 96th section of the Internal Revenue act of July 20th, 1868 (15 U. S. Statute at Large 164), enacts that if "any distiller, rectifier, etc., shall knowingly and wilfully omit, neglect or refuse to do or cause to be done any of the things required by law in carrying on or conducting his business or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act, for neglecting or omitting or refusing to do or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of \$1,000; and if the person so offending be a distiller, rectifier, etc., all distilled spirits or liquors owned by him or in which he has any interest as owner . . . shall be forfeited to the United States." Considering this provision, WOODRUFF, J. says: "Who is the person so offending, or, rather, what is the meaning of so offending? . . . is he one and every one who is guilty of the knowing and wilful omission, neglect and refusal, or who does the thing prohibited by the act? or is he one and only one who is guilty of a knowing and wilful omitting, neglect or refusal to do what is required, or does something which is prohibited for which no specific penalty or punishment is imposed by any other section of the act?"

OFFENSIVE—(See also NOXIOUS; NUISANCE).—See note 1.

OFFER—(See also CONTRACT, vol. 3, p. 823).—A proposition to do a thing.² It is sometimes a convertible term with attempt.³

It cannot, we think, be denied that either construction would satisfy the words used in the section. . . . I concur with those who held that the forfeiture here declared applies only to the acts for which no specific penalty or punishment is imposed by other sections. *United States v. 1412 Gallons of Distilled Spirits*, 10 Blatchf. (U. S.) 432.

In an act restricting sales by auction and providing a penalty for persons "offending" against its provisions, it was held that the word "offending" was not used in any criminal sense, but in the sense of "breaking or violating" the prohibitory injunction of the act. *Ott v. Jordan*, 116 Pa. St. 218.

1. Where the parties to a deed inserted a covenant, prohibiting the erection of certain kinds of buildings, in which cow stables are specified, together with other noxious, unwholesome and offensive establishments, trades, callings and businesses, "the word offensive in the covenant included all establishments, trades, callings or business of a different class than those already recited, which are disagreeable to the senses in the same degree, *noscitur a sociis*; but it does not include trades of the same class which have been already named. If stables had been prohibited in so many words, then the general words would not refer to them; and we think that the use of the word stables has the same effect, although it is preceded by the word cow. That word limited the establishments prohibited of the same class, and the words 'others, etc.,' do not include stables where domestic animals are to be kept. The parties could have prohibited all stables by omitting a single word." *Flanagan v. Hollingsworth*, 108 N. Y. 621.

Offensive.—In construing a covenant not to carry on any "offensive" trade, or business on premises demised, much will depend on the situation of the premises; and in construing such a covenant it is particularly worthy of consideration, whether such trade as that complained of was carried on there at the time of the demise; and, *semble*, that a trade carried on there at the time of the demise would not be within the

covenant (per *TINDAL*, C. J., *Gutteridge v. Munyard*, 7 C. & P. 129); and the words "any other offensive trade" must be read as *eiusdem generis* with those that follow (*Doe d. Wetherell v. Bird*, 2 A. & E. 161; 4 N. & M. 285). Neither a private lunatic asylum (*Doe d. Wetherell v. Bird*, 2 A. & E. 161), nor a hospital for curing diseases which may be infectious (*V. per LINDLEY*, L. J., *Tod-Heatley v. Benham*, 40 Ch. D. 80), nor the business of a licensed victualler (*Jones v. Thorne*, 1 B. & C. 715), nor that of a lucifer match deposit (*Hickman v. Isaacs*, 4 L. T. 285), is an "offensive" business within such a covenant. In the last case the words were "*noisome or offensive*;" and *COCKBURN*, C. J., asked if the word "Dangerous" were in the covenant, and getting a negative reply, said to counsel arguing for a breach, "then you cannot make anything of your point."

The business of a butcher, though in carrying it on beasts are slaughtered on the premises, is not, necessarily, an "offensive, noisy or noisome" trade within such a covenant. *Cleaver v. Bacon*, 4 T. R. 27.

2. *Bouv. L. Dict.*, followed in *People v. Ah Fook*, 62 Cal. 494. See also *Reggs v. Denniston*, 3 Johns. Cas. (N. Y.) 202.

3. *Com. v. Harris*, 1 Pa. Leg. Gaz. 455.

Offer to vote (by ballot) is to present one's self, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. *Morrison v. Springer*, 15 Iowa 327; *Chase v. Miller*, 41 Pa. St. 419.

Offer in Writing.—In an action in a justice's court to recover damages for an involuntary trespass, an entry of defendant's oral answer, that he "tenders judgment for 6 cts. and costs up to today," in justice's docket sufficiently fulfils the requirements of the revised statutes of *Wisconsin*, § 3627, which provides that the defendant may offer *in writing* to permit the plaintiff to take judgment against him for the sum, damages or things stated in said offer with costs. *Williams v. Ready*, 72 Wis. 408.

But it has been held that there is a distinction between "offering" and "promising" a reward to a voter.¹

OFFICERS AND AGENTS OF PRIVATE CORPORATIONS—(See AGENCY, vol. 1, p. 331; BANKS AND BANKING, vol. 2, p. 89; CORPORATIONS, vol. 4, p. 184; CUMULATIVE VOTING, vol. 4, p. 954; DE FACTO OFFICERS, vol. 5, p. 93; STOCK: STOCKHOLDERS).

- I. In General, 41.
- II. Election of Officers, 41.
 1. Power and Right to Elect Officers, 41.
 2. Notice of Election, 42.
 3. Place of Meeting, 43.
 4. Time for Holding Election, 44.
 5. The Electors; Voting, 45.
 6. Inspectors, 46.
 7. Majority Elects, 47.
 8. Validity; Invalid Elections, 48.
 - (a) Generally, 48.
 - (b) Combinations and Contracts, 49.
 9. Failure to Elect; Holding Over, 49.
 10. Contested Elections; Review by Courts, 51.
 - (a) Generally, 51.
 - (b) *Quo Warranto*, 51.
 - (c) *Equity Jurisdiction*, 52.
 11. Acceptance of Office, 54.
- III. Appointment of Agents, 54.
 1. Power to Appoint, 54.
 2. Method of Appointment, 55.
 3. Who May be Appointed, 57.
 4. Appointment of Sub-agents, 57.
 - (a) Generally, 57.
 - (b) By Directors, 57.
 5. Proof of Appointment, 61.
 6. Presumption of Agency, 62.
- IV. Official Bonds, 63.
 1. Taking, Acceptance and Approval, 63.
 2. Validity of Bonds, 65.
 3. Conditions, When Broken, 67.
 4. Duration of Liability of Sureties, 70.
 5. Effect of Increase of Capital Stock, Business, etc., 72.
 6. Scope of Officer's Employment, 73.
 7. Release of Sureties, 74.
 - (a) *Misrepresentation or Concealment by Obligees*, 74.
 - (b) *Negligence of Company*, 77.
 - (c) *Death of Officer*, 79.
 - (d) *Acceptance of Satisfaction from Principal*, 79.
 - (e) *Date of Appointment*, 79.
 - (f) *Notice by Surety of Withdrawal*, 79.
 - (g) *Covenant Not to Sue*, 79.
 - (h) *Acts of Corporation*, 80.
 8. Action on Bond, 80.
- V. Directors, 81.
 1. Generally, 81.
 2. Qualification, 81.
 - (a) *Requisite that Directors be Shareholders*, 81.
 - (b) *Election of Disqualified Person*, 82.
 3. Meetings, 83.
 - (a) *Directors Must Act as a Board*, 83.
 - (b) *Number Necessary to Meet and Act*, 83.
 - (c) *Necessity of Notice*, 84.
 - (d) *Requisites of Notice*, 85.
 - (e) *Presumption of Notice; Regularity, etc.*, 85.
 - (f) *Place of Meeting*, 86.
 - (g) *Minutes of Meeting*, 86.
 4. Powers, 87.
 - (a) *Generally*, 87.
 - (b) *Express Powers*, 89.
 - (c) *Implied Powers*, 89.
 - (d) *Directors Cannot Have Their Powers Increased by the Legislature*, 90.
 - (e) *When Director's Power May be Delegated to Another*, 90.
 - (f) *Discretionary Powers*, 91.
 - (g) *Fiduciary Relations*, 91.

Offered in a bill of exceptions is not the equivalent of given—*e. g.*, "This was all the evidence offered in the cause," has not the same meaning, as "this was all the evidence given in the cause."

Baltimore etc. R. v. Barnum, 79 Ind. 263. See also Goodwine v. Crane, 41 Ind. 335; Woolen v. Weshmer, 70 Ind. 108.

1. State v. Harker, 4 Harr. (Del.) 559.

- (h) *Dealings of Directors*, 95.
- (i) *Notice*, 99.
- (j) *Authority to Bind the Company*, 100.
- (k) *To Loan and Borrow Money*, 103.
- (l) *To Mortgage Property*, 103.
- (m) *To Lease Property*, 105.
- (n) *Stock*, 105.
- (o) *Bonds*, 106.
- (p) *Declaring Dividends*, 107.
- (q) *Winding Up Business of a Company*, 108.
- 5. *Duties and Liabilities*, 109.
 - (a) *To Shareholders*, 110.
 - (b) *To Creditors*, 111.
 - (c) *For Breach of Trust*, 111.
 - (d) *For Issuing Fraudulent Certificates*, 113.
 - (e) *Debts*, 113.
 - (f) *Fraudulent Representations*, 115.
 - (g) *False Reports*, 116.
 - (h) *Unauthorized Acts*, 118.
 - (i) *Mistakes*, 119.
- 6. *Compensation*, 119.
- 7. *Directors of Insolvent Corporation Have No Preference as Creditors*, 122.
- 8. *Directors Cannot Favor Particular Shareholders*, 123.
- 9. *Assignment for Benefit of Creditors*, 123.
- VI. *President*, 124.
 - 1. *Powers*, 124.
 - (a) *Generally*, 124.
 - (b) *Selling Property, Borrowing Money, etc.*, 128.
 - (c) *Transfer of Negotiable Instruments*, 129.
 - (d) *Repayment of Loan; Release of Subscriptions, etc.*, 129.
 - (e) *Release or Surrender of Claim; Stay of Execution*, 129.
 - (f) *Assuming Debts, Purchasing Property, etc.*, 130.
 - (g) *Acting also as Superintendent and Financial Agent*, 130.
 - (h) *Payment of Debts*, 130.
 - (i) *Authority to Commence and Defend Actions*, 131.
 - (j) *Authority to Convene Meetings*, 131.
 - 2. *Absence or Death of President*, 132.
- VII. *Treasurer*, 132.
 - 1. *Negotiating Bills and Notes*, 133.
 - 2. *Assuming Debts*, 133.
 - 3. *Misapplication of Funds*, 134.
- VIII. *Secretary*, 134.
 - 1. *Assignment by Secretary*, 134.
 - 2. *Secretary Pro Tem.*, 134.
 - 3. *Resignation*, 135.
- IX. *Officers and Agents—Generally*, 135.
 - 1. *Powers*, 135.
 - (a) *Limitation of Power*, 138.
 - (b) *Notice*, 139.
 - (1) *Generally*, 139.
 - (2) *Notice of Agent's Authority*, 142.
 - (3) *Notice of the Fraud of an Officer or Agent*, 143.
 - (4) *Courts Will Not Take Judicial Notice of Agent's Authority*, 143.
 - (c) *Authority to Borrow Money*, 144.
 - (d) *To Execute Notes and Bills of Exchange*, 144.
 - (e) *To Transfer Negotiable Instruments*, 147.
 - (f) *To Confess Judgment*, 149.
 - (g) *To Increase Capital Stock*, 149.
 - (h) *To Use Common Seal*, 149.
 - (i) *To Act Through Committees*, 150.
 - (j) *To Employ Surgical Aid*, 150.
 - (k) *To Employ Attorneys*, 151.
 - (l) *To Employ Workmen*, 151.
 - (m) *Purchases and Sales of Property*, 152.
 - (n) *Assignments*, 155.
 - (o) *Declarations of Officers and Agents*, 155.
 - (p) *Unauthorized Acts*, 157.
 - (q) *Fraudulent Issue of Certificates*, 159.
 - (r) *Misapplication of Funds*, 159.
 - (s) *Use of Officer's Property by the Corporation*, 160.
 - (t) *Authority to Represent Two Companies in Their Mutual Dealings*, 161.
 - (u) *Agents and Officers Acting in a Foreign State*, 161.

2. *Ratification*, 162.
3. *Compensation*, 166.
4. *Resignation*, 169.
5. *Removal of Officers*, 169.
6. *Duties and Liabilities*, 170.
 - (a) *Books*, 170.
 - (1) *Duty to Keep Books*, 170.
 - (2) *Failure to Produce Books*, 170.
 - (b) *Individual Liability*, 171.
 - (c) *Liability for Personal Injuries*, 171.
 - (d) *Liability for Maintaining Nuisances*, 171.

X. Actions By and Against Officers and Agents, 172.

1. *Generally*, 172.
2. *Parties*, 172.
3. *Officers and Agents Acting*

- in Behalf of the Company*, 174.
4. *Service of Process* (See also SERVICE OF PROCESS), 175.
 - (a) *Proper Officers and Agents for Service*, 175.
 - (b) *Conclusiveness of Return*, 175.
5. *Effect of Appearance*, 175.
6. *Pleas in Abatement*, 176.
7. *Verification*, 176.
8. *Evidence*, 176.
 - (a) *Generally*, 176.
 - (b) *Books of the Corporation*, 177.
 - (c) *Evidence of Misappropriation*, 177.
9. *Judgments*, 177.
10. *Costs*, 178.

I. GENERALLY.—A corporation aggregate being an artificial body—an imaginary person of the law—is from its nature incapable of doing any act except through agents to whom is given by its fundamental law, or in pursuance of it, every power of action it is capable of possessing or exercising.¹ The duties of officers of corporations, where those duties are prescribed by the corporation itself, are in the nature of an agency.² Officers have no franchises in their offices, but are the mere ministerial agents of the corporation to conduct its business for the benefit and under the authority of the corporation.³

II. ELECTION OF OFFICERS—(See STOCKHOLDERS)—**1. Power and Right to Elect Officers.**—The power to elect officers for the government of the affairs of a corporation, and the conduct of its business, belongs to corporate bodies without being expressly conferred by the act of incorporation.⁴ If this power is not expressly

1. New York etc. R. Co. *v.* Schuyler, 34 N. Y. 30; Planters' etc. Bank *v.* Andrews, 8 Port. (Ala.) 404; Talladega Bank *v.* Peacock, 67 Ala. 253; New Hampshire Savings Bank *v.* Downing, 16 N. H. 187; Muhleman *v.* National Ins. Co., 6 W. Va. 508.

A corporation can do no act but through the instrumentality and agency of others. Lyman *v.* White River Bridge Co., 2 Aik. (Vt.) 255; s. c., 16 Am. Dec. 705.

A corporation aggregate having a board of trustees to manage its affairs can contract only through the aggregate body by vote; or through the board of trustees by vote; or through an agent authorized, by vote of one body or the other, or both. Methodist Episcopal Church *v.* Sherman, 36 Wis. 404.

2. Dispatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205.

3. Burr *v.* McDonald, 3 Gratt. (Va.) 215.

4. Hughes *v.* Parker, 20 N. H. 58.

The power to have a board of directors is inherent in all private corporations. Hurlbut *v.* Marshall, 62 Wis. 590.

In case of an emergency in which the mode prescribed by the charter of a corporation fails to accomplish the purposes intended and the necessary offices are vacant, the corporators may exercise the power of election and provide for the appointment of inspectors for that purpose. *Ex parte* Wheeler, 2 Abb. Pr., N. S. (N. Y.) 361.

A charter was granted to certain persons, "their associates, successors and assigns." Held, that the grantees could

Election of Officers. *OFFICERS (Private Corporations). Notice of Election.*

lodged in other hands, it is to be exercised by the body at large.¹ The power of electing officers, however, may be reposed in a board of directors, or other select body.²

Directors of a corporation who are in office cannot dispute the right of a stockholder, or stockholders, holding a majority of the stock, to have an election in accordance with the by-laws.³ Nor is their right to elect officers affected by a sale of the property of the corporation by a receiver under an order of the court.⁴

2. Notice of Election.—It is usually provided that the stockholders or members of a corporation must be given notice of the meeting for the purpose of electing corporate officers.⁵

legally elect directors without having made any associates, successors or assigns. *Hughes v. Parker*, 19 N. H. 181.

Scheme of Organization of a telegraph company held fraudulent, upon the facts, chiefly because it provided that no general election of directors should be had until 2,000 miles of line should be equipped, thus putting it beyond the power of subscribers to the stock to exercise any control over the principal expenditure. An election of directors and a mode of settling for the work done, were decreed. *Terwilliger v. Great Western Tel. Co.*, 59 Ill. 249.

1. *Com. v. Bonsall*, 3 Whart. (Pa.) 560; *State v. Aucker*, 2 Rich. L. (S. Car.) 245.

2. *Com. v. Gill*, 3 Whart. (Pa.) 288.

Where the legislature amends a charter of a corporation by taking away the right of the stockholders generally to elect officers and conferring that right on a few, and the corporation refused to accept such amendment and even rejected it by a vote of its directors, held that the corporation is not bound by the amendment, and the court cannot compel it to hold an election of officers under the amendment. *Orr v. Bracken Co.*, 81 Ky. 593; s. c., 4 Am. & Eng. Corp. Cas. 231.

3. *Camden etc. R. Co. v. Elkins*, 37 N. J. Eq. 273.

This cannot be done on the ground that the stockholder intends to use his legal rights for purposes detrimental to the interests of the corporation, and that the desired election is merely a step toward that end. *Camden etc. R. Co. v. Elkins*, 37 N. J. Eq. 273.

It is not necessary that a demand for an annual election of trustees of a corporation should be made upon the board of trustees when in session; a demand upon each individual trustee of

the corporation is sufficient. *State v. Wright*, 10 Nev. 167.

Receivership—Order of Court.—An insolvent corporation had been in the hands of this court since 1876, and its railroad operated through a receiver appointed by the chancellor. The injunction restraining the managers of the corporation from interfering with or exercising the franchises of the company was modified in order to allow the stockholders to hold an election for directors, and thereunder certain stockholders made a written application to the existing board of directors to order an election of new directors, at the time designated by the by-laws for holding such annual election. This the directors refused to do. On application to the chancellor, held that he might order an election of directors by the present stockholders, and so ordered; such election to conform as nearly as possible to the requirements of the by-laws of the company. *Lehigh Coal & N. Co. v. Central R. & B. Co.*, 35 N. J. Eq. 349; 9 Am. & Eng. R. Cas. 512.

Mandamus to Compel Election.—See *MANDAMUS*, 14 Am. & Eng. Encyc. of Law 155.

Injunction to Prevent Election.—An injunction forbidding the holding of any election whatever is an interference with the management of corporate affairs to which the courts will decline to be a party, and such an injunction, would, if granted, be void. *People v. Albany etc. R. Co.*, 55 Barb. (N. Y.) 344.

4. *State v. Merchant*, 37 Ohio St. 251; s. c., 9 Am. & Eng. R. Cas. 516.

5. A notice of the day, hour, and place of the annual meeting of the stockholders of a corporation to elect a board of trustees, must be given, or such meeting cannot be legally held, unless the stockholders are all present and con-

3. Place of Meeting—(See STOCKHOLDERS).—The notice of election usually specifies the place of meeting of the electors, and where the usual place of meeting has been changed an election at the old place is invalid.¹ Meetings must in most cases be held

senting, either in person or by proxy. *San Buenaventura Mfg. Co. v. Vassault*, 50 Cal. 534.

The fact that one of the by-laws of the corporation fixes the day upon which such meeting shall be held is not a sufficient notice of the time and place at which the meeting will be held. *San Buenaventura Mfg. Co. v. Vassault*, 50 Cal. 534.

Where the charter of a corporation declares that two weeks' published notice shall be given of the annual meetings for the election of managers, managers elected after a notice of two days only given, are not elected according to law, and no by-law can render nugatory the mandatory provision of the charter. *United States v. McKelden*, 4 MacArthur (D. C.) 162.

Act Ky. April 12, 1888, providing for an election of turnpike road officers on the first Tuesday in May following, not having fixed a place for holding the election, no presumption arises of notice to the stockholders. *Cassell v. Lexington etc. Turnpike Road Co.* (Ky. 1886), 9 S. W. Rep. 701.

A notice of an election required to be given by the directors is not sufficient if signed by the individual names of a majority, without stating that it was given by order of the board, or stating that the persons whose names were signed were directors. *Johnston v. Jones*, 23 N. J. Eq. 216.

Where the charter declares that the election of directors shall be conducted in the manner prescribed by the by-laws, and the by-laws fix a time and place of election, and require notice to be given, but do not specify the length and mode of notice, it must be given for the time and in the manner prescribed by the general law. *In re Long Island R. Co.* 19 Wend. (N. Y.) 37.

Adjournment—Failure to Give Notice.—Where the stockholders of a corporation were notified that the annual meeting for the election of directors would be held at a certain hour of the day fixed by the charter, and the corporation was restrained from holding an election on that day, in consequence of which no meeting was held until several hours after the time fixed in the

notice, when a small number of stockholders, without the knowledge of the others, met, organized, and adjourned until the next day, at which time an election was held by a minority of the stockholders, without notice to others, who were in the vicinity for the purposes of the meeting, and might have been readily notified—*held*, that such election was invalid, whether the restraining order did or did not bind the stockholders. *State v. Bonnell*, 35 Ohio St. 10.

Notice of Business Meeting—Increasing Number of Directors.—A meeting of a mutual fire insurance company, called "for the purpose of making such alterations in the by-laws of said company as may be deemed necessary, and for the transaction of such other business as may come before them," cannot, after voting to increase the number of directors (which is not limited by the by-laws), elect the additional directors; and an assessment or call made at a meeting of a board of directors, as which only the additional directors so chosen are present, is void. *People's Mutual Ins. Co. v. Westcott*, 14 Gray (Mass.) 440.

Presumption of Notice.—Where act Ky. April 12, 1888, providing for an election of turnpike road officers on the first Tuesday in May following, did not fix a place for holding the election, no presumption arises of notice to the stockholders. *Cassell v. Lexington etc. Road Co.* (Ky. 1888), 9 S. W. Rep. 701.

Who May Make Call.—Act Ky. April 12, 1888, providing for the election of president and directors of a turnpike company, in which the State was interested and could vote, to be held on the first Tuesday in May following, not being in time to require all the stockholders to take notice of the passage and be present, and not giving special authority to any one to call a meeting, only the president and directors could make the call, and an election held on a call by a person claiming to act as the State proxy is illegal. *Cassell v. Lexington etc. Road Co.* (Ky. 1888), 9 S. W. Rep. 502.

1. *Miller v. English*, 21 N. J. L. 317.

within the State in which the corporation was organized.¹

4. Time for Holding Election.—The time for holding an election to choose officers is usually either stated in the charter or required to be set out in the by-laws.² Where the charter requires annual meetings for the election of directors, the directors cannot by a by-law so change the time as to continue themselves in office more than a year, against the wishes of the holders of a majority of the stock.³ Acts required to be done by the directors in the way of designating a time for election must be done by them as a board when lawfully convened. And a determination by the directors that an election must be held without fixing a time does not authorize one of them to fix the time and give notice.⁴

An election is not rendered invalid by the fact that the polls were open somewhat longer than the hour named in the notice, if this is done in the exercise of a reasonable discretion.⁵

A minority of the directors of a railroad, although legally assembled pursuant to call, cannot lawfully adjourn the meeting to a place 50 miles distant. *State v. Smith*, 48 Vt. 266.

1. The annual meeting of the stockholders for the election of directors held without the State, although irregular and illegal, cannot be taken advantage of in a collateral proceeding by either the corporation or one contracting with it as such. *Humphreys v. Mooney*, 5 Colo. 282.

The charter of a Texas corporation purported to authorize it to transact business at Paris, France. *Held*, that the corporation could not hold stockholders' meetings outside of Texas, and that directors elected at a meeting held at Paris were not directors even *de facto*, and that their acts were a nullity. *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

2. When a charter directs that all elections for directors after the first shall be held annually, at such time as the by-laws shall direct, no second election can be held until by-laws designating the time have been adopted. Nor can there be an omission to hold an election, such as to authorize the directors to designate a day for it, provided for only in case of such omission. *Johnston v. Jones*, 23 N. J. Eq. 216.

Where the charter of an association required a chief engineer to be elected "annually" by the board of delegates also elected annually, and a board elected one for the term of five years, *held*, that his tenure terminated upon election of another by the succeeding

board; and this although not taking place on the day prescribed in the charter therefor, but at a later regular meeting. *State v. Batt*, 38 La. An. 955.

1 Rev. St. N. Y., p. 604, § 8, providing for an election of directors within 60 days after the appointed time, in case for any reason an election is not held on the appointed day, is directory merely; and where the by-laws provide for an election on the third Tuesday in November, and no election is held from November, 1879, until October 15, 1881, the last election is legal. *Beardsley v. Johnson*, 1 N. Y. Supp. 608.

The provision in the act incorporating "Manchester and Lawrence Railroad," which requires the directors to be chosen at the annual meetings of the corporation, is directory only, and not restrictive; and its observance is not necessary to the validity of an election. *Hughes v. Parker*, 20 N. H. 58.

3. *Elkins v. Camden etc. R. Co.*, 36 N. J. Eq. 467.

4. *Johnston v. Jones*, 23 N. J. Eq. 216.

5. *People v. Albany etc. R. Co.*, 55 Barb. (N. Y.) 344.

Where no time is limited within which the poll of an election must be held, it may be adjourned from day to day in the discretion of the inspectors. *In re Chenango Co. Mut. Ins. Co.*, 19 Wend. (N. Y.) 635.

Inspectors of an election of directors are not bound to close the polls at the end of an hour, although by the resolution of the board from which they derive their authority the election is limited to one hour; they may exercise

5. The Electors; Voting—(See CUMULATIVE VOTING; STOCK; STOCKHOLDERS).—Unless it is otherwise provided the stockholders of a corporation are the ones entitled to vote in an election for officers.¹ Where the qualifications of persons who may vote for officers of a corporation are definitely prescribed by statute, the corporation cannot extend or limit the right to vote.² A corporation cannot, either directly or through the intervention of a trustee be a "shareholder" of its own capital stock. Shares, therefore, owned by the corporation cannot be voted upon either directly or indirectly, whether the stock is registered in the name of the corporation or not.³ The votes cast for a candidate who is ineligible will not be thrown away so as to

a reasonable discretion in the matter. *In re* Election etc. of Mohawk & H. R. Co., 19 Wend. (N. Y.) 135.

The polls cannot be opened before the appointed time. This is a surprise and fraud upon the stockholders. *People v. Albany etc. R. Co.*, 55 Barb. (N. Y.) 344.

1. The provision of N. Y. acts 1850, ch. 140, § 5, as amended by acts 1854, ch. 282, requiring directors of corporations to be elected annually, is applicable to all corporations not excluded from its operation expressly or by necessary implication. The omission of a corporation to provide, by a by-law, for an election, does not affect the case. Where, therefore, an election is had more than a year after a previous election, or after organization, shareholders who acquired their stock after the expiration of a year are not entitled to vote upon it at such election. *Vandenburgh v. Broadway Underground etc. R. Co.*, 29 Hun (N. Y.) 348.

Failure to Vote—Ratification.—Stockholders of a corporation who do not vote against the re-election of directors may be deemed to acquiesce, in such omission, in acts of such directors done prior to the re-election, and of which such stockholders had information sufficient to put them on enquiry; and are not entitled afterward to have those directors suspended on the ground of misconduct previous to the re-election. *Ramsey v. Erie R. Co.*, 7 Abb. Pr., N. S. (N. Y.) 156; s. c., 38 How. Pr. (N. Y.) 193.

2. A resolution of the board declaring that a certain person is recognized as the one entitled to vote on certain stock is inoperative, if his right cannot be established under the statute. *Brewster v. Hartley*, 37 Cal. 15, 24.

3. Cook on Stock and Stockholders,

§ 613; *Brewster v. Hartley*, 37 Cal. 15; *New England Mut. L. Ins. Co. v. Phillips*, 141 Mass. 535; 13 Am. & Eng. Corp. Cas. 104; *American Railway Frog Co. v. Haven*, 101 Mass. 398; *Vail v. Hamilton*, 85 N. Y. 453; *Ex parte Holmes*, 5 Cow. (N. Y.) 426; *Monseaux v. Urquhart*, 19 La. An. 482; *McNeely v. Woodruff*, 13 N. J. L. 352; *State v. Smith*, 48 Vt. 266; *United States v. Columbian Ins. Co.*, 2 Cranch (C. C.) 266.

But in *Taylor v. Miami Exporting Co.*, 6 Ohio 176, it was held that if one purchase of the bank a large amount of stock to multiply his votes for a board of directors, vote upon such stock, and immediately after the board direct that the purchase money of the stock be returned, and the stock again taken by the bank, equity will not compel the purchaser to refund the money and take back the stock, where the proofs show no actual loss attendant upon the transaction.

It seems that stock bought by the corporation for nonpayment of assessments is entitled to vote only when all the stock is represented at the meeting, and all consent to have the treasurer cast a vote. But stock thus subscribed for is not to be counted in taking a stock vote. *Farwell v. Houghton Copper Works*, 8 Fed. Rep. 66.

If there be any reason to suspect that the corporation owns the stock voted upon, the parties acting as inspectors of election may enquire into the matter. *Ex parte Holmes*, 5 Cow. (N. Y.) 426.

The seat of directors of an insurance company will be vacated, and the directors having a majority of votes upon the outstanding stock will be declared duly elected on motion, where the facts are sufficiently ascertained by affidavit. *Ex parte Desdoits*, 1 Wend. (N. Y.) 98.

elect a candidate having a minority of votes, unless the electors casting such votes had knowledge of the fact on which the disqualification of the candidate for whom they voted rested, and also knew that the latter was for that reason disabled by law from holding the office.¹ So stockholders who do not vote against the re-election of directors may be deemed to acquiesce, by such omission, in acts of such directors done prior to the re-election, and of which such stockholders had information sufficient to put them on enquiry; and are not entitled afterward to have those directors suspended on the ground of misconduct previous to the re-election.²

6. Inspectors.—Corporate elections are generally superintended by two or more inspectors, whose appointment is provided for in the charter or by-laws. In an emergency, however, in which the forms prescribed by the charter fail to accomplish the purposes contemplated, it is competent for the corporators to exercise the power of election, and provide for the appointment of inspectors for that purpose.³ Where the charter prohibits directors from serving as inspectors, other officers of the company are not excluded.⁴ Inspectors are also eligible as candidates.⁵ An election of officers of a corporation will not be set aside merely because the inspectors were not sworn.⁶ The inspectors are required to

Mandamus will lie upon the petition of a corporation to compel the surrender to its lawful officers of books held by persons actually but unlawfully exercising the functions of those officers, having usurped them under the choice of a minority of the stockholders by the use of votes upon shares held by the corporation. *American Railway Frog Co. v. Haven*, 101 Mass. 398.

Though in an election of directors voters upon stock held by the corporation may have been admitted, and legal votes have been rejected, yet, if a majority of legal votes still appears for those who are returned, the election shall be established. *McNeely v. Woodruff*, 1 Gr. (N. J.) 352.

The fact that the stock has been issued to and is held by a trustee who holds it as a pledge for money loaned by third persons to the corporation, under stipulation that on payment of the debt it shall be transferred to the corporation, and that meantime the trustees shall vote upon it, makes no difference. A corporation cannot either directly or through the intervention of a trustee be a "stockholder" of its own capital stock. *Brewster v. Hartley*, 37 Cal. 15, 24.

1. *In re Election of St. Lawrence*

Steamboat Co., 44 N. J. L. 529; s. c., 1 Am. & Eng. Corp. Cas. 359.

2. *Ramsey v. Erie R. Co.*, 7 Abb. Pr., N. S. (N. Y.) 156; 38 How. Pr. (N. Y.) 193.

3. *Ex parte Wheeler*, 2 Abb. Pr., N. S. (N. Y.) 361.

It is sufficient that two inspectors act, whether originally elected as such or appointed as substitutes. *Ex parte Excelsior Fire Ins. Co.*, 16 Abb. Pr. (N. Y.) 8.

At a meeting of stockholders called to elect directors under Ohio Rev. Stat., § 3246, the right to choose the inspectors of election is vested in the stockholders and not in the directors. *State v. Merchant*, 37 Ohio St. 251; s. c., 9 Am. & Eng. R. Cas. 516.

Chairman.—At a corporate meeting for the election of officers, the person who first nominates a chairman is entitled to declare who is elected, without regard to the question whether he is elected by a majority of the stockholders or shares voting. *In re Pioneer Paper Co.*, 36 How. Pr. (N. Y.) 105.

4. *Matter of Chenango Co. Mut. Ins. Co.*, 19 Wend. (N. Y.) 635.

5. *Ex parte Willocks*, 7 Cow. (N. Y.) 402.

6. *Matter of Chenango Co. Mut. Ins.*

decide upon the admissibility of votes offered, but they cannot pass upon the eligibility of persons for whom the votes are proposed to be cast.¹ Although an injunction by which the inspectors of election are commanded to refrain from holding any election or receiving and counting any votes is void, yet, an injunction requiring inspectors to desist from holding any election while the plaintiffs and other owners of certain stock shall be forbidden to vote upon the same is valid; and it is the duty of the inspectors to obey it.²

7. Majority Elects.—After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly altogether abstain from voting.³ An election cannot be successfully contested if it be shown that after throwing out the invalid votes the officers declared elected would still have a valid majority of the votes cast according to the return.⁴

Co., 19 Wend. (N. Y.) 635; *Ex parte Wheeler*, 2 Abb. Pr., N. S. (N. Y.) 361.

An election of directors of an incorporated company will not be set aside on a summary application to the supreme court for that purpose, on the ground that the inspectors were not sworn in the form prescribed by the statute; and it seems that the election would not be set aside upon such application, although no oath whatever was administered to the inspectors, if no objection was interposed at the time of the election—it is enough that they were duly appointed and entered on the discharge of the duties of their office. They are inspectors *de facto*. *In re Mohawk etc. R. Co.*, 19 Wend. (N. Y.) 135.

1. The question of eligibility is one that can be raised only in the courts. *In re Election of St. Lawrence Steamboat Co.*, 44 N. J. L. 521; 1 Am. & Eng. Corp. Cas. 359.

After the closing of a corporate election, the inspectors have no power to decide upon the legality of votes which were received without objection. *People v. White*, 11 Abb. Pr. (N. Y.) 168.

2. *People v. Albany etc. R. Co.*, 55 Barb. (N. Y.) 344.

3. *State v. Green*, 37 Ohio St. 227; *People v. Albany etc. R. Co.*, 55 Barb. (N. Y.) 344; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393; *Durfee v. Old Colony etc. R. Co.*, 5 Allen (Mass.) 242; *Dudley v. Kentucky High School*, 9 Bush (Ky.) 578; *New Orleans etc. R. Co. v. Harris*, 27 Miss. 537; *East Tennessee etc. R. Co. v.*

Gammon, 5 Sneed (Tenn.) 567. In corporations within the scope of corporate authority the majority rules. *Leo v. Union Pac. R. Co.*, 19 Fed. Rep. 283.

Persons receiving a minority of the votes cast for directors, cannot, upon a *quo warranto* information be declared elected, although it appear that the judges improperly rejected enough legal votes offered to give a majority. *State v. McDaniel*, 22 Ohio St. 352; *People v. Phillips*, 1 Den. (N. Y.) 388.

If the person declared elected did not have a clear majority of all the legal votes cast, he will be ousted. *People v. Devin*, 17 Ill. 84.

Where votes, rejected by inspectors at an election of directors, if received, would have elected a certain ticket, are adjudged to have been erroneously rejected, the only remedy is to set aside the election; the court have not the power to declare the ticket successful, for which the votes would have been cast had they been received. *In re Long Island R. Co.*, 19 Wend. (N. Y.) 37.

4. **Cook on Stock and Stockholders**, § 616. *In Re Chenango Co. Mut. Ins. Co.*, 19 Wend. (N. Y.) 635; *Ex parte Murphy*, 7 Cow. (N. Y.) 153; *People v. Tut-hill*, 31 N. Y. 550; *Wardens of Christ Church v. Pope*, 8 Gray (Mass.) 140; *Trustees of School District No. 3 v. Gibbs*, 2 Cush. (Mass.) 39; *State v. Lehre*, 7 Rich. L. (S. Car.) 235; *McNeely v. Woodruff*, 13 N. J. L. 352; *State v. McDaniel*, 22 Ohio St. 352.

In *Inhabitants of First Parish v. Stearns*, 21 Pick. (Mass.) 148, several illegal voters having been permitted to

8. Validity—Invalid Elections—(a) **GENERALLY.**—Elections of officers must generally conform to the requirements of the charter or by-laws.¹ But where no particular mode of proceeding is prescribed by law, if the wishes of the corporators have been fairly expressed, and the election is conducted in good faith, it will not be set aside on account of any informality in the manner of conducting it.² All acts done by a portion of the stockholders

vote at a parish meeting, in the election of officers, many of the legal voters protested against the proceeding and withdrew without voting; but the persons declared to be elected having received the votes of a majority of the legal voters who remained and voted, it was held that they were duly elected.

The mere fact that illegal votes were polled will not vitiate the election, if they did not change the result. *People v. Tuthill*, 31 N. Y. 550.

Directors de facto, of a corporate body, are to be considered, *prima facie*, as directors *de jure*. It is not incumbent upon them, in an action to recover the amount of a subscription for stock, to prove that the managers were elected by a majority of the votes. *Rockville etc. Turnpike Road Co. v. Van Ness*, 2 Cranch. (C. C.) 449.

1. At a meeting of all the stockholders, where only a portion of the stockholders participated in the election of trustees; where the president, although present, did not preside; where no president *pro tempore* was chosen and where no person who participated in the proceedings was authorized to receive the ballots or declare the result, *held*, that there was no legal election. *State v. Pettineli*, 10 Nev. 141.

Where an act of incorporation provides that there shall be "three directors," out of whom "a president shall be chosen," it is sufficient if the president be elected by a legally constituted meeting, and at the same time with the other directors, without having been previously appointed a director. *Currie v. Mutual Assurance Society*, 4 Hen. & M. (Va.) 315.

2. *Philips v. Wickham*, 1 Paige (N. Y.) 590.

An election of directors will not be set aside because illegal votes were given, unless they were challenged; nor will it be set aside although the votes were challenged, if, after deducting all illegal votes there is still a clear majority in favor of the persons declared to be elected. *In re Chenango Co. Mut. Ins. Co.*, 19 Wend. (N. Y.) 635.

At a meeting of the stockholders to elect directors, if certain persons receive the requisite number of legal votes, their election is not invalidated by the fact that the presiding officer insists on counting certain votes otherwise than as they should be counted, announces the result of the election to be otherwise than it really is, issues certificates of election to those not entitled to them, and declares the meeting adjourned, although a majority vote against adjournment in no way affects the rights as directors of those in fact elected. *State v. Smith*, 15 Oreg. 98; s. c., 19 Am. & Eng. Corp. Cas. 496.

Where an election is held for seven directors of a private corporation created under the Pennsylvania act of 1874, at which the cumulative plan of voting is employed, and five only, composing a legal quorum, of the candidates receive a plurality of votes, such election is valid as to the five so chosen. *Wright v. Com.*, 109 Pa. St. 360; s. c., 11 Am. & Eng. Corp. Cas. 609.

Adjournment During Balloting.—It is no objection to the legality of the election of a board of directors that an adjournment was had through the process of balloting. *Penobscot etc. R. Co. v. Dunn*, 39 Me. 587.

Invalid Election—Ratification.—When by statute the vacancies in the board of directors are to be filled by the board, and the power of the stockholders to elect directors is confined to annual, as distinguished from special meetings, the stockholders have no authority, at a special meeting, to ratify an invalid appointment of directors, by less than a quorum of the board. *Moses v. Tompkins*, 84 Ala. 613; s. c., 21 Am. & Eng. Corp. Cas. 634.

Invalid Election—Not a De Facto Board.—A board of directors claiming an election at a meeting at which a majority of the stock is not represented, cannot as against another board holding over from a previous election about which no question is raised, be regarded as officers *de facto*. That doctrine is not applicable where other individuals, as

which bear the appearance of trick, secrecy or fraud will be held invalid. Surprise and fraud in respect to another portion of the stockholders is ground for avoiding an election.¹

(b) COMBINATIONS AND CONTRACTS.—The election of officers of a corporation is not usually invalidated by the fact that it is the result of a combination among certain stockholders owning a majority of the shares.² But if the election is carried by the use of fraud or unfair means it is void.³

9. Failure to Elect—Holding Over.—Where the officers of a corporation are required to be elected at stated intervals, it seems that they may continue in office after the period for which they were elected and until others are elected.⁴ The failure to elect

the defendants in this suit, are claiming to hold the title to the offices and the right to act in that capacity, and to have been legally elected to such office. *Ellsworth Woolen Mfg. Co. v. Faunce*, 79 Me. 440; s. c., 19 Am. & Eng. Corp. Cas. 155.

1. *People v. Albany etc. R. Co.*, 55 Barb. (N. Y.) 344.

Where the notice of the time of holding an election of directors was for 12 o'clock m., held, that a meeting called to order, under such notice, and organized, about 15 minutes before 12 o'clock, was a surprise and fraud upon many of the stockholders, and, as against such of them as did not participate in the meeting, was irregular and void? Such irregularity could not be cured by a reorganization of the meeting at 12 o'clock, where such meeting was in fact, and in legal effect, but a continuation of the first meeting.

2. *Cook on Stock and Stockholders*, § 618; *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506; *Faulds v. Yates*, 57 Ill. 416; *Barnes v. Brown*, 80 N. Y. 527.

An agreement among some of the shareholders, who, together own a majority of the stock, that all will vote for certain directors in the belief they will, if elected, manage the affairs in a certain way, or to hold their shares and sell only together, is not unlawful or contrary to public policy. *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506.

3. Where there was a preconceived scheme, combination or conspiracy on the part of a portion of the stockholders in a railroad corporation, to carry an election of directors and thus get control of the road by the use and abuse of legal process and proceedings, and by their efforts and contrivances to prevent a fair election of inspectors at a

preliminary meeting of stockholders, which conspiracy was carried into effect by those means, together with the concurring preoccupation of the room where such meeting was to be, and was held, by such a number of persons not stockholders as utterly precluded a free and fair meeting for such purpose—held, that an election of directors held under these circumstances by inspectors so chosen was irregular, fraudulent and void. *People v. Albany etc. R. Co.*, 55 Barb. (N. Y.) 344.

4. *Thorington v. Gould*, 59 Ala. 461; *Olcott v. Tioga R. Co.*, 27 N. Y. 546; *People v. Runkle*, 9 Johns. (N. Y.) 147; *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547; *Currie v. Mutual Assurance Soc.*, 4 Hen. & M. (Va.) 315; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274; *People of Faile v. Ferris*, 16 Hun (N. Y.) 224.

A trustee elected to fill a vacancy holds over until his successor is elected and qualified, if that is the rule as to ordinary trustees. *Huguenot Nat. Bank v. Studwell*, 6 Daly (N. Y.) 13.

Where an act provided that the officers holding office at that time should not hold after the first Tuesday in May, on which day an election of their successors was to have been held, but no valid election was held, the former officers continue in office until their successors are legally elected and qualified. *Cassell v. Lexington etc. Road Co.* (Ky. 1888), 9 S. W. Rep. 701.

But under 2 N. Y. Rev. St. 624, § 2, providing for the incorporation of benevolent societies, the trustees do not, in the absence of any special provision therefor in the constitution or by-laws, hold over their year until their successors are elected. Where there is no such provision for holding over, and the corporation has for several years failed

officers at the stated time does not *per se* work a dissolution. Although the proper officers may be necessary to enable the body to act, yet they are not essential to its vitality. Even a want of officers and a want of power to elect them could not be fatal to its existence.¹ It has a potentiality which might, by proper authority, be called into action without affecting the identity of the corporate body.² If, however, such neglect to choose officers in any particular case results in destroying the end and object for which it was instituted, it is equivalent to a surrender of its rights;³ and a mere election of trustees to keep

to elect trustees, the corporators may, without any new legislative aid, meet at the time designated in the constitution and elect a new board of trustees. *People v. Twaddell*, 18 Hun (N. Y.) 427.

And where the charter of a bank provided that directors should remain in the office until successors should be elected, yet where the same bank elected directors in 1822, and from that time until 1838 were entirely insolvent, and performed no corporate act—*held*, that said directors did not continue in office until the latter year, their neglect to perform any duty being regarded as an abandonment of the office. *Bartholomew v. Bentley*, 1 Ohio St. 37.

1. Consistory Ref'd Dutch Church *v. Brandow*, 52 Barb. (N. Y.) 236; *Lehigh Bridge Co. v. Leigh Coal etc. Co.*, 4 Rawle (Pa.) 9; s. c., 26 Am. Dec. 11; *Morley v. Thayer*, 3 Fed. Rep. 748; *Hardon v. Newton*, 14 Blatchf. (U. S.) 379; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124; *Byers v. Rollins*, 13 Colo. 22.

A corporation has been held not dissolved by an omission to elect trustees for more than two years, while the members constituting an integral part of the corporation, remained *in esse*, but the old trustees continued in office until others were elected in their stead. *Haight v. Day*, 1 Johns. Ch. (N. Y.) 18; *People v. Runkle*, 9 Johns. (N. Y.) 147; *Meads v. Walker*, Hopk. Ch. (N. Y.) 587; *Barclay v. Talman*, 4 Edw. Ch. (N. Y.) 123; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124; s. c., 43 Am. Dec. 457; *Attorney General v. Stevens*, 1 N. J. Eq. 369; s. c., 32 Am. Dec. 526.

Failure to elect officers does not work a dissolution of the corporation, where a by-law provides that the first directors shall remain in office until others are chosen. *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124; s. c., 43 Am. Dec. 457.

zoo Mut. Ins. Co., 2 Doug. (Mich.) 124; s. c., 43 Am. Dec. 457.

Where the officers of a corporation are not authorized to hold over, if the corporators, without the presence of any officers, or any act to be done on their part possess the power to assemble and choose officers to carry into effect the objects of the incorporation, a neglect to choose officers at the proper time will not work a dissolution of the corporation, but will merely suspend the exercise of the powers of the corporation until proper officers are chosen. But if the corporators have not the power to fill vacancies without the presence of their officers or something to be done by them preparatory thereto, and such officers do not attend, or neglect to do the act requisite to the validity of the appointment, or there are no such officer, then, as the powers of the corporation cannot be revived, it is virtually dissolved. *Philips v. Wickham*, 1 Paige (N. Y.) 590.

And the omission to elect a clerk pursuant to Mass. Rev. St. ch. 38, § 4, at an annual meeting of a manufacturing corporation which elected a clerk the year before and who continued to act as such during the year in question does not work a dissolution of the corporation. *Knowlton v. Ackley*, 8 Cush. (Mass.) 93.

Though the neglect of the corporators to reappoint officers may, in certain cases, suspend the existence of the corporation, it cannot be thus extinguished to the injury of its creditors. *Brown v. Union Ins. Co.*, 3 La. An. 177. See *Ward v. Sea Ins. Co.*, 7 Paige (N. Y.) 294.

2. *Boston Glass M. v. Langdon*, 24 Pick. (Mass.) 49; s. c., 35 Am. Dec. 295; *Colchester v. Seaber*, 3 Burr. 1870.

3. *Harris v. Mississippi Valley etc. R. Co.*, 51 Miss. 602; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124; s. c., 43 Am. Dec. 457; *Russell v.*

the corporation in existence will not prevent such dissolution.¹

Where the holders of a majority of the stock thus neglect to choose officers to take charge of the property, a receiver will be appointed upon an application of the owners of a majority of the stock.²

10. Contested Elections—Review by Courts—(a) GENERALLY.—Where the courts are given power to review elections in private corporations,³ notice to the persons who claim to have been elected and to the corporation is sufficient, it is not necessary that all the stockholders have notice of the application.⁴ An action for usurpation of an office is a civil action and must be governed by the rules applicable thereto.⁵ Where the statute provides a remedy to test the right to exercise an office, it is exclusive of all other remedies.⁶

(b) QUO WARRANTO.—The remedy by information in the nature of *quo warranto* lies against persons who have usurped or intruded in the office of a corporation, or against persons who intrude into an office or offices created for the government of a corporation.⁷ And, although any stockholder has a right to

McLellan, 14 Pick. (Mass.) 63; Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49; State v. Trustees of Vincennes University, 5 Ind. 77; Pearce v. Olney, 20 Conn. 544; Slee v. Bloom, 19 Johns. (N. Y.) 456; s. c., 10 Am. Dec. 273; Lehigh Bridge Co. v. Lehigh Coal etc. Co., 4 Rawle (Pa.) 9; s. c., 26 Am. Dec. 111; Com. v. Cullen, 13 Pa. St. 133; s. c., 53 Am. Dec. 450; State v. Commercial Bank, 33 Miss. 474.

1. Briggs v. Penniman, 8 Cow. (N. Y.) 387; 18 Am. Dec. 454.

2. Lawrence v. Greenwich F. Ins. Co., 1 Paige (N. Y.) 587; Ward v. Sea Ins. Co., 7 Paige (N. Y.) 294.

Where the members of a corporation neglect to appoint officers to the injury of its creditors, the court will appoint a manager to wind up the company. Brown v. Union Ins. Co., 3 La. An. 177.

3. N. J. Rev. p. 184, § 44, makes it the duty of the supreme court, upon the application of persons complaining regarding any election, to give a hearing, and "thereupon establish the election so complained of, or to order a new election, or to make such order and give such relief in the premises as right and justice may appear to said supreme court to require." Held, that the statute applied to the election of officers of private corporations, and that the court, having determined who would have been elected if all the legal

votes tendered had been received, could put such persons in office and put out intruders. *In re* Election of St. Lawrence Steamboat Co., 44 N. J. L. 529.

4. Schohaire Valley R. Co.'s case, 12 Abb. (N. Y.) Pr., N. S. 394.

5. Atchison etc. R. Co. v. People, 5 Colo. 60; s. c., 9 Am. & Eng. R. Cas. 542.

It must be instituted by filing a complaint and issuing a summons. Atchison etc. R. Co. v. People, 5 Colo. 60; s. c., 9 Am. & Eng. R. Cas. 542.

6. Atchison etc. R. Co. v. People, 5 Colo. 60; s. c., 9 Am. & Eng. R. Cas. 542.

7. People v. Tibbets, 4 Cow. (N. Y.) 358; Com. v. Graham, 64 Pa. St. 339; Com. v. Arrison, 15 S. & R. (Pa.) 127.

The rule, however, appears to be otherwise in *England*. High Extraordinary Leg. Rem. (2d ed.) § 653; Queen v. Mousley, 8 A. & B., N. S. 946; King v. Ogden, 10 V. & C. 230.

In *Colorado*, proceedings by *quo warranto* are not legal, the criminal form of the old action having been superseded by civil action. Central etc. R. Co. v. People, 5 Colo. 39; s. c., 9 Am. & Eng. R. Cas. 546.

And in *North Carolina* it is held that the office of chief engineer of a railroad is not a public office, and that *quo warranto* will not lie to recover the same. The true test of a public office is that it is a parcel of the administration of government, civil or mili-

enquire, by a *quo warranto*, into the election of those who assume to administer the corporation of which he is a member, yet a stockholder may have so acted as to render himself incompetent or disqualified to become a relator.¹

(c) *EQUITY JURISDICTION*.—A court of equity has no authority to determine the validity of the election of the officers of a private corporation and pronounce judgment of a motion;² but

tary, or is itself created directly by the law-making power, and an information in the nature of *quo warranto* only will lie to recover the same. *Eliason v. Coleman*, 86 N. Car. 235; s. c., 9 Am. & Eng. R. Cas. 433.

In *New Jersey* a court of chancery has no jurisdiction to determine the validity of an election of the directors of a private corporation and whether certain persons claiming to be and acting as directors are such. The courts of law exercise jurisdiction by writ of *quo warranto*, or informations in the nature of *quo warranto*, and if there is any doubt as to the application of these remedies in *New Jersey* to corporations merely civil, the difficulty is obviated and supplied by the summary and efficient proceeding under the statute passed for this very purpose. Act of April 15, 1846; Nix. Dig. 141, § 19, distinguishing 1 N. J. Eq. (Sax.) 376; 1869, *Owen v. Whitaker*, 20 N. J. Eq. 122.

1. Where the wrong complained of was the result of his own misconduct or neglect, or he has acquiesced or concurred in it, he will not be listened to, and although a corporator will not be permitted to impeach a title conferred by an election over which he presided, or the legality of the votes which he himself, as commissioner, received, nor to contest an election in which he has concurred; yet if one should concur in an election in ignorance of some fact making it invalid, and should afterwards show the objection, and that it has come to his knowledge since the election, he should be heard, consent, induced by error, not being binding in the eye of the law. *Wiltz v. Peters*, 4 La. An. 339.

In *Pennsylvania*, under a statute authorizing proceedings in *quo warranto* in action concerning the exercise "of any office in any corporation created by authority of law," it is held that the jurisdiction is limited to corporate officers strictly, and that it does not imply servants or employees such as a pro-

fessor in an incorporated college. *Phillips v. Com*, 98 Pa. St. 394.

An information to oust an officer of a private corporation, alleging that he was elected at an illegal meeting, and deceived the relators as to the time of such meeting, need not allege that the relators would have voted against him if present. *Armington v. State*, 95 Ind. 421.

2. *Mechanics' Nat. Bank v. Burnet Mfg. Co.*, 32 N. J. Eq. 236; *Johnston v. Jones*, 23 N. J. Eq. 216; *Owen v. Whitaker*, 20 N. J. Eq. 122; *Hughes v. Parker*, 20 N. H. 58.

The election of persons as trustees, if the corporation is not actually dissolved, is not a proper subject for equitable cognizance. The legislature has provided a summary remedy by an application to the supreme court to set aside the election if it is illegal. *Mickles v. Rochester City Bank*, 11 Paige (N. Y.) 118.

But in *California* it is held that the superior court sitting as a court of equity has jurisdiction to enquire into the validity of an election for corporate directors and to set it aside if it was not made in conformity to law, although such jurisdiction has been expressly conferred upon it by statute. *Wright v. Central California etc. Water Co.*, 67 Cal. 532; 13 Am. & Eng. Corp. Cas. 89.

The extent and limits of the power of courts of equity to review an election of officers of a corporation—explained; and a particular election reviewed and adjudged fraudulent and void, on the ground of insufficiency of notice and falsity of the list exhibited and acted upon as the list of stockholders entitled to vote. *Johnston v. Jones*, 23 N. J. Eq. 216.

Though it may be necessary, in proceedings against a corporation, to oust it of its jurisdiction and franchises, for the proper officer of the State to be the actor, by information or *quo warranto*, yet where one or more have obtained, through fraud, the possession of a cor-

when the question of the validity of such an election necessarily arises in the determination of a suit properly cognizable by a court of equity, such court will determine it as it would any other question of law or fact necessary to be decided to settle the rights of the parties.¹ In some States, however, it is expressly provided by statute that courts of equity shall have power to enquire into the validity of corporate elections.²

poration created by law, and assume to exercise its functions, and are possessed of its franchises, the court will entertain a bill, filed by parties aggrieved by such an act, as a matter of private right; and where such possession has been acquired by means of the process of a court fraudulently used, and after the acquirements of the franchise by means thereof, it is abandoned, a bill filed by the aggrieved parties will be entertained to annul all that had been accomplished by the improper use of the process of the court, and the parties will be placed *in statu quo*. *Putnam v. Sweet*, 2 Pinney (Wis.) 302.

Injunction.—An injunction will not be continued against a corporation merely because a dispute has arisen as to the election of directors who have not yet even taken their seat. *Paynter v. Clegg*, 9 Phila. (Pa.) 480.

A bill for injunction cannot be maintained for the purpose of determining the question of the contested election of directors of a railroad company. *New England Mut. L. Ins. Co. v. Phillips*, 141 Mass. 535; s. c., 13 Am. & Eng. Corp. Cas. 104.

1. *Mechanics' Nat. Bank v. Burnet Mfg. Co.*, 32 N. J. Eq. 236; *Johnston v. Jones*, 23 N. J. Eq. 216. As where a new board of directors, elected with a view to effecting a consolidation with another corporation, attempt to consummate it, and a bill is filed to enjoin them, the court may and will enquire into the legality of their election. *Nathan v. Tompkins*, 82 Ala. 437; s. c., 19 Am. & Eng. Corp. Cas. 336.

In a suit for an injunction restraining the collection of an assessment alleged to have been made by certain persons claiming to be directors, the court will, for the purpose of determining the legality of such assessment, enquire into the validity of the election or appointment of such directors. *Moses v. Tompkins*, 84 Ala. 613; 21 Am. & Eng. Corp. Cas. 634.

2. In *New York*, the supreme court sitting as a court of chancery, is em-

powered to review corporate elections, and to grant such relief as the particular circumstances and justice of the case seem to require. See *Schoharie Valley R. Co.'s Case*, 12 Abb. Pr. N. Y. S. (N. Y.) 394. As to California statute see *Wright v. Central California etc. Water Co.*, 67 Cal. 532; s. c., 13 Am. & Eng. Corp. Cas. 89; *Brewster v. Hartley*, 37 Cal. 15.

In proceedings to enquire into an election of directors, under the forty-fourth section of the New Jersey act concerning corporations (Rev., p. 184), the court may either establish the election or set it aside and order a new election; or may, in its discretion, besides putting those out of office who were illegally returned as elected, make such an order as will put those in office as directors who would have been in office if the election had been properly conducted, if such relief appears to the court to be such as right and justice require. If those candidates for whom the majority of the votes for directors was given or offered were disqualified for the office, the court will only set aside the election and order a new election; but if they were qualified, and the election was, in all respects, fairly conducted, except in the rejection of legal votes tendered for them, the court will set aside the election and make an order putting them in office. *In re Election of St. Lawrence Steamboat Co.*, 44 N. J. L. 529; 1 Am. & Eng. Corp. Cas. 359.

Who May Complain.—Stockholders in a private corporation, in virtue of their interest in the management of its affairs, have a standing in court to test the regularity of an election of directors and the legality of the acts of inspectors of the election, in receiving or rejecting votes and in declaring the result. They are parties aggrieved within the meaning of the statute. Rev. Stat., p. 184, § 44. *In re Election of St. Lawrence Steamboat Co.*, 44 N. J. L. 529; 1 Am. & Eng. Corp. Cas. 359. 1 N. Y. Rev. Stat. 603, § 5, author-

11. Acceptance of Office.—Where no qualification is required and there is no usage to control, a person who is elected an officer in a corporation is presumed to accept the office unless he declines it.¹

III. APPOINTMENT OF AGENTS—1. Power to Appoint.—A corporation being so constituted, that all its transactions must be done by agents, has inherent in itself the power to appoint and constitute them, and this power need not be conferred by the charter of the corporation.²

izes any person who "may be aggrieved by, or may complain of, any election," by directors of a corporation, to make application to the supreme court to compel a new election. *Held*, that this provision of law could not be invoked by one who was not a stockholder at the time of the election complained of, and who received his stock from one of the authors of the wrong complained of. *Re Syracuse etc. R. Co.*, 91 N. Y. 1.

A stockholder in a corporation may institute an action to set aside an election for directors, although he has not had stock standing in his name on the books of the company for a sufficient length of time to entitle him to vote at such election, under section 312 of the California Civil Code. *Wright v. Central California etc. Water Co.*, 67 Cal. 532; 13 Am. & Eng. Corp. Cas. 89.

No one but a party, named as aggrieved, in the notice of application to set aside the election, is entitled to be heard; a notice given by one as attorney for A B, and others, entitles no one but A B to be heard. *In re Mohawk etc. R. Co.*, 19 Wend. (N. Y.) 135.

1. *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308.

The records of a corporation, showing the election at an annual meeting of a certain person as director, and his presence and making motions at a subsequent meeting of the directors, are admissible as *prima facie* evidence, though not conclusive of his acceptance of the office, in an action of tort brought by him against a sheriff for levying an execution against the corporation on his property as a director. *Blake v. Bayley*, 16 Gray (Mass.) 531.

If the clerk of a corporation is present when a vote approving of his election is passed, and he himself records the vote, his acceptance of the office will be presumed. *Delano v. Smith Charities*, 138 Mass. 63.

The appointment of an agent must

be accepted. Acceptance need not be by direct and positive act. It may be shown by conduct on the part of the appointee indicating an intention to accept, and be implied from circumstances. *Cameron v. Seaman*, 69 N. Y. 396.

A, on being asked to become a director of a bank about to be established, said he would consent to do so if he could be convinced that a certain portion of the capital had been subscribed, and that the persons named in the prospectus as directors had actually become such. He attended one meeting of the board, and signed a check with one of the directors. Upon receiving, a few days afterwards, a letter of allotment of the shares necessary to qualify him, he at once sent it back with his refusal to act as director, for the reason that he was not satisfied upon the two points named by him. The secretary wrote in answer that A's resignation had been accepted. *Held*, that he was not liable as a contributor. *In re Peninsular etc. Bank*, L. R., 2 Eq. 435.

2. *Boone on Corporations*, § 128; *Waterman on Corporations*, § 101; *Kitchen v. Cape Girardeau etc. R. Co.*, 59 Mo. 514; *Morawetz Corp.*, § 503; *Angell & Ames on Corporations*, § 231; *Potter on Corporations*, §§ 125, 126; *Hurlbut v. Marshall*, 62 Wis. 590; *Atlantic Bank v. Merchants' Bank*, 10 Gray (Mass.) 532; *Hughes v. Parker*, 20 N. H. 58; *Hoyt v. Shelden*, 3 Bosw. (N. Y.) 267; *Morrow v. United States Mortgage Co.*, 96 Ind. 21. See also **POWER TO ELECT OFFICERS**, *ante*.

The objects of corporations so numerous and diversified would seldom be attained, unless they possessed the power of appointing agencies; and this power though generally conferred in the fundamental law, yet in a large class of cases rests upon the *implication* drawn from the powers conferred. *Potter on Corp.*, § 127.

A corporation may employ an agent to perform services consonant with its

2. Method of Appointment.—There is no difference between the method of appointing the agents of a corporation and those of an individual. The authority to act as agent may be conferred by the corporation at a regular meeting of the directors, or by their separate assent, or by any other mode of doing such acts.¹

general design without any specific authority for that purpose conferred by the charter. *Kitchen v. Cape Girardeau etc. R. Co.*, 59 Mo. 514.

"All acts within the powers of a corporation may be performed by agents of its own selection." *Barnes v. Ontario Bank*, 19 N. Y. 158.

When a party takes out a policy in a mutual life insurance company, he becomes a member of the company, and is bound by its rules, which he is presumed to know; but it seems that, as between him and the company acting through its proper representatives, the company may change those rules, or dispense with their literal and rigorous enforcement, when, by so doing, no substantial rights of the company will be impaired. *Protection L. Ins. Co. v. Foote*, 79 Ill. 361.

The charter of a railroad company providing "that the president and the manager shall conduct the business of the company," etc., it was held that the purchase of a locomotive being part of the business of the company, the president and manager could appoint an agent to make such purchase, whether the agent was one of their number or a stranger, and to execute bills and notes of the company in payment of debts thus incurred. *Olcott v. Tioga R. Co.*, 27 N. Y. 546.

The officers of a corporation may, unless prohibited by the charter, appoint agents to draw and execute bills of exchange on behalf of the company. *Preston v. Missouri etc. Lead Co.*, 51 Mo. 43.

A corporation may, unless otherwise provided by its charter, by resolution or by law, appoint any person an agent, for the purpose of transferring or disposing of its property or negotiable securities. No officer of the corporation possesses such exclusive power, unless conferred by charter. And in the absence of both statutory authority and regulations of the corporate body, if the proof showed that the president was in the habit of exercising such power, then his authority so to act might be inferred. *Mitchell v. Deeds*, 49 Ill. 416.

A board of directors may delegate authority to a committee of its members to alienate or mortgage real estate; and such authority to convey real estate necessarily implies authority to execute proper instruments for that purpose, and to affix the corporate seal thereto. *Burrill v. Nahant Bank*, 2 Met. (Mass.) 163.

The Association of the Tobacco Trade of Cincinnati is authorized to appoint, as one of its corporate officers, an inspector of leaf tobacco. The right to inspect tobacco is not vested exclusively in the inspectors appointed under Ohio Rev. Stat. as amended by act of April 20th, 1881. *State v. Casey*, 38 Ohio St. 555.

Power of Particular Board—Judicial Notice.—Courts cannot judicially notice that a particular board or body of the corporation is authorized by the charter and by-laws to appoint agents, where the evidence of the charter and by-laws is not introduced. *Haven v. New Hampshire Asylum*, 13 N. H. 532.

1. *Crowley v. Genesee Min. Co.*, 55 Cal. 273. See *Lewis v. Albemarle & Raleigh R. Co.*, 95 N. Car. 179; *Wood v. Wiley Construction Co.*, 56 Conn. 87; *Bancroft v. Wilmington Conference Academy*, 5 Del. 577.

Agency for a corporation is not required to be shown by a resolution of the board of directors or other written evidence, but may be inferred from facts and circumstances. *Santa Clara Min. Assoc. v. Meredith*, 49 Md. 389; s. c., 33 Am. Rep. 264; *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 326; *Elysville Mfg. Co. v. Okisko Co.*, 5 Md. 152; *Northern Cent. R. Co. v. Bastian*, 15 Md. 501; *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 69.

Where, by resolution of the directors of a corporation, the plaintiff was appointed their superintendent at a certain salary, held that the resolution did not constitute a contract binding on the corporation, and that plaintiff's employment was terminable at the pleasure of the board. *Queen v. Second Avenue R. Co.*, 44 How. (N. Y.) Pr. 281.

The law will infer authority in a corporate agent, as well from the general

No particular formalities are required, and the common-law rule that the appointment must be made under the corporated seal, has long since been exploded in this country.¹

character of the acts which he has been permitted to perform, as from a special written power. *Exchange Bank v. Monteath*, 17 Barb. (N. Y.) 171; *Smiley v. Mayor etc. of Chattanooga*, 9 Heisk. (Tenn.) 604. See also *Bank of Middlebury v. Rutland etc. R. Co.*, 30 Vt. 159; *St. Andrew's Bay Land Co. v. Mitchell*, 4 Fla. 192. And see PRESUMPTION OF AGENCY, *infra*.

A corporation is bound by the acts of its acknowledged agents in the common transactions of the corporation, although the appointment of the agents be not evidenced by the records of the corporation. *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348; *Bank of Lyons v. Demmon, Hill & D. Supp.* (N. Y.) 398.

The appointment may be by parol. *Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 85; *Boone on Corporations*, § 129. And where an act of incorporation does not require that the appointment of an agent by the company should be made in writing, and it does not appear to be so made, the appointment may be proved by parol evidence. *Richardson v. St. Joseph Iron Co.*, 5 Blackf. (Ind.) 146.

A note payable to the president, directors and company of an incorporated bank, their order was endorsed by the president pursuant to a vote of the directors, and the assignment was held sufficient. *Spear v. Ladd*, 11 Mass. 94.

1. *Crowley v. Genesee Min. Co.*, 55 Cal. 873; *Randell v. Van Detchen*, 19 Johns. (N. Y.) 60; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; *Topping v. Bickford*, 4 Allen (Mass.) 120; *Hayden v. Middlesex Turnpike Corp.*, 10 Mass. 397; *Andover etc. Turnpike Co. v. Hay*, 7 Mass. 102; *Hutchins v. Byrnes*, 9 Gray (Mass.) 367; *Wolf v. Goddard*, 9 Watts (Pa.) 544; *Planters' Bank v. Bivingsville Cotton Mfg. Co.*, 10 Rich L. (S. Car.) 95; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; *Rex v. Bigg*, 3 P. Wms. 419; *Manby v. Long*, 3 Levinz 107; *Fleckman v. Bank of U. S.*, 8 Wheat. (U. S.) 338; *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738; *Western Bank v. Gilstrap*, 45 Mo. 419; *Howe v. Keeler*, 27 Conn. 538; *Lathrop v. Com-*

mercial Bank, 8 Dana (Ky.) 114; *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 85; *Bates v. Bank of Alabama*, 2 Ala. 461; *Stamford Bank v. Benedict*, 15 Conn. 445; *New Haven Sav. Bank v. Davis*, 8 Conn. 191; *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. (Mass.) 282; *Essex Turnpike Corp. v. Collins*, 8 Mass. 292; *Wright v. Lanckton*, 19 Pick. (Mass.) 290; *Mickey v. Stratton*, 5 Sawy. (U. S.) 475; *Hopkins v. Gallatin Turnpike Co.*, 4 Humph. (Tenn.) 403; *Town of New Athens v. Thomas*, 82 Ill. 259; *London etc. R. Co. v. Winter*, 1 Craig & Ph. Ch. 57; *Baptist Church v. Mulford*, 8 N. J. L. 182; *Buncombe Turnpike Co. v. McCarson*, 1 Dev. & B. (N. Car.) 306; *Bank of Columbia v. Patterson*, 7 Cranch (C. C.) 299; *Dunn v. Rector of St. Andrew's Church*, 14 Johns. (N. Y.) 118; *Bates v. Bank of Alabama*, 2 Ala. 461; *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 334; *St. Andrew's Bay Land Co. v. Mitchell*, 4 Fla. 192; *Detroit v. Jackson*, 1 Doug. (Mich.) 106. See also AGENCY, 1 Am. & Eng. Encyc. of Law. 339; *Waterman on Corporations*, § 91; *Morawetz Priv. Corp.* (2nd ed.), § 504; *Boone on Corp.*, § 129; *Green's Brices Ultra Vires*, p. 451, n. (a).

This is so, although the object of the agency is the execution of a deed requiring the corporate seal to be affixed. See authorities above cited. Upon this point the Supreme Court of New Hampshire, in the case of *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, say: "If the formality of an instrument under seal conferring the power upon the agent who is to make the conveyance should be required, it would add nothing to the authenticity of the contents if the individual who affixes the seal to the power derives his authority from a mere vote of the corporation." And in *Waterman on Corporations*, vol. 1, p. 288, it is said: "If the corporation or its representative, the board of directors, can assent to an act primarily by vote alone and insist that it can constitute an agent to make a deed only by deed, is to contend that it can constitute no such agent whatever, for some person must be empowered by vote to seal the power of attorney. There is, therefore, no good reason why it should be necessary to appoint an agent by an in-

3. Who May be Appointed.—Rules applicable to natural persons apply to corporations, in this respect, and it may be said that all persons of sane mind are capable of becoming the agents of corporations; and, therefore, infants, married women, aliens, etc., may act as such.¹

4. Appointment of Sub-agents—(a) **GENERALLY.**—The principle of the law of agency, that an agent who has a bare power or authority must execute it himself, and cannot delegate his authority to another,² applies with full force to the agents of corporations.³

(b) **BY DIRECTORS.**—The board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds towards his principal. In the strict relation

strument under seal, whatever may be the object of the agency, but his acts may be made valid by the subsequent ratification of the corporation."

An agency for collecting and securing debts of a corporation may be created without the use of the corporate seal. *Lathrop v. Commercial Bank*, 8 Dana (Ky.) 114; *Planters' Bank v. Bivingsville Cotton Mfg. Co.*, 10 Rich. (S. Car.) 95.

Notice to Quit.—The authority from a corporation to its agent, by which he orders tenants to quit, need not be under seal. *Wolf v. Goddard*, 9 Watts (Pa.) 544.

1. Boone on Corporations, § 131; Potter on Corporations, § 127; Angell & Ames on Corporations, § 278.

If there be a provision in the charter, however, prescribing the qualifications of agents for particular purposes, it must be complied with. *Washington etc. Turnpike Co. v. Cullum*, 8 Serg. & R. (Pa.) 519. Where the charter or act of incorporation speaks upon this subject, it must be strictly pursued, or the appointment may be avoided. *Ang. & A. Corp.*, § 277.

A corporation may employ one of its own members as an agent to act as auctioneer at the sale of its pews, who may make the memorandum of sale required under the statute of frauds to bind the purchaser. *Stoddard v. Port Tobacco Parish*, 2 Gill & J. (Md.) 227.

2. See AGENCY, 1 Am. & Eng. Encyc. of Law 368.

3. *Tippets v. Walker*, 4 Mass. 595; *Gillis v. Bailey*, 21 N. H. 199; *McCormick v. Bush*, 38 Tex. 314. And see authorities cited in the following note:

In *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, it was held that al-

though a general agent of a trading company being himself also one of the company may have authority to make promissory notes binding on the company, yet a subordinate of his has no such authority. The court said: "We are not satisfied that the plaintiffs are correct in the ground thus taken. If Buffum is to be viewed as an agent deriving his authority from the choice of the company, his power must be considered to be limited by the terms of his appointment; and, although the general administration of the affairs of the company were entrusted to him, we see no power given him to appoint subagents. Nor can such power be implied, for a confidence is supposed to exist between principal and agent which is not communicated to subagents selected and appointed only by the agent. There is no doubt that the clerks, and other persons, necessarily employed by Buffum to execute the business of the company, may be considered as servants of the company as far as their instrumentality is necessary for the due execution of the general concerns of the company, according to the spirit of their association. Thus, in a concern so extensive, in which it was contemplated to monopolize, as far as possible, the business of selling hats, factors might be employed by Buffum to buy stock and sell the manufactures. But it is not necessary, nor would it be safe, to allow persons of this description to make promissory notes, or other written contracts to bind the company. It would be difficult to limit such transactions to cases beneficial to the company; and it would be unreasonable to commit their whole interest into the hands of a multitude of

of principal and agent, all the authority of the latter is derived by delegation from the former, and if the power of substitution is not conferred, it cannot exist at all. The directors of a corporation, however, convened as a board, are the primary possessors of all the powers which the charter confers, and, like private principals, they may delegate to agents of their own appointment the performance of many acts which they themselves can perform;¹ where, however, personal trust or confidence is reposed in the directors, and especially where the exercise and application of

inferior agents when they had appointed a principal one, in which they had reposed all their confidence."

Where the charter of a corporation provided that there should be a high steward, and imposed upon him various judicial and ministerial duties, but did not give him power to appoint a deputy, it was held that he could not appoint a deputy generally to discharge all of the ministerial duties of his office. Whether if the appointment had been to do some particular act, and the corporation had allowed him to do it, that would have been valid, *quære*. *Rex v. Gravesend*, 3 Barn. & Cress. 602.

1. *Hoyt v. Thompson*, 19 N. Y. 207, holding that a board of twenty-three directors may delegate, by by-law, to a quorum of five the power to transact ordinary business.

A board of bank directors may delegate authority to a committee of its members to alienate or mortgage real estate. *Burrell v. Nahant Bank*, 2 Met. (Mass.) 163.

The directors of a bank may authorize the president and cashier to borrow money or obtain discount for the use of the bank. *Ridgway v. Farmers' Bank*, 12 S. & R. (Pa.) 256; *Fleckman v. Bank of U. S.*, 8 Wheat. (U. S.) 338. And see *Spear v. Ladd*, 11 Mass. 94; *Northampton Bank v. Pepoon*, 11 Mass. 288; *Merrick v. Bank of Metropolis*, 8 Gill. (Md.) 59. *Compure Percy v. Millaudon*, 3 La. O. S. 568; *Bank Commrs. v. Buffalo Bank*, 6 Paige (N. Y.) 497.

In *Olcott v. Tioga R. Co.*, 27 N. Y. 546, it is held to be within the power of the board of managers of a railroad company to clothe the president with authority to purchase locomotives. "It cannot be questioned," say the court, "that the president and managers can appoint an agent with full power to make such purchases whether the agent was one of their number or a stranger."

The directors of a land company

may authorize the president to donate land to a company. *State v. Glenn*, 18 Nev. 34.

An agent may be invested with authority to draw bills of exchange by the trustees of a land company. *Preston v. Missouri etc. Lead Co.*, 51 Mo. 43.

A corporation may be bound by the acts of its agents, although such acts have not been authorized by a deed or power in writing under its corporate seal, or even by a written instrument not under seal, except in cases where, by the statute of frauds or otherwise, the contract made by a natural person must be reduced to writing to be valid. *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496.

The directors of a corporation have power to employ attorneys and counsellors without express delegations of power or formal resolutions to that effect. *Southgate v. Atlantic etc. R. Co.*, 61 Mo. 89; *Morawetz on Private Corporations*, § 535.

When the transaction of legitimate business properly before a board of directors can be facilitated by delegating to one or more of their number the power to transact the business, the board has the right thus to delegate its powers. *Leavitt v. Oxford etc. Min. Co.*, 3 Utah 265; s. c., 4 Am. & Eng. Corp. Cas. 234.

In *Ex parte Conway*, 4 Ark. 359, it was held that the central board of the Real Estate Bank of the State of Arkansas were not considered trustees in the sense of the rule forbidding trustees to delegate their trusts, but rather as the representative of the corporation empowered to declare its will, and hence may appoint trustees to pay the debts of the corporation without, legally speaking, a delegation of power.

Green's *Brice's Ultra Vires* states that delegation is allowable in the following five instances:

"1. The constating instruments may

contain express authority to do so. *Harris's Case*, L. R., 7 Ch. 587. See *Howard's Case*, L. R., 1 Ch. 561.

"2. Such authority may also be given in virtue of wide powers of management, if such contain any reference to the employment of agents in their own stead. See *Harris's Case*, *ubi supra*, though power to exercise a general superintendence and control will not suffice.

"3. This restriction extends only to those acts which the directors are personally required to attend to, or which, involving personal judgment and discretion they are by implication entrusted personally with, and so have with respect thereto a duty thrown upon them. What these latter acts are will often be very doubtful. In *Cartmell's Case*, L. R., 9 Ch. 691, 695, directors could not delegate a power to buy their own shares even to a general manager. 'It appears to me that a mere power to appoint a general manager would not authorize the directors to transfer to him the power to purchase shares; because that power is by the articles expressly given to the directors themselves, whilst the only duties which they could delegate to the general manager are those which belong to the management of the ordinary commercial business of such a company. It is true that a company of that kind must act by its manager, but the directors could not delegate to another person those powers which they would not have had except under the peculiar provision in the articles.'

"4. So the latter part of the proposition holds without qualification. A governing body, at the most, is under the obligation of personally acting in cases which either are of a peculiar and special nature, or which closely affect the well-being or existence of the corporation. With respect to other matters, it is sufficient if they exercise a general control, and they may leave the actual carrying out of such to inferior officials. *Cartmell's Case*, L. R., 9 Ch. 691, 695.

"5. Lastly, there is another set of cases where the restriction does not apply, or rather where in reality there is not, though apparently there is, a delegation of authority. This is when a preliminary or investigation committee is appointed to prepare matters for the consideration of the general body, who, in fact, themselves examine and decide upon, possibly in a per-

functory manner, the matter so referred, investigated and reported on. This was what happened in *Osgood v. Nelson*, L. R., 5 H. L. 636. The corporation of London having the power to dismiss one of its officers, holding a freehold office, on complaint against him, referred to a committee of its own body the task of examining into the complaint and receiving evidence upon it, and reporting thereon. The committee performed this duty. The report and evidence were duly furnished to the inculpated officer, who was then called on for his defence. He was afforded the opportunity of being heard, and counsel was heard for him, but the corporate body itself did not rehear the evidence. He was ordered to be dismissed from his office. The house of lords held that this was not a case of delegation of lawful authority, but was a due exercise of that authority by the corporate body itself."

Termination of Board—Cessation of Agent's Authority.—Where directors have power to appoint agents, the authority of those agents does not necessarily cease with the termination of that board. *Green's Brice's Ultra Vires*, p. 143 n.; *Anderson v. Langdon*, 1 Wheat. (U. S.) 85; *Dedham Bank v. Chickering*, 3 Pick. (Mass.) 335; *Brown v. Somerset Co.*, 11 Mass. 221; *Northampton Bank v. Pepoon*, 11 Mass. 288; *Union Bank v. Ridgley*, 1 Har. & G. (Md.) 431; *Exeter Bank v. Rogers*, 7 N. H. 33.

Appointment by De Facto Board.—An appointment by a *de facto* board of directors has the same effect as if made by a regular legal board. The acceptance of such an appointment is governed by the by-laws in force at the time. *Ellis v. North Carolina Institution*, 68 N. Car. 423.

Quorum Necessary to Appoint.—Under a statute and by-law which declare that a majority of the directors shall be a quorum, and shall be competent to fill all vacancies in the board, no number of directors less than a majority can fill vacancies, and an alleged appointment made by two out of seven directors to fill vacancies caused by the disqualification of the remaining five directors is *ultra vires* and invalid. *Moses v. Tompkins*, 84 Ala. 613; s. c., 21 Am. & Eng. Corp. Cas. 634.

Judicial Notice of Power to Appoint.—The court cannot judicially notice the charter or by-laws of a corporation, or whether the trustees would be author-

the power is made subject to their judgment or discretion, the authority is purely personal and cannot be delegated to another unless there be a special power of substitution.¹

ized to appoint an agent of the corporation, where the evidence of the charter and by-laws is not introduced. *Haven v. N. H. Asylum*, 13 N. H. 532.

1. *Gillis v. Bailey*, 21 N. H. 149. In *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, it was held, in this case, that the authority conferred upon the canal commissioners to enter upon and take possession of the lands, etc., of individuals for the construction of a canal, can be executed only by them in person, or under their express direction; and that an engineer, or any other subagent of the State, cannot lawfully exercise such power but by the express direction of the canal commissioners, or one of them, although to such engineer or other subagent has been entrusted the superintendence of the construction of the canal in the vicinity of the premises entered upon.

In *Tippets v. Walker*, 4 Mass. 595, it was held that where the directors of a turnpike corporation were empowered by the corporation to contract for the making of a turnpike road, and they, without authority so to do, appointed subagents, who covenanted on behalf of the directors to pay certain sums for the making of the road, the corporation was not bound by the contract, since it had given the directors no power to substitute agents under them.

An attempt on the part of the directors of a corporation to make a certain one the irrevocable agent of the corporation, and to grant to one of its agents an irrevocable power of attorney, amounts to a virtual dissolution of the company, and is therefore void. *Davis v. Flagstaff Min. Co.*, 2 Utah 74.

The articles of association provided that the directors should have power to appoint and remove agents of the corporation. *Held*, that a contract with A, agreeing to appoint B the agent and manager of all the mining property of the corporation, and that B should be retained in that position until B should pay A, out of the profits, a certain sum which A claimed was due him, and that B should be removable at A's pleasure, was one which the directors had no power to make, and was not binding upon the corporation. *Flagstaff Silver Min. Co. v. Patrick*, 2 Utah 304.

The board of directors of a colliery

company cannot delegate the discretion of the power of allotting shares to two members of the board and the manager *Howard's Case*, L. R., 1 Ch. Div. 561. If, however, the allotment of shares does not involve the exercise of the directors' discretion they may be issued by an agent. *Lohman v. New York etc. R. Co.*, 2 Sandf. (N. Y.) 39. See *Morawetz Private Corporations*, § 536. The directors cannot delegate the power given to them by statute of selling shares of stockholders for nonpayment of assessments. *York etc. R. Co. v. Ritchie*, 40 Me. 425.

The articles of a corporation authorizing the executive committee of the board of directors "to do all acts necessary for the prosperity of the society in the intervals of the meetings of the board," were held not to confer upon the committee authority to purchase real estate, especially where the purchase was not assented to by the entire committee, but only by a majority thereof. *Tracy v. Guthrie Co. Agricultural Soc.*, 47 Iowa 27.

The directors of a railroad company have a right to decide, but no power to submit to arbitration, the question of the propriety of their formal action in declaring a dividend; without the consent of the company, the charter confers no such power. *Gratz v. Redd*, 4 B. Mon. (Ky.) 178.

The directors of a corporation cannot delegate to the treasurer the power of making calls. *Silver Hook Road v. Greene*, 12 R. I. 164. And a charter power, conferred upon the directors of an insurance company, in terms importing an exercise of discretion by them to make assessments for losses, can only be exercised by the directors personally. *Farmers' Mut. F. Ins. Co. v. Chase*, 56 N. H. 341. But see *Read v. Memphis Gas Co.*, 9 Heisk. (Tenn.) 545.

Where the power to allot shares was conferred upon the directors, and a shareholder who had been offered some reserved shares accepted them conditionally, but the board of directors did not expressly assent to such conditional acceptance, but resolved that the shares remaining undisposed of should be allotted at the discretion of two of the directors, and the manager afterwards wrote to the shareholder that the shares

5. Proof of Appointment.—The general rule is that agency must be proved otherwise than by the mere acts of the agent before it can be assumed that such acts are binding upon the principal.¹ The records of a corporation are the best evidence to prove an appointment;² but where it is not required that the appointment shall be entered in the records or be made by written instrument, and it does not appear to have been so made, the appointment may be proved by parol.³ Where there is no evidence tending to show the assent of the corporation to the act of the agent, these acts in connection with the assent of the principal thereto may go to the jury as evidence; and if the acts of the supposed agent

he had accepted had been allotted to him, it was held that the board of directors could not delegate their power in respect to allotting shares. *In re Leeds Banking Co., L. R., 1 Ch. 561.*

By a statute, the president and directors of a railroad company were authorized to exercise all the powers granted to the corporation for the purpose of completing their railroad, and for the transportation of persons, goods and merchandize thereon. It was held that there was nothing in the nature of the power to establish the rates of freight which necessarily limited it to the directors personally, but that it might be exercised by their agents; and that the assent of the directors would be presumed, unless there was some evidence of dissent. *Manchester etc. R. Co. v. Fisk, 33 N. H. 297.*

A banking association organized under the general law has power to divide its business into distinct departments, and to entrust the charge of each to a separate committee of the directors. *Palmer v. Yates, 3 Sandf. (N. Y.) 137.*

The commissioners to receive subscriptions to the stock of a corporation must all be present in order to perform judicial duties assigned to them. *Crocker v. Crane, 21 Wend. (N. Y.) 211.*

1. *Talladega Ins. Co. v. Peacock, 67 Ala. 253.*

2. *Haven v. New Hampshire Asylum, 13 N. H. 532; s. c., 38 Am. Dec. 516; Buncombe Turnpike Co. v. McCarter, 1 Dev. & B. (N. Car.) 206; Narragansett Bank v. Atlantic Silk Co., 3 Met. (Mass.) 282; Owings v. Speed, 5 Wheat. (U. S.) 420. His power as agent should be shown from the corporate books." Benedict v. Lansing, 5 Den. (N. Y.) 283; Clark v. Farmers' Woolen Mfg. Co., 5 Wend. (N. Y.) 256.*

In an action against a corporation, to recover money expended by the plain-

tiff while in the employment of the corporation, he having, as it was alleged, been appointed by a vote of the trustees, it was held that the records of the corporation, being the best evidence, should be produced; that the testimony of an officer to show what the votes were or the authority conferred by them could not be received; that if the plaintiff desired to prove any facts which were on record, he should have notified the corporation to produce the books, and if they had not been produced he might then have given parol evidence of the votes of the trustees. *Haven v. New Hampshire Asylum, 13 N. H. 532; s. c., 38 Am. Dec. 516.*

Where a corporation brings a bill in equity, and alleges therein that certain acts were done by the committees thereof, whereby a resulting trust in certain land conveyed to a third party was raised in favor of the corporation, it cannot prove the authority of the committee to act, by parol evidence, since their power to act can only be shown by the records. *Methodist Chapel Corp. v. Herrick, 25 Me. 354.*

Refusal to Produce Books.—In a suit against a manufacturing corporation on a bill of exchange accepted by T, who signed as treasurer of the corporation, where the defendants refused to produce their records on notice so to do, and a witness testified that he had seen the defendant's records, and that it appeared therein that T was chosen treasurer at the first meeting, it was held that a jury might legally infer that the treasurer was duly elected and authorized to accept the bill in suit. *Narragansett Bank v. Atlantic Silk Co., 3 Met. (Mass.) 282.*

Corporation Books as Evidence.—See BOOKS AS EVIDENCE, 2 Am. & Eng. Encyc. of Law 467j.

3. *Hamilton v. Newcastle R. Co., 9*

are so continuous in their character and of such a nature as to furnish in themselves any reasonable amount of inference that they were known to the corporation, and that in the absence of authority it would not have suffered them, such acts are competent evidence to be submitted to the jury.¹

6. Presumption of Agency.—If the agents of a corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of the agents will be deemed rightful, and the delegated authority will be presumed.²

Ind. 359; *Union Mfg. Co. v. Pitkin*, 14 Conn., 174; *Richardson v. St. Joseph Iron Co.*, 5 Blackf. (Ind.) 146; *Badger v. Bank of Cumberland*, 26 Me. 428.

In order to establish an agency in behalf of a corporation, it is not indispensable to show a written authority, or a vote or resolution of the corporate authorities. *Williams v. Christian etc. College*, 29 Mo. 250.

1. *Talladega Ins. Co. v. Peacock*, 67 Ala. 253.

The authority of an agent of a corporation need not be proved by record or other writing, but may be shown by acts and the general course of business. *Badger v. Bank of Cumberland*, 26 Me. 428.

On refusal of the corporation to produce the books, secondary evidence may be given, such as general reputation and the acts of the agent in the charge and management of the property and concerns of the corporation. *Clark v. Farmer's Woolen Mfg. Co.*, 15 Wend. (N. Y.) 256.

General reputation merely, is inadmissible to prove who are the officers of a corporation; though *semble* it may be received in connection with their acts performed as officers. *Litchfield Iron Co. v. Bennett*, 7 Cow. (N. Y.) 234.

If a corporation, being a party to a suit, refuse to produce their books upon notice, the adverse party may introduce parol evidence of the choice of the directors of the corporation and of the acts of such directors. *Thayer v. Middlesex Mut. F. Ins. Co.*, 10 Pick. (Mass.) 326.

The subsequent recognition of the acts of a corporate agent appointed by parol proves his agency. *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64; *Bank of Kentucky v. Schuylkill Bank*, Par. Sel. Cas. (Pa.) 180; *Middlesex Husbandmen v. Davis*, 3 Met. (Mass.)

133; *Com. v. Cullen*, 33 Pa. St. 133; *Mellege v. Boston Iron Co.*, 5 Cush. (Mass.) 158; *Detroit v. Jackson*, 1 Doug. (Mich.) 113; *Narragansett Bank v. Atlantic Silk Co.*, 3 Met. (Mass.) 282; *Walker v. Detroit Transit R. Co.*, 47 Mich. 338.

2. *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64; *Warren v. Ocean Ins. Co.*, 16 Me. 439; *Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392; *Badger v. Bank of Cumberland*, 26 Me. 428; *Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Troy Turnpike Co. v. McChesney*, 21 Wend. (N. Y.) 296; *Bank of Lyons v. Demmon*, Hill & D. Supp. (N. Y.) 398; *Lohman v. New York etc. R. Co.*, 2 Sandf. (N. Y.) 30; *Burgess v. Pue*, 2 Gill. (Md.) 254; *Yarborough v. Bank of England*, 16 East 6; *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 426; *State Bank v. Comegys*, 12 Ala. 772; *Keith v. Globe Ins. Co.*, 52 Ill. 518; *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 248; *Fayles v. National Ins. Co.*, 49 Mo. 380; *Bank of Auburn v. Putman*, 1 Abb. App. Dec. (N. Y.) 80; *Lester v. Webb*, 1 Allen (Mass.) 34.

If a person acts notoriously as cashier of a bank and is recognized by the directors or by the corporation as an existing officer, a regular appointment will be presumed and his acts as cashier will bind the corporation, although no written proof is or can be adduced of his appointment. *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64.

The law will infer authority in an agent as well from the general character of the acts which he has been permitted to perform as from a special written power. *Exchange Bank v. Monteath*, 17 Barb. (N. Y.) 171.

Where one has an actual charge and management of the business of the corporation with knowledge of the direc-

IV. OFFICIAL BONDS—1. Taking, Acceptance and Approval.—While the charter or act of incorporation usually requires that certain officers and employees shall give a bond with sureties for the faithful discharge of their duties,¹ yet, although the statute does

tors, the corporation will be bound by his contracts made on account of the corporation in the course of the business thus conducted by him without other evidence of actual authority from the corporation. *Goodwin v. Union Screw Co.*, 34 N. H. 378.

Evidence that one openly and notoriously transacted the general business of a corporation, had possession and care of its office, in which the business was transacted, the custody of the books and papers, and the funds of the corporation, and had, on more than one occasion, borrowed money, which appeared on the books of the company, entered to the credit of the lender, tends to show the relationship of such person to the corporation, the duty and authority pertaining thereto, and might authorize a jury to infer that, in the absence of authority from the corporation, such acts would not have been permitted. *Talladega Ins. Co. v. Peacock*, 67 Ala. 253.

The authority of an agent may be inferred from the recognition of his acts by the corporation or its directors; so *held*, in an action against a city for labor upon a small-pox hospital, where the city records failed to show the appointment upon the health committee, of the aldermen who engaged the plaintiff. *Smiley v. Mayor etc. of Chattanooga*, 6 Heisk. (Tenn.) 604.

The authority of an agent may be inferred from the presumption or acceptance of his services. Thus, the president of one corporation subscribed for stock in another corporation. The certificate for the stock was received by the agent of the former, and retained by it; and the stock on two occasions was voted by an officer or member of the former corporation. *Held*, that from these facts the authority of the president to make the subscription might be presumed. *Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392.

In an action against a manufacturing corporation for the value of goods sold and delivered to it, it appeared that the contract for the goods was made by the president of the corporation and that the articles bought were used by it in its business. A by-law of defendant

which was offered in evidence prescribed that no officer, agent or servant of the company should have power to bind it for the purchase of any article, or to contract any debt for the company exceeding twenty-five dollars in amount, without previous authority from the board of directors. It was not shown that the plaintiff was aware of the existence of such a by-law prior to the sale and delivery of the articles by him. It was held that the validity of the sale could not be questioned. *Ten Broek v. Bailer Compound Co.*, 20 Mo. App. 19.

Appointment Established by Estoppel.

—A corporation can only be subjected to the responsibilities and liabilities of a bailee by the acts and contracts of its agents duly authorized, or by agents acting within the scope of their general powers and apparent authority under circumstances which would estop the corporation from denying that their real was not coextensive with their apparent authority, or that they were not authorized to exercise the powers usually delegated to like officers and agents in other corporations of the same character. *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278.

1. *Boone on Corp.*, § 138.

Complete Appointment.—The taking of a bond, unless made a condition precedent thereto, is not in general necessary to the complete appointment of the officer required to give it. *Bank of Northern Liberties v. Cresson*, 12 S. & R. (Pa.) 306; *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64; *United States v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *United States v. Vanzant*, 11 Wheat. (U. S.) 184. And see *Hastings v. Blue Hill Turnpike Co.*, 9 Pick. (Mass.) 80; *State Bank v. Chetwood*, 8 N. J. L. 1.

Governor as Oblige.—In 1841, the charter of the Bank of Darien, Georgia, was repealed, and the assets transferred to the Central Bank, which appointed an agent to collect them, who gave bond to the governor of the State. The charter of the Central Bank required its officers to give bonds, payable to the governor. *Held*, that the bond of the agent was rightly made payable to the

not require a bond the corporation has a right to take one and the sureties on it are liable as on a common-law bond.¹ The acceptance of an official bond is usually necessary to render it valid,² but no formal vote accepting an officer's bond need be shown in order to entitle the corporation to maintain an action upon it.³ Nor is it necessary that there should be written evidence of the acceptance and approval in order to bind the sureties; and parol evidence is admissible that the bond was laid before the directors and that they expressed themselves satisfied with it.⁴

governor. *Anderson v. State*, 2 Ga. 370.

1. Mayor etc. of Hoboken *v. Harrison*, 30 N. J. L. 73; *Lionberger v. Krieger*, 88 Mo. 166; 14 Am. & Eng. Corp. Cas. 87, holding that a bond may be required of a bank cashier although not required by statute.

2. *Franklin Bank v. Cooper*, 36 Me. 179.

3. *Lexington etc. R. Co. v. Elwell*, 8 Allen (Mass.) 371.

The fact of the possession by the bank of such a bond, in due form, legally executed and complete in every respect, the officer having been allowed to enter upon his duties, is evidence which of itself will suffice to authorize a suit upon it as having been delivered, accepted and approved with all requisite formality. *Bostwick v. Van Voorhees*, 91 N. Y. 353; s. c., 1 Am. & Eng. Corp. Cas. 337; *Bank U. S. v. Dandridge*, 12 Wheat. (U. S.) 64; *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23; s. c., 19 Am. Rep. 50; *Morse on Banking* (2d ed.), 235, and cases cited. See *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 324; *Lexington etc. R. Co. v. Elwell*, 8 Allen (Mass.) 371.

Provisions respecting the acceptance of the bond must be deemed directory, and not as conditions precedent to its validity. *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64.

4. *Amherst Bank v. Root*, 2 Met. (Mass.) 522.

The charter of a bank required the cashier to give a bond with two sureties, to the satisfaction of the board of directors, for the faithful discharge of his duties. *Held*, that where the board by a vote, approved of two persons as sureties in a bond to be given, and a bond was afterwards found in the possession of the president, duly executed by the cashier and such sureties, there was a sufficient acceptance of it by the corporation. *Dedham Bank v. Chickering*, 3 Pick. (Mass.) 335.

In a suit brought by the president, directors and company of the Bank of the United States, upon a bond given to the bank to secure the faithful performance of the official duties of one of its cashiers, evidence of the execution of the bond and of its approval by the board of directors (according to the rules and regulations contained in the charter of the bank) is admissible, notwithstanding there was no record of such approval; and the plaintiff may prove the fact of such approval by the board, by presumptive evidence, in the same manner as such fact might be proved in the case of private persons, not acting as a corporation, or as the agents of a corporation. *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64.

Where, in such a case, the cashier is duly appointed, and permitted to act in his office for a long time, under the sanction of the directors, it is not necessary that his official bond be accepted by the board of directors as satisfactory, according to the terms of the charter, in order to enable him to enter legally on the duties of his office, or to make his sureties responsible for the non-performance of those duties. The charter and the by-laws are to be considered, in this respect, as directory to the board, and not as conditions precedent. *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64.

An action was brought by the receiver of a bank who produced the bond. It appeared that B was chosen cashier by resolution of the board of directors passed January 17, 1869, and at the same time his bond was fixed at \$30,000 with sureties "to be approved by the board." The amount stated was that of the bond in suit, which was dated January 30, 1869; it was executed by B and his sureties, three of whom, including defendant's testator, were directors of the bank, and was witnessed by the then teller or the bank, who, on the same day, proved its execution

2. Validity of Bonds.—Bonds given to private corporations by their officers are the subject of private contract, by which the parties may bind themselves in any manner or to any extent not violative of public policy or positive statute.¹ An officer's bond is not void as against the policy of the law by reason of its being approved by a board of directors, some of which had executed it as sureties.² But where a statute provides that such a bond shall not be signed by a director it will still be valid if signed by one who is a director at the time but ceased to be one before it was accepted.³ And where the statute requires the officer to be one of the directors, the fact that he was not a director when appointed does not make the bond given by him invalid.⁴ The neglect to swear an officer will not vitiate his bond.⁵ A bond containing the conditions required by a statute and with condition for additional acts, though invalid as a statute bond, is valid

before a justice of the peace, who was also a director. B thereupon entered upon the discharge of his duties, and continued to act as cashier until January, 1877. No direct evidence was given that the bond was ever delivered to or that it was ever in possession of the bank, or that the sureties were formally approved. It appeared that in 1873, one of the sureties wrote to one of the directors expressing a wish no longer to be bondsman for B, and that the letter was produced and read at the next meeting of the board of directors. *Held*, that it was a fair and legal inference from the facts that the bond was at or about its date delivered to and accepted by the bank; and that an express approval in writing was not necessary to make the bond binding. *Bostwick v. Van Voorhis*, 91 N. Y. 353; s. c., 1 Am. & Eng. Corp. Cas. 337.

1. *Fresno Enterprise Co. v. Allen*, 67 Cal. 505; 10 Am. & Eng. Corp. Cas. 344; *Hubert v. Mendheim*, 64 Cal. 213.
2. *Amherst Bank v. Root*, 2 Met. (Mass.) 522.

But where the statute forbids a director of a bank to sign as surety the bond of its cashier, his obligation to indemnify others against loss to induce them to become sureties is void; so, too, a mortgage to secure the performance of such an obligation is invalid, and as no legal liability, on the part of the director, is created by his obligation, a conveyance of real estate by him to the bank, based thereon, and to make good a defalcation of the cashier which had occurred, is without legal consideration—a gift, fraudulent in law, as against prior creditors, unless it appears

he has sufficient estate left to satisfy the claims of the creditors. *Jose v. Hewett*, 50 Me. 248.

Officers Not Joined in Bond.—The Pennsylvania statute of 1814,—incorporating certain banks—authorized the directors to make by-laws for the government of the bank, and made it the duty of the directors to take such security for the good behavior of the officers as the by-laws should prescribe; and a by-law of the directors declared that the cashier should give bond to the bank in a certain sum, with one or more sureties to be approved by the board, and “the first book-keeper in six thousand dollars.” *Held*, that a bond given by two sureties for the first book-keeper accepted by the board, was binding on the sureties, although the book-keeper was not joined in the bond. *Bank of North-eastern Liberties v. Cresson*, 12 S. & R. (Pa.) 306.

A misnomer of the corporation, in the official bond of a cashier, by the omission of the words “and company” does not vitiate the bond. *Pendleton v. Bank of Kentucky*, 1 Mon. (Ky.) 175.

3. *Franklin Bank v. Cooper*, 36 Me. 179.

4. *Lionberger v. Krieger*, 88 Mo. 160; 14 Am. & Eng. Corp. Cas. 87. The court said: “The appointment of Krieger, though he was not a director, was not a prohibited act, and he certainly was cashier for all purposes and his acts binding as such. We do not see how the fact that he was not a director can make invalid the bond which he gave for his fidelity while in office.”

5. *State Bank v. Chetwood*, 8 N. J. L. 1.

at common law if such conditions require no immoral or wrongful act.¹ But if the bond is executed upon a contract between the officer or agent and the company for the performance of illegal acts, it is void in its inception, and no action can be maintained upon it.²

1. *Franklin Bank v. Cooper*, 36 Me. 179.

A cashier's bond voluntarily executed, and containing nothing contrary to law is not invalid, because the condition varies from the form required by statute. *Grocers' Bank v. Kingman*, 16 Gray (Mass.) 473.

A condition in a cashier's bond "to account for, settle, and pay over all moneys, etc.," is tantamount to the condition prescribed by statute, which is "for his good behavior." And if it was not, yet the condition prescribed by the statute does not preclude the insertion of the former. *State Bank v. Locke*, 4 Dev. L. (N. Car.) 529.

An action lies against the sureties upon a bond given by the cashier of a bank to secure the faithful performance of the duties of his office, although it does not in its terms conform to the provisions of Mass. Rev. Stat., ch. 36, § 27, and no other bond was taken. *Bank of Brighton v. Smith*, 5 Allen (Mass.) 413.

A bank, authorized to make by-laws, and to take bond from the cashier for the "faithful discharge of the duties of his office," may take a bond with condition that he shall perform the duties of his office according to law and the by-laws of the institution, and that he shall not make known any secrets, or the state of the funds, etc., to any person except the directors, etc. As these things may be required of the cashier by the by-laws, they may be required in the bond. *Bank of Carlisle v. Hopkins*, 1 Mon. (Ky.) 245.

2. *Daniels v. Barney*, 22 Ind. 207, holding that an action cannot be maintained against the principal and surety upon a bond given by an express agent to secure the faithful discharge of his duties to an express company which carries on its business in the State of Indiana, without compliance with the requirements of the law of March 5, 1855 (1 G. & H. 327), because, under the provisions of that law, the business of such company, so carried on, is illegal. The parties to such bond are bound to know the law, and must be presumed to know that the requirements of the law have not been complied with by the

company, which were necessary to render the business legal.

Where a bank establishes an agency in a State and takes a bond from the agent in charge of it, the sureties on the bond may set up the illegality of the bond in an action against them for the penalty. *Bank of Newberry v. Stegall*, 41 Miss. 142.

A bond given by the agent of a foreign corporation and taken without compliance with the conditions prescribed by the law of the State to be observed before the company may transact business within the State, cannot be enforced. *Thorne v. Travellers' Ins. Co.*, 80 Pa. St. 15.

But in *Washington Co. Ins. Co. v. Colton*, 26 Conn. 42, it appeared that a statute of Pennsylvania required all foreign insurance companies establishing agencies within the State, to publish a report of their condition for three months in every year in certain cities named, and all agents of such companies, before commencing business, to file copies of their powers of attorney in the office of the secretary of the State. In a suit brought by such a company against such an agent and others his sureties, upon a bond for the faithful discharge by such agent of his duty in said State, it was held (1) that the publication of such report, not being made by the act a condition precedent of the right to commence business, the requirement was merely directory, and the neglect of the company to comply with it did not render the business transacted by the agent illegal, and the bond in consequence void; and (2) that the filing of a copy of the power of attorney with the secretary of State was the duty of the agent himself, of the neglect of which neither he nor his sureties could take advantage.

Ultra Vires Business.—Sureties for the fidelity of an officer are not liable for an embezzlement by the latter of the corporate funds entrusted to him while engaged for the corporation in a business *ultra vires* of it. *Blair v. Perpetual Ins. Co.*, 10 Mo. 559. *Compare Melville v. Doige*, 6 C. B. 450. See *Boone on Corp.*, § 138.

3. Conditions, When Broken—(See SCOPE OF OFFICERS' EMPLOYMENT, *infra*).—Bonds given by corporate officers are to be interpreted like other private contracts, with reference to their language and the circumstances under which they were entered into.¹ Generally, it is no defence to an action upon an officer's bond to show that he erred by mistake and not for want of fidel-

1. *Fresno Enterprise Co. v. Allen*, 67 Cal. 505; 10 Am. & Eng. Corp. Cas. 344.

Forfeiture as to Principal.—When the default of the principal would forfeit the bond as to him, it will forfeit it as to the surety. *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 343.

Duties Prescribed.—An official bond, conditioned for the faithful performance of the duties of the office, "which may be prescribed by the board of directors," held to mean the same as if it had said "the duties which have been, are now, or may hereafter be prescribed by the board of directors." *Durkin v. Exchange Bank*, 2 Patt. & H. (Va.) 277. Compare *Bank of U. S. v. Brent*, 2 Cranch (C. C.) 696.

Cashier's or Teller's Bond—When Forfeited.—Where a cashier exceeded his power, by changing the securities of the bank, without the knowledge of the directors, his sureties were held to be liable; but the measure of damages, in a suit on the bond, was adjudged to be, not the absolute amount of the original securities, but the probable amount that would have accrued from them if they had not been changed. *Barrington v. Bank of Washington*, 14 S. & R. (Pa.) 405.

The receipt, by the cashier, of money on deposit, with direction to pass it to the credit of another bank, and his omission so to do, and his concealment of the fact that the money was deposited, constitute a breach of such bond, and the cashier and his sureties are liable therefor, without proof that the bank, of which he was cashier, had paid the amount of the deposit to the bank for which it was deposited. *State Bank v. Locke*, 4 Dev. L. (N. Car.) 529.

Where a statute prohibited any bank from issuing bills payable at any place except at the bank, and a cashier, on receiving bills not proved to have been issued after the statute had passed (which had been taken up and paid by another bank, at which they were made payable), put them again into circulation for his own use—*held*, to be a breach of his bond given for the faith-

ful performance of his duty, for which his sureties were liable. *Dedham Bank v. Chickering*, 4 Pick. (Mass.) 314.

A cashier's sureties are not liable on his bond for his not accounting to the bank for their money collected by him as an attorney at law. Nor for his surreptitiously conveying his shares in the bank to a third person, by means of blank certificates signed by the president and deposited in the cashier's hands, though he had previously pledged the shares to the bank as security for the payment of his notes. *Dedham Bank v. Chickering*, 4 Pick. (Mass.) 314.

On the bond of a cashier "faithfully and honestly to discharge his duties as such cashier, and faithfully apply and account for all such moneys," etc., "and return the same on proper demand to the order of the board," etc., he and his sureties are liable for a loss caused by his negligence, though the directors did not use due diligence. *Batchelor v. Planters' Nat. Bank*, 78 Ky. 435.

Where a cashier, before his reappointment to office, had misapplied the funds of the bank, and, after his reappointment, borrowed money, as cashier, and placed it in the bank, to conceal his delinquency, and afterwards returned the money so borrowed, and was dismissed as a defaulter—*held*, that the sureties on his last bond were answerable; as the money that he so placed in the bank became the property of the bank, and his subsequent conduct was a breach of the condition of that bond. *Ingraham v. Maine Bank*, 13 Mass. 208.

In assigning a breach on a cashier's bond, it is sufficient to allege that the principal obligor has received money for which he has not accounted; and evidence that he had the character of an honest, careful and vigilant officer, and that similar losses by bank officers are frequent, and that the directors have expressed their belief that the loss in question was caused by accidental overpayments, and that they, after the loss, continued to employ him, etc., is not sufficient to sustain a rejoinder

averring that the loss was by accidental overpayments, etc. *American Bank v. Adams*, 12 Pick. (Mass.) 303.

No act or vote of directors, contrary to their duties, and in fraud of stockholders' rights and interests, will excuse the cashier or his sureties for violating the stipulations in his bond, well and truly to execute the duties of his office. Such bond covers all defaults in the duties annexed to such office, from time to time, by those who are authorized to control the affairs of the bank; and the sureties enter into the contract with reference to the rights and authority of the president and directors under the charter and by-laws. *Minor v. Mechanics Bank*, 1 Pet. (U. S.) 46.

It is the duty of the cashier to forward to the State treasurer the duties on dividends declared by the bank; and if he omits so to do, he and his sureties are liable on his bond to the amount of the injury thereby necessarily sustained by the bank. *Bank of Washington v. Barrington*, 2 P. & W. (Pa.) 27.

An error against the bank, in the addition of a column of figures by the cashier, is *prima facie* evidence of a loss to the bank to the amount of such error; and the cashier and his sureties are liable therefor, unless they show that the loss did not in fact accrue. And if a cashier permits a transfer of stock to be made to the bank beyond the amount permitted by the charter, he is answerable to the stockholders on his bond for any loss thereby caused, although such transfer was authorized by a resolution of the directors. *Bank of Washington v. Barrington*, 2 P. & W. (Pa.) 27.

Taking the check of a person of good credit upon another bank, in which it afterwards appears that he had no funds, if taken as was usual in the ordinary course of banking business, and the usage of banks in like cases is not a breach of the condition of the teller's official bond to make good damages through his unfaithfulness or want of care. *Union Bank v. Mackall*, 2 Cranch (C. C.) 695.

The bond of a bank teller that he will "well and faithfully execute the office, and in all things relating to the same well and faithfully behave," is not to be construed as meaning more than the words "faithful performance of trust reposed," that phrase being the requirement of the by-law regulating the

giving of security. *Bank of U. S. v. Brent*, 2 Cranch (C. C.) 696.

Where the defendants were sued as sureties upon a bond conditioned for the faithful conduct of their principal, a teller in a bank, and it appeared that he had abstracted money from the bank before the bond was executed; but afterwards, and while it was in force, had falsified his accounts in order to conceal the deficit—*held*, that the defendants were liable for a technical breach of the bond, but that the measure of damages would be merely nominal, as the loss of the bank had not resulted from the misapplication of money to the wrong account, which was the only breach of their bond, but had already been sustained before the contract of suretyship commenced. *State v. Ather-ton*, 40 Mo. 209.

Book-keeper.—Where, by the by-laws of a bank, it was made the duty of every other officer of the bank to perform such services as might be required of him by the president and cashier, and the bond of the book-keeper was conditioned to perform the duties of his office, and "all other duties required of him in said bank"—*held*, that the sureties in the bond were liable for money fraudulently taken and appropriated to his own use by the book-keeper. *Planters' Bank v. Lamkin*, R. M. Charlt. (Ga.) 29.

The sureties of the accountant of a bank, in a bond for his faithful performance of the duties of that office, are not liable for moneys taken by him from the teller's drawer, without his consent or knowledge, the accountant not being entrusted with any moneys of the bank, nor put in possession of them as accountant. *Allison v. Farmers' Bank*, 6 Rand. (Va.) 204.

The bond was that the assistant book-keeper should faithfully discharge the trust reposed in him as assistant book-keeper, as aforesaid. *Held*, that it secured the bank not only against dishonest book keeping, but against all dishonesty or infidelity to his trust as an employee. *Rochester City Bank v. Elwood*, 21 N. Y. 88.

Sometime after an assistant book-keeper's appointment, he kept the "credit journal" which at the time of his appointment was kept by the teller. *Held*, that the bond covered false entries made by him in that book to conceal embezzlements of money by him. *Rochester City Bank v. Elwood*, 21 N. Y. 88.

ity.¹ But it is no forfeiture of a bond conditioned for the faithful service of an officer and to indemnify against all loss by his malfeasance, misfeasance, wilful neglect, or wrongful act, that the loss has occurred by his mere accident or mistake or by his being unable to perform all the duties put upon him.²

Where the charter of a corporation creates the office of treasurer, it becomes one of his duties, from the nature of his office, to receive and account for money; and his sureties in his official bond, conditioned that he shall perform his duties agreeably to the regulations, requirements and restrictions of the charter, are responsible for the money which may come into his hands as

Messenger.—Larceny of moneys from a bank by its messenger, whether when he was acting within the scope of his employment or not—*held*, to be a breach of his bond “that he shall in all things conduct himself honestly and faithfully as such messenger.” *German Am. Bank v. Auth*, 87 Pa. St. 419.

1. *State Bank v. Chetwood*, 8 N. J. L., 1.

A bond well and truly to execute the duties of cashier or teller of a bank, includes not only honesty but reasonable skill and diligence. If, therefore, he performs those duties negligently and unskilfully, or if he violates them from want of capacity and care, the condition of his bond is broken. *Barrington v. Bank of Washington*, 14 S. & R. (Pa.) 405; *American Bank v. Adams*, 12 Pick. (Mass.) 303; *Minor v. Mechanic's Bank*, 1 Pet. (U. S.) 46; *Atlanta etc. R. Co. v. Cowles*, 69 N. Car. 59.

Under a teller's bond, “faithfully to perform all duties assigned to him in said bank, and make good to the said bank all damages which the same shall sustain through his unfaithfulness or want of care,” damages arising from his want of care may be recovered as well as those arising from his unfaithfulness. *Union Bank of Georgetown v. Forrest*, 3 Cranch (C. C.) 218.

But in *Union Bank v. Closkey*, 10 Johns. (N. Y.) 271, where the condition of a bond was that a clerk in a bank should “well and faithfully perform the duties assigned to and trust reposed in him, as first teller,” etc., it was held to apply to the honesty and not to the ability of the clerk; and that the sureties were not responsible for a loss arising to the bank from the mistake of the clerk, but only for a breach of trust or dishonesty.

But if, in such case, the teller con-

ceals deficiencies that at first arose from mistake, and makes false entries in the books, for the purpose of concealment, it is a breach of the bond, and his sureties are liable for the loss sustained in consequence of such fraudulent conduct. *Union Bank v. Closkey*, 10 Johns. (N. Y.) 271.

2. *Morris Canal etc. Co. v. Van Voorst*, 21 N. J. L. 100.

Failure of Bank.—The condition of a bond given by a treasurer of a corporation that he “shall faithfully discharge the duties of the office, and well behave therein,” only binds him to an honest, diligent and competently skilful effort to keep the money. Hence where the treasurer deposited the money of the company to his credit as such in a banking house, which was at the time in good standing and credit, and was considered by the community a safe place of deposit for money—*held*, that he and his sureties were not responsible for its loss by the sudden and unexpected failure of the banking house. *Atlantic etc. R. Co. v. Cowles*, 69 N. Car. 59. Compare *Morris Canal etc. B. Co. v. Van Voorst*, *supra*.

Robbery.—A cashier's bond conditioned “safely to keep all moneys,” etc., does not render the obligors responsible for money violently robbed from him while in the discharge of his duty. *Planters' etc. Bank v. Hill*, 1 Stew. (Ala.) 201.

The paymaster of a railroad gave a bond conditioned to perform his duties faithfully, “and promptly to pay over and promptly account for all moneys belonging” to the company. Money in the paymaster's custody was stolen from the office safe in the daytime while the cashier was in the room. There was evidence tending to show that the paymaster had suggested that a certain door should be bricked up, and it was

treasurer.¹ An endorsement by the treasurer of a corporation, upon notes signed by himself, and running to the corporation is sufficient evidence to render the sureties upon his bond liable for the amount endorsed, as for moneys received by him in his official capacity, without any further evidence of actual payments of money.²

4. Duration of Liability of Sureties.—Where an officer of a private corporation gives a bond conditioned for the faithful performance of his duties, and unlimited as to time such bond is only for the term of office for which the officer had been elected at the time the bond was given.³ And the sureties on a bond for faithful performance, etc., for one year are not liable for the principal's defalcation occurring after subsequent re-election without renewal

doubtful whether the safe was locked at the time of the robbery. It was not the paymaster's duty to see to these things, but the cashier's. *Held*, that the paymaster and the sureties on the bond were not liable for the loss. *Chicago etc. R. Co. v. Bartlett*, 120 Ill. 603.

1. *Portage Co. Mut. Ins. Co. v. Wetmore*, 17 Ohio 330.

2. *Lexington etc R. Co. v. Elwell*, 8 Allen (Mass.) 371.

But the bond of the treasurer of a private corporation is not forfeited by his exposing property of the corporation to be attached, or by his refusal to assist a collector by furnishing bills and papers, or by seeking with others a dissolution of the corporation. *Literati v. Heald*, 141 Mass. 326.

3. *Kan. Life Assoc. v. Lemke*, 40 Kan. 661; *Fresno Enterprise Co. v. Allen*, 67 Cal. 505; 10 Am. & Eng. Corp. Cas. 344, holding, that an officer's term being for one year from June 1st, 1881, and until a successor should be elected and qualified, came to an end on the officer being appointed to succeed himself in June 1882, and the sureties on the bond were not liable. *Manufacturers etc. Co. v. Odd Fellows Assoc.*, 48 Pa. St. 446; *Liverpool Water Works Co. v. Atkinson*, 6 East 507; *Barker v. Parker*, 1 Taunt. 295; *Hassell v. Long*, 2 M. & S. 363; *Mobile etc. R. Co. v. Brewer*, 76 Ala. 135. See *Black v. Aflender*, 135 Pa. St. 526.

S was appointed treasurer of a corporation in 1851, and was annually re-appointed until 1858. Upon his first appointment he gave bond with sureties for the faithful discharge of his duties of the office, but no new bond was afterwards given. He committed no default until after his reappoint-

ment in 1856. By the constitution of the corporation, the directors were to be appointed annually, and they were to appoint the treasurer and other officers, all the officers of the corporation to continue in office until the next annual meeting, and until others should be elected in their stead. *Held*, 1. That the office was an annual one, and that the obligation of the bond did not extend beyond the year for which the treasurer was first appointed. 2. That the question of the liability of the sureties upon the bond was not affected either by the fact of official relations to the company on their part, which made it their duty to see that proper bond was given by the treasurer, or by the fact that, after the default, before they had examined the bond, and in the belief that they were holden upon it, they had promised the plaintiffs that they would pay it. *Welch v. Seymour*, 28 Conn. 387.

But in *Amherst Bank v. Root*, 2 Met. (Mass.) 522, it appeared that in 1831, while St. 1828, ch. 96, was in force—which provided that a cashier should retain his place until removed therefrom, or another should be appointed in his stead—a cashier was appointed and gave bond for the faithful discharge of the duties of his office. In 1832 he was reappointed but gave no new bond. In 1836 and 1837 he was guilty of defaults, and his bond was afterwards put in suit. *Held*, that his sureties were liable on the bond, although it appeared from the records of the directors that in 1831, and also in 1832, he was appointed "for the year ensuing."

Office Unlimited as to Term.—A person was elected cashier of a bank in March 1814, when it was first organized, and again in October, 1814, 1815 and 1817..

of the bond.¹ Under certain circumstances, also, the sureties are not liable for defaults which occur after an omission to re-elect an officer at a regular meeting for that purpose, and after such further time as might be reasonably sufficient for the election and qualification of his successor, although he continues to exercise the functions of his office.² -

by directors chosen annually, and he continued to act as cashier from his first election until 1823, when he committed a breach of duty. *Held*, that a bond given by him with sureties upon his first election, for the faithful performance of his duties "so long as he should continue in said office," extended to this breach of duty, it not appearing, either in the bond itself, or in the charter, records or regulations of the bank, that the office of cashier was an annual office. *Dedham Bank v. Chickering*, 3 Pick. (Mass.) 335.

In *Exeter Bank v. Rogers*, 7 N. H., 21, it was held that when the office is held at the will of those making the appointment, and is unlimited as to term, the presumption is, nothing to the contrary, that the bond was intended to cover all the time the person shall continue in office under the appointment. RICHARDSON, C. J., said: "When the term of office is limited to a particular period, as a year, or five years, and the person appointed cannot continue in office for a longer period without a new appointment, then the official bond, if nothing appear to the contrary, is presumed to be intended to be confined to the particular term; and if the officer be reappointed, there must be a new bond. But when an office is held at the will of those who make the appointment, and is not limited to any certain term, then the bond is presumed to be intended, if nothing appear to the contrary, to cover all the time the person appointed shall continue in office under the appointment." See also *Mobile etc. R. Co. v. Brewer*, 76 Ala. 135.

Renewal of Bond.—Where a bank, pursuant to its by-laws, required the cashier to renew his bond, and the order requiring the renewal provided that the previous bond should not thereby be impaired until given up to be cancelled—*held*, that the first bond, remaining uncanceled, remained in force after the second was executed. *Pendleton v. Bank of Kentucky*, 1 Mon. (Ky.) 177.

1. *Cumberland Gap etc. R. Co. v. Murrell*, 11 Heisk. (Tenn.) 715.

M, a bank director, elected in 1849, gave a bond conditioned for discharge of his duties "while he should be a director." He was re-elected annually, but never gave any other bond. *Held*, that notwithstanding the statute forbade any bank director from entering upon the duties of his office until his bond had been executed and approved, and also provided that a director should hold his office until another was appointed and qualified, nevertheless the office was to be considered an annual one, and M was to be regarded as acting as director each year under his last preceding election. *State v. Mann*, 34 Vt. 371.

2. The sureties on the bond of the treasurer of a railroad company, the condition of which provides for his faithful discharge of the duties of the office "during his continuance in office, during the present year and for such further periods as he may from time to time be elected to said office," are not liable for defaults which occur after an omission to re-elect him at a regular meeting for that purpose, and after such further time as may be reasonably sufficient for the election and qualification of his successor, although he continues to act as treasurer, and is re-elected at the next regular meeting thereafter; but they are not discharged from their liability by a vote of the corporation postponing for five weeks the time of the regular meeting for the election of officers, and the consequent postponement of an election for that period, nor by the corporation's assuming the entire management of the railroad, after having leased it to another corporation. *Lexington etc. R. Co. v. Elwell*, 8 Allen (Mass.) 371.

The case of *Chelmsford Co. v. Demarest*, 7 Gray (Mass.) 1, decided that a bond given by the treasurer of a manufacturing company, although in general terms, and with the condition "if, during his continuance in office, he shall faithfully perform," etc., does not bind the sureties beyond the period of his first election, and such further time as is reasonably sufficient for the elec-

Where the accounts of a defaulting officer are in a confused state, and the dates of his speculations unknown, it has been held proper to apply one-half of the amount appropriated by him to the time covered by the bond.¹ And where vouchers are passed to an officer's credit for moneys paid out by him before the bond was executed, such credit must be applied to his arrearages anterior to the execution of the bond.²

Where an act consolidating two railroad companies provides that all the securities of the old company are to be vested in the new, a surety on a bond entered into one of the companies before amalgamation is liable for breaches committed afterward.³

5. Effect of Increase of Capital, Stock, Business, etc.—It is no defence to an action upon a bond conditioned for the faithful performance of the duties of an officer or agent, that, after his appointment, the capital stock of the company was increased, or his duties enlarged.⁴

tion and qualification of his successor, the office being by statute an annual one. It was also held that his re-election from time to time does not charge the sureties, and also that the statute provision, that the treasurers when elected "shall hold their offices until others are chosen and qualified in their stead," does not extend their liability to subsequent elections of the same person.

Re-election After Another Person Had Held Office.—The case of *Middlesex Mfg. Co. v. Lawrence*, 1 Allen (Mass.) 339, was also a suit upon a bond given by a treasurer of a manufacturing corporation, but the bond in that case contained a provision binding the sureties for his fidelity "for and during such further time as he may continue therein by any re-election or otherwise." It was conceded that the sureties might be thus bound, if it was distinctly recited in the bond that they should be; but even this provision could not extend their liability beyond the period of the treasurer's continuous holding of his office, and did not include time during which he held the office by virtue of a new election after he had left the same, and another person had been the treasurer for a few months.

1. Thus in *Lexington etc. R. Co. v. Elwell*, 8 Allen (Mass.) 371, it was held that if the treasurer of a corporation has appropriated to his own use sums of money received from a certain source during the time covered by his official bond, and other sums received from the same source after the bond had expired, and he has afterwards entered upon the

books a sum as received from that source, and such sum was not in fact received at the date of the entry, and there is nothing to show when the same, or the items of which it was composed, should have been entered, it is proper, in an action upon the bond, to apply one half of it to the time covered by the bond.

2. *Vilwig v. Baltimore & O. R. Co.*, 79 Va. 449; 26 Am. & Eng. R. Cas. 95.

3. *Eastern Union R. Co. v. Cochrane*, 23 L. J., N. S. Exch. 61; *London etc. R. Co. v. Goodwin*, 3 Exch. 320.

4. *Bank v. Wollaston*, 3 Harr. (Del.) 90.

An increase of the capital stock, the borrowing of money, and the increase of the circulation of a banking company, by virtue of statutes passed after the date of the cashier's bond, will not discharge the sureties on such bond. *Morris Canal etc. Co. v. Van Voorst*, 21 N. J. L. 100; *Lionberger v. Krieger*, 88 Mo. 160; 14 Am. & Eng. Corp. Cas. 87.

In the case of *Bank v. Wollaston*, 3 Harr. (Del.) 90, a bank cashier's bond was executed in 1833, and the stock was increased in 1837 by acts of the legislature. The sureties of the cashier contended that they were thereby released. The court said: "The simple answer to the proposition is that there was no enlargement of the duties of the officer. The sphere of his duties was the same, although the subject matter of his charge might be increased, which is no more than what happens from day to day from fluctuation in the amount of deposits."

6. Scope of Officer's Employment.—The sureties upon an official bond undertake for nothing which is not within the letter of their contract. The obligation is *strictissimi juris*, and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent.¹ Where, therefore, new duties are imposed upon the officer or employee giving the bond, which it was not contemplated by the bond that he was to perform, the sureties are discharged from liability.²

In *Grocers' Bank v. Kingman*, 16 Gray (Mass.) 473, it was held that the sureties on a cashier's bond, in which they undertake to save the bank harmless from every loss that may arise from the cashier's mistakes, as well as from losses arising from his fraud, inattention or negligence in the performance of his duties, are exonerated by an increase of the capital stock of the bank, after the making of the bond, from liability for acts of the cashier after the additional capital has been paid in.

It is no defence to an action upon a bond conditioned for the faithful performance by a person, who has been appointed ticket seller of a railroad corporation, of "all the duties of the said office which are or may be imposed upon him under this or any future appointment," that, after his appointment, the capital stock of the corporation was increased, his duties, by reason of the corporation forming business connections with other corporations, enlarged, and his salary augmented accordingly. *Eastern R. Co. v. Loring*, 138 Mass. 381; 26 Am. & Eng. R. Cas. 92.

In the case of *Strawbridge v. Baltimore etc. R. Co.*, 14 Md. 360, a bond to the Baltimore & Ohio R. Co., in the penalty of \$3,000, recited that the principal obligor had been "appointed by the said company as ticket and freight agent at Ellicott's Mills," and was conditioned for the faithful performance of the duties of said office, so long as he should hold the same. At the date and delivery of the bond, Ellicott's Mills was a second-class station, but the company subsequently made it a first-class station. At first-class stations a greater amount of freight is paid than at second-class stations, but the duties of the ticket and freight agent are the same at both—viz, to receive all sums payable at his station both for freight and passengers. *Held*, that the change in the regulations of the company by which

this was made a first-class station did not discharge the sureties on the bond. That the sureties, in executing this bond, must be regarded as having contracted, with reference to the right and authority of the company, by their charter, to make changes, from time to time, in their regulations, as to their rates of fare and freights, and the points for receiving and delivering freight, in order to carry on successfully their business operations.

In *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, it was held that where an insurance company had no right to engage in banking, one who became surety for the fidelity of an agent of such corporation was not bound for an embezzlement by the agent of the funds of the corporation while such agent was engaged in the business of banking for the corporation.

1. *Detroit Sav. Bank v. Zeigler*, 49 Mich. 157; 1 Am. & Eng. Corp. Cas. 332, citing, *Paw Paw v. Eggleston*, 25 Mich. 36, 40; *Detroit v. Weber*, 29 Mich. 24; *Johnston v. Kimball Township*, 39 Mich. 187; *Bullock v. Taylor*, 39 Mich. 137; *United States v. Boyd*, 15 Pet. (U. S.) 187; *State v. Cutting*, 2 Ohio 1; *McCluskey v. Cromwell*, 11 N. Y. 593; *Urmston v. State*, 73 Ind. 175.

2. The secretary of an insurance company gave a bond faithfully to perform his duties as such secretary, and to account for all the money which should come into his hands as such secretary. *Held* (1) That if the secretary was entrusted with the funds of the company, notwithstanding it was also the prescribed duty of the president to receive the money paid to the company and to deposit the same, and he was responsible for any failure of duty on his part, that did not relieve the secretary from responsibility for the faithful disposition of any funds confided to his care. The unauthorized act of the president in entrusting funds to the secretary could

7. Release of Sureties—(See *supra*, EFFECT OF INCREASE OF CAPITAL STOCK, BUSINESS, ETC.; SCOPE OF OFFICER'S EMPLOYMENT)—(a) MISREPRESENTATION OR CONCEALMENT BY OBLIGES.—Persons proposing to become sureties to a corporation for the good conduct of an officer are entitled to be treated with perfect good faith, and to have disclosed to them any secret fact materially increasing their obligation, whereof the directors are aware, or by slight diligence could become aware.¹ Where, therefore, the official bond of an officer is given to a corporation, the corporation is bound, if fit opportunity offers, to inform the sureties of material facts within its knowledge relative to the trustworthiness of the officer, such as prior defaults, and the like, which might affect the readiness of the sureties to become responsible for him. If they fail to do this, the surety will be dis-

not discharge the secretary from the faithful preservation thereof; (2) That the stipulation of the bond was an undertaking for the fidelity and honesty of the secretary commensurate with the scope of his duties; and the enumeration in the by-laws of certain things to be performed by him did not supersede this obligation, which pervaded every department of his official functions. The company had the right, under this stipulation, to insist upon indemnity for any deviation from the line of his duty to its prejudice. *Engler v. People's F. Ins. Co.*, 46 Md. 323.

Such interchange of assistance between officers of a bank as temporary need may require is fairly within the contemplation of the appointment of such an officer, and the sureties on his bond are liable for a default made while he was temporarily filling the place of another officer. The receiving teller of the savings department of a bank, while filling the place of the general teller, during the latter's temporary absence, embezzled moneys of the bank; *held*, that the sureties on a bond given by him for the faithful performance of his duties were liable for the money so taken. *Detroit Sav. Bank v. Zeigler*, 49 Mich. 157; s. c., 1 Am. & Eng. Corp. Cas. 332.

In an action against the sureties upon a bond, given to a bank, and conditioned for the faithful discharge by C of "all his duties as clerk of said bank," and against the misappropriation of any of the funds of the bank "which may come under the care or control of said C as clerk," the evidence showed that C, during the whole term of his employment, performed the duty to some extent usually performed by a

teller, of paying and receiving money over the counter of the bank. It was found as a fact that "the duties as clerk," contemplated in the bond, did not mean merely the duties of a book-keeper, but that they embraced the duty of receiving and paying out money at the counter of the bank. *Held*, that the defendants were not entitled to a ruling, as matter of law, that there had been such a change in the duties of the clerk as to discharge them from liability. *Rollstone Nat. Bank v. Carleton*, 136 Mass. 226.

The defendant entered into a bond as surety for the faithful performance by C of his duty as clerk to a bank. C, having been sent by the manager of the bank, at the request of a customer, to his residence, several miles distant from the bank, in order to receive a large sum of money, to be placed to the customer's account, on his way back lost it. It was held that the money was received by C in the course of his employment as clerk to the bank; that the defendant was liable as surety, notwithstanding the finding of the jury that it was not the custom for bankers in that part of the country to send for their customers' money in the manner adopted, and that the loss of the money was *prima facie* evidence of gross negligence on the part of C. *Melville v. Dodge*, 6 M. G. & S. 450.

1. *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23.

Knowledge by Branch Bank.—In a suit on such bond, by the principal bank, a plea imputing to the directors of the branch bank (in which the principal obligor was cashier) knowledge of the cashier's delinquency, and a connivance at it, will not be sufficient; as it

charged.¹ But the corporation is only bound to give information as to such facts as it absolutely knows. It is not bound to disclose mere rumors.² And according to some authorities mere concealment is not sufficient unless actual *mala fides* is shown.³

is not a legal presumption that what is known to the branches is communicated to the principal bank. *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. (Ky.) 568.

1. *Franklin Bank v. Cooper*, 36 Me. 179; *Dinsmore v. Tidball*, 34 Ohio St. 411; *State v. Atherton*, 40 Mo. 209; *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23; *Western N. Y. L. Ins. v. Clinton*, 66 N. Y. 326; *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 343; *Ætna L. Ins. Co. v. Mabbett*, 18 Wis. 668; *Maltby's Case*, 1 Dow. 294.

The bond of a bank cashier, framed to cover past as well as future delinquencies, will be invalid against a surety, if his name was procured at the desire of the directors, they knowing that past defalcations existed, of which he was ignorant, and withholding the knowledge from him, though with a suitable opportunity to communicate it. *Franklin Bank v. Cooper*, 36 Me. 179; *Franklin Bank v. Cooper*, 39 Me. 542; *Franklin Bank v. Stevens*, 39 Me. 532; *Smith v. Bank of Scotland*, 1 Dow 273; *Cashin v. Perth*, 7 Grant's Ch. & App. Rep. 340.

In an action by a railroad company against the sureties on the bond of a station agent, who was in arrears to the company when the bond was executed, and continued to make additional defaults in several subsequent monthly settlements, the presiding judge committed no error in charging the jury "that if the plaintiffs knew when the bond was given, that their agent was in default and indebted to them in his pre-existing agency, and yet concealed this fact and held him out to the sureties as trustworthy, either expressly or impliedly, such conduct would be a fraud upon the sureties, and would make void the bond as to them." *Wilmington etc. R. Co. v. Ling*, 18 S. Car. 116; s. c., 16 Am. & Eng. R. Cas. 539.

Where the surety claims exemption from any responsibility on account of a fraudulent concealment of facts affecting the risk by the agents of the bank, which concealment may be proved by facts and circumstances, no one of which of itself would be sufficient, but when combined with and explained by other evidence, might satisfy the jury of

its existence, although it should appear in the evidence: 1. That the surety did not call for information, nor see the officers of the bank after he was called upon to sign, and before the delivery of the bond, and the agent of the bank had not avoided giving the information. 2. That the agent had only omitted to seek after the surety and volunteer unsolicited explanations. 3. That knowing the defendant was to be the surety, and afterwards receiving his bond, without seeing him, when he was near at hand and could readily have been found; the proof of these facts will not authorize the court to say to the jury that they overthrow the defence, as a rule of law. *Franklin Bank v. Cooper*, 39 Me. 542.

2. *State v. Atherton*, 40 Mo. 209.

3. *Ætna L. Ins. Co. v. Mabbett*, 18 Wis. 668; *Guardians of Stokely Union v. Strother*, 22 L. T. 84.

In *Atlantic etc. Tel. Co. v. Barnes*, 64 N. Y. 385; s. c., 21 Am. Rep. 621, it was held that "the sureties upon a bond given by an employee to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming into his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal, known to the employer, and a continuance of the employment after such default, in the absence of evidence of fraud and dishonesty on the part of the employee."

In *Atlas Bank v. Brownell*, 9 R. I. 168; s. c., 11 Am. Rep. 231, an action on a cashier's bond, it was held, that to avoid a bond on the ground of fraud on the part of the bank, or its directors, there must be a fraudulent concealment of something material for the surety to know.

In an action against the sureties on a cashier's bond, conditioned that he should account for moneys received before as well as after its date, held that a misrepresentation or concealment as to any material part of the transaction, when the agents of the bank entered into the contract of suretyship with the defendant, would avoid the contract; but proof that the agents of the bank

Of course, the mere fact that the officer was at the time the bond was given a defaulter, the corporation having no knowledge of

knew that bonds had not been given in former years; that the directors had been negligent; that the accounts of the bank were in a confused state, and that the bank commissioners had not discharged their duty relating to the bank, and that such agents had concealed these facts from the surety, will not show such material concealment and misrepresentation. *Franklin Bank v. Stevens*, 39 Me. 532.

Before a bond can be avoided, fraud or bad faith which has misled the surety to his damage must be brought home to the obligee by clear and decisive evidence. Thus, B was teller of the bank before he was appointed cashier. It was claimed that before such appointment, the directors were aware of certain misconduct on his part as teller which they concealed from the sureties. The misconduct complained of did not affect the moral character or official fidelity of B. *Held*, that the objection was untenable; that mere irregularities or omissions of duty, even if known to the directors, furnished no ground for a defence. *Bostwick v. Van Voorhis*, 91 N. Y. 353; 1 Am. & Eng. Corp. Cas. 337.

The concealment of the fact from the surety that the predecessor of a bank cashier was also a defaulter does not affect their liability, as it in no way increases or relates to the obligations assumed. *Bostwick v. Van Voorhis*, 91 N. Y. 353; 1 Am. & Eng. Corp. Cas. 337.

To render the defence of concealment sufficient in an action by a creditor against a surety, it is necessary to aver that the creditor either procured the surety's signature or was present when the instrument was executed, and then misrepresented or concealed essential facts which should have been disclosed. *Magee v. Manhattan L. Ins. Co.*, 92 U. S. 93.

Where a party becomes surety upon the bond of a treasurer of a secret society for the faithful application of moneys in his hands, payable to the society, the fact that the officers and members of the society knew of his previous misappropriations of the funds entrusted to him during the prior year, and with such knowledge re-elected him, and failed to communicate such fact to his sureties, no enquiry being

made of them by the sureties, and they doing no act to put the sureties off their guard or preventing them from ascertaining the facts, no fraud can be imputed to the society which can be set up in avoidance of the sureties' liability on the bond. *Roper v. Trustees of Sangamon Lodge etc.*, 91 Ill. 518.

An agent of an insurance company gave a bond with sureties to the company, conditioned for the faithful performance of his duties as agent, according to the by-laws of the company. A by-law required that the agents of the company should render monthly accounts and pay each month the balance due to the company. The agent rendered his accounts regularly; but, one month, did not pay the whole balance due from him, and thereafter for more than a year his indebtedness to the company increased from month to month until it exceeded the penal sum in the bond, when, for the first time, the sureties were notified. *Held*, that these facts did not discharge the sureties. *Watertown F. Ins. Co. v. Simmons*, 131 Mass. 85.

The rules of a railway company required from the cashier monthly reports and payments; the bond of the cashier and his sureties was conditioned that he should faithfully discharge his duties as required by the rules, "a copy of which he acknowledged to have received;" the cashier neglected to account and pay over for six months, when he was dismissed, and the sureties were not notified of his default for three months afterwards. *Held*, that they were not discharged. *Pittsburgh etc. R. Co. v. Shæffer*, 59 Pa. St. 350.

Misrepresentations of Principal -- A surety cannot interpose the fraudulent or false representations of his principal whereby he was induced to become liable, as a defence to the payment of a bond without connecting the payee with such misrepresentations. *Davis Sewing Machine Co. v. Buckles*, 89 Ill. 237.

In an action upon an official bond it was held that the judge erred in refusing to charge the jury "that as a matter of law, it was no fraud upon the sureties to the bond in suit that the principal was behind in his accounts at the time the bond was given, and no

that fact, will not discharge the surety.¹

(b) NEGLIGENCE OF COMPANY.—Mere negligence on the part of the officers of a corporation in examining into the accounts of the bonded officer, or employee will not discharge the sureties upon his official bond.² Nor will a failure on their part promptly to institute proceedings against the defaulter upon discovering his delinquency.³ The officers are, however, bound upon discovering the default promptly to discharge the delinquent. If

notice was given to the sureties." *Wilmington etc. R. Co. v. Ling*, 18 S. Car. 116; s. c., 16 Am. & Eng. R. Cas. 539.

1. *Bowne v. Mt. Holly Nat. Bank*, 45 N. J. L. 360; s. c., 3 Am. & Eng. Corp. Cas. 339.

Where at the time the official bond of a cashier is executed, the directors are not aware of the fact that he has previously defrauded the bank, the sureties are not discharged by the failure of the directors to communicate that fact to them, and this although the negligence on their part may have been great in not being aware of the fact. *Tapley v. Martin*, 116 Mass. 275; *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 343; *Union Bank v. Forstall*, 11 La., O. S. 211. But see *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23; *Home Ins. Co. v. Holway*, 55 Iowa 571.

2. *United States v. Kilpatrick*, 9 Wheat. (U. S.) 720; *Inhabitants of Farmington v. Stanley*, 60 Me. 472; *Union Bank v. Forrest*, 3 Cranch (C. C.) 218; *Atlas Bank v. Brounell*, 9 R. I. 168; *Black v. Ottoman Bank*, 15 Mo. P. C. C. 472; *Watertown F. Ins. Co. v. Simmons*, 131 Mass. 85.

The sureties of a cashier or bank teller are not exonerated from liability for his defaults, by reason of the neglect of the directors to examine, as required by the by-laws, into the state of the affairs of the bank. *Amherst Bank v. Root*, 2 Met. (Mass.) 522; *Morris Canal etc. Co. v. Van Voorst*, 21 N. J. L. 100; *State v. Atherton*, 40 Mo. 209.

Where a bank had no reason to suspect a teller and there was no request by the surety to investigate his accounts, omission of the bank to make such investigation will not discharge the surety. *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 343.

That the cashier's neglect to settle the daily accounts of the teller, according to the by-laws does not discharge the teller's sureties. See *Union Bank v. Forrest*, 3 Cranch (C. C.) 218.

The fact that the cashier of a bank before giving the bond had committed frauds upon the bank which the officers by careful inspection of the books might have discovered, will not discharge the surety thereon. *Tapley v. Martin*, 116 Mass. 275; *Bowne v. Mt. Holley Nat. Bank*, 45 N. J. L. 360; 3 Am. & Eng. Corp. Cas. 339.

A corporation is not estopped to maintain an action upon their treasurer's bond by having accepted a report of an auditing committee who had approved his accounts nor by making a report founded thereon to the legislature. *Lexington etc. R. Co. v. Elwell*, 8 Allen (Mass.) 371.

The want of diligence on the part of the directors constitutes no defence on the part of the cashier for a neglect of his duty; and if the loss has been caused by his negligence, he and his sureties are liable. *Batchelor v. Planters' Nat. Bank*, 78 Ky. 435.

Misleading Statements in Report.—The cashier of a national bank, who had executed no bond, was guilty of embezzling the funds, discovery whereof might have been effected by the use of slight diligence on the part of the directory. They, however, published, according to law, a statement of the condition of the bank, from which it appeared that its affairs were being prudently and honestly administered, and from which the public had a right to believe that he was trustworthy. Afterwards persons who had seen his report became sureties on the official bond of the cashier, and for his subsequent embezzlement were sought to be held liable thereon. *Held*, that the sureties, being misled by the statement, were released. They had a right to believe that the directors, before publishing it, investigated the condition of the bank. *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23.

3. *Planters' Bank v. Lamkin*, R. M. Charl't. (Ga.) 29; *Pickering v. Day*, 3 Houst. (Del.) 474.

they fail to do so, the sureties are not liable for subsequent defaults.¹ But the corporation is not bound, on discovering that an officer is in default, at once to inform the sureties. The failure thus to notify them does not discharge them from liability.² A mere request of the sureties before breach to discharge an officer does not relieve them from liability for his subsequent defaults in office.³ Where the surety is a director, he is estopped to set up negligence on the part of the board.⁴

The books of a bank and statements sent to the comptroller of the currency are not admissible in evidence to prove the negli-

The discontinuance of an action against the principal in an official bond does not discharge the sureties when they are not injured thereby. *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 343.

1. *Phillips v. Foxall*, L. R., 7 Q. B. 666; *Sanderson v. Ashton*, L. R., 8 Exch. 73; *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. (Ky.) 564. *Compare Pittsburgh etc. R. Co. v. Schaeffer*, 59 Pa. St. 350.

Although a failure to discharge the officer after detecting a default releases the sureties from liability for subsequent defaults it will not relieve them from liability for a prior default. *State Bank v. Chetwood*, 8 N. J. L. 1. And see *Union Bank v. Forstall*, 11 La., O. S. 211.

And it is only where the default is evidently a dishonest one amounting to a breach of the bond that the corporation is bound to discharge the delinquent. *Atlantic etc. Tel. Co. v. Barnes*, 64 N. Y. 385. See *McKecknie v. Ward*, 58 N. Y. 541; *Albany Dutch Church v. Vedder*, 14 Wend. (N. Y.) 165; *Richmond etc. R. Co. v. Kasey*, 30 Gratt. (Va.) 218.

In an action upon an official bond, the court charged: "That each default of the agent, after the bond was given, in failing to pay over to the company the money collected by him, was a breach of his duty and obligation, and gave the plaintiffs the right to dismiss him; that if, knowing of these defaults, the plaintiffs condoned his fault and continued him in his agency without notice to his sureties of his misconduct, such conduct would be prejudicial to the interest of the sureties, and would discharge them." *Held*, that he erred in failing to limit the discharge to defaults occurring after the first. *Wilmington etc. R. Co. v. Ling*, 18 S. Car. 116; 16 Am. & Eng. R. Cas. 539.

Time for Discharge.—A cashier's

sureties were held liable until the time of his being discharged from office, though the order for his discharge (which was given upon discovery of his breach of trust) was received on Sunday morning, and was not executed until the afternoon of the next day. *McGill v. Bank of U. S.*, 12 Wheat. (U. S.) 511; 1 Paine (U. S.) 661.

2. *Morris Canal etc. Co. v. Van Voorst*, 21 N. J. L. 100; *Pittsburgh etc. R. Co. v. Schaeffer*, 59 Pa. St. 359; *Grocers' Bank v. Kingman*, 16 Gray (Mass.) 473; *Pell v. Tatlock*, 1 Bos. & Pul. 419; *Wilmington etc. R. Co. v. Ling*, 18 S. Car. 116; 16 Am. & Eng. R. Cas. 539.

In *State Bank v. Chetwood*, 3 Halst. (N. J.) 1, the court struck out a notice to a plea to a declaration on a cashier's bond, that no notice had been given to the sureties as to the time when damage accrued to the corporation.

The sureties on a cashier's bond are not entitled to notice of the cashier's resignation or of his default, nor need any demand be made upon them before action brought on the bond. *Grocers' Bank v. Kingman*, 16 Gray (Mass.) 473.

3. *Crane v. Newell*, 2 Pick. (Mass.) 612; *Bostwick v. Van Voorhis*, 91 N. Y. 353; 1 Am. & Eng. Corp. Cas. 337.

4. *Bostwick v. Van Voorhis*, 91 N. Y. 353; 1 Am. & Eng. Corp. Cas. 337. It was claimed in this case that defendant's testator was released, because of misconduct and embezzlement of B, the defaulting officer, in 1874. It did not appear that the directors had any knowledge that the action B complained of was fraudulent or dishonest. *Held*, that the objection was untenable; that if the directors were guilty of any negligence in not learning of the misconduct of B, defendant's testator, as one of them, was equally guilty with the others.

gence of the bank officers in failing to ascertain that the cashier was a defaulter, nor as tending to establish the fact of knowledge on the part of the bank of the existence of the defalcation.¹

(c) DEATH OF OFFICER.—The death of a corporate officer does not release the sureties on his bond.²

(d) ACCEPTANCE OF SATISFACTION FROM PRINCIPAL.—The surety on an official bond may plead that the principal has given his note in full satisfaction and that the obligee has accepted the same in full satisfaction, and discharge; but the plea in such case is not good if it does not directly aver that the note was accepted in satisfaction, and that time was given on the bond.³

(e) DATE OF APPOINTMENT.—If it is recited in the condition of the bond that a certain person has been appointed officer or agent, the surety cannot contradict this by showing that the appointment was in fact subsequent to the date or even to the delivery of the bond.⁴

(f) NOTICE BY SURETY OF WITHDRAWAL.—Whatever may be the effect of a notice given by one of the sureties of his desire to be released from liability, it cannot operate instantaneously. The directors after receiving it must have a reasonable time to act, in order to give notice to the cashier and other sureties to procure a new bond.⁵

(g) COVENANT NOT TO SUE.—A covenant given to one of several obligors, which provides that if suit should be brought against him, the instrument should become a good bar thereto, and operate as an absolute release and acquittance of the bond as to him, and which declared that it was not intended thereby to release or discharge the other sureties, is a covenant not to sue, and not a release.⁶

1. *Bowne v. Mt. Holly Nat. Bank*, 45 N. J. L. 360; s. c., 3 Am. & Eng. Corp. Cas. 339.

2. *Lionberger v. Krieger*, 88 Mo. 160; s. c., 14 Am. & Eng. Corp. Cas. 87.

3. *Morris Canal etc. Co. v. Van Voorst*, 21 N. J. L. 100.

4. The bond was dated September 25th, and the condition recited the appointment of such agent as having been already made. The appointment was in fact made and the bond delivered on the 27th of September. The defendants claimed that the agency under which the breach of the bond was claimed to have been committed, was not covered by the bond, which could be taken as referring only to some former agency. *Held*, that there being confessedly but a single agency, the defendants were estopped from showing that it was different from that which they had described in their own

bond. *Washington Co. Ins. Co. v. Colton*, 26 Conn. 42.

5. It was claimed that, by the notice above referred to, given by one of the sureties of his desire to be released, he and the other sureties were relieved from liability for subsequent defaults by B. The notice was communicated to the board of directors November 8, 1873. It appeared that before the close of that month the defalcation of B amounted to more than the penalty of the bond. *Held* that, whatever might be the effect of such a notice, it could not operate immediately, but the bank had reasonable time thereafter to act, to notify the cashier and procure a new bond; and, therefore, that the notice did not affect the liability of the sureties. *Bostwick v. Van Voorhis*, 91 N. Y. 353; s. c., 1 Am. & Eng. Corp. Cas. 337;

6. *Bowne v. Mt. Holly Nat. Bank*,

(h) ACTS OF CORPORATION.—The sureties are not discharged in consequence of the adoption of a by-law changing the time for holding the annual meeting, nor by reason of a change in the mode of conducting the business of a corporation, after the termination of a lease of its property.¹ If the obligee makes any material change in the contract with the principal without the consent of the surety, the surety will be discharged.² And if the corporation secures an extension of its charter without notice to the sureties, the sureties are not liable for the officer's defalcations under the new charter.³

8. **Action on Bond.**—Although the bond states that the sureties are bound unto the directors, yet it is in legal effect made to the company, which may maintain an action upon it in its corporate name.⁴ The sureties on an official bond severally and not jointly liable may be joined as defendants in one action on the bond.⁵ In a joint action against a cashier and the sureties on his bond, the admissions and declarations of the cashier are evidence against the sureties.⁶ Sureties when sued alone cannot, without

45 N. J. L. 360; s. c., 3 Am. & Eng. Corp. Cas. 339.

1. 1 Waterman on Corporations, p. 342; Lexington etc. R. Co. v. Elwell, 8 Allen (Mass.) 371.

2. 1 Waterman on Corporations, § 107.

A clerk was appointed at a salary of £100 a year, and a bond was executed by the defendant, conditioned for the accounting by the clerk for all moneys received by him for the use of his employers. Subsequently his salary was commuted for a payment on commission. *Held*, in an action on the bond, that the defendant was released by the change in the mode of payment. *Northwestern R. Co. v. Whinray*, 10 Ex. 77.

3. *Thompson v. Young*, 2 Ohio 334.

Where a charter was forfeited by a cashier's omission to forward duties to the State treasurer, and by a subsequent statute the charter was "revived and continued in as full force and ample a manner as if no forfeiture had taken place"—*held*, that the sureties on the cashier's bond were not liable for his defaults after the passing of that statute. *Bank of Washington v. Barrington*, 2 P. & W. (Pa.) 27.

But in *Union Bank v. Forrest*, 3 Cranch (C. C.) 218, sureties on a teller's bond were held bound for matters occurring after the charter had been renewed, without any formal re-appointment of him under the extended charter.

4. *Bayley v. Onondaga Mut. Ins. Co.*, 6 Hill (N. Y.) 476. In this case the company brought action on the bond in their corporate name, but omitted to aver that it was made to them by the name and description of the directors, etc. *Held*, nevertheless, that the declaration was sufficient after verdict or judgment by default.

Action by Directors Out of Office.—

Where a bond was given by the agent of an unincorporated joint stock company to the directors for the time being, for the faithful performance of his duties, etc., and the directors were appointed annually, and changed before a breach of the condition of the bond, the agent and his sureties were held liable to an action brought by the obligees after they had ceased to be directors. *Anderson v. Longden*, 1 Wheat. (U. S.) 85.

5. *Grocers' Bank v. Kingman*, 16 Gray (Mass.) 473, decided under Mass. Stat. of 1852, ch. 312, § 3. See *Citizens' Building Assoc.*, 45 Ohio St. 664.

6. *Amherst Bank v. Root*, 2 Met. (Mass.) 522; *Pendleton v. Bank of Kentucky*, 1 Mon. (Ky.) 177.

Books as Evidence.—Where, in a suit on a cashier's bond, issue was taken on the averment that certain false and deceptive entries were made in the books of the bank by its clerks, with the connivance of the cashier, such books (on proof that they were kept by the clerks, and that the entries were in their handwriting), are evidence for the

the consent of their principal, avail themselves by way of set-off of a debt due from the plaintiff to the principal at the commencement of the suit.¹ A recital in a bank cashier's bond that he was appointed cashier by the directors is conclusive in an action on the bond by the sureties.²

V. DIRECTORS—1. Generally.—The directors of a corporation are its chosen representatives, in whom the active management and direction of its affairs are ordinarily vested.³ They are its primary agents, and in reference to corporate property act in the relation of trustees.⁴ As to bank directors, see **BANKS AND BANKING**, 2 Am. & Eng. Encyc. of Law 114.

2. Qualification.—In the absence of a statute requiring it, the discretion of the stockholders in electing directors is not limited to persons holding stock.⁵ It is said by a prominent text-writer, that "any person of sound mind, who is capable of acting as agent for another, may be elected director or trustee of a corporation, unless some special qualification is prescribed by the charter or by-laws of the company."⁶ The individual bankruptcy of a person who is a stockholder in, and a director of a corporation which is not in bankruptcy does not incapacitate him.⁷

Votes cast for a candidate who is ineligible will not be discarded so as to give the election to a candidate having a minority of votes unless the directors knew of the ineligibility of the candidate voted for.⁸

(a) **REQUISITE THAT DIRECTORS BE SHAREHOLDERS.**—It is usually provided in the charter or act of incorporation that directors must be selected from the stockholders.⁹ While the books of the corporation are the only evidence as to who are

purpose of laying a foundation for other testimony to show fraud, etc., by the cashier. *Union Bank v. Ridgely*, 1 Harr. & G. (Md.) 327.

1. *Beard v. Union etc. Pub. Co.*, 71, Ala. 60; s. c., 5 Am. & Eng. Corp. Cas. 1.

2. *Lionberger v. Krieger*, 88 Mo. 160; s. c., 14 Am. & Eng. Corp. Cas. 87.

3. *Maynard v. Firemen's Fund Ins. Co.*, 34 Cal. 48.

4. **FIDUCIARY RELATIONS**, *infra*.

5. *State v. McDaniel*, 22 Ohio St. 354; *Beardsley v. Johnson*, 121 N. Y. 224; *Bainbridge v. Smith*, L. R. 1891 (2), 13 Ch. D. 606.

6. *Morawetz Priv. Corp.* (2d ed.), § 505.

Residence Out of State.—The Oregon statute permitting a minority of the directors of corporations constructing railroads or canals to reside out of the State, applies to a corporation whose railroad, running from its furnace to

its mine, is only three miles long, and whose short canal is not navigable. *State v. Smith*, 15 Oreg. 98; s. c., 19 Am. & Eng. Corp. Cas. 496.

Practical Mechanics.—A provision in a bank charter requiring a certain portion of the directors to be practical mechanics—*Held*, not to require that they should be in actual practice at the time of the election. *Gray v. Mechanics' Bank*, 2 Cranch (C. C.) 51.

Treasurer and Director.—Unless the by laws or statute expressly provide otherwise, the same person may be treasurer and director of a corporation. *Sargent v. Webster*, 13 Met. (Mass.) 497.

7. *Atlas National Bank v. Gardner Co.*, 8 Biss. (U. S.) 537.

8. Re-election of *St. Lawrence Steamboat Co.*, 44 N. J. L. 529; s. c., 1 Am. & Eng. Corp. Cas. 359; *Atlas Bank v. T. B. Gardner Co.*, 8 Biss. (U. S.) 537.

9. Where the charter provided that stockholders only should be elected

the stockholders and as such entitled to vote at elections, yet, with respect to the qualifications of a director, the books are not conclusive. A person may be qualified to be a director whose vote cannot be received at an election by reason of the transfer of stock to him not being entered on the books; and he may appear as a stockholder on the books and still be disqualified for the office of director for reasons *aliunde*.¹

(b) ELECTION OF DISQUALIFIED PERSON.—If a corporation elect a person director who is ineligible to that office, and permits him to act as such, the corporation will be bound by the acts which he performs within the scope of the authority possessed

directors, persons having no interest in the stock, but fraudulently and collusively receiving the transfer of a share to qualify them, are not eligible; and such fraud on the charter will prevent those participating in it from receiving any protection under its provisions to escape private responsibility. *Bartholomew v. Bentley*, 1 Ohio St. 37.

In *Nevada*, it has been held that a person who "holds" shares issued in his name should be recognized as a stockholder, as well as one who "owns" them. Thus, G owned certain shares of stock in a corporation organized for the purpose of maintaining a ditch, etc.; he gave them to his son, with the request that new certificates should be issued in his son's name and transferred upon the books of the company. This request was complied with. The son paid nothing for the stock, the transfer being made in order that his son might be eligible to the office of trustee. *Held*, upon a review of the statutes of this State, that such a transaction constituted the son a stockholder in the corporation, and made him eligible to the office of trustee. *State v. Leete*, 16 Nev. 242.

A bought stock with his wife's money as an investment for her, but the certificate was accidentally made out to him. At first he ordered it to be changed, but afterwards concluded to take the stock himself, and countermanded the order, and transferred the cost from his wife's account to his own. *Held*, that he was a *bona fide* holder of stock and eligible as director. Re-election of St. Lawrence Steamboat Co., 44 N. J. L. 359; s. c., 1 Am. & Eng. Corp. Cas. 359.

Under the New York act of 1848, the directors named in the certificate of incorporation to manage the com-

pany for the first year are not required to be shareholders. *Davidson v. Westchester Gaslight Co.*, 99 N. Y. 558.

Stockholders in Other Corporations.—The provision of the Connecticut act of 1876 (Sess. Laws, 1876, p. 107) that any one of the directors or executive officers of any domestic corporation, shall be eligible to be a director of such other corporation, was not repealed by the provision of the Joint Stock act of 1880 (Sess. Laws 1880, p. 561), that the directors of joint-stock corporations shall be stockholders therein. *Chase v. Tuttle*, 55 Conn. 455; s. c., 19 Am. & Eng. Corp. Cas. 122.

1. *Re St. Lawrence Steamboat Co.*, 44 N. J. L. 529; 1 Am. & Eng. Corp. Cas. 350. In this case it was also held that if the stock was legally issued, and the legal title is in the stockholder, he is, *prima facie*, capable of being a director, and his right to be a director, in virtue of his legal title to such stock, can be impeached only by showing that title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose in furtherance of some fraudulent scheme touching the organization or control of the company.

Where the statute declares that no person shall be eligible to the office of director of a corporation unless he is a stockholder therein, and where the by-laws of a corporation provide that transfers of stock shall be made only on the corporation books, and that the transfer-book shall be closed for ten days previous to the day of the annual meeting of the stockholders, although the purchaser of stock, who has not caused his transfer to be recorded, might be refused permission to vote, or to receive dividends, yet he may be elected a director by the vote of a majority of the stockholders. *State v.*

by a director.¹ And, as his acts cannot be questioned by the corporation, they cannot be by those who claim under the corporation or collaterally.²

3. Meetings—(a) DIRECTORS MUST ACT AS A BOARD.—The legal effect of investing the management of the affairs of a corporation in the board of directors, is to invest the directors with such government and management *as a board*, and not otherwise. This is in accordance with the general rule that the governing body of a corporation, as such, are agents as a board, and not individually. Hence, it follows that they have no authority to act except when assembled at a board meeting. The separate action individually of the directors is not the action of the constituted body of men clothed with corporate powers.³

(b) NUMBER NECESSARY TO MEET AND ACT.—In the absence of a different regulation a majority of the board of directors is necessary to constitute a legal meeting,⁴ although at a legal

Smith, 15 Oreg. 98; s. c., 19 Am. & Eng. Corp. Cas. 496.

1. Despatch Co. v. Bellamy Mfg. Co., 12 N. H. 205; s. c., 37 Am. Dec. 203; Atlas Nat. Bank v. Gardner Co., 8 Biss. (U. S.) 537. See DE FACTO OFFICERS—VALIDITY OF ACTS, 5 Am. & Eng. Encyc. of Law 94.

2. Atlas Nat. Bank v. Gardner Co., 8 Biss. (U. S.) 537.

3. Baldwin v. Canfield, 26 Minn. 43; *In re* Marseilles Extension R. Co., L. R., 7 Ch. App. 161; D'Arcy v. Tamar etc. R. Co., L. R., 2 Exch. 158; Schumm v. Seymour, 24 N. J. Eq. 143; Lockwood v. Thunder Bay etc. Co., 42 Mich. 536; First Nat. Bank v. Christopher, 40 N. J. L. 435; Junction R. Co. v. Reeve, 15 Ind. 237; Cammeyer v. United German Churches, 2 Sandf. Ch. (N. Y.) 186; Yellow Jacket Silver Min. Co. v. Stevenson, 5 Nev. 224; Hillyer v. Overman Silver Min. Co., 6 Nev. 51; Stoystown etc. Turnpike Road Co. v. Craver, 45 Pa. St. 386; Edgerly v. Emerson, 23 N. H. 555; s. c., 55 Am. Dec. 207; Boss v. Crockett, 14 La. An. 823; Appeal of Rittenhouse (Pa.), 21 Atl. Rep. 254; Buttrick v. Nashua & Lowell R., 62 N. H. 413; 13 Am. Rep. 578; Reilly v. Oglebay, 25 W. Va. 36; Herrington v. Liston District Township, 47 Iowa 11.

In *Vermont* it appears that a somewhat different view is allowed, as in the case of the Bank of Middlebury v. Rutland etc. R. Co., 30 Vt. 159. In that case it is held that directors may bind their corporation by acting separately if this is their usual practice in transacting the corporate business.

In Baldwin v. Canfield, 26 Minn. 43,

the rule stated in the text was applied to a case in which a deed of real estate belonging to the corporation and executed in the name of such corporation by all the directors acting separately and not as a board, and without any authority from the board of directors, was held void as a conveyance, and equally ineffectual as a contract to convey.

Absence of President.—It is not necessary that the president of a manufacturing corporation should be present at a meeting of the directors in order to authorize them to transact business. Sargent v. Webster, 13 Met. (Mass.) 497.

Order of Business.—Directors are entitled to take up business at a meeting in any order they think proper. *In re* Cawley & Co., L. R., 42 Ch. Div. 209; 31 Am. & Eng. Corp. Cas. 425.

4. Ellsworth Woolen Mfg. Co. v. Faunce, 79 Me. 440; Lockwood v. Mechanics' Nat. Bank, 9 R. I. 308, holding that a by-law adopted at a meeting of six *ad interim* directors of a national bank which had twelve directors before its conversion is invalid because not adopted by a majority or quorum of the board. Sargent v. Webster, 13 Met. (Mass.) 497; Cram v. Bangor House Proprietary, 12 Me. 354; Price v. Grand Rapids etc. R. Co., 13 Ind. 58; Hamilton v. Grand Rapids etc. R. Co., 13 Ind. 347; Cowley v. Grand Rapids etc. R. Co., 13 Ind. 61; Edgerly v. Emerson, 23 N. H. 555; s. c., 55 Am. Dec. 207; Wells v. Rahway etc. Rubber Co., 19 N. J. Eq. 402; Booker v. Young, 12 Gratt. (Va.) 303; Leavitt v. Oxford etc. Min. Co., 3 Utah 265; 4 Am. &

meeting where a quorum is present a majority may act.¹

(c) **NECESSITY OF NOTICE.**—But a bare quorum is capable to act and bind the company only at a meeting duly convened with proper notice given to all the members of the board.² But objections based upon the want of sufficient notice to the direct-

Eng. Corp. Cas. 234; *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 79; *St. Louis Colonization Assoc. v. Hennessy*, 11 Mo. App. 555.

A mortgage authorized by a vote of four directors of an incorporated company, when their charter required that five should constitute a quorum, is null and void, it never having received the proper sanction of the board. *Holcomb v. Managers New Hope etc. Bridge Co.*, 9 N. J. Eq. 457.

A contract by a board of directors cannot be changed by less than a quorum of the board. *Tennessee etc. R. Co. v. East Alabama R. Co.*, 73 Ala. 426.

An election held for seven directors of a private corporation created under Pennsylvania General Corporation act of 1873, at which the cumulative system of voting was employed, and five directors only received the necessary pluralities, is valid as to the five so elected, and they have full power to act as a board, even though the two remaining directors were not chosen. *Wright v. Com.*, 109 Pa. St. 560.

Consolidation of Two Companies.—An original charter granted by the State of Connecticut required four directors to constitute a quorum. The company was afterwards merged with a corporation chartered by Rhode Island, whose charter was silent as to the number required. By the contract of merger, which was affirmed by the Rhode Island legislature, the latter company surrendered its franchises, powers and privileges to the Connecticut company, and the Connecticut legislature, by an act confirming the merger, declared that all the rights of the old company in this State should be preserved to the new one. *Held*, that after the merger, four only, and not a majority, were necessary for a quorum. *Lane v. Brainerd*, 30 Conn. 565.

1. *Smith v. Los Angeles Immigration & L. Co-op. Assoc.*, 78 Cal. 289; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; *Sargent v. Webster*, 13 Met. (Mass.) 497; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; s. c., 27 Am. Dec. 203; *Foster v. Mullanphy Plan-*

ing Mill Co., 92 Mo. 97. See *Howard v. Maine Industrial School etc.*, 78 Me. 230.

2. *Story v. Furman*, 25 N. Y. 214; *Thompson v. Williams*, 76 Cal. 153; *Simon v. Sevier Co. Co-op. Assoc.*, (Ark.), 14 S. W. Rep. 1101.

A resolution by two directors of a corporation in the absence of a third not sufficiently notified will not authorize the execution of a mortgage whereby the latter's property is taken from his possession. *Doyle v. Mizner*, 42 Mich. 332.

But where the directors of a corporation execute a lease of its whole property without notice to the president who is a director, the lessees taking with notice of the invalidity of their title, will be decreed to account in equity. *Kersey Oil etc. Co. v. Oil Creek etc. R. Co.*, 5 W. N. C. (Pa.) 144.

Application was invited by a company for 106,000 preference shares. At a meeting of all the directors, five in number, it was resolved not to allot till 14,000 shares were applied for. At a meeting of two (a quorum of) directors, held shortly afterwards, it was resolved that the previous resolution was cancelled, and that the shares then applied for, about 3,000, should be allotted. The meeting was held at two o'clock, on a few hours' notice to two of the directors who did not attend, of whom one did not receive his notice till the next day, and the other gave notice he could not attend till three; the fifth director was abroad and no notice was sent to him. *Held*, that the allotments made under the later resolution were void against the allottees. *In re Homer etc. Gold Mines*, L. R., 38 Ch. Div. 546; 24 Am. & Eng. Corp. Cas. 28.

The rule stated in the text is also approved by MR. MORAWETZ, in his work on Corporations (2nd ed.), § 532. *Compare*, however, *Bank v. Flour Co.*, 41 Ohio St. 552, and *Edgerly v. Emerson*, 23 N. H. 555; s. c., 55 Am. Dec. 207, where it was held that a corporation is bound where a quorum of the directors meet and unite in any determination whether the other directors are or are not notified.

ors of the meeting at which certain action was taken may be waived.¹

(d) REQUISITES OF NOTICE.—Where the notice of a directors' meeting is sent by mail, the person notified must have, in the absence of any regulation, a reasonable time after receiving it to reach the place of meeting by traveling in the customary manner.² Where the company's by-laws are prescribed by the directors and not by the stockholders, if the directors disregard a by-law directing what notice shall be given of a special meeting, the corporation cannot set up the irregularity in order to impair as towards third persons the director's act.³ And the failure on the part of some of the directors who were out of the State to receive notice does not invalidate the action of the majority forming a legal quorum at such meeting.⁴ It appears, also, that the purpose of the meeting need not be specified in the notice.⁵

(e) PRESUMPTION OF NOTICE, REGULARITY, ETC.—Where there is a common-law quorum present at a meeting of a board of directors, there is a presumption that due and legal notice was given of the meeting, unless the contrary appears.⁶ And, generally, the rule is settled, that where at a board meeting an act is ordered to be done, without objection either then or subsequently made to the regularity of the meeting, and the act thus author-

1. *Reed v. Hayt*, 109 N. Y. 659; 21 Am. & Eng. Corp. Cas. 295.

2. *Covert v. Rogers*, 38 Mich. 363, holding that notice sent June 20th from Hubbardston Mich. to Cleveland, Ohio, for a meeting to be held on the 23rd, was sufficient, it being shown that a traveller leaving Hubbardston on the morning of one day, could go to Cleveland and get back by the evening of the next. The court said: "Corporations have power under the statute to make specific provisions fixing the time and manner of giving notice of special meetings, and if they do not avail themselves of the power thus given, but leave the entire matter to the discretion of one of their principal officers, they have no right to complain of the insufficiency of the notice given, so long as it appears that sufficient time was given to enable the parties to be present if they so desired."

3. *Samuel v. Holladay*, 1 Woolw. (U. S.) 400.

4. *Chase v. Tuttle*, 55 Conn. 455; 19 Am. & Eng. Corp. Cas. 122.

5. A mortgage was executed under a resolution passed at a special meeting of the directors. The resolution recited that written notices of the meeting had been served on each director. The purpose of the meeting was not

specified in the notices. *Held*, that the meeting was regularly called, and the mortgage valid. *Granger v. Original Empire Mill etc. Co.*, 59 Cal. 678. See *Chase v. Tuttle*, 55 Conn. 455; 19 Am. & Eng. Corp. Cas. 122.

6. *Leavitt v. Oxford etc. Min. Co.*, 3 Utah 265; 4 Am. & Eng. Corp. Cas. 234; *Chouteau Ins. Co. v. Holmes*, 68 Mo. 601; *Lane v. Brainerd*, 30 Conn. 565; *Sargent v. Webster*, 13 Met. (Mass.) 497; *Wells v. Rahway etc. Rubber Co.*, 19 N. J. Eq. 402; *Edgerly v. Emerson*, 23 N. H. 555; s. c., 55 Am. Dec. 207.

Where a proposition from plaintiff to the defendant—a corporation—offers to perform certain duties for the corporation upon conditions, the presumption that such proposition was presented to the board of trustees of the corporation and acted on by them favorably, which arises from the fact that the plaintiff performed the duties, and the board allowed his bill therefor, may be overcome by direct and positive proof to the contrary. *Hillyer v. Overman etc. Min. Co.*, 6 Nev. 51.

Purpose of Meeting.—Where the record of a meeting of the directors of a corporation recites that the proceedings recorded were had at a meeting called for a certain purpose, it will be pre-

ized is afterwards performed, its legality cannot afterwards be questioned in a suit in equity on the ground of irregularity.¹

(*f*) PLACE OF MEETING.—Where the by-laws of a corporation authorizes the president to call special meetings of the directors upon giving notice of time and place thereof, and such place is not prescribed by the by-laws, the president may call such meeting at a place other than the particular place of business of the corporation.² Although a corporation exists only within the State that created it; yet it is well settled that it may by its agents make contracts and transact business in another State and sue and be sued therein; hence the directors, who are but the agents of the corporation, may hold their meetings in a foreign State if they so desire, and the transactions of such meeting will be upheld.³

(*g*) MINUTES OF MEETING.—It is not necessary that all the doings of a board of directors should be entered upon their records; but the corporation will be bound by any verbal order or direction in which a majority of such directors concur in relation to any business deputed to them.⁴ But, where a resolution of the board of directors is duly entered upon the minutes and

sumed until the contrary appears, that the purpose of the meeting was specified in the notice thereof sent to the respective directors. *Chase v. Tuttle*, 55 Conn. 455; 19 Am. & Eng. Corp. Cas. 122.

1. *Samuel v. Holladay*, 1 Woolw. (U. S.) 400.

2. *Corbett v. Woodward*, 5 Sawy. (U. S.) 403.

3. *Wood Hydraulic etc. Co. v. King*, 45 Ga. 34; *Arms v. Conant*, 36 Vt. 745; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Corbett v. Woodward*, 5 Sawy. (U. S.) 403; *Wright v. Bundy*, 11 Ind. 398; *Humphreys v. Mooney*, 5 Colo. 282; *Bellows v. Todd*, 39 Iowa 209; *Ohio etc. R. Co. v. McPherson*, 35 Mo. 13.

In *Galveston etc. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 477, it was objected that a mortgage executed by a Texas railroad company was not properly executed because the meeting of the directors by which the mortgage was authorized was held in New York city. It was held, however, that the mortgage was valid.

In *McCall v. Bryam Mfg. Co.*, 6 Conn. 427, it was held to be competent for the directors of a manufacturing company, incorporated by the State of Connecticut, without restriction on the place of holding their meetings, to meet in another State and there appoint a secretary.

In *Bellows v. Todd*, 39 Iowa 209, it was held that the directors of a corporation may authorize a conveyance of real estate at a meeting held outside of the State from which it derives its charter. In the exercise of his power they act, not as a corporation but in the capacity of its agents.

In *State v. Alvord*, 63 Barb. (N. Y.) 415, the Supreme Court of New York held that although another State cannot create a corporation within the State of New York, yet it is no objection to the corporate acts of foreign corporations done in that State that they are authorized by a meeting of the directors held in New York, when the acts so authorized are not repugnant to the policy of the laws of New York.

The agents and officers of a corporation chartered in one State may bind it by contracts and engagements made in other States; and the minutes of its board of directors may be used as evidence of the acts of the board, even though the meetings of the board appear to have been held out of the chartering State. *Wood Hydraulic etc. Co. v. King*, 45 Ga. 34. Compare *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623; *Hilles v. Parrish*, 14 N. J. Eq. 380.

4. *Cram v. Bangor House Proprietary*, 12 Me. 354; *Heintzelman v. Druids' Relief Assoc.*, 38 Minn. 138.

signed by the proper officers, it has been held to be a memorandum in writing as required by the statute of frauds, and as such could be lawfully enforced.¹ Such a resolution duly entered and signed is also held to be a contract in writing within the meaning of the statute of limitations.²

4. **Powers**—(a) **GENERALLY**.—The directors of a corporation do not exercise a delegated authority in the sense in which the rule applies to agents and attorneys, who exercise the powers especially conferred on them and no others. They are to all purposes of dealing with others, the corporation, and when convened as a board are the primary possessors of all the powers which the charter confers.³ Although they are selected by the majority of the shareholders by reason of their peculiar fitness to manage the corporate affairs, yet it does not follow that the majority can control them or interfere with their management of the business of the company. The authority of the board of directors is derived from the unanimous agreement of the shareholders expressed

1. *Argus Co. v. Mayor etc. of Albany*, 55 N. Y. 495. *Johnson v. Trinity Church Soc.*, 11 Allen (Mass.) 123; *Tufts v. Plymouth Gold Min. Co.*, 14 Allen (Mass.) 411; *Chase v. Lowell*, 7 Gray (Mass.) 35; *Grimes v. Hamilton Co.*, 37 Iowa 294; *Himrod Furnace Co. v. Cleveland etc. R. Co.*, 22 Ohio St. 451. In the few cases which seemingly hold a contrary doctrine, the resolutions were deemed rather propositions for a contract than final acceptances of a contract. See *Flint v. Pierce*, 99 Mass. 69; *Dunham v. Boston*, 12 Allen (Mass.) 376; *Wade v. Newbern*, 77 N. Car. 460.

2. *Texas Western R. Co. v. Gentry*, 69 Tex. 625; 33 Am. & Eng. R. Cas. 46, holding that the minutes of a corporation accepting a conveyance constitute a contract in writing, on which an action may be brought in four years, under Rev. Stat. Tex., art. 3205, enacting that an action for debt, where indebtedness is evidenced or founded on any contract in writing shall be commenced and prosecuted within four years from accrual of cause of action.

A resolution of the board of directors of a private corporation, reciting that the president's salary was fixed at a certain amount during the preceding year, is competent evidence of the fact; but it does not show a contract for a salary prior to that time. *Smith v. Woodville Consolidated Silver Min. Co.*, 66 Cal. 398.

3. *Hoyt v. Thompson*, 19 N. Y. 207; *Burrill v. Nahant Bank*, 2 Met. (Mass.)

163; *Star Line v. Van Vliet*, 43 Mich. 364; *Genessee Sav. Bank v. Michigan Barge Co.*, 52 Mich. 438; *Clevel etc. R. Co. v. Himrod Furnace Co.*, 37 Ohio St. 321; *Tripp v. Swansea Paper Co.*, 13 Pick. (Mass.) 291; *Miller v. Rutland etc. R. Co.*, 36 Vt. 452; *Bank of Middlebury v. Edgerton*, 30 Vt. 182; *Union Mut. F. Ins. Co. v. Keyser*, 32 N. H. 313; *Leavitt v. Oxford etc. Min. Co.*, 3 Utah 265; s. c., 4 Am. & Eng. Corp. Cas. 234.

The directors or dominant body of a corporation is deemed to be the mind and soul of the corporate entity, and what they do as the representative of the corporation, the corporation itself is deemed to do. *Maynard v. Firemen's Fund Ins. Co.*, 34 Cal. 48.

The board of directors of a corporation may control the corporate property within the limit which the law has assigned to the exercise of corporate authority. *Wright v. Oroville Gold etc. Min. Co.*, 40 Cal. 20.

But the powers of the directors to bind the corporation by contract depends exclusively upon the charter and by-laws. *Town of Royalton v. Royalton etc. Turnpike Co.*, 14 Vt. 311.

A stockholder's resolution that "it is not deemed necessary to adopt by-laws, for the reason that the articles of incorporation provide that the control and management of the corporation shall be in the hands of the board of directors"—held, to leave the entire control of the corporate business with the

in their charter or articles of association, and hence those powers which it is intended shall belong to the directors exclusively, cannot be impaired by the majority or any other agent.¹ And as the powers of directors are either defined by the express language of the charter or are derived by necessary implication therefrom, their acts will not bind or affect in any manner the corporation unless they are within the scope of their ordinary powers.² So what powers do not vest either expressly or by necessary implication in the board of directors, or are not

directory. *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439.

Limitation on Powers.—By-law.—The directors of a company have no power under a by-law giving them more general authority to amend the by-laws, to disregard or alter a by-law intended to impose a limitation on their powers. *Stevens v. Davison*, 18 Gratt. (Va.) 819.

Power of Amotion.—The requirement of Wis. Laws of 1872, ch. 176, § 3, that the trustees of the Northern Wisconsin hospital for the insane shall, before entering upon the "duties of their office," take an oath, etc.—construed to declare them to be merely officers. Consequently, the board not being a corporation has no power of amotion. *State v. Kuehn*, 34 Wis. 229.

Power to Settle Pending Action.—The directors of a corporation, acting *bona fide* and in the exercise of their best judgment, have authority to settle a pending action. *Donohoe v. Mariposa Land & Min. Co.*, 66 Cal. 317.

"Corporate Powers."—Acts of an Iowa corporation in acquiring property in *Illinois*, and in giving notes and mortgages therefor, are not "corporate acts," but such as may be done by the directors in the exercise of their powers as agents, and may be performed in *Illinois*. *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439.

Joint Management of Railroad Lines.—Two railroad corporations entered into a contract for the joint management of their lines, including certain railroads leased to them. The contract fixed the proportion of the net earnings to be drawn by each. The directors of the plaintiff company authorized the deduction from the net earnings of interest on the cost of a new depot built by the defendant company for the accommodation of the joint traffic. It was also agreed by the two boards of directors that the defendant company should purchase a controlling interest

in two roads leased to them and managed under the joint contract, and that the excess of interest on the purchased money over dividends earned should be borne in proportion to their shares of the net earnings. *Held*, that the directors of the plaintiff company had acted within their powers. *Nashua etc. R. Co. v. Boston etc. R. Co.*, 27 Fed. Rep. 821.

1. *1 Morawetz Pri. Corp.*, § 511.

2. *Soper v. Buffalo etc. R. Co.*, 19 Barb. (N. Y.) 310; *East River Bank v. Hoyt*, 41 Barb. (N. Y.) 441; *Adriance v. Roome*, 52 Barb. (N. Y.) 399; *Risley v. Indianapolis etc. R. Co.*, 1 Hun (N. Y.) 202; *Pittsburgh etc. R. Co. v. Alleghany Co.*, 79 Pa. St. 210; *Ridley v. Plymouth etc. Bank Co.*, 2 Ex. 711; *Bargate v. Shortridge*, 5 H. L. Cas. 297; *Athenæum Life Ins. Soc. v. Poorley*, 3 De G. & J. 294; *Re German Min. Co.*, 27 Eng. L. & Eq. 158; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Cas. (Pa.) 180.

The board of directors ordinarily may do any act in the general range of the business of the company which the company can do, unless restrained by the charter and by-laws. *Bank of Middlebury v. Rutland etc. R. Co.*, 30 Vt. 159; *Whitwell v. Warner*, 20 Vt. 425; *Wright v. Oroville Gold etc. Min. Co.*, 40 Cal. 20.

And this authority extends to contracting debts and pledging or conveying real or personal estate in payment or as security. *Dispatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; *Bank of Middlebury v. Edgerton*, 30 Vt. 182; *Augusta Bank v. Hamblet*, 35 Me. 491; *Miller v. Rutland etc. R. Co.*, 36 Vt. 452; *Sargent v. Webster*, 13 Met. (Mass.) 497; *Burrell v. Nahant Bank*, 2 Met. (Mass.) 163; *Hoyt v. Thompson*, 19 N. Y. 207; *Gordon v. Preston*, 1 Watts (Pa.) 385.

But directors have no power to alienate corporate property essentially necessary for the transaction of the com-

exercised by it, must reside in the whole body of the corporation, and in emergencies and contingencies in which the forms of procedure prescribed by the charter fail to accomplish the purposes contemplated, the stockholders have the right to exercise the powers required, in order to preserve the corporate existence. The power to change fundamentally the character or existence of a corporation is not contained in the power vested in the board of directors, to manage the business or affairs of the company. This is a right of individual stockholders, and can only be exercised with the consent of each stockholder, or upon compensation being made to the dissentients.¹ A change so organic or fundamental as that of increasing the capital stock of the corporation beyond the limit fixed in the charter cannot be made by the directors alone unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock. Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital, are necessarily fundamental to their character, and cannot, on general principles, be made without the express or implied consent of the members.²

(b) EXPRESS POWERS.—What the express powers actually are will be gathered from the language of the charter or by-laws, not unfrequently somewhat obscure and contradictory. They cannot be contrary to statutory enactments or to public policy; and if any statutes contemplate, that associations coming within their purview, or the members thereof, shall have certain rights or discharge certain functions, all provisions or by-laws derogatory thereto will be simply void.³

(c) IMPLIED POWERS.—Directors will have not all but only some of the powers impliedly belonging to the corporation. They will have none which are denied them either expressly by

pany's business. *Rollins v. Clay*, 33 Me. 132. Nor to destroy the corporate existence, or give away its funds, or deprive it of any of its means to accomplish the full purpose for which it was chartered. *Penobscot etc. R. Co. v. Dunn*, 39 Me. 587; *Burke v. Smith*, 16 Wall. (U. S.) 395.

1. *Ex parte Wheeler*, 2 Abb. Pr., N. S. (N. Y.) 361; *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578; *State v. Adams*, 44 Mo. 570.

The directors of themselves cannot make any great or material change in enlargement of corporate powers or purposes. *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Chicago etc. R. Co. v. Allerton*, 18 Wall. (U. S.) 233. But see *State v. Adams*, 44 Mo. 570; *Day-*

ton etc. R. Co. v. Hatch, 1 Dis. (Ohio) 84.

They have no power to assent to an alteration of its charter when not themselves the corporate body. *Com. v. Cullen*, 13 Pa. St. 133.

2. *Chicago etc. R. Co. v. Allerton*, 18 Wall. (U. S.) 233; *Black v. Delaware etc. Canal Co.*, 22 N. J. Eq. 133.

An act which to all intents terminates the corporation, by entirely taking from it all power to fulfil the purposes of its organization, is beyond the power of the trustees. *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578.

3. *Re General Company for the Promotion of Land Credit*, L. R., 5 Ch. 363; *Re Financial Corporation*, L. R., 2 Ch. 714.

the instruments or resolutions constituting them, or impliedly by necessary deduction therefrom. They will have none which are not required to enable them properly and expeditiously to accomplish their duties, and to carry on economically and successfully the affairs of their constituents. They may ordinarily do any act in the general range of the business of the company which the company can do, unless restrained by the charter and by-laws.¹ And this authority extends to contracting debts and pledging or conveying real or personal property in payment, or as security.²

A resolution that "it is not deemed necessary to adopt by-laws for the reason that the articles of incorporation provide that the control and management of the corporation shall be in the hands of the board of directors," passed by the stockholders, leaves the entire control of the corporate business with the directory.³

(d) **DIRECTORS CANNOT HAVE THEIR POWERS INCREASED BY THE LEGISLATURE.**—The management of the concerns of the corporation does not give the directors power to apply to the legislature for an increase of their powers. Such application can be made by the authority of the company only.⁴

(e) **WHEN DIRECTOR'S POWER MAY BE DELEGATED TO ANOTHER.**—The directors convened as a board are the primary possessors of all the powers which the charter confers, and like private principals they can delegate to the agents of their own appointment the performance of any acts which they can themselves perform.⁵ They may delegate authority to a committee of their own number to alienate or mortgage real estate.⁶ So a board of directors may delegate by by-laws to a quorum the power to

1. *Wright v. Oroville Gold etc. Min. Co.*, 40 Cal. 20.

So contracts entered into by them will therefore always be binding on the corporation, where they are not outside of the scope of the corporate powers. *Bank of Middlebury v. Rutland etc. R. Co.*, 30 Vt. 159; *Hoyt v. Thompson*, 19 N. Y. 207; *Augusta Bank v. Hamblet*, 35 Me. 491; *Bank of Middlebury v. Edgerton*, 30 Vt. 182; *Whitwell v. Warner*, 20 Vt. 425; *Protection L. Ins. Co. v. Foote*, 79 Ill. 361; *Union Mut. Ins. Co. v. Keyser*, 32 N. H. 313; *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565; *Dayton etc. R. Co. v. Hatch*, 1 Dis. (Ohio) 84; *Reicord v. Central Pac. R. Co.*, 15 Nev. 167; 2 Am. & Eng. R. Cas. 394; *Hodder v. Kentucky etc. R. Co.*, 7 Fed. Rep. 793; 2 Am. & Eng. R. Cas. 640; *Fackiner v. Grand Junction R. Co.*, 4 Ont. Rep. Ch. Div. 350; 16 Am. & Eng. R. Cas. 591; *Leavitt v. Oxford & Geneva Silver Min. Co.*, 3 Utah 265; 4 Am. & Eng. Corp. Cas. 234; *Shawhan v. Zinn*, 79 Ky. 300; 4 Am. & Eng. Corp. Cas.

243; *Cicotte v. Anciaux*, 53 Mich. 227; 5 Am. & Eng. Corp. Cas. 279.

2. *Sargent v. Webster*, 13 Met. (Mass.) 407; *Burrill v. Nahant Bank*, 2 Met. (Mass.) 163; *Lordon v. Preston*, 1 Watts (Pa.) 385; *Hoyt v. Thompson*, 19 N. Y. 207; *Miller v. Rutland etc. R. Co.*, 36 Vt. 452; *Dispatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; *Augusta Bank v. Hamblet*, 35 Me. 491.

3. *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439.

4. In *Marlborough Mfg. Co. v. Smith*, 2 Conn. 583, it was held that the resolution of an assembly giving power to the company to assess the stockholders is void because the application was made by the directors only, without any authority from the company.

5. *Hoyt v. Thompson*, 19 N. Y. 207.

6. *Waite v. Windham Co. Min. Co.*, 36 Vt. 18; *Corn Exch. Bank v. Cumberland Coal Co.*, 1 Bosw. (N. Y.) 436; *Bank Commrs. v. Bank of Buffalo*, 6 Paige (N. Y.) 497; *Olcott v. Tioga R.*

transact ordinary business.¹ They also have power to authorize one of their number to sign any securities belonging to the company.² So where they have power to appoint agents, the authority of those agents does not necessarily cease with the termination of that board.³

(f) DISCRETIONARY POWERS.—The board of directors of a corporation cannot be controlled in the exercise of the discretionary powers conferred upon them.⁴ When a wrong has been done to a corporation the advisability for suing for redress and the time and manner of proceeding are largely entrusted to their judgment. This discretionary power confided to agents of a corporation cannot be usurped by its shareholders, and therefore the courts will not interfere at the suit of the shareholder to redress an injury suffered by the corporation merely because its managing agents have, in good faith, refused to begin a suit in the name of the corporation. A director cannot exercise his discretion in a matter involving his own individual interest, and the rule that prohibits one from being judge in his own cause applies so far to directors that the decision of the interested director is not conclusive, but it is subject to be set aside if it is not equal and just and free from any taint of fraud and partiality.⁵

(g) FIDUCIARY RELATIONS.—The director of a corporation entrusted by others with powers which are to be exercised for the common and general interests of the corporation, and not for his private interest, occupies the relation of trustee to such corporation and its property.⁶ He falls therefore within the great rule by which equity requires that confidence shall not be abused

Co., 27 N. Y. 546; *Western Bank v. Giltstrap*, 45 Mo. 419.

1. *Hoyt v. Thompson*, 19 N. Y. 207.

2. *Spear v. Ladd*, 11 Mass. 94; *Northampton Bank v. Pepoon*, 11 Mass. 288; *Stevens v. Hill*, 29 Me. 133.

3. *Dedham Bank v. Chickering*, 3 Pick. (Mass.) 335; *Northampton Bank v. Pepoon*, 11 Mass. 288; *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 431; *Exeter Bank v. Rogers*, 7 N. H. 32; *Anderson v. Longden*, 1 Wheat. (U. S.) 85. See *Thompson v. Young*, 2 Ohio 334.

4. *Tuscaloosa Mfg. Co. v. Cox*, 68 Ala. 71; *Smith v. Prattville Mfg. Co.*, 29 Ala. 503; *Pratt v. Pratt*, 33 Conn. 446; *Banet v. Alton etc. R. Co.*, 13 Ill. 504; *Dudley v. Kentucky High School*, 9 Bush (Ky.) 578; *Karnes v. Rochester etc. R. Co.*, 4 Abb. Pr., N. S. (N. Y.) 110; *State v. Bank of Louisiana*, 6 La., O. S. 745; *Hedges v. Paquett*, 3 Oreg. 77; *Elkins v. Camden etc. R. Co.*, 36 N. J. Eq. 241; *Sims v. Street R. Co.*, 37 Ohio St. 557; *Oglesby v. Attrill*, 105 U. S. 605; *Bardstown & G. R. Turn-*

pike Co. v. Rodman (Ky.), 13 S. W. Rep. 918.

The action of the officers of an incorporated company, without any violation of the charter or constitution of the company, cannot be disregarded or controlled by any court, at the instance of a stockholder, unless it is shown to have been a wilful abuse of their discretion, or the result of bad faith, or of a wilful neglect or breach of a known duty. *Smith v. Prattville Mfg. Co.*, 29 Ala. 503.

5. *Hedges v. Paquett*, 3 Oreg. 78.

6. *Schelter v. Southern Oreg. Co.* (Oreg.), 24 Pac. Rep. 25; *Ryan v. Leavenworth etc. R. Co.*, 21 Kan. 365; *Hale v. Republican Bridge Co.*, 8 Kan. 466; *San Francisco etc. R. Co. v. Bee*, 48 Cal. 398; *Covington etc. R. Co. v. Winslow*, 9 Bush (Ky.) 468; *Butts v. Wood*, 38 Barb. (N. Y.) 181; *Blake v. Buffalo Creek R. Co.*, 56 N. Y. 485; *Black v. Delaware etc. Canal Co.*, 24 N. J. Eq. 463; *Barnes v. Brown*, 80 N. Y. 527; *Jackson v. Ludeling*, 21 Wall. (U. S.) 616; *Mussina v. Goldthwaite*,

by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party entrusted to deal on his own behalf in respect of any matter

34 Tex. 125; Aberdeen R. Co. v. Blaikie, 1 Macq. 461; Parker v. McKenna, L. R., 10 Ch. 96; Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 715; Clark v. San Francisco, 53 Cal. 306; Corbett v. Woodward, 5 Sawy. (U. S.) 403; Hoyle v. Plattsburgh etc. R. Co., 54 N. Y. 314; Cumberland Coal Co. v. Sherman, 30 Barb. (N. Y.) 553; Booth v. Roberson, 55 Md. 419; Bent v. Priest, 86 Mo. 475; *In re* Cameron's Coalbrook etc. R. Co., 18 Beav. 339; Williams v. Page, 24 Beav. 654; Great Luxembourg R. Co. v. Magnay, 25 Beav. 586; Imperial Mercantile Credit Assoc. v. Coleman, L. R., 6 H. L. 189; Poole, Jackson & Whyte's Case, L. R., 9 Ch. Div. 322; Robinson v. Smith, 3 Paige (N. Y.) 222; s. c., 24 Am. Dec. 216; Bank of St. Mary's v. St. John, 25 Ala. 566; European etc. R. Co. v. Poor, 59 Me. 277; s. c., Thompson's Liabilities of Officers and Agents of Corp. 243; Drury v. Cross, 7 Wall. (U. S.) 302; Wood v. Drummer, 3 Mason (U. S.) 308; Heath v. Erie R. Co., 8 Blatchf. (U. S.) 347; Fuller v. Dame, 18 Pick. (Mass.) 472; Peabody v. Flint 6 Allen (Mass.) 52; Coleman v. Second Ave. R. Co., 38 N. Y. 201; Ogden v. Murry, 39 N. Y. 202; Blake v. Buffalo Creek R. Co., 56 N. Y. 485; Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 64; Freemont v. Stone, 42 Barb. (N. Y.) 169; Buffalo etc. R. Co. v. Lampson, 47 Barb. (N. Y.) 533; Blatchford v. Ross, 5 Abb. Pr., N. S. (N. Y.) 434; Davidson v. Seymour, 1 Bosw. (N. Y.) 88; Risley v. Indianapolis etc. R. Co., 1 Hun (N. Y.) 202; Huffman Steam Coal Co. v. Cumberland Coal Co., 16 Md. 456; Redmond v. Dickinson, 9 N. J. Eq. 507; Gray v. New York etc. S. S. Co., 3 Hun (N. Y.) 383; United Society of Shakers v. Underwood, 9 Bush (Ky.) 617; Goodin v. Cincinnati etc. Canal Co., 18 Ohio St. 169; Buell v. Buckingham, 16 Iowa 284; Flint etc. R. Co. v. Dewey, 14 Mich. 477; York etc. R. Co. v. Hudson, 16 Beav. 485; Beatty v. Northwestern Transp. Co. (Can.), 19 Am. & Eng. Corp. Cas. 171; Sweeney v. Sugar Refining Co., 30 W. Va. 443; 19 Am. & Eng. Corp. Cas. 80; Cumberland Coal etc. Co. v. Parish, 42 Md. 598; Butts v. Wood, 37 N. Y. 317; Richards v. New Hampshire Ins. Co., 43 N. H.

263; Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 542; Bliss v. Matteson, 45 N. Y. 22; Shea v. Mabry, 1 Lea (Tenn.) 319; Angell & Ames on Corp., § 312; And also for the creditors of the corporation, so far as the capital stock and corporate assets are concerned. Bank of St. Mary's v. St. John, 25 Ala. 566; Lyman v. Bonney, 118 Mass. 222; Richards v. New Hampshire Ins. Co., 43 N. H. 263; Van Cott v. Van Brunt, 2 Abb. N. Cas. (N. Y.) 283; Bliss v. Matteson, 45 N. Y. 22; Shea v. Mabry, 1 Lea (Tenn.) 319. Compare Sperring's Appeal, 71 Pa. St. 11; s. c., 10 Am. Rep. 684; Deaderick v. Wilson, 8 Baxt. (Tenn.) 108; Planters' Bank v. Whittle, 78 Va. 737.

The doctrine that the directors of a corporation are trustees of the stockholders has relation only to the acts of the directors in connection with the property held by the corporation itself, and to their management of its business. Tippecanoe Co. v. Reynolds, 44 Ind. 509.

Directors and managers of insolvent corporations are trustees of the funds, as well for the creditors as for the corporation, and are bound to apply them *pro rata*, and cannot use them to exonerate themselves to the injury of other creditors. Richards v. New Hampshire Ins. Co., 43 N. H. 263.

Mr. Morawetz says that directors of a corporation are not technical trustees for the corporation or stockholders, they are often called so in practice but are merely agents invested with wide discretionary powers in managing the affairs of the corporation, although in many respects their relation to the corporation is a fiduciary or trust relation. Morawetz on Priv. Corp., § 243. For cases holding that their relation to the corporation is that of agents, see Ferguson v. Wilson, L. R., 2 Ch. 77, per LORD CAIRNS; Allen v. Curtis, 26 Conn. 456; Ryan v. Leavenworth etc. R. Co., 21 Kan. 365. In Sperring's Appeal, 71 Pa. St. 11; s. c., 10 Am. Rep. 684, they are declared to be mandataries rather than technical trustees. Overend, Gurney & Co. v. Gibb, L. R., 5 N. L. 480.

In Gardiner v. Pollard, 10 Bosw. (N. Y.) 691, ROBERTSON, J., also describes the relation of directors to shareholders as being akin to that of bailment.

involving such confidence.¹ So all advantages, all purchases, all sales, and all sums of money received by directors dealing with the property of the corporation, are made and received by them as trustees of the corporation, and they must account for all such moneys or advantages received by them by reason of their position as trustees.² There is an inherent obligation, implied in the acceptance of such trust, not only that they will use their best efforts to promote the interest of the shareholders, but that they will in no manner use their positions to advance their individual interest as distinguished from that of the corporation, or acquire interests that may conflict with the fair and proper discharge of their duty.³ So the directors have no authority to bind the company to any contract made with themselves personally, or to represent it in any transaction with third parties in which they have a private interest at stake;⁴ nor have they any right to use either the assets or credits of the corporation, or any of the powers of

1. *Hoyle v. Plattsburgh etc. R. Co.*, 54 N. Y. 314; *Cook v. Sherman*, 20 Fed. Rep. 167; *Attaway v. Third Nat. Bank*, 93 Mo. 485; 19 Am. & Eng. Corp. Cas. 149; *Weed v. Little Falls etc. R. Co.*, 31 Minn. 154; *Hilles v. Parish*, 14 N. J. Eq. 380; *Bent v. Priest*, 86 Mo. 475; *Roan v. Winn*, 93 Mo. 503; 19 Am. & Eng. Corp. Cas. 102; *European etc. R. Co. v. Poor*, 59 Me. 277; *Ashurst's Appeal*, 60 Pa. St. 290; *Farmers and Traders' Bank v. Kimball Milling Co. (Dak.)*, 47 N. W. Rep. 402; *Davis v. Gemmell*, 70 Md. 356.

Where a director, by means of his power as such, secures to himself any advantage over other stockholders or creditors, equity will treat the transaction as void, or charge him as trustee for the benefit of the injured parties; nor can such director, as to such parties, claim to have acted in ignorance of what it was his duty to know concerning the conduct and condition of the affairs of the corporation. *Corbett v. Woodward*, 5 Sawy. (U. S.) 403.

2. *Bent v. Priest*, 86 Mo. 475; *Dennis v. Kennedy*, 19 Barb. (N. Y.) 518; *Re Iron Clay Brick Mfg. Co.*, 19 Ont. 113.

A corporation formed for the development and sale of a tract of land had assumed a mortgage on the land. The officers quarrelled and sales stopped. At a sale under the mortgage, defendants, the president, vice-president and treasurer, purchased the property. *Held*, that they must hold it as trustees, and that their allegation that it was the fault of plaintiff, the secretary, that sales stopped and the foreclosure fol-

lowed, was immaterial. *Raleigh v. Fitzpatrick*, 43 N. J. Eq. 501.

Where railway directors have collected subscriptions and taken aid notes, to be used in building the road and in discharging existing obligations, an individual director cannot apply such funds, collected by himself, to the payment of his own personal share of any obligation made jointly with the rest. *Hart v. Brockway*, 57 Mich. 189.

3. *Cumberland Coal etc. Co. v. Parish*, 42 Md. 598; *Davis v. Gemmell*, 70 Md. 356. See *Davenport Bank v. Gifford*, 47 Iowa 575.

By accepting the office, the director of a corporation undertakes to give his judgment and influence to the interests of the corporation in all matters in which he represents it. That judgment and influence of right belong to the corporation, and so does that which they produce, and bonds received by him are its property. *Bent v. Priest*, 86 Mo. 475; 16 Am. & Eng. Corp. Cas. 78.

4. *Alford v. Miller*, 32 Conn. 543; *Gilman etc. R. Co. v. Kelly*, 77 Ill. 426; *Harts v. Brown*, 77 Ill. 227; *Bestor v. Wathen*, 60 Ill. 138; *Paine v. Lake Erie etc. R. Co.*, 31 Ind. 283; *Port v. Russell*, 36 Ind. 60; *Blair Town Lot etc. Co. v. Walker*, 50 Iowa 376; *First Nat. Bank v. Gifford*, 47 Iowa 575; *Levisse v. Shreveport City R. Co.*, 27 La. An. 641; *Percy v. Millandon*, 3 La., O. S. 268; *Flint etc. R. Co. v. Dewey*, 14 Mich. 477; *European etc. R. Co. v. Poor*, 59 Me. 277; *Cumberland Coal etc. Co. v. Parish*, 42 Md. 598; *Jones v. Morrison*, 31 Minn. 140; *Gardner v. Butler*, 30 N.

their office except to advance the interest of the company, irre-

J. Eq. 702; *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505; *Guild v. Parker*, 43 N. J. L. 430; *Redmond v. Dickinson*, 9 N. J. Eq. 507; *Risley v. Indianapolis etc. R. Co.*, 1 Hun (N. Y.) 202; reversed 62 N. Y. 240; *Coleman v. Second Ave. R. Co.*, 38 N. Y. 202; *European etc. R. Co. v. Poor*, 59 Me. 277; *Butts v. Wood*, 37 N. Y. 317; 38 Barb. (N. Y.) 181; *Hoyle v. Plattsburgh etc. R. Co.*, 54 N. Y. 314; *Blake v. Buffalo Creek R. Co.*, 56 N. Y. 485; *Ogden v. Murray*, 39 N. Y. 202; *Morrison v. Ogdensburgh etc. R. Co.*, 52 Barb. (N. Y.) 173; *Bliss v. Matteson*, 45 N. Y. 22; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 64; *Buffalo etc. R. Co. v. Lampson*, 47 Barb. (N. Y.) 533; *Blatchford v. Ross*, 5 Abb. Pr., N. S. (N. Y.) 434; *Gray v. New York etc. S. S. Co.*, 3 Hun (N. Y.) 383; *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578; *McAleer v. McMurray*, 58 Pa. St. 126; *Simons v. Vulcan Oil etc. Co.*, 61 Pa. St. 202; *Rices' Appeal*, 79 Pa. St. 168; *Cook v. Sherman*, 20 Fed. Rep. 167; *Thomas v. Brownsville etc. R. Co.*, 1 McCrary (U. S.) 392; *Wardell v. Union Pacific R. Co.*, 4 Dill. (U. S.) 330; *Murphy v. O'Shea*, 2 Jones & La. T. 422; *Flanagan v. Great Western R. Co.*, L R., 7 Eq. 116; *Aberdeen R. Co. v. Blaikie*, 1 Macq. Sc. App. 461; *McElhenny's Appeal*, 61 Pa. St. 188; *Weed v. Little Falls etc. R. Co.*, 31 Minn. 154; *Roan v. Winn*, 93 Mo. 503; s. c., 19 Am. & Eng. Corp. Cas. 102; *Ward v. Davidson*, 89 Mo. 445; *Bent v. Priest*, 10 Mo. App. 543; *Derris v. French*, 6 Thomp. & C. (N. Y.) 581; 4 Hun (N. Y.) 292; *European etc. R. Co. v. Poor*, 59 Me. 277; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Linder v. Carpenter*, 62 Ill. 399; *Pacific R. Co. v. Seely*, 45 Mo. 212; *Great Luxembourg R. Co. v. Magnay*, 25 Beav. 586; *Drury v. Cross*, 7 Wall. (U. S.) 299; *Mahoney Mining Co. v. Bennett*, 5 Sawy. (U. S.) 141; *Bradbury v. Barnes*, 19 Cal. 120; *Ward v. Salem St. R. Co.*, 108 Mass. 332; *Michigan Air Line R. Co. v. Mellon*, 44 Mich. 32; 5 Am. & Eng. Corp. Cas. 245; *Little Rock etc. R. Co. v. Page*, 35 Ark. 304; 7 Am. & Eng. R. Cas. 36; *Houston and Texas Central R. Co. v. Van Alstyne*, 56 Tex. 439; 9 Am. & Eng. R. Cas. 686; *Addison v. Lewis*, 75 Va. 701; 9 Am. & Eng. R. Cas. 702; *Graham v. La Crosse etc.*

R. Co., 102 U. S. 148; 1 Am. & Eng. R. Cas. 416; *Barnes v. Brown*, 80 N. Y. 527; 2 Am. & Eng. R. Cas. 638; *Duncomb v. New York etc. R. Co.*, 84 N. Y. 190; 4 Am. & Eng. R. Cas. 293; s. c., 88 N. Y. 1; 13 Am. & Eng. R. Cas. 84.

When a contract with a corporation is fulfilled to the satisfaction of the directors, and it appears that the work is beneficial to the corporation, and done on favorable terms, a court of equity will not enjoin the payment of the stipulated compensation on the allegation of one of the stockholders, that there is a secret agreement between one of the directors and the contractor, to divide the profits. *Havens v. Hoyt*, 6 Jones Eq. (N. Car.) 115.

Compare Deaderick v. Wilson 8 Baxt. (Tenn.) 108.

A contract made by a committee of the directors of a railroad company with a third person, giving him the right to prospect for coal upon the company's lands, and agreeing to buy coal from him, may be repudiated by the corporation on discovering that officers who negotiated it had a secret interest in it, notwithstanding it has been for a long time acted upon. *Wardell v. Union Pac. R. Co.*, 4 Dill. (U. S.) 330.

If directors of a corporation attempt to act for the corporation and for their private gain at the same time, they must account to the corporation for the profits made. *Ward v. Davidson*, 89 Mo. 445.

When a director of a corporation assents to a contract from which he is to derive a secret profit, equity will compel him to surrender it to the company. *Bent v. Priest*, 10 Mo. App. 543.

While an arrangement by which a managing director of a railroad corporation puts forward a third person as a contractor to do work for the corporation, the director designing to secure a special benefit to himself, may be constructively fraudulent, yet where the relation of the director to the contract is not that of an undisclosed principal, and the stockholders have knowledge of the facts and power to prevent the consummation of the contract, if they choose, actual fraud not existing, constructive fraud will not be presumed. *Union Pac. R. Co. v. Credit Mobilier*, 135 Mass. 367.

spective of their own advantage or desires.¹ So where the property of the corporation has been thus fraudulently or wrongfully disposed of by the directors, the creditors and stockholders may pursue it into the hands of purchasers with notice and assert their lien upon it, or their claims for its value.²

If a director sells his influence in such a way that one creditor of a corporation obtains an advantage over its other creditors, such action is void both as being fraudulent towards the other creditors, and as an undertaking to control the action of the directors contrary to their duty as trustees of the stockholders.³ But the acts of the directors regularly performed can be enquired into at the suit of the stockholders only when bad faith can be imputed.⁴

(h) **DEALINGS OF DIRECTORS.**—It may be said generally that the directors of a corporation may deal with it on the same terms and in like manner as other persons. But their dealings with the corporation are viewed by courts of equity with a suspicious eye. Directors are not allowed to make use of their position to secure any profit or advantage for themselves.⁵ They may purchase

1. *York etc. R. Co. v. Hudson*, 16 Beav. 485; *Blair Town Lot etc. Co. v. Walker*, 50 Iowa 376; *Gaskell v. Chambers*, 26 Beav. 360; *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169.

Equity will jealously scrutinize any attempt by the directors of a corporation to pledge the assets thereof in favor of themselves. *Chouteau v. Allen*, 70 Mo. 290.

It will not permit a director, in the exercise of his official duties, to make a profit for himself to the exclusion of the other stockholders. *Farmers' etc. Bank v. Downey*, 53 Cal. 466.

Under the Mo. statute, a creditor of a dissolved corporation, the assets of which have been appropriated by the directors, can only maintain an action against them after an ascertainment in equity of the amount due him, unless his claim is the only one that the corporation owed at the time of its dissolution, or unless the assets appropriated by the directors exceed such claim in amount. *Horner v. Carter*, 3 McCrary (U. S.) 595.

2. *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169.

A creditor of a corporation may pursue its property into the hands of a director, a shareholder, to whose use were appropriated bonds, assets of the corporation, under a resolution in the passage of which he aided, he being liable to the creditors, as trustee, for the value of such bonds. *Union Nat. Bank*

v. Douglass, 1 McCrary (U. S.) C. Ct. 86.

3. *Bliss v. Matteson*, 45 N. Y., 22; *Berryman v. Cincinnati etc. R. Co.*, 14 Bush (Ky.) 755.

4. *Butts v. Wood*, 38 Barb. (N. Y.) 181.

5. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Buell v. Buckingham*, 16 Iowa 284; *Hayward v. Pilgrim Soc.*, 21 Pick. (Mass.) 270; *Beach v. Miller*, 23 Ill. App. 151; *Ellis v. Boston etc. R. Co.*, 107 Mass. 1; *Sargent v. Webster*, 13 Met. (Mass.) 497; *Whitewell v. Warner*, 20 Vt. 425. See *Gillett v. Bowen*, 23 Fed. Rep. 627; *Deaderich v. Wilson*, 8 Baxt. (Tenn.) 108. See *Perry v. Pearson* (Ill.), 25 N. E. Rep. 626; *Alford v. Miller*, 32 Conn. 543.

In *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, MILLER, J., said: "That a director of a joint stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others. *Koehler v. Black River Falls Iron Co.*, 2 Blackf. (U. S.) 715; *Drury v. Cross*, 7 Wall. (U. S.) 299; *Railroad Co. v. Mahney*, 25 Beav. 586; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.)

property of the corporation.¹ So where a corporation is insolvent and without means to discharge the indebtedness or redeem property sold under a judicial sale, and the directors give all the stockholders an opportunity of making advances to relieve the company from embarrassment, which they refuse to embrace, the directors have the right to purchase such indebtedness and acquire title to the corporate property, by enforcing a sale under a deed of trust given to secure such indebtedness, and the other stockholders have no right to complain.² But the directors are not generally authorized, without some special authority, to make sale of that portion of its estate or property essentially necessary to be retained to enable it to transact its customary business.³

A court of equity will set aside contracts between the corporation and its directors at the option of the stockholder.⁴ Such contracts and dealings are not, however, absolutely prohibited,

553; *Hoffman Steam Coal Co. v. Cumberland Coal etc. Co.*, 16 Md. 456."

1. *Beach v. Miller*, 23 Ill. App. 151; *Ellis v. Boston etc. R. Co.*, 107 Mass. 1; *Hayward v. Pilgrim Soc.*, 21 Pick. (Mass.) 270; *Buell v. Buckingham*, 16 Iowa 284; *Kitchen v. St. Louis etc. R. Co.*, 69 Mo. 224; *Pioneer Gold Min. Co. v. Baker*, 20 Fed. Rep. 4. Compare *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Jones v. Arkansas Mech. etc. Co.*, 38 Ark. 17; *Gillett v. Gillett*, 9 Wis. 194; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433; *Hoyle v. Plattsburgh etc. R. Co.*, 54 N. Y. 314.

The director of a corporation may purchase on his individual account at a fair public sale the property of a corporation on a mortgage foreclosure; and even if the foreclosure sale could be avoided, or the purchaser declared to hold the property subject to a trust, this can only be done by the corporation or its stockholders. *Saltmarsh v. Spaulding*, 147 Mass. 224; 20 Am. & Eng. Corp. Cas. 514.

The managers or directors of a private corporation have a right to purchase the bonds or other indebtedness of the company. And where the company is insolvent, and has no means to discharge its indebtedness or redeem property sold, and the directors give all the stockholders an opportunity of making advances to relieve the company of its embarrassment, which they refuse to embrace, the directors will have the right to purchase such indebtedness and acquire title to the corporate property by enforcing its sale under a deed of trust given to secure

such indebtedness, and the other stockholders will have no right to complain. *Harts v. Brown*, 77 Ill. 226.

Officers of a corporation cannot purchase any claim against, or interest in the company, except in trust for the stockholders, after a resolution has been adopted by themselves, as managers, directing one of their number to purchase for the benefit of the company. *Kimmell v. Geeting*, 2 Grant Cas. (Pa.) 125.

2. *Harts v. Brown*, 77 Ill. 226. See *Knowles v. Duffy*, 40 Hun (N. Y.) 485.

3. *Rollins v. Clay*, 33 Me. 132. See *Hoffman Steam Coal Co. v. Cumberland Coal Co.*, 16 Md. 456; *Knowles v. Duffy*, 40 Hun (N. Y.) 485.

Authority to sell bonds of a company will not be inferred from the position of a party as director of the company, nor from the fact that the president of the company gave him a power of attorney to sell. The authority of the president to execute such power of attorney must be shown. *Titus v. Cairo etc. R. Co.*, 37 N. J. L. 98.

A director who, by agreement with his co-directors, sells the bonds of the corporation on his private account, must account for the profit realized to creditors or stockholders. *Widrig v. Newport Street R. Co.*, 82 Ky. 511.

4. *Butts v. Wood*, 37 N. Y. 317; *Drury v. Cross*, 7 Wall. (U. S.) 299; *Terry v. Bank of Orleans*, 9 Paige (N. Y.) 663; *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578; *Ward v. Salem St. R. Co.*, 108 Mass. 332; *Mahanoy Min. Co. v. Bennett*, 5

and will be sustained when entered into in good faith.¹ So directors cannot speculate with the funds or credit of the company and appropriate to themselves the profit of such speculation.² They cannot, in making sales or purchases for the company, take advantage of their position as directors, and either directly or indirectly speculate upon the company.³ If they are the only

Sawyer. (U. S.) 141; European etc. R. Co. v. Poor, 59 Me. 277; Flint etc. R. Co. v. Dewey, 14 Mich. 477; First Nat. Bank v. Gifford, 47 Iowa 475; Hoffmann Steam Coal Co. v. Cumberland Coal etc. Co., 16 Md. 456; Cumberland Coal etc. Co. v. Sherman, 20 Md. 118; Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 715; Blair Town Lot etc. Co. v. Walker, 50 Iowa 376; York etc. R. Co. v. Hudson, 16 Beav. 485; Luxembourg R. Co. v. Magnay, 25 Beav. 586; Abedeen R. Co. v. Blaikie, 1 McQ. 461; Wardell v. Union Pac. R., 103 U. S. 651; 1 Am. & Eng. R. Cas. 427; Thomas v. Brownville etc. R. Co., 1 McCrary (U. S.) 392; Hopkins' Appeal, 90 Pa. St. 69; Little Rock etc. R. Co. v. Page, 35 Ark. 304; 7 Am. & Eng. R. Cas. 36; Chouteau v. Allen, 70 Mo. 290; Davis v. Rock Creek etc. Min. Co., 55 Cal. 359; Addison v. Lewis, 75 Va. 701; 9 Am. & Eng. R. Cas. 702; Bent v. Priest, 10 Mo. App. 543; Graham v. La Crosse etc. R. Co., 103 U. S. 148; 1 Am. & Eng. R. Cas. 416; Barnes v. Brown, 80 N. Y. 527; 2 Am. & Eng. R. Cas. 638; Michigan Air-Line R. Co. v. Mellen, 44 Mich. 321; 5 Am. & Eng. R. Cas. 245; Houston etc. R. Co. v. Van Alstyne, 56 Tex. 439; 9 Am. & Eng. R. Cas. 686; Duncomb v. New York etc. R. Co., 84 N. Y. 190; 4 Am. & Eng. R. Cas. 293; Metropolitan El. R. Co. v. Manhattan R. Co., 1 Daly (N. Y.) 373; 15 Am. & Eng. R. Cas. 1; Budd v. Walla Walla Printing etc. Co., 2 Wash. Ter. 347.

1. Omaha Hotel Co. v. Wade, 97 U. S. 13; Twin Lick Oil Co. v. Marbury, 91 U. S. 587; Stratton v. Allen, 16 N. J. Eq. 229; Railroad Co. v. Claghorn, 1 Spear's Eq. (S. Car.) 546; Gordon v. Preston, 1 Watts (Pa.) 385; Buehl v. Buckingham, 16 Iowa 284; St. Louis v. Alexander, 23 Mo. 483; Hallam v. Indianola Hotel Co., 56 Iowa 178; Sims v. Brooklyn St. R. Co., 8 Fed. Rep. 118; 4 Am. & Eng. R. Cas. 132; Claflin v. South Carolina R. Co., 37 Ohio St. 556; 4 Am. & Eng. R. Cas. 231.

A transaction fairly and openly en-

tered into between a corporation and one of its directors, sanctioned by all and inuring to the benefit of the corporation, will not be set aside at its instance seven years afterwards on the ground that it was *ultra vires*. • Pneumatic Gas Co. v. Berry, 113 U. S. 322.

2. Redmond v. Dickinson, 9 N. J. Eq. 516; Franklin F. Ins. Co. v. Jenkins, 3 Wend. (N. Y.) 130; Richards v. New Hampshire Ins. Co., 43 N. H. 263.

The directors of a moneyed or other joint-stock corporation, who wilfully abuse their trust, or misapply the funds of the company, or suffer the corporate property to be lost or wasted by gross negligence and inattention to their duties, are personally liable, as trustees, to make good the loss. Robinson v. Smith, 3 Paige (N. Y.) 222.

The directors of a corporation are its agents for limited purposes, and they have no power to give away its funds, or deprive it of any of the means to accomplish the purposes for which it was chartered. Bedford R. Co. v. Bowser, 48 Pa. St. 29.

Where railway directors have collected subscriptions and taken aid notes, to be used in building the road and in discharging existing obligations, an individual director cannot apply such funds, collected by himself, to the payment of his own personal share of any obligation made jointly with the rest. Hart v. Brockway, 57 Mich. 189.

The directors cannot use the funds of the corporation in payment of a note made by them to the president of the corporation as payee, and for its benefit. Gallery v. National Exch. Bank, 41 Mich. 169.

The directors of an incorporated company, who, acting in good faith and with reasonable diligence, but under a mistake of the law, have invested the corporate funds in a manner not authorized by the charter, are not responsible to the stockholders for a loss occasioned thereby. Scott v. Depyster, 1 Edw. Ch. (N. Y.) 513.

3. Manufacturers' Sav. Bank v. Big Muddy Iron Co., 97 Mo. 38; 26

persons interested as stockholders, and such speculations impair the capital stock and have a tendency to substitute a fictitious or a real capital, such transactions are opposed to the policy of their act of incorporation, and cannot in any manner be

Am. & Eng. Corp. Cas. 140; *Port v. Russell*, 36 Ind 60. They may be made to account to the corporation for all profits made by the use of the corporate property. But where they sell property of a corporation and realize more than it is worth and the corporation receives the full benefit of the transaction, its stockholders cannot complain. *Manufacturers' Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38; 26 *Am. & Eng. Corp. Cas.* 140. See *Ward v. Davidson*, 89 Mo. 445; 14 *Am. & Eng. Corp. Cas.* 73; *Keokuk etc. Packet Co. v. Davidson*, 95 Mo. 467.

They can make no division of such property which shall not give to each stockholder his proportionate share. *Hale v. Republican River Bridge Co.*, 8 Kan. 466.

A purchase by a corporation will not be set aside because of the interest of one of the directors, where the complaining stockholder has suffered no damage. *Hill v. Nisbet*, 100 Ind. 341.

Where one, in order to secure his pay as president and attorney of a private corporation, caused its secretary to assign to him certain certificates of the purchase of land held by the corporation and in their possession as officers thereof—*held*, that a court of equity might compel an unconditional return of the certificates; the officers had no lien thereon. *Emporium etc. Real Estate etc. Co. v. Emrie*, 54 Ill. 345.

If a member of a corporation, who is also a director, claims that the other directors, as agents of the corporation, have exceeded their functions, in selling property in derogation of the rights of the corporation, that claim must be seasonably asserted in a manner that will bind the parties to such sale. Acquiescence will confirm the sale; and allowing the consideration to be applied to the use of the corporation will adopt and ratify it. *State v. Smith*, 48 Vt. 266.

Assets.—Equity will jealously scrutinize any attempt by the directors of a corporation to pledge the assets thereof in favor of themselves. *Choteau v. Allen*, 70 Mo. 290.

But a sale of assets of a corporation,

made by directors to themselves or to an association in which they are members, is not necessarily void. Its fairness, however, must be shown affirmatively by those who claim under it, or consent of stockholders must be proved. *Ashurst's Appeal*, 60 Pa. St. 290.

The purchase of assets of an incorporated company by one of its directors is voidable only at the instance of a party in interest. Such director is conclusively presumed to know the financial condition of the company, and therefore the transaction is not *bona fide*. *Jones v. Arkansas etc. Co.*, 38 Ark. 17.

Where an insolvent corporation has no means to contest attachment suits, it is not a breach of trust for directors, on advice of counsel, and in good faith, to make an advantageous sale of the corporate assets to an attachment creditor, on condition that he cancel his own debt and discharge the debts of the other attachment creditors. *White, etc. Mfg. Co. v. Pettes Importing Co.*, 30 Fed. Rep. 864.

Real Estate.—The directors of a corporation may, as its agents, authorize a conveyance of real estate at a meeting held outside of the State from which it derives its charter. (Following 13 Pet. (U. S.) 521; and 36 Vt. 743.) *Bellows v. Todd*, 39 Iowa 209.

Under a resolution of trustees of a corporation authorizing the president to convey land to purchasers, he may convey land given by way of donation. *State v. Glenn*, 18 Nev. 34.

Complaint.—A bill in equity, brought by three stockholders, two of whom were directors, against four other directors, constituting the executive committee, one of whom was treasurer, charging that the treasurer bought exclusively of a firm of which he was a member, at prices largely in excess of the market rates, and asking for his removal and a settlement of his accounts—*held*, to show no equity as not charging fraud on the part of the other members of the committee or alleging that redress had been sought by an appeal to the directors, or by vote of the stockholders, or by other remedies provided by the charter or by laws. *Tuscaloosa Mfg. Co. v. Cox*, 68 Ala. 71.

countenanced by a court of equity.¹

Where a corporation has virtually ceased to exist and is hopelessly insolvent, its officers may make proper arrangements themselves to carry on the business.²

(2) NOTICE.—Notice or information regarding any matter, upon which the corporation is required to act, communicated to the board of directors when assembled as a board, is notice to the corporation.³ As a general rule, what the directors know regarding matters affecting its interest, the corporation knows. The knowledge of the directors may often be inferred from circumstances, and it is not always necessary to show it by direct proof.⁴ But notice given to a director privately, or which he acquires from rumor, or through channels open to all alike, and which he does not communicate to his associates at the board, will not bind the corporation.⁵ But notice given to him officially for the

1. *Manufacturers' Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38; 26 Am. & Eng. Corp. Cas. 140.

2. *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140; *Ashurst's Appeal*, 60 Pa. St. 290; *Cumberland Coal etc. Co. v. Parish*, 42 Md. 598; *Bradly v. Williams*, 3 Hughes (U. S.) 26; *Farmers' etc. Bank v. Downey*, 53 Cal. 466; *Gindrat v. Dane*, 4 Cliff. (U. S.) 260.

3. *Bank of Pittsburgh v. Whitehead*, 10 Watts (Pa.) 397; 36 Am. Dec. 186; *Ex parte Agra Bank*, L. R., 3 Ch. App. 555; *Ex parte Holmes*, 5 Cow. (N. Y.) 426; *Fulton Bank v. New York etc. Canal Co.*, 4 Paige (N. Y.) 127.

Notice communicated to one of the directors of a company, for the purpose of its being given by him to the board of which he is a member, is notice to the corporation. *Boyd v. Chesapeake etc. Canal Co.*, 17 Md. 195.

4. *Toll Bridge Co. v. Betsworth*, 30 Conn. 380. See *Slee v. Bloom*, 19 Johns. (N. Y.) 456; *Ex parte Holmes*, 5 Cow. (N. Y.) 426; *Schoharie Valley R. Co's Case*, 12 Abb. Pr., N. S. (N. Y.) 394; *Central Bank v. Levin*, 6 Mo. App. 543.

Under what conditions knowledge acquired by a director in other than his official capacity will be constructive notice to the corporation binding on it, is not entirely settled in the cases. Some cases hold that notice to a single director, or to any number of individual directors, or to all of the directors, individually, can in no case be notice to the corporation, unless actually communicated to the board of directors as a body. *Boyd v. Chesapeake etc.*

Canal Co., 17 Md. 195; *General Ins. Co. v. United States Ins. Co.*, 10 Md. 527; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Louisiana State Bank v. Senecal*, 13 La., O. S. 525; *Mercier v. Canonge*, 8 La. Ann. 37.

Other cases hold that where a director, having such knowledge, acts as a member of the board upon the matter affected by the information, the corporation will be bound, whether such knowledge is acquired privately or in the course of business of the corporation. *National Security Bank v. Cushman*, 121 Mass. 490; *Clerk's Sav. Bank v. Thomas*, 2 Mo. App. 367; *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Bank of United States v. Davis*, 2 Hill (N. Y.) 451. Compare *Terrell v. Branch Bank*, 12 Ala. 502; *Custer v. Tompkins Co. Bank*, 9 Pa. St. 27.

5. *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280; *Farrel Foundry v. Dart*, 26 Conn. 376; *Farmers' etc. Bank v. Payne*, 25 Conn. 444; *Mercier v. Canonge*, 8 La. Ann. 37; *Fairfield Sav. Bank v. Chase*, 72 Me. 226; 39 Am. Rep. 319; *Atlantic State Bank v. Savery*, 18 Hun (N. Y.) 36; 82 N. Y. 291; *Westfield Bank v. Cornen*, 37 N. Y. 320; *National Bank v. Norton*, 1 Hill (N. Y.) 572; *Fulton Bank v. New York etc. Canal Co.*, 4 Paige (N. Y.) 127; *Peruvian R. Co. v. Thames etc. Ins. Co.*, L. R., 2 Ch. 617; *In re Carew's Estate Act*, 31 Beav. 39; *Powles v. Page*, 3 C. B. 16; *Ex parte Burbridge*, 1 Deac. 131; *Ex parte Watkins*, 2 Mont. & A. 349; 4 Deac. & Chit. 87; *General Ins. Co. v. United States*

purpose of being communicated to the board, although it is not so communicated, will bind the corporation.¹

(j) **AUTHORITY TO BIND THE COMPANY.**—The representations² and the admissions³ of directors or other agents of a corporation, bind only while they are acting within their authority and in due course of business. But either the representation or admission must be that of the director or of a quorum thereof of the body, or if one director, some evidence must be given of the authority of such person to bind the company.⁴

Ins. Co., 10 Md. 517; Winchester v. Baltimore etc. R. Co., 4 Md. 231; United States Ins. Co. v. Shriver, 3 Md. Ch. 381; Sawyer v. Pawnors' Bank, 6 Allen (Mass.) 207; First Nat. Bank v. Christopher, 40 N. J. L. 435; 8 Cent. L. J. 181; Jones v. Planters' Bank, 9 Heisk. (Tenn.) 455; Brown v. Brown, 56 Conn. 249.

If a bank director act in behalf of the bank in a transaction for its benefit, notice at the time of any fact material to such transaction is notice to the bank. Smith v. South Royalton Bank, 32 Vt. 341.

Evidence that the general agent of a corporation was in the habit of giving notes for such company, is inadmissible, unless there is an offer to prove that the company had some knowledge that the agent was in the practice of giving notes in the name of the company. Lawrence v. Gebhard, 41 Barb. (N. Y.) 575.

1. United States Ins. Co. v. Shriver, 3 Md. Ch. 38.

The fact that a minority of such trustees, not in their official capacity, knew of and consented to the entry of the defendant, and his acts performed under the lease, did not charge the company with knowledge of the lease. Blatchford v. Ross, 54 Barb. (N. Y.) 42; 5 Abb. Pr., N. S. (N. Y.) 434.

2. Deposit L. Assurance Co. v. Ayscough, 6 E. & B. 763; Meux's Case, 2 De G. M. & G. 522; Burnes v. Pennell, 2 H. L. 497; Conybeare v. New Brunswick R. Co., 9 H. L. 711; National Exch. Co. v. Drew, 2 Macq. 105.

3. Meux's Case, 2 De G. M. & G. 522; Burnes v. Pennell, 2 H. L. 497.

4. Holt's Case, 22 Beav. 48; Nicol's Case, 28 L. J., Ch. 257.

Union Min. Co. v. Rocky Mt. Nat. Bank, 1 Colo. 531; 2 Colo. 248, 565; Green v. Ophir Copper etc. Min. Co., 45 Cal. 522; Michigan Cent. R. Co. v. Gougar, 55 Ill. 503; American Merchants' Union Express Co. v. Gilbert,

57 Ill. 468; Farmers' etc. Bank v. Troy Bank, 1 Doug. (Mich.) 457; Kalamazoo etc. Mfg. Co. v. McAlister, 36 Mich. 327; Troy F. Ins. Co. v. Carpenter, 4 Wis. 20; Hazleton v. Union Bank, 32 Wis. 34; Howe Machine Co. v. Snow, 32 Iowa 433; Northrup v. Mississippi Ins. Co., 47 Mo. 435; Kenneday v. Otoe Nat. Bank, 7 Neb. 59; Polleys v. Ocean Ins. Co., 14 Me. 141; Franklin Bank v. Cooper, 36 Me. 179; Franklin Bank v. Steward, 37 Me. 519; Lime Rock Bank v. Hewett, 52 Me. 531; Bank of Grafton v. Woodward, 5 N. H. 301; Pemigewasset Bank v. Rogers, 18 N. H. 255; Low v. Connecticut etc. R. Co., 45 N. H. 370; 46 N. H. 284; Cocheco Nat. Bank v. Haskell, 51 N. H. 116; Chelmsford Co. v. Demarest, 7 Gray (Mass.) 1; Fogg v. Pew, 10 Gray (Mass.) 409; McGenness v. Adriatic Mills, 116 Mass. 177; Hartford Bank v. Hart, 3 Day (Conn.) 495; Fairfield Co. Turnpike Co. v. Thor, 13 Conn. 173; Crump v. United States Min. Co., 7 Gratt. (Va.) 352; Muhleman v. National Ins. Co., 6 W. Va. 508; Smith v. North Carolina R. Co., 68 N. Car. 107; Thew v. Porcelain Mfg. Co., 5 S. Car. 415; Charleston etc. R. Co. v. Blake, 12 Rich. (S. Car.) 634; Mitchell v. Rome R. Co., 17 Ga. 574; Vicksburg etc. R. Co. v. Ragsdale, 54 Miss. 200; Sewanee Min. Co. v. McMahon, 1 Head (Tenn.) 582; Jones v. Planters' Bank, 9 Heisk. (Tenn.) 455; Hogg v. Zanesville Mfg. Co., Wright (Ohio) 139; Sturges v. Bank of Circleville, 11 Ohio St. 153; Toledo etc. R. Co. v. Fisher, 13 Ind. 258; Heller v. Crawford, 37 Ind. 279; New England F. Ins. Co. v. Schettler, 38 Ill. 171; Chicago etc. R. Co. v. Coleman, 18 Ill. 297; Toll Bridge Co. v. Betsworth, 30 Conn. 380; Osgood v. Manhattan Co., 3 Cow. (N. Y.) 612; Trustees of First Baptist Church v. Brooklyn F. Ins. Co., 28 N. Y. 153; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278; Matteson v. New York Cent. R. Co., 62 Barb. (N. Y.) 364; Soper v. Buffalo etc. R. Co., 19

The directors of a corporation have a general power to make and modify its contracts, and its stockholders cannot control that power when it is exercised in good faith.¹ Such power depends exclusively upon the charter and by-laws of the corporation.² So where the directors of the corporation have power to bind it by their contracts the majority of their directors may do it.³ Contracts between a corporation and its directors are valid.⁴ The validity of such contracts, however, depends upon the nature and terms of the contract itself, and the circumstances under which it

Barb. (N. Y.) 310; *East River Bank v. Hoyt*, 41 Barb. (N. Y.) 441; *Spelman v. Fisher Iron Co.*, 56 Barb. (N. Y.) 151; *Harvey v. West Side El. R. Co.*, 13 Hun (N. Y.) 392; *Sussex Co. Mut. Ins. Co. v. Woodruff*, 26 N. J. L. 541; *Pennsylvania R. Co's Appeal*, 80 Pa. St. 265; *Huntingdon etc. R. Co. v. Decker*, 82 Pa. St. 119; *Harrisburgh Bank v. Tyler*, 3 W. & S. (Pa.) 373; *Bank of Northern Liberties v. Davis*, 6 W. & S. 285. See *Holt's Case*, 22 Beav. 48; *Moody v. Brighton etc. R. Co.*, 31 L. J., Q. B. 54; *Re Tring etc. R. Co.*, 3 De G. & S. M. 10.

1. *Flagg v. Manhattan R. Co.*, 20 Blatchf. (U. S.) 142; *Herod v. Rodman*, 16 Ind. 241; *Wardell v. Union Pac. R. Co.*, 103 U. S. 651; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565; *Flagstaff Silver Min. Co. v. Patrick*, 2 Utah 304; *Lightner v. Brooks*, 2 Cliff. 287; *Cady v. Sanford*, 53 Vt. 632; *Einsphar v. Wagner*, 12 Neb. 458; *Amherst Academy v. Cows*, 6 Pick. (Mass.) 427.

An agreement made by the director of a corporation to use his vote and influence to the disadvantage of the corporation, and for the interest and benefit of third persons, is an immoral and corrupt contract, and will not be enforced. *Attaway v. Third Nat. Bank*, 93 Mo. 485.

A former member of the board of directors of a corporation organized under 1 *Indiana Rev. Stat.* 1876, p. 654, is not liable individually for a contract made by his successors in excess of the solvent stock of the corporation. *Schofield v. Henderson*, 67 Ind. 258.

Directors of a corporation are *quasi* trustees, and, without special power under the charter, cannot bind the corporation or its assets by a contract to pay usury. *Planters' Warehouse Co. v. Johnson*, 62 Ga. 308.

Nor is a member of the board liable who protests against and refuses to con-

sent to such contract. *Schofield v. Henderson*, 67 Ind. 258.

2. *Royalton v. Royalton etc Turnpike Co.*, 14 Vt. 311; *Leavitt v. Oxford etc. Min. Co.*, 3 Utah 265.

3. *Cram v. Bangor House Proprietary*, 12 Me. 354; *Wells v. Rahway etc. Rubber Co.*, 19 N. J. Eq. 402; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; *Booker v. Young*, 12 Gratt. (Va.) 303.

Where a quorum of a board of directors of a corporation votes to make a contract with one of their number, the contract is not necessarily void because such member voted, no fraud or bad faith being charged. *Leavitt v. Oxford etc. Silver Min. Co.*, 3 Utah 265.

A contract by a board of directors cannot be changed by less than a quorum of the board. *Tennessee etc. R. Co. v. East Alabama R. Co.*, 73 Ala. 426.

4. *Budd v. Walla Walla Printing etc. Co.*, 2 Wash. Ter. 347; *Little Rock etc. R. Co. v. Page*, 35 Ark. 304.

A party who constructs ditches under a written contract with the directors of a draining company may recover on the contract, although he was one of the directors at the time of its execution. *Ward v. Polk*, 70 Ind. 309.

A transaction fairly and openly entered into between a corporation and one of its directors, sanctioned by all and inuring to the benefit of the corporation, will not be set aside at its instance seven years afterwards, on the ground that it was *ultra vires*. *Pneumatic Gas Co. v. Berry*, 113 U. S. 322.

An express contract between the director of a corporation and the company is not void, but is voidable at the option of the *cestui que trust* exercised within a reasonable time. No consideration of its apparent or intrinsic fairness will induce a court either of law or equity to enforce it against the resisting *cestui que trust*. Such a contract

is made, and the effect of its provisions. If they are pernicious and tend to work a fraud on the rights of the corporation, the directors have no authority to enter into it.¹ But the general doctrine with regard to this class of contracts is not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it.²

A contract between two corporations, agreed to by persons who are directors in both corporations, the stockholders not being consulted, is voidable.³

is, however, valid and enforceable as to others. *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505.

A contract between a corporation and a director thereof, embodied in a resolution for the passage of which the director's vote was necessary and was given, is invalid. *Bennett v. St. Louis Car Roofing Co.*, 19 Mo. App. 349.

A director of a corporation cannot enforce a contract made with his co-directors, under which he is to have one third of a profit of \$100,000 for selling a railroad property, his services being trifling. Such a contract is beyond the power of the directors to make. *Hubbard v. New York etc. Investment Co.*, 14 Fed. Rep. 675.

The directors of a railroad corporation will not be enjoined from doing acts within their powers, such as making contracts with connecting roads and selling stock of another road owned by the company, at the suit of one holding a majority of the stock, because they are hostile to him, unless some dishonest purpose is shown. *Elkins v. Camden etc. R. Co.*, 36 N. J. Eq. 241.

A contract between a railroad and a construction company is void when any of the directors of the railroad are members of the construction company, and the fact of long acquiescence on the part of the stockholders of the railroad makes no difference. *Thomas v. Brownsville etc. R. Co.*, 1 McCrary (U. S.) 392.

1. *Hubbard v. New York etc. Investment Co.*, 14 Fed. Rep. 675; *Simons v. Vulcan Oil etc. Co.*, 61 Pa. St. 202.

2. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Little Rock etc. R. Co. v. Page*, 35 Ark. 304; *Kitchen v. St. Louis etc. R. Co.*, 69 Mo. 224; *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 522; *Buell v. Buckingham*, 16 Iowa 284; *Ashurst's Appeal* 60 Pa. St. 291; *Addison v. Lewis*, 75 Va. 701.

If the corporation does not disaffirm

the transaction, or take proceedings to set it aside, it should as a rule be treated as binding if called in question by other parties. *Buell v. Buckingham*, 16 Iowa 284.

3. *Gallery v. National Exch. Bank*, 41 Mich. 169. See *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578; *Wardens etc. of St. James' Church v. Church of the Redeemer*, 45 Barb. (N. Y.) 356; *Polar Star Lodge v. Polar Star Lodge*, 16 La. Ann. 76; *San Diego v. San Diego etc. R. Co.*, 44 Cal. 106; *Bill v. Western Union Tel. Co.*, 16 Fed. Rep. 14; *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48; *Pearson v. Concord R. Co.*, 22 N. H. 537; 13 Am. & Eng. R. Cas. 102; *Sweeny v. Sugar Refining Co.*, 30 W. Va. 443.

And this is so even if a majority of directors sanctioned the contract without counting those who were members of both boards; and even if stockholders knew when they elected directors that some of them were members of the other board. *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 11 Daly (N. Y.) 373; 14 Abb. N. Cas. (N. Y.) 103.

But a contract made between two corporations through their respective boards of directors is not voidable at the election of one of the parties thereto from the mere circumstance that a minority of its board of directors are also directors of the other company. *United States Rolling Stock Co. v. Atlantic etc. R. Co.*, 34 Ohio St. 450. And see *Mayor etc. of Griffin v. Inman*, 57 Ga. 371. But compare *San Diego v. San Diego etc. R. Co.*, 44 Cal. 106.

Powers of Directors of Two Roads Operated Under Contract for Joint Management.—Two railroads entering into a contract for the joint management of their lines, including certain railroads leased to them. The contract fixed the proportion of the net earnings to be drawn by each of the contracting parties. In pursuance of the agreement,

(*k*) TO LOAN AND BORROW MONEY.—The director of a corporation is not prohibited from lending its moneys when they are needed for its benefit, and the transaction is open and otherwise free from blame; nor is his subsequent purchase of the property at a fair public sale by a trustee under a deed of trust executed to secure payment of fund, invalid.¹ So under a law authorizing a company "to enter into any obligations or contracts and to attend to the transaction of its ordinary affairs, or for the purposes for which it was created," the directors may borrow money for these purposes, negotiate loans, execute notes, and sign checks.² But if a director of a corporation lends money to it for an excessive interest, and takes a mortgage to secure a note to an amount included therein beyond the sum actually borrowed, the note and mortgage cannot be enforced.³

(*l*) TO MORTGAGE PROPERTY.—The directors of a corporation, unless forbidden by its charter, or the laws of the State from which it derives its existence, may confer power to mortgage the real property of the corporation.⁴ And in the absence of a provision of law to the contrary, it will be presumed that the presi-

the directors of the plaintiff company authorized the deduction from the net earnings of interest on the cost of a new depot built by the defendant company for the accommodation of the joint traffic. It was also agreed by the respective boards of directors that the defendant company should purchase a controlling interest in two roads leased to them and managed under the joint contract, and that during the continuance of the joint contract the excess of interest upon the purchase money over the amount of dividends earned upon the stock should be borne in proportion to their shares of the net earnings. *Held*, that, under the circumstances, the directors of the plaintiff company had acted within their powers, and that the plaintiffs could not claim payment of the sums so expended. *Nashua etc. R. Co. v. Boston etc. R. Co.*, 27 Fed. Rep. 821.

1. *Saltmarsh v. Spaulding*, 147 Mass. 224; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Holt v. Bennett*, 146 Mass. 437; 21 Am. & Eng. Corp. Cas. 622.

A loan by a bank in the usual course of business, to a corporation, will not be invalidated by the fact that the president of such corporation and one of the directors is also a State officer and a defaulter, and the officer of the bank negotiating the loan is one of his bondsmen, and knows that the corporation is negotiating such loan to repay

to such president, moneys advanced by such president to enable him to settle his account with the State. *Lippincott v. Shaw Carriage Co.*, 27 Fed. Rep. 577.

A director of an association who gave to it an ordinary bond and mortgage for a loan, cannot set up, as a defence to its foreclosure, that, by a secret parol agreement between him and the other directors, the loan had been repaid by his stock in the association having been fully paid up. *Pangborn v. Citizens' Building Assoc.*, 35 N. J. Eq. 341.

Complaint.—A declaration containing a general charge, that the defendants, as directors, lent the corporate funds on security known by them to be insufficient, without specifying time, person or circumstances, is bad on demurrer. So of a declaration that alleges the grievance to have been committed in part by want of care, and in part by corrupt and wilful mismanagement. *Franklin Fire Ins. Co. v. Jenkins*, 3 Wend. (N. Y.) 130.

2. *Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192; *Cheever v. Gilbert El. R. Co.*, 43 N. Y. Super. Ct. 478.

3. *Sutter St. R. Co. v. Baum*, 66 Cal. 44.

4. *Bassett v. Monte Christo etc. Min. Co.*, 15 Nev. 293; *Davis v. Rock Creek etc. Min. Co.*, 15 Cal. 359; 36 Am. Rep. 40.

dent, secretary, and treasurer of the corporation have power to execute a mortgage to secure a debt within the power of the corporation to create, and it is not essential to the validity of the mortgage that it should have been made at a regular meeting of the directors.¹ So where the by-laws of a corporation provide that in the management of its affairs the directors shall have all the powers which the corporation itself possesses not incompatible with the provisions of the by-laws, and the laws of the commonwealth, the directors may mortgage the lands of the corporation in security of its bonds.² Where a particular number of members of the board of directors or trustees are required by the act of incorporation to be present at the making of a contract, the required number must be present at the execution of the mortgage, although a less number may perform the purely ministerial act of affixing the seal to the deed.³

So the directors of a corporation have the right to foreclose a mortgage debt against it for their demands.⁴ But the directors of the corporation cannot mortgage or convey the corporate property to themselves or secure to themselves a preference in

Where a mortgage is executed in the name of a corporation by its secretary and treasurer, and the circumstances show the existence of a resolution of authorization, the fact that the resolution is not recorded in the proper book will not render the mortgage invalid. *Schallard v. Eel River Steam Nav. Co.*, 70 Cal. 144.

1. *Eureka Iron Works v. Bresnahan*, 60 Mich. 332; *Sherman v. Fitch*, 98 Mass. 59; *Amerman v. Wiles*, 24 N. J. Eq. 13; *Nelson v. Drake*, 14 Hun (N. Y.) 465. See *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; 5 Am. & Eng. Corp. Cas. 248; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237; 6 Am. & Eng. Corp. Cas. 240; *Poole v. West Point Butter etc.*, 30 Fed. Rep. 513.

A mortgage of all the personal property of a manufacturing corporation, except its book accounts, given by the president and treasurer of the corporation to secure the payment of a pre-existing debt, without previous authority or subsequent ratification by, or the knowledge and acquiescence of, the directors of the corporation, is invalid, although the president and treasurer was also the general manager of the corporation and owned all but two shares of its capital stock. *England v. Dearborn*, 141 Mass. 590.

2. *Hendee v. Pinkerton*, 14 Allen (Mass.) 381. See *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Ellis v.*

Boston etc. R. Co., 107 Mass. 1; *Taylor Co. Court v. Baltimore etc. R. Co.*, 35 Fed. Rep. 161; *Hopson v. Aetna Axle & Spring Co.*, 50 Conn. 597; *Hayward v. Pilgrim Society*, 21 Pick. (Mass.) 270. Compare *Tyrrell v. Washburn*, 6 Allen (Mass.) 466.

An agent of a corporation, appointed by the directors for the purpose of superintending and carrying on its business, has no authority in virtue of such agency to pledge or mortgage the machinery used by the company for the security of a loan. *Dispatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205.

Where a resolution of the board of directors of a corporation authorized the execution of a deed of trust, which was lost in the mail before delivery, *hela*, that a ratification of a duplicate deed was unnecessary. *Bassett v. Monte Christo etc. Min. Co.*, 15 Nev. 293.

3. *Berks etc. Turnpike Co. v. Myers*, 6 S. & R. (Pa.) 12; *Holcomb v. Managers New Hope etc. Bridge Co.*, 9 N. J. Eq. 457.

4. *McMurtry v. Montgomery Masonic Temple Co.*, 86 Ky. 206.

A director of a corporation may become its creditor and foreclose a mortgage and purchase at the execution sale; but he is bound to act in the utmost good faith, and the sale will be set aside on slighter grounds than in ordinary cases. *Hallam v. Indianola Hotel Co.*, 56 Iowa 178.

case the corporation is insolvent.¹

(m) TO LEASE PROPERTY.—The directors of a railway company cannot execute a lease of the company's entire property though controlling the majority of the stock, without special authority in their charter or without first submitting the question to the stockholders at a meeting called in accordance with their charter.² A right to manage the business affairs of the corporation confers no such extraordinary power.³

(n) STOCK.—The directors of a corporation cannot increase its capital stock beyond the limit fixed by its charter unless expressly authorized thereto,⁴ nor can they delegate power so to do, to an agent; nor can an act of negligence or misconduct on the part of the agent effect, by any liability for such act, what the company could not do directly in the way of such

1. *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639. See *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 84; *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513; *European etc. R. Co. v. Poor*, 59 Me. 277; *Hoyle v. Plattsburgh etc. R. Co.*, 54 N. Y. 314; 13 Am. Rep. 595; *Butts v. Wood*, 38 Barb. (N. Y.) 188; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 434; *In re Taylor Orphan Asylum*, 36 Wis. 552; *Pickett v. School District*, 25 Wis. 553; *Walworth Co. Bank v. Farmers' Loan and Trust Co.*, 16 Wis. 629; *Koehler v. Black River Falls Iron Co.*, 2 Black (U. S.) 715; *Corbett v. Woodward*, 5 Sawyer (U. S.) 403; *York etc. R. Co. v. Hudson*, 22 L. J., Ch. 529; 19 Eng. L. & Eq. 365; *Great L. R. Co. v. Magnay*, 25 Beav. 586.

2. *Martin v. Continental Pass. R. Co.*, 14 Phila. (Pa.), 10. See *Flagg v. Manhattan R. Co.*, 20 Blatchf. (U. S.) 142; *Union Bridge Co. v. Troy etc. R. Co.*, 7 Lans. (N. Y.) 240; *Ban v. New York etc. R. Co.* (N. Y.), 26 N. E. Rep. 145.

The holders of a majority of the capital stock of a corporation, by their votes in a stockholders' meeting, cannot lawfully authorize its officers to lease its property to themselves, or to another corporation formed for the purpose, and exclusively owned by them, unless such lease is made in good faith, and is supported by an adequate consideration; and in a suit, properly prosecuted, to set aside such contract, the burden of proof is upon the parties claiming thereunder. All doubts will be solved in favor of the corporation

for whom such stockholders assumed to act. *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48.

An unauthorized lease made by officers of a corporation is void, and the acquiescence of the corporation is not to be inferred from silence merely. *Kersey Oil Co. v. Oil Creek & Allegheny R. Co.*, 12 Phila. (Pa.) 374.

3. *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 11 Daly (N. Y.) 373; 14 Abb. N. Cas. (N. Y.) 103.

Where a board of directors of a mining corporation makes a nominal lease of the mine owned by the corporation, to a party really acting in the interests of a minority of the stockholders, not in the ordinary course of the business of the corporation, but for the purpose of withdrawing the mine from the control of a board of directors about to be elected at an approaching meeting of the stockholders, and thereby perpetuating the control of the minority, a court of equity will cancel the lease on a bill filed by the corporation for that purpose. *Mahoney Min. Co. v. Bennett*, 5 Sawy. (U. S.) 141.

The general agent of a corporation, having charge of its lands and buildings, cannot, by virtue of a special vote, authorize him to enter and hold certain land, make a lease of the same, after his entry for condition broken, in order to try the title thereto. *Gillis v. Bailey*, 17 N. H. 18.

Trustees of a secret society vested with general power to manage its property may lease the lodge room to another society for one night in each week. *Phillip v. Aurora Lodge*, 87 Ind. 505.

4. *Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 233; *Eidman v. Bow-*

increase.¹ The stock in a corporation held by an individual is his own private property, which he may sell or dispose of as he sees proper, and over which neither the corporation nor its officers have any control. It is the subject of daily commerce and is bought and sold in market like any other marketable commodity. The directors have no control or dominion over it whatever, or duty to discharge in reference to its sale and transfer, unless it be to see that proper books and facilities are furnished for that purpose. As the property of the individual holder, he holds it as free from the dominion and control of the directors, as he does his lands or other property.²

One corporation cannot, without express statutory authority, become the owner of any portion of the stock of another corporation.³ But a director may take stock in another company in payment of property sold and as the means of selling it, if taken with a view to sell again—otherwise, with the intent permanently to hold it.⁴

(o) BONDS.—Managers or directors of a private corporation have a right to purchase the bonds of the company.⁵ They cannot, however, enforce equally with other bondholders bonds given by the company to them to secure the debt, when the money for which the debt was incurred did not go to increase the fund from which the bondholders are to be paid.⁶

Authority to sell bonds of a company will not be inferred from the position of a party as director of the company, nor from the fact that the president of the company gave him a power of attorney to sell. The authority of the president to execute such

man, 58 Ill. 444; *Finley Shoe etc. Co. v. Kurtz*, 34 Mich. 89; *New York etc. R. Co. v. Schuyler*, 36 Barb. (N. Y.) 534.

Where the charter of a corporation says that the capital stock of the corporation shall be a sum named, "and may be increased from time to time at the pleasure of the said corporation," the directors alone, and without the matter being submitted to and approved by the stockholders, have no power to increase it, unless expressly authorized thereto. The fact that the charter declares that "all the corporate powers of the said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint, does not alter the case. The powers thus granted to the directors, etc., refer to the ordinary business transactions of the corporation. *Chicago etc. R. Co. v. Allerton*, 18 Wall. (U. S.) 233.

1. *New York etc. R. Co. v. Schuyler*, 38 Barb. (N. Y.) 534.

Nor can the directors of a corpora-

tion reduce the amount of its capital. *Percy v. Millandon*, 3 La., O. S. 569.

2. *Tippecanoe Co. v. Reynolds*, 44 Ind. 515.

Directors of a corporation who sell to themselves stock at one third of its par value, are liable to the company and its creditors for the full value of the stock. *Freeman v. Stine*, 15 Phila. (Pa.) 37. See *Sturgis v. Stetson*, 3 Phila. (Pa.) 304. Compare *Deaderick v. Wilson*, 8 Baxt. (Tenn.) 108.

3. *Hill v. Nisbett*, 100 Ind. 349. See *Pearce v. Madison etc. R. Co.*, 21 How. (U. S.) 441; *Central R. Co. v. Collins*, 40 Ga. 582; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; 38 Am. Rep. 594; *Mutual Sav. Bank etc. Assoc. v. Meridian Agency Co.*, 24 Conn. 159; *Franklin Co. v. Lewiston Institution*, 68 Me. 43; *Sumner v. Marcy*, 3 Woodb. & M. (U. S.) 105.

4. *Hodges v. New England Screw Co.*, 3 R. I. 9.

5. *Harts v. Brown*, 77 Ill. 226.

6. *Duncomb v. New York etc. R. Co.*, 22 Hun (N. Y.) 133.

power of attorney must be shown.¹

(p) **DECLARING DIVIDENDS.**—Unless there is some obligation created by the charter or by contract to the contrary, it is entirely a matter of discretion with the directors whether any, or what dividend, be declared. They are to manage the affairs of the corporation in this, as in every other respect as wise, prudent, and honest men manage their own affairs. So long as they act in good faith the courts will not interfere, even though they may deem their judgment erroneous.² If they abuse their power by dividing the unearned premiums without leaving sufficient to satisfy the probable losses, they may, in case of any extraordinary loss which is sufficient to exhaust the whole capital and more, make themselves personally liable to the creditors of the company.³ On the other hand, should they without reasonable cause refuse to divide what is actually surplus profits, the stockholders are not without remedy if they apply to the proper tribunal before the corporation has become insolvent.⁴ The remedy of a stockholder aggrieved by the refusal of a board of directors to accept his views, is to unite with other stockholders and charge those directors; but if irreparable mischief to his interest

1. *Titus v. Cairo etc. R. Co.*, 37 N. J. L. 98.

2. *Karnes v. Rochester etc. R. Co.*, 4 Abb. Pr., N. S. (N. Y.) 107; *State v. Bank of Louisiana*, 6 La., O. S. 745; *Ely v. Sprague, Clarke Ch.* (N. Y.) 351; *Luling v. Atlantic Mut. Ins. Co.*, 45 Barb. (N. Y.) 510. See *Pratt v. Pratt*, 33 Conn. 446; *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. (N. Y.) 280; *State v. Baltimore etc. R. Co.*, 6 Gill (Md.) 363; *Smith v. Prattville Mfg. Co.*, 29 Ala. 503; *Stringer's Case*, L. R., 4 Ch. 475; *Jackson v. Newark Plank Road Co.*, 31 N. J. L. 277; *Williams v. Western Union Tel. Co.*, 93 N. Y. 162; *State v. Bank of Louisiana*, 6 La., O. S. 745; *Coyote etc. Min. Co. v. Ruble*, 8 Oreg. 284; *Chaffee v. Rutland R. Co.*, 55 Vt. 110; *Rex v. Bank of England*, 2 Barn. & Ald. 620.

3. *Scott v. Eagle Fire Co.*, 7 Paige (N. Y.) 203; *Pratt v. Pratt*, 33 Conn. 456; *Slayden v. H. J. Seip Coal Co.*, 25 Mo. App. 439.

The action of directors in declaring a dividend with a knowledge that there are no profits, is illegal. *Slayden v. H. J. Seip Coal Co.*, 25 Mo. App. 439.

Under a statute declaring the directors of a corporation who vote for the crediting of any interest or dividend in excess of the interest or profits earned, personally liable to the corporation for the amount of the excess, does not limit the interest which law-

fully may be voted for, to net profits. If a trustee votes for a dividend less than the whole amount of interest or profits earned, without any deduction therefrom for expenses, although the earnings have not been actually received, he does not, in the absence of fraud or bad faith, overstep his statutory duty, and he is not liable to the penalty. *Van Dyck v. McQuade*, 86 N. Y. 38.

A company may recover money paid to a director of the company for dividends illegally declared, and a judgment creditor of such company, with a return of *nulla bona* on his execution, may subject to the satisfaction of his demand money so paid, when the company is insolvent, and need not bring the other creditors and stockholders of the company before the court. *Gratz v. Redd*, 4 B. Mon. (Ky.) 178.

4. *Beers v. Bridgeport Spring Co.*, 42 Conn. 17; *Pratt v. Pratt*, 33 Conn. 446; *Stevens v. South Devon R. Co.*, 9 Hare 313; *State v. Bank of Louisiana*, 6 La., O. S. 745; *Scott v. Eagle Fire Co.*, 7 Paige (N. Y.) 203; *Browne v. Monmouthshire R. etc. Co.*, 13 Beav. 32; *Jermain v. Lake Shore etc. R. Co.*, 91 N. Y. 484; *Howell v. Chicago etc. R. Co.*, 51 Barb. (N. Y.) 378; *Boardman v. Lake Shore etc. R. Co.*, 84 N. Y. 157; *Smith v. Prattville Mfg. Co.*, 29 Ala. 503; *Hazeltine v. Belfast etc. R. Co.*, 79 Me. 411; *Belfast etc. R.*

may accrue in the meantime, equity will administer preventive justice until such time as the will of the body of stockholders can be ascertained.¹ But in order to charge the directors personally for declaring a dividend, the insolvency charged against the corporation must be clearly proved.² A plaintiff who has no claim against the corporation cannot sustain a suit against the directors therefor for assenting to the dividend impairing the capital of the company.³

When they undertake to declare a dividend they are bound to make it equal and just among all who are interested. They have no right to divide their profits among a few particular friends, neither have they authority to say that one class of stockholders shall receive a larger amount of profits or a greater dividend than others.⁴ When such discriminations are made, the courts have a right to interfere to prevent them.⁵ So if the directors of a private corporation accept the statement of the manager of the company, and pay a dividend which, by reason of an erroneous account submitted, proves to have been made out of capital and not from profits, they are liable for a breach of duty, and must repay the sums divided.⁶

A company may recover money paid to a director of the company for dividends illegally declared, and a judgment creditor of such company, with the return of *nulla bona* on his execution, may submit to the satisfaction of his demand money so paid, when the company is insolvent, and need not bring the other creditors and stockholders of the company before the court.⁷

(g) WINDING UP BUSINESS OF A COMPANY.—Directors of a corporation have no implied authority to wind up the company or to sell any property which is necessary in order to carry on its

Co. v. Belfast, 77 Me. 445; March v. Eastern R. Co., 43 N. H. 548; Park v. Grant Locomotive Works, 40 N. J. Eq. 114.

1. Samuel v. Holladay, 1 Woolw. (U. S.) 400.

The directors of a trading corporation may be restrained by an injunction, upon the application of a party interested, from his managing the business of the corporation, or wasting its funds. *Sears v. Hotchkiss*, 25 Conn. 171.

"When the right to a dividend is clear, and there are funds from which it can properly be made, the court of equity will interfere to compel the company to declare it. The directors are not allowed to use their power illegally, wantonly, or oppressively." *Belfast etc. R. Co. v. Belfast*, 77 Me. 445; *Williston v. Michigan Southern etc. R. Co.*, 13 Allen (Mass.) 400; *Boardman v. Lake Shore etc. R. Co.*,

84 (N. Y.) 157; *Jermain v. Lake Shore etc. R. Co.*, 91 N. Y. 483.

2. *Slaymaker v. Jaffray*, 82 Va. 346.

3. *Hill v. Frazier*, 22 Pa. St. 320.

4. *Luling v. Atlantic Mut. Ins. Co.*, 45 Barb. (N. Y.) 510; *Ryder v. Alton etc. R. Co.*, 13 Ill. 516; *Jones v. Terre Haute etc. R. Co.*, 57 N. Y. 196; *Hoole v. Great Western R. Co.*, L. R., 3 Ch. App. 272.

5. *Jones v. Terre Haute etc. R. Co.*, 57 N. Y. 196; *Hale v. Republican River Bridge Co.*, 8 Kan. 466; *Jackson v. Newark Plank Road Co.*, 31 N. J. L. 277; *Luling v. Atlantic Mut. Ins. Co.*, 45 Barb. (N. Y.) 510; *Harrison v. Mexican R. Co.*, L. R., 19 Eq. 358. See *Beers v. Bridgeport Spring Co.*, 42 Conn. 17.

6. *Leeds Estate B. & I. Co. v. Shepherd*, L. R., 36 Ch. Div. 787; 19 Am. & Eng. Corp. Cas. 200.

7. *Gratz v. Redd*, 4 B. Mon. (Ky.) 178.

business.¹ But by the *New York* statutes, the directors of a dissolved corporation have power to settle its affairs, if no other persons are appointed to settle them.² It is the duty of the directors to pay the debts of the company, and they are justified in using the property for that purpose. They may use the property for such purposes, though the company be thereby disabled from carrying on its business, if they act in good faith with a due regard to the interests of all the shareholders.³ So the directors of an insolvent corporation may convey the whole of its assets to a trustee for the payment of creditors.⁴

5. Duties and Liabilities.—Whatever the duties of the directors or officers are, they must be discharged with fidelity and conscience, and with ordinary care. Gross negligence in the performance of such duties, and a want of reasonable and ordinary fidelity and care will impose liability for loss thereby occasioned.⁵ Every director present at a meeting of the board is responsible for any act of it for which he votes or which he does not oppose, and in the latter case, for all the injurious consequences of the act which he does not apparently labor to avert. Every absent director is equally responsible in case of extreme neglect in his attendance at the board, or in any case after the act comes or must have come to his knowledge, had he used due diligence, he does not labor to avert its injurious consequences.⁶ So one who acts as a director may be liable although he was not legally

1. *Rollins v. Clay*, 33 Me. 132; *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578; *Bank Commr's v. Bank of Brest*, 1 Harr. Ch. (Mich.) 106; *Ernest v. Nicholls*, 6 H. L. Cas. 401; *Hopson v. Ætna Axle & Spring Co.*, 50 Conn. 600. Compare *Bank of Switzerland v. Bank of Turkey*, 5 L. T., N. S. 549; *Wilson v. Miers*, 10 C. B., N. S. 348.

2. *Edison Electric Light Co. v. New Haven Electric Co.*, 35 Fed. Rep. 233.

3. *Sheldon Hat Blocking Co. v. Eickmeyer Hat Blocking Machine Co.*, 56 How. Pr. (N. Y.) 70.

4. See assignment for benefit of creditors, *infra*.

5. *Mowbray v. Antrin*, 123 Ind. 24. Liquidators of West Bank v. Douglas, 11 Session Cas. 112; *Hun v. Cary*, 82 N. Y. 73; *Spering's Appeal*, 71 Pa. St. 11; *Charitable Corporation v. Sutton*, 2 Atk. 405; *Litchfield v. White*, 3 Sandf. (N. Y.) 545; *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513; *Beal v. Osborne*, 72 Cal. 305; *Robinson v. Smith*, 3 Paige (N. Y.) 222; *Cady v. Sanford*, 53 Vt. 632; *Myers v. Caperton*, 87 Ky. 306.

Directors of banks are required to

exercise ordinary care in the discharge of their duties. *Percy v. Millandon*, 8 Martin, N. S. (La.) 68. Or such care as men of common prudence exercise in the management of their own affairs. *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513.

If the secretary of a corporation, whose duty it is to receive moneys due the corporation, and to pay them over to the treasurer, fails to pay over promptly, and the moneys are stolen from him, he and the sureties, on a bond given by him for the faithful performance of his duties, are liable. *Odd Fellows' Mut. Aid Assoc. v. James*, 63 Cal. 598; 49 Am. Rep. 107.

To Keep Property Insured.—Where there is no statute making it their duty, directors of a corporation are not necessarily obliged to insure the property of the company. *Charleston Shoe Co. v. Dunsmore*, 60 N. H. 85.

6. *Percy v. Millandon*, 3 La. Ann. 568; *Ramsey v. Gould*, 52 Barb. (N. Y.) 398; *Robinson v. Smith*, 3 Paige (N. Y.) 222; *Shea v. Mabey*, 1 Lea (Tenn.) 319; *Black v. Delaware etc. Canal Co.*, 22 N. J. Eq. 420; *Smith v. Poor*, 3 Ware (U. S.) 148; *Metropolitan R. Co. v. Kneeland*, 120 N. Y. 134.

elected and is not a stockholder.¹ Directors of a corporation formed under a general law are chargeable with knowledge of the provisions of the law regulating their duties or imposing liabilities upon them.²

(a) TO SHAREHOLDERS.—Shareholders cannot hold the directors or other agents of the company liable for breaches of duty to the corporation.³ The remedy for acts in violation of corporate rights must be obtained through the corporation.⁴ The shareholders cannot maintain a bill to compel the directors to account unless it first appear that the directors refuse to prosecute the suit or the present directors are the parties who made themselves answerable for the loss. In all cases the corporation is a necessary party either as complainants or defendants.⁵ If a stockholder intends to treat an act of the corporation as illegal and to hold the directors personally answerable, he must tell them so. He cannot stand by and see it done, objecting to it on

1. Halstead v. Dodge, 51 N. Y. Super. Ct. 169.

2. Van Etten v. Eaton, 19 Mich. 187.

When directors of a corporation have the means of knowledge, ignorance will not excuse them for allowing the funds thereof to be diverted from the purposes of the trust, and they are individually responsible therefor. Shea v. Mabry, 1 Lea (Tenn.) 319.

It is error to instruct the jury that, as a matter of law, directors of a corporation are chargeable with knowledge of that which, by the exercise of diligence, they might have known. Murray v. Nelson Lumber Co., 143 Mass. 250.

3. Gardiner v. Pollard, 10 Bosw. (N. Y.) 675; Smith v. Hurd, 12 Met. (Mass.) 371.

4. Smith v. Poor, 40 Me. 422; Ackerman v. Halsey, 37 N. J. Eq. 356; affirmed, 38 N. J. Eq. 501; Williams v. Halliard, 38 N. J. Eq. 373; Robinson v. Smith, 3 Paige (N. Y.) 222; Hersey v. Veazie, 24 Me. 9; Cunningham v. Pell, 5 Paige (N. Y.) 607; Brewer v. Boston Theater, 104 Mass. 399; Slaterry v. St. Louis Transp. Co., 91 Mo. 217; Detroit v. Dean, 106 U. S. 537; Hawes v. Contra Costa Water Co., 104 U. S. 450; Pond v. Vermont Valley R. Co., 12 Blatchf. (U. S.) 280; Peabody v. Flint, 88 Mass. (6 Allen) 52; Sheridan v. Sheridan Electric Light Co., 38 Hun (N. Y.) 396.

5. Memphis etc. Gas Co. v. Williamson, 9 Heisk. (Tenn.) 315; Jackson v. Ludeling, 21 Wall. (U. S.) 616 (1874); Davenport v. Dows, 18

Wall. (U. S.) 626; Memphis v. Dean, 8 Wall. (U. S.) 64; Young v. Drake, 8 Hun (N. Y.) 61; Rogers v. Lafayette Agricultural Works, 52 Ind. 296; March v. Eastern R. Co., 40 N. H. 548; Hodges v. New England Screw Co., 1 R. I. 312; Duckett v. Gover, L. R., 6 Ch. Div. 82; MacDougall v. Gardiner, L. R., 1 Ch. Div. 13; Atwood v. Merryweather, L. R., 5 Eq. 464 n. (1867); Benson v. Heathorn, 1 Younge & Co. 326; Heath v. Erie R. Co., 8 Blatchf. (U. S.) 347; Forbes v. Memphis etc. R. Co., 2 Woods (U. S.) 323; Mason v. Harris, L. R., 11 Ch. Div. 97; Menier v. Hopper's Tel. Works, L. R., 9 Ch. Div. 350.

In Hodges v. New England Screw Co., 1 R. I. 312, it is held that the primary party to sue for a breach of trust is the corporation, but if the corporation refuses to sue, or is under control of the guilty directors, the stockholders may sue in their individual names. So in Smith v. Poor, 40 Me. 415, it was held that an individual corporation who has suffered damage in a contract made with an unincorporated company through the fraudulent contracts and votes of directors, under color of their office, can maintain no action against them to recover compensation. His remedy is against the company. But where the action is brought to enforce an equitable lien against a corporation, no fraud being alleged against the directors, nor relief sought from them, they should not be joined with the corporation as defendants. Norwood v. Memphis etc. R. Co., 72 Ala. 563.

other grounds, and then hold them responsible for reasons not alleged in opposition at the time.¹

(b) TO CREDITORS.—Aside from statutory provisions or one of similar nature in the organic law, the directors or officers of a corporation would not be individually responsible in an action at law for injury resulting to a creditor unless the injury were occasioned by the malicious or fraudulent act of the party complained of. Mere nonfeasance will not answer; nothing short of active participancy in a positively wrongful act intendedly and directly operating injuriously to the party complaining will give origin to individual liability as above indicated.² Creditors of an insolvent corporation are, however, entitled in equity to have the company's remaining assets applied in payment of their claims, and this equitable right will be protected by the courts.³ So a misapplication of the company's assets, either by the board of directors or by other persons, may be enjoined by the creditors of the insolvent corporation, and they may hold the company's agents liable for wasting assets which are needed to settle their claims on the ground that this constitutes a misapplication of the trust funds.⁴ Any agreement made between the officers and the stockholders of a company, as to the liability of the stockholders on their stock notes, cannot affect creditors.⁵

(c) FOR BREACH OF TRUST.—The directors of a corporation are liable in equity as trustees for a fraudulent breach of trust.⁶

1. *Hodges v. New England Screw Co.*, 3 R. I. 9.

2. *Fusz v. Spaunhorst*, 67 Mo. 264; *Solmon v. Richardson*, 30 Conn. 360; *Harman v. Tappenden*, 1 East 555; *Vose v. Grant*, 15 Mass. 505; *Gerhard v. Bates*, 20 Eng. L. & Eq. 129; *Crown v. Brainerd*, 57 Vt. 625. See *Union Nat. Bank v. Douglass*, 1 McCrary (U. S.) 86.

The directors of a corporation appointed a secretary, whose character was free from suspicion, and to whom the funds of the corporation were not unnecessarily exposed, and they exercised reasonable care in relation to the performance of his duties. *Held*, that such directors were not personally liable to the stockholders for a loss by the fraud and embezzlement of the secretary, who had baffled enquiry by the production of false and forged books. *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513.

Payments made by a corporation, intending in good faith to go on and develop valuable patents owned by it, to its directors, of money borrowed from them in the ordinary course of business, are not recoverable from such directors by a creditor of the corporation whose

debt at the time was not due and payable. *Holt v. Bennett*, 146 Mass. 437.

A creditor at large cannot, under §§ 1781, 1782, of *New York Code*, maintain an action against directors of a corporation for their misconduct. A judgment creditor only is entitled to sue. *Paulsen v. Van Steenberg*, 65 How. Pr. (N. Y.) 342.

3. *Branch v. Roberts*, 50 Barb. (N. Y.) 435; *Winter v. Baker*, 34 How. Pr. (N. Y.) 183; 50 Barb. (N. Y.) 432; *Fusz v. Spaunhorst*, 67 Mo. 264; *Zinn v. Mendel*, 9 W. Va. 580; *Crown v. Brainerd*, 57 Vt. 625; *Sweeny v. Sugar Refining Co.*, 30 W. Va. 443; *Atlanta Real Estate Co. v. Atlanta Nat. Bank*, 75 Ga. 41.

4. *Gratz v. Redd*, 4 B. Mon. (Ky.) 178; *Bank of St. Mary's v. St. John*, 25 Ala. 566; *Wood v. Drummer*, 3 Mason (U. S.) 308; *Adder v. Milwaukee Brick Co.*, 13 Wis. 62; *Atlanta Real Estate Co. v. Atlanta Nat. Bank*, 75 Ga. 40; *McCarty's Appeal*, 110 Pa. St. 374; *People v. Bruff*, 60 How. Pr. (N. Y.) 1; *Sears v. Hotchkiss*, 25 Conn. 171.

5. *Peychaud v. Hood*, 23 La. Ann. 732.

6. *Hodges v. New England Screw*

So for the damage sustained by a stockholder from illegal and fraudulent acts of directors and officers of a company, an action may be sustained by the stockholder against the officers and directors.¹ So where a loss is sustained because of the wilful abuse of their trust or misapplication of the funds of the company, or where the corporate funds are lost through their gross negligence or inattention to the duties of their trust, they are personally liable.²

A director is not liable for a breach of trust or act *ultra vires*, or improvident act committed by his co-directors, where he was not present when it was decided upon, took no part in it, and had no knowledge of it, unless it appears that he might have prevented it by ordinary attention to his duties.³ So where a director was present during only a part of the session at which an illegal or wrongful act was approved, and had no knowledge of

Co., 1 R. I. 1; *Re Oxford Benefit Ben. etc. Soc.*, 35 Ch. Dev. 502; 17 Am. & Eng. Corp. Cas. 179; *Re Bolt & Iron Co.*, 14 Ontario Rep. 211; 19 Am. & Eng. Corp. Cas. 165; *Colquitt v. Howard*, 11 Ga. 556; *Peabody v. Flint*, 6 Allen (Mass.) 56; *Smith v. Poor*, 40 Me. 415; *Bank of St. Mary's v. St. John*, 25 Ala. 566; *Robinson v. Smith*, 3 Paige (N. Y.) 222; 24 Am. Dec. 212; *Gindrat v. Dane*, 4 Cliff. (U. S.) 260; *Koehler v. Black River Falls Iron Co.*, 2 Black (U. S.) 721; *Charitable Corporation v. Sutton*, 2 Atk. 400; *Thompson's Liabilities of Officers and Agents of Corp.* 226; *Hazard v. Durant*, 11 R. I. 195; *Shea v. Mabry*, 1 Lea (Tenn.) 319; *Spering's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; *Greaves v. Gouge*, 69 N. Y. 154; *Cunningham v. Pell*, 5 Paige (N. Y.) 607; *Smith v. Rathbun*, 66 Barb. (N. Y.) 405; *Neall v. Hill*, 16 Cal. 145; *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 389; *Citizens' Loan Assoc. v. Lyon*, 29 N. J. Eq. 110.

Directors represent the corporation in all its business affairs and are authorized to transact all the corporate business within the scope of its authority. In the exercise of these powers the directors are at all times subject to the equity jurisdiction of the courts in the application of the stockholder or a minority of stockholders, to restrain all breaches of trust or the exercise of powers not delegated to them to the injury of stockholders. *Sims v. Street R. Co.*, 37 Ohio St. 567.

Under a provision in the charter of a trust company, that the "directors shall be liable to the creditors and

stockholders" for loss occasioned by remissness in the discharge of their official duties, a creditor cannot maintain a suit at law, but must bring a bill in equity. *Crown v. Brainerd*, 57 Vt. 625.

1. *Cook v. Jewett*, 12 How. Pr. (N. Y.) 19.

2. *Robinson v. Smith*, 5 Paige (N. Y.) 222; *Butts v. Wood*, 38 Barb. (N. Y.) 181; 37 N. Y. 317. See *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Bank of St. Mary's v. St. John*, 25 Ala. 566; *Wilkinson v. Dodd*, 40 N. J. Eq. 142; *Ackerman v. Halsey*, 37 N. J. Eq. 362; *Citizens' Building etc. Assoc. v. Coriell*, 34 N. J. Eq. 383; *Citizens' Loan Assoc. v. Lyon*, 29 N. J. Eq. 110; *Taylor v. Miami Exporting Co.*, 5 Ohio 167; *Spering's Appeal*, 71 Pa. St. 23; 10 Am. Rep. 692; *Lewis v. St. Albans Iron etc. Works*, 50 Vt. 481; *Mutual Bldg. Fund v. Boseiux*, 3 Fed. Rep. 835; *Tippecanoe Co. v. Reynolds*, 44 Ind. 509; 15 Am. Rep. 251; *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 84; *Franklin F. Ins. Co. v. Jenkins*, 3 Wend. (N. Y.) 130.

3. *Spering's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; *Maisch v. Seaman's Sav. Fund Soc.*, 5 Phila. (Pa.) 30. See *Robinson v. Smith*, 3 Paige (N. Y.) 222; *State v. Willis*, 78 Me. 70; *Ackerman v. Halsey*, 37 N. J. Eq. 356; 38 N. J. Eq. 501; *Hodges v. New England Screw Co.*, 1 R. I. 312; 3 R. I. 9; *Movius v. Lee*, 30 Fed. Rep. 298; *Cargill v. Bower*, L. R., 10 Ch. Div. 502; *Joint Stock Discount Co v. Brown*, L. R., 8 Eq. 381.

the facts.¹ But if he was present when an act was decided upon, whereby the funds of the corporation were wasted, and did not oppose it, he will be liable.²

(d) FOR ISSUING FRAUDULENT CERTIFICATES.—If directors of a corporation knowingly issue illegal and spurious stock beyond that which they are authorized by the charter to issue, they are liable to any purchaser or subsequent transferee of the certificates of obligations who takes them relying on their apparent validity.³ In a suit to recover against the officers for issuing illegal stock, the plaintiff is bound to prove to the satisfaction of the jury, that the certificates bought by him did not represent genuine stock, but constituted part of the over issue.⁴

(e) DEBTS.—Directors cannot by resolution as directors create, revise, or continue a debt to themselves and against their company.⁵ Nor can they make the corporation assume a debt due a third person for which they are personally responsible.⁶ The laws under which companies are incorporated usually impose a personal liability against the officers and directors for indebtedness exceeding the capital stock.⁷ Under such laws the directors

1. *Land Credit Co. v. Fermoy*, L. R., 5 Ch. 763.

2. *Percy v. Millandon*, 8 Mart., N. S. (La.) 79; *Joint Stock Discount Co. v. Brown*, L. R., 8 Eq. 381.

3. *National Exch. Bank v. Sibley*, 71 Ga. 726; *Clark v. Edgar*, 12 Mo. App. 345; *Watson v. Crandall*, 7 Mo. App. 233; *Whiting v. Crandall*, 78 Mo. 593; *Hornblower v. Crandall*, 78 Mo. 581; *Bruff v. Mali*, 36 N. Y. 200; *Nimmons v. Tappan*, 2 Sweeny (N. Y.) 652; *Cazeaux v. Mali*, 25 Barb. (N. Y.) 578. *Compare Seizer v. Mali*, 32 Barb. (N. Y.) 76.

The officers of a corporation authorized to issue certificates of the stock thereof, are liable not only to the immediate purchaser of spurious stock, falsely and fraudulently certified to by them, but also to any subsequent purchaser, buying upon the faith of the false certificates. *Shotwell v. Mali*, 38 Barb. (N. Y.) 445.

4. *Bruff v. Mali*, 36 N. Y. 200.

5. *Coleman v. Second Ave. R. Co.*, 38 N. Y. 201.

6. *Stark Bank v. United States Pottery Co.*, 34 Vt. 144; *In re Congregational Church*, 6 Abb. N. Cas. (N. Y.) 398.

7. *Buchanan v. Bartow Iron Co.*, 3 Ill. App. 191; *Buchanan v. Low*, 3 Ill. App. 202; *Allison v. Coal Creek etc. Coal Co.*, 87 Tenn. 60; 24 Am. & Eng. Corp. Cas. 34; *Patterson v. Robinson*, 37 Hun (N. Y.) 341; *Kritzer v.*

Woodson, 19 Mo. 327; *Head v. Owen* (Iowa), 44 N. W. Rep. 210; *Moore v. Lent*, 81 Cal. 502; *Witters v. Sowles*, 43 Fed. Rep. 405; *National Park Bank v. Rensen*, 43 Fed. Rep. 226. *Compare Snyder v. Wiley*, 59 Tex. 448.

Under the provisions of the Rev. Stat. of *New York*, declaring that the total amount of debts at any time owing by an incorporated company shall not exceed three times the amount of the capital stock paid in, and that, in case of any excess, the directors, under whose administration the same may have happened, shall, in their individual and private capacities, jointly and severally be liable for such excess, to the corporation, and, in the event of its dissolution, to any of the creditors thereof, to the full amount of such excess, the liability of the directors of a corporation to the creditors, in case of a violation of the statute, is not restricted to those debtors whose debts were contracted or remained unpaid while the excess of indebtedness existed, but attaches in favor of any creditor of the corporation, in case it shall appear upon investigation that at any time there has been an excess of indebtedness beyond the limit fixed by the statute. *Tallmadge v. Fishkill Iron Co.*, 4 Barb. (N. Y.) 382.

Under a statute making directors of a corporation liable for debts beyond the amount of its capital, debts to them

are liable only to the creditor as a whole, not to any individual creditor for the amount of his debt,¹ and this liability can only be enforced in chancery.² Each creditor can only recover such

are not to be counted. *McClave v. Thompson*, 36 Hun (N. Y.) 365.

Railroad directors, authorized by *New Hampshire Laws*, 1871, ch. 83, to contract debts for construction and equipment, are not liable under *New Hampshire Gen. St.*, ch. 135, § 5, for debts so contracted, though exceeding half the capital stock and assets. *Niagara Bridge Works v. Jose*, 59 N. H. 81.

Debts for Which Liability Is Incurred.

—The giving of new notes for old ones is not an increase of indebtedness in such a sense as to render the directors of a company liable in an action based upon such new notes, under the act of incorporation, whereby they are made liable, if the assent to the contracting of debts exceeding three-fourths of the capital paid in. And this is so although the indebtedness exceeds the limits prescribed by the statute. *National Bank v. Paige*, 53 Vt. 452.

Where a corporation note is merely a renewal and consolidation of items of previous indebtedness, the liability of those who were directors when such note was given does not attach, as in the case of a debt originally accruing during their direction. *Sullivan v. Sullivan Mfg. Co.*, 24 S. Car. 341.

The liability of a corporation for infringement of letters-patent is not before judgment a "debt" for which the officers are liable. *Child v. Boston etc. Iron Works*, 137 Mass. 516; 50 Am. Rep. 328.

The liability of trustees of a manufacturing corporation under the *New York* law of 1848, ch. 40, § 12, for "debts" thereof, does not extend to torts committed by the corporation. *Esmond v. Bullard*, 16 Hun (N. Y.) 65.

It seems that the "debts" in said chapter 40 do not include unliquidated claims for breaches of contracts, and causes of action incidentally arising thereon, which the company could defeat by sufficient evidence. *Victory Web etc. Printing Co. v. Beecher*, 26 Hun (N. Y.) 48.

Debts owing by a corporation for advances made by one of its directors cannot be included among the debts of such corporation, in order to render the directors personally liable for them upon the ground that such debts exceed the capital stock of the corpora-

tion. *Robinson v. Thompson*, 20 N. Y. Wkly. Dig. 557. See *Knox v. Baldwin*, 80 N. Y. 610; *Easterly v. Barber*, 65 N. Y. 255.

In an action against the trustees, a judgment against the corporation is not even *prima facie* evidence of the existence of a "debt." *Esmond v. Bullard*, 16 Hun (N. Y.) 65.

Complaint.—The directors are not liable to any person, unless it is expressly charged that the indebtedness existing at one time exceeded the stock paid in. *Kritzer v. Woodson*, 19 Mo. 327.

1. *Buchanan v. Bartow Iron Co.*, 3 Ill. App. 19; *George Woods Co. v. Storer*, 144 Mass. 319; *Low v. Buchanan*, 94 Ill. 76; *McLeigh v. Thompson*, 31 Hun (N. Y.) 365; 21 N. Y. Wkly. Dig. 452.

In *Snyder v. Wiley*, 59 Tex. 448, it is held that no judgment can be rendered against the trustees of a corporation in their individual character for the debt of the corporation, unless they have made themselves personally liable therefor; following *Dyer v. Sullivan*, 18 Tex. 773.

An action under *New York Laws*, 1848, ch. 40, § 23, against a trustee, for assenting to the corporation's contracting debts in excess of its capital stock, can only be brought by all the creditors jointly, or by one in behalf of himself and all the others. *Anderson v. Speers*, 21 Hun (N. Y.) 568; 59 How. Pr. (N. Y.) 421.

But in *Hill v. Frazier*, 22 Pa. St. 320, it is held that a director of a manufacturing company, who has assented to a dividend amounting to more than the profits, may be sued for such violation of duty, without joining with him the company as co-defendant. *Hill v. Frazier*, 22 Pa. St. 320.

2. *Buchanan v. Bartow Iron Co.*, 3 Ill. App. 19.

To enforce the personal liability of directors of a corporation for the excess of its debts over its capital stock, a suit in equity affords the only appropriate remedy, where none is prescribed by the statute. *Stone v. Chisolm*, 113 U. S. 302. See *Horne v. Carter*, 3 McCrary (U. S.) 595.

It is no ground of objection to a bill in equity, under *Massachusetts St.* 1870,

portion of the excess of the debts from the amount of the capital debt as his debt bears to the whole amount of the debts of the company,¹ and he can only recover by showing that at the time the debt was contracted it was "over and above the solvent stock of such company."² The object of these statutes is to furnish to the creditors generally a common fund to which they may, on terms of perfect equality, resort to for the satisfaction of their debts.³ This personal liability is sometimes incurred by a failure to file an annual report.⁴ (See MANUFACTURING CORPORATIONS, vol. 14, p. 284.) Whether the corporation belongs to the class requiring such reports is to be determined from its charter.⁵

(f) FRAUDULENT REPRESENTATIONS.—The directors or offi-

ch. 224, § 42, against a corporation and its directors, to enforce the personal liability of the latter on the ground that the debts exceeded the capital stock at a particular time, that the directors are also defendants to a bill in equity, brought by the same plaintiffs against them as stockholders to enforce their personal liability, on the ground that the capital stock of the company was never paid in. And the same principle applies to the bill against the stockholders. *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563.

1. *Anderson v. Speers*, 21 Hun (N. Y.) 568; 69 How. Pr. (N. Y.) 421.

2. *Aimen v. Hardin*, 60 Ind. 119.

3. *Buchanan v. Bartow Iron Co.*, 3 Ill. App. 191.

4. *Duckworth v. Roach*, 8 Daly (N. Y.) 159; *Cooke v. Pearce*, 23 S. Car. 239; *Chase v. Curtis*, 113 U. S. 452; *Berke v. Wheeler*, 18 Hun (N. Y.) 496. See *Beal v. Osborne*, 72 Cal. 305; *Whittaker v. Masterton*, 106 N. Y. 277; *Blake v. Griswold*, 103 N. Y. 429; *Loveland v. Garner*, 71 Cal. 541; *Gregory v. Hay*, 3 Cal. 332.

The filing of an annual report for a previous year after debts have accrued does not exempt them from such liability. *Duckworth v. Roach*, 8 Daly (N. Y.) 159.

A failure of a manufacturing corporation to file the report required by *New York Laws*, 1848, ch. 40, § 12, renders the trustees liable for the debts then existing as well as for those thereafter contracted. And if the failure occurs after the creditor's death, the trustees are personally liable to his executor. *Carley v. Hodges*, 19 Hun (N. Y.) 187.

The annual statement which direct-

ors are required to make if they would escape personal liability for the corporate debts, must be made without regard to whether there was or was not a stockholders' meeting. *Cooke v. Pearce*, 23 S. Car. 239.

The complaint, in an action under the statute, making directors liable for corporate debts on failure to make a report, is bad on demurrer, if it fails to aver those things which the statute makes the foundation of the liability; as, for example, that the corporation did business in the county. *Anfenger v. Anzeiger Pub. Co.*, 9 Colo. 377. The complaint must state the purpose for which the corporation was organized (merely filing a copy of its articles of association is not enough), and also that the defendants constitute a majority of the directors, or it will be demurrable. *Niles v. Dodge*, 70 Ind. 147.

Statutes Imposing Liability Constructed.—The liability of trustees of a corporation to pay a debt thereof on failure to file a report, etc., is not a "fine" nor "penalty," in the sense in which those terms are used in *New York Code*, § 459, subd. 1, so as to subject the party to arrest. *Glen's Falls Paper Co. v. White*, 58 How. Pr. (N. Y.) 172.

The provision of *Colorado Rev. Stat.*, p. 121, § 15, prescribing the liability of trustees of corporations, arising from a failure to publish an annual report, being penal, the repeal of the statute, without any saving clause, sweeps away all inchoate rights arising thereunder. As to said § 15, the prohibition, in § 21 of any future alteration or repeal is nugatory. *Gregory v. German Bank*, 3 Colo. 332.

5. *Cooke v. Pearce*, 23 S. Car. 239.

cers of a corporation who make false statements of material facts, misrepresentations as to solvency and the like, the natural tendency of which is to deceive the public, are liable for the damages sustained by one who relies on such statements and is misled and suffers damage in consequence.¹ The mere fact of being a director and stockholder will not make one liable for the frauds and misrepresentations of the active managers of the corporation, some knowledge and participation in the act complained of as being fraudulent must be brought home to the person charged; it is only where a director lends his name and influence to promote a fraud, or is guilty of some violation of law, or some other mismanagement, that he is personally liable.²

(g) FALSE REPORTS.—The statutes usually require annual reports to be filed by the directors of a corporation.³ The purposes for which these annual reports are required to be published, are that the public may be correctly informed of the financial conditions and resources of corporations, in order that they may

1. *Morgan v. Skiddy*, 62 N. Y. 319; *Clark v. Edgar*, 12 Mo. App. 345; *Pier v. George*, 20 Hun (N. Y.) 210; *Oakland Bank v. Wilcox*, 60 Cal. 126; *Delano v. Case*, 121 Ill. 247; 2 Am. St. Rep. 81; 17 Ill. App. 531; *Cragie v. Hadley*, 99 N. Y. 131; 52 Am. Rep. 9; *Bartholomew v. Bentley*, 15 Ohio 659; 45 Am. Dec. 596; *Bank of Montreal v. Thayer*, 2 McCrary (U. S.) 1; Anonymous, 67 N. Y. 598; *Chaffee v. Fort*, 2 Lans. (N. Y.) 81; *Eaton v. Avery*, 83 N. Y. 31; 38 Am. Rep. 389; *Commonwealth v. Harley*, 7 Met. (Mass.) 462. Compare *Schwenk v. Naylor*, 102 N. Y. 683; *Phillips v. Wortenclyke*, 31 Hun (N. Y.) 192.

False and fraudulent representations made by the agent of a corporation to a party at the time of his subscription to his stock, is a good defence in an action thereon. *Eaglesfield v. Marquis of Londonderry*, L. R., 4 Ch. Div. 693; *Cole v. Cassidy*, 138 Mass. 437; *Morgan v. Skiddy*, 62 N. Y. 319; *Paddock v. Fletcher*, 42 Vt. 389; *Stewart v. Austin*, L. R., 3 Eq. 299; *Henderson v. Lacon*, L. R., 10 Eq. 73. See *Upton v. Englehart*, 3 Dill. (U. S.) 496, 506; *Davidson v. Tullock*, 3 Macq. H. L. Cas. 783, 6 Jur., N. S., 543; *Cazeaux v. Mali*, 25 Barb. (N. Y.) 578; *Ang. & Ames on Corp.*, § 531, note (a); *Cross v. Sacket*, 2 Bosw. (N. Y.) 617; *Crump v. United States Min. Co.*, 7 Gratt. (Va.) 452; *State v. Jefferson Turnpike Co.*, 3 Humph. (Tenn.) 305; *New Sombrero Co. v. Erlanger*, L. R., 5 Ch. D. 73; *Waldo v. Chicago etc. R. Co.*, 14 Wis. 575.

In *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 195, the court said: "When a fraud is committed in the name and under cover of a corporation, by persons having the right to speak for it, for their personal gain and benefit, they are bound to answer personally for their wrongful acts. Their tongues uttered the false words and their purses should pay the damages." See *Bank of Montreal v. Thayer*, 2 McCrary (U. S.) 1; *Bartholomew v. Bentley*, 15 Ohio 659; 45 Am. Dec. 596; *Seale v. Baker*, 70 Tex. 283; 8 Am. St. Rep. 592.

False representations, made by the officers of a corporation which has become a stockholder in another corporation, as to the financial condition of the latter, do not subject the former to liability as a member of the latter for debts, etc. *Langan v. Iowa etc. Construction Co.*, 49 Iowa 317.

2. *Arthur v. Griswold*, 55 N. Y. 400.

A director of a corporation, who sees a card issued by the officers of the company in the ordinary course of their business, with the names of the directors attached, cannot be held liable for false representations contained in the card, where it appears that he did not circulate the cards, and had no knowledge as to the truth or untruth of the representations thereon but allowed his name to be used, without reflection as to the consequences. *Wakeman v. Dalley*, 44 Barb. (N. Y.) 498.

3. *Butler v. Smaller*, 101 N. Y. 76.

judge of the credit to which they are entitled.¹ What is a sufficient compliance, depends upon the terms of the statute.² If they issue false and fraudulent reports or prospectuses, any person into whose hands they come in the ordinary course of business, and who is misled thereby, has his action against the directors.³

To charge an officer for signing a false report, knowing it to be false, some fact or circumstance must be shown indicating that it was made in bad faith or for some fraudulent purpose, and not ignorantly or inadvertently, and this is a question of fact which must be passed upon before the liability can be adjudged.⁴ If the report filed be untrue and constitute a false representation, it renders liable only the officer who signed it, know-

1. *Pier v. Hanmore*, 86 N. Y. 101; *Pier v. George*, 86 N. Y. 613.

2. See MANUFACTURING CORPORATIONS, vol. 14, p. 284; *Westerfield v. Radde*, 12 Daly (N. Y.) 450; *Duckworth v. Roach*, 81 N. Y. 49; *Glens Falls Paper Co. v. White*, 18 Hun (N. Y.) 214; *Butler v. Smalley*, 101 N. Y. 71; *Cincinnati Cooperage Co. v. O'Keefe*, 44 Hun (N. Y.) 64; *Bonnell v. Griswold*, 80 N. Y. 128; *Knox v. Baldwin*, 80 N. Y. 610.

The statement of the property which is to be made by the managing agent of a corporation, is properly made by the superintendent. *Lake County v. Sulphur Bank Quicksilver Min. Co.*, 68 Cal. 14.

3. *Cincinnati Cooperage Co. v. O'Keefe*, 20 N. Y. 603; *Cross v. Sacket*, 2 Bosw. (N. Y.) 617; 6 Abb. Pr. (N. Y.) 247; *Clarke v. Dickson*, 6 C. B., N. S. 453; *Bale v. Cleland*, 4 F. & F. 117; *Jarrett v. Kennedy*, 6 C. B. 319; *Gerhard v. Bates*, 2 El. & Bl. 476; *Woutner v. Sharp*, 4 C. B. 404; *Providence Steam Engine Co. v. Hubbard*, 101 U. S. 188; *Blake v. Wheeler*, 18 Hun (N. Y.) 496; *Pier v. George*, 20 Hun (N. Y.) 210; *Brockway v. Ireland*, 61 How. Pr. (N. Y.) 372; *Richards v. Crocker*, 19 Abb., N. Cas. (N. Y.) 73; *Morgan v. Skiddy*, 62 N. Y. 319, 326; *Paddock v. Fletcher*, 42 Vt. 389. See *Smith v. Chadwick*, L. R., 9 App. Cas. 187; 5 Am. & Eng. Corp. Cas. 23; *Petrie v. Guelph Lumber Co.*, 11 Supreme Court of Canada Rep. 451; 15 Am. & Eng. Corp. Cas. 487; *Edington v. Fitzmaurice*, L. R., 29 Ch. Div. 459; 19 Am. & Eng. Corp. Cas. 78; *Carley v. Hodges*, 19 Hun (N. Y.) 187; *Glens Falls Paper Co. v. White*, 58 How. Pr. (N. Y.) 172. See *Vernon v. Palmer*, 6

How. Pr. (N. Y.) 425; *Hewlett v. Epstein*, 63 Cal. 184; *Bolz v. Ridder*, 12 Daly (N. Y.) 329; *Duckworth v. Roach*, 8 Daly (N. Y.) 159; *Sears v. Waters*, 44 Hun (N. Y.) 101; *Huntington v. Attrill*, 42 Hun (N. Y.) 459; *Simons v. Vulcan Oil etc. Co.*, 61 Pa. St. 202; *Gaus v. Switzer*, 9 Mont. 408; *Wallace v. Walsh* (N. Y.), 25 N. E. Rep. 1076; *Priest v. White*, 89 Mo. 609.

The filing of a false report by a manufacturing corporation on successive years, gives rise to a separate cause of action as to each year, under *New York Laws*, 1848, ch. 40, § 15. *Anderson v. Speers*, 58 How. Pr. (N. Y.) 68.

4. *Pier v. Hanmore*, 86 N. Y. 95.

The directors of a tramway company issued a prospectus in which they stated that they were authorized to use steam power, and that by this means a great saving in working would be effected. At the time of making this statement they had not, in fact, obtained authority to use steam power, but they honestly believed that they would obtain it as a matter of course. *Held* (reversing the judgment of the court below, 21 Am. & Eng. Corp. Cas. 243), that they were not liable in an action of deceit brought by a shareholder who had been induced to apply for shares by the statement in the prospectus. *Derry v. Peek*, 14 App. Cas. (H. L.) 337; 26 Am. & Eng. Corp. Cas. 341.

Where, in an action to enforce the liability imposed by statute on the trustees of a manufacturing corporation, for making a false report, the falsity charged consists in a statement that the capital stock had been paid up in full, without stating that a portion was paid for in property, *held*, that bad faith or a fraudulent purpose must be shown, as the penalty follows an actual, not a

ing it to be false.¹ Liability for failure to fill report, see MANUFACTURING CORPORATIONS, vol. 14, p. 284.

(h) UNAUTHORIZED ACTS.—If directors transcend or abuse their powers, they are responsible for any loss resulting from it.² Thus, if they knowingly issue spurious stock and obtain a loan on it, they are personally liable.³ They are liable for losses from loans made on personal security of stockholders, in violation of a by-law limiting the amount of such loss.⁴ And whenever they threaten to perform acts or to enter into contracts which are clearly *ultra vires*, they may be enjoined by a court of equity.⁵

constructive, falsehood. *Bonnell v. Griswold*, 89 N. Y. 122.

1. *Pier v. Hanmore*, 86 N. Y. 95.

Complaint.—A complaint in an action under the statute making directors liable for corporate debts on failure to make a report, is bad on demurrer if it fails to aver those things which the statute makes the foundation of the liability, as, for example, that the corporation did business in the county. *Anfenger v. Anzeiger Pub. Co.*, 9 Colo. 377.

The complaint must also state the purposes for which the corporation was organized, and also that the defendants constitute a majority of the directors, or it will be demurrable. *Niles v. Dodge*, 70 Ind. 147.

So in an action founded on the failure of the trustees of a manufacturing corporation to file an annual report, a failure to allege that the services for which plaintiff asks compensation were rendered at the request of the corporation, is fatal. *Tovey v. Culver*, 22 Jones & S. (N. Y.) 404. And that a debt was contracted after the defendant became trustee. *Anderson v. Speers*, 8 Abb. N. Cas. (N. Y.) 382.

A complaint in a proceeding to charge a trustee with a debt due from a corporation, on the ground that he signed an annual report which he knew to be false in a material representation, is sufficient in alleging knowledge of the falsity of the report, without stating facts which are implied in such allegation. *Taylor v. Thompson*, 66 How. Pr. (N. Y.) 102.

Answer.—In an action against trustees of a corporation organized under the *New York* general manufacturing act, to recover a debt of the corporation because of a failure to make and file an annual report, certain of the defendants, in attempting to set up the statute of limitations, failed to allege that they were trustees at the time of defaults

stated by them to have occurred in previous years, and failed to allege a default on the part of the corporation in performing the corporate duty of making a report. *Held*, that the answer stated no defence. *Cornell v. Roach*, 101 N. Y. 373.

2. *Oakland Bank v. Wilcox*, 60 Cal. 135; *Citizens' Building etc. Assoc. v. Coriell*, 34 N. J. Eq. 383; *Farmers' Co-operative Trust Co. v. Floyd* (Ohio), 26 N. E. Rep. 110.

For the damage sustained by a stockholder from illegal and fraudulent acts of directors and officers of a company, an action may be sustained by the stockholder against the officers and directors. *Crook v. Jewett*, 12 How. Pr. (N. Y.) 19.

Directors of a corporation placing bonds in the hands of an agent for sale, and falsely and knowingly causing them to be endorsed "first mortgage bonds," are liable in damages to purchasers in good faith relying on such endorsements and injured by the misrepresentation. *Clark v. Edgar*, 84 Mo. 106; 54 Am. Rep. 84.

3. *National Exchange Bank v. Sibbey*, 71 Ga. 726; *Ship v. Crosskill*, L. R., 10 Eq. 73, 84; *Stewart v. Austin*, L. R., 3 Eq. 299; *Paddock v. Fletcher*, 42 Vt. 389; *Henderson v. Lacon*, L. R., 5 Eq. 249; *Morgan v. Skiddy*, 62 N. Y. 319, 326; *Cole v. Cassidy*, 138 Mass. 437.

4. *Citizens' Building etc. Assoc. v. Coriell*, 34 N. J. Eq. 383.

5. *Balfour v. Ernest*, 5 C. B., N. S., 601; *Zabriskie v. Hackensack etc. R. Co.*, 3 C. B., N. S. 178; *Black v. Delaware etc. Canal Co.*, 22 N. J. L. 130; *Kean v. Johnson*, 9 N. J. Eq. 401; *Bliss v. Anderson*, 31 Ala. 613; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637; *Memphis v. Dean*, 8 Wall. (U. S.) 64; *Zabriskie v. Cleveland etc. R. Co.*, 23 How. (U. S.) 381; *Attorney Gen'l v. Eastlake*, 11 Hare 205.

(2) MISTAKES.—A board of directors acting in good faith and with reasonable care and diligence, who nevertheless fall into a mistake, either as to law or fact, are not liable for the consequences of such mistake.¹ They are not liable for mistakes of judgment although so gross as to appear absurd, if honest and within the scope of their powers, especially where acting under direction of legal counsel.²

6. Compensation.—Directors of a corporation cannot recover compensation for services rendered, unless the compensation has been previously fixed by a by-law or a resolution before the services are performed.³ The board of directors may, by resolution,

1. *Hun. v. Cary*, 82 N. Y. 73; *Percy v. Millandon*, 8 Martin, N. S. (La.) 68; *Admr. v. Kyle*, 14 Bush (Ky.) 134; *Vance v. Phoenix Ins. Co.*, 4 Lea (Tenn.) 388; *Hodges v. New England Co.*, 3 R. I. 9; 1 R. I. 312; *Smith v. Pratlve Mfg. Co.*, 29 Ala. 503; *Overend v. Gurney*, L. R., 4 Ch. 701; *Sperings' Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; *Witters v. Sowles*, 31 Fed. Rep. 2; *Tippecanoe Co. v. Reynolds*, 44 Ind. 517; 15 Am. Rep. 251; *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513; *Humphrey v. Jones*, 71 Mo. 62.

The directors of an insurance company re-elected their secretary, but took no new bond, supposing that the bond first given was a continuing security. They took no legal advice, but were good business men, stockholders in the company, and acted in good faith. *Held*, that they could not be made personally liable for the secretary's defalcation. *Vance v. Phoenix Ins. Co.*, 4 Lea (Tenn.) 385.

Violation of Charter.—Directors are not personally responsible for a violation of the charter, where such violation resulted from a mistake as to their power, provided such mistake did not proceed from a want of ordinary care and prudence. *Hodges v. New England Screw Co.*, 1 R. I. 312.

2. *Sperings' Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; *Percy v. Millandon*, 8 Martin, N. S. (La.) 68; *Van Dyck v. McQuade*, 86 N. Y. 45; *Smith v. Prattville Mfg. Co.*, 29 Ala. 503; *Godbold v. Bank at Mobile*, 11 Ala. 191; *Hedges v. Paquett*, 3 Oregon 77; *Turquand v. Marshall*, L. R., 4 Ch. 376; *Overend v. Gibb*, L. R., 4 Ch. 701; L. R., 5 H. L. 480; *Henry v. Jackson*, 37 Vt. 431; *In re Faure Electric Accumulator Co.*, 40 Ch. Div. 141; 24 Am. & Eng. Corp. Cas. 42.

3. *Holder v. Lafayette etc. R. Co.*, 71 Ill. 106; *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Kilpatrick v. Penrose Ferry Bridge Co.*, 49 Pa. St. 121; *Loan Assoc. v. Stonemetz*, 29 Pa. St. 534; *Maux Ferry Gravel R. Co. v. Branegan*, 40 Ind. 361; *Jones v. Morrison*, 31 Minn. 140; *Hall v. Vermont etc. R. Co.*, 28 Vt. 401; *New York etc. R. Co. v. Ketchum*, 27 Conn. 170; *Wood v. Lost Lake etc. Mfg. Co. (Oregon)*, 23 Pac. Rep. 848; *Citizens' Nat. Bank v. Elliott*, 55 Iowa 104; *Lafayette B. etc. R. Co. v. Cheeney*, 87 Ill. 446; *Ogden v. Murray*, 39 N. Y. 202; *American etc. R. Co. v. Miles*, 52 Ill. 174; *Santa Clara Min. Assoc. v. Meredith*, 49 Md. 389, 390; *Pierson v. Thompson*, 1 Edw. Ch. (N. Y.) 212; *Hodges v. Rutland etc. R. Co.*, 29 Vt. 220; *Gill v. New York Cab Co.*, 48 Hun (N. Y.) 524; *Fraylor v. Sonora Min. Co.*, 17 Cal. 594; *First Nat. Bank v. Drake*, 29 Kan. 311; 44 Am. Rep. 646; *American Cent. R. Co. v. Miles*, 52 Ill. 174; *Barril v. Calendar Insulating & Water Proofing Co. (Supreme Ct.)*, 2 N. Y. Supp. 758; 19 N. Y. St. Rep. 877.

In the absence of a statute or a contract, directors of a corporation are not entitled to compensation for their services. *Smith v. Putnam*, 61 N. H. 632.

In *Kilpatrick v. Penrose Ferry Bridge Co.*, 49 Pa. St. 118, the same doctrine is laid down, and in the course of the opinion the court uses this language: "Corporate offices are usually offices filled by the chief promoters of the corporation, whose interest in the stock or in other incidental advantages is supposed to be a motive for executing the duties of the office without compensation, and this presumption prevails until overcome by an express prearrangement of salary."

In *Citizens' Nat. Bank v. Elliott*, 55

establish compensation to be paid to them for their services.¹ When, however, as directors they fix the compensation for their own services, either as directors or other officers, their act is not necessarily valid. They are agents of the corporation, and as in the case of other agents, their acts on behalf of their principal in matters where their own interests come in conflict with those of the corporation,—where their self-interest may tend to deprive the corporation of the full, free and impartial exercise of the judgment and discretion which they owe to their principal,—are looked upon and scrutinized with great jealousy by the courts. Their acts in such cases are *prima facie* voidable at the election of the corporation or of the stockholder.² So a director claiming increase of compensation is disqualified

Iowa 104. it is held that no contract to pay for services rendered by a director can be implied as against the corporation. See *American Cent. etc. R. Co. v. Miles*, 52 Ill. 174.

The position of a managing director rendering services for which remuneration is given, is not that of a servant hired by a company, but of a working member of the company, whose rights as to payment are to be measured by the provisions of the charter and by-laws of the company; and he cannot recover for services rendered after expiration of the time for which provision for payment is made by the corporation. *Re Bolt & Iron Co.*, 14 Ontario Rep. 211; 19 Am. & Eng. Corp. Cas. 165.

The plaintiff was a director of the defendant corporation. The board of which he was a member had voted a certain compensation for all special services performed by any director. *Held*, that he could not recover higher compensation for any services, such as could only have been performed by a director. *Hodges v. Rutland etc. R. Co.* 29 Vt. 220.

Nor could he, in addition to or in lieu of the compensation provided by the resolution, claim a commission for the negotiation of the defendant's bonds. *Hodges v. Rutland etc. R. Co.*, 29 Vt. 220.

A by-law of a corporation that directors should receive no compensation for services as directors, "though traveling expenses may be audited and paid," is relevant evidence in an action by a director for such services. *Barstow v. City R. Co.*, 42 Cal. 465.

1. *Hodges v. Rutland etc. R. Co.*, 29 Vt. 220. See *Holder v. Lafayette etc. R. Co.*, 71 Ill. 106.

Trustees of a mutual benefit insurance association who have received compensation for past years of service have no authority to vote themselves "back pay" for those years. *State v. People's Mut. Ben. Assoc.*, 42 Ohio St. 579.

Where the board of directors of a railroad company, at a regular meeting, authorized and directed its promissory note to be executed by the president of the company, in payment of the salary of one of its officers, when a by-law of the company provided that it shall be drawn by the auditor to the president, etc., it is not a good defence to an action on the note that there had not been a strict compliance with all the requirements of the by-laws in the execution of the note. The services having been performed for the payment of which the note was issued by the company, any matter of form and not of substance ought not to defeat the recovery. *St. Louis etc. R. Co. v. Tierman*, 37 Kan. 606.

2. *Jones v. Morrison*, 31 Minn. 140; *MacNaughton v. Osgood*, 41 Hun (N. Y.) 109. See *Shattuck v. Oakland Smelting etc. Co.*, 58 Cal. 550; *Ward v. Davidson*, 89 Mo. 445.

The company objecting, directors cannot bind it by a contract made by themselves with reference to their own compensation or employment. *Gardner v. Butler*, 30 N. J. Eq. 702; *Blatchford v. Ross*, 5 Abb. Pr. N. S. (N. Y.) 434; *Butts v. Wood*, 37 N. Y. 317, 38 Barb. (N. Y.) 181. See also *Ogden v. Murray*, 39 N. Y. 202; *Levissee v. Shreveport City R. Co.*, 27 La. Ann. 641.

Nor can directors pay for past services rendered at a fixed salary or under an agreement that they should be gratuitous. *Jones v. Morrison*, 31 Minn. 140.

from acting on the question, and if it be necessary to make up a quorum of the board, the board so constituted cannot act so as to bind the corporation.¹

The by-law or resolution providing for such compensation, must also have been passed before the services of such director were rendered,² because a subsequent vote to pay a director for his official services without consideration is therefore void.³ They have no authority to appropriate its funds and pay claims which the corporation is under no legal or moral obligation to pay, as for past services which had been rendered and paid for at a fixed salary previously agreed on, or a previous agreement that there should be no compensation for them.⁴ If a director is properly employed to perform services which do not pertain to his office as director, and are most unquestionably beyond the range of his official duties, he is entitled to such compensation as has been agreed upon or as the services are reasonably worth.⁵

An agreement made by the majority of the directors of a corporation among themselves, privately and unofficially, that they should be paid a percentage upon all the money raised upon the credit of a bond of indemnity, signed by them, against the future indebtedness of said corporation, is not binding on such corporation. *Butler v. Cornwall Iron Co.*, 22 Conn. 335.

A director of a corporation cannot enforce a contract made with his co-directors, under which he is to have one-third of a profit of \$100,000 for selling a railroad property, his services being trifling. Such a contract is beyond the power of the directors to make. *Hubbard v. New York etc. Investment Co.*, 14 Fed. Rep. 675.

1. *Butts v. Wood*, 37 N. Y. 317; *Re Oxford Ben. etc. Soc.*, 35 Ch. Div. 502; 17 Am. & Eng. Corp. Cas. 179. See *Shattuck v. Oakland Smelting etc. Co.*, 58 Cal. 550; *Blatchford v. Ross*, 54 Barb. (N. Y.) 42; *Maux Ferry Gravel Road Co. v. Branegan*, 40 Ind. 361; *Gardner v. Butler*, 30 N. J. Eq. 702, 721.

When a board so constituted audits a claim for compensation, any stockholder may sue for himself, and any others who may join themselves as parties, to prevent the payment of such a bill by the treasurer. *Butts v. Wood*, 37 N. Y. 317.

A, who was the president and one of the trustees of a corporation, joined the other trustees in fixing his compensation. But for his vote the matter could not have been arranged. *Held*, that an action could not be founded on the vote.

Copeland v. Johnson Mfg. Co., 47 Hun (N. Y.) 235.

2. *Lafayette etc. R. Co. v. Cheeney*, 87 Ill. 446; 68 Ill. 750. *Compare Barstow v. City R. Co.*, 42 Cal. 465.

3. *Kerr on Business Corp.*, § 445; *Loan Assoc. v. Stonemetz*, 29 Pa. St. 534; *Carr v. Chartiers Coal Co.*, 25 Pa. St. 337; *Dustin v. Imp. Gas Co.*, 3 B. & Ad. 125. See *Maux Ferry Gravel R. Co. v. Branegan*, 40 Ind. 361.

But a director may be compensated for services rendered before he became a director. *Branch Bank v. Collins*, 7 Ala. 95, and for services previous to the organization of the company, which were not within the range of his official duties. *New York etc. R. Co. v. Ketchum*, 27 Conn. 170.

4. *Jones v. Morrison*, 31 Minn. 140; *Frames v. Bulfontein Min. Co.*, L. R., 1891, 1 Ch. Div. 140.

5. *Jackson v. New York Central R. Co.*, 2 Thomp. & C (N. Y.) 653; *Loan Assoc. v. Stonemetz*, 29 Pa. St. 534; *Hodges v. Rutland etc. R. Co.*, 29 Vt. 220. See *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Holder v. Lafayette etc. R. Co.*, 71 Ill. 106; *Rockford etc. R. Co. v. Sage*, 65 Ill. 328; *Maux Ferry Gravel R. Co. v. Branegan*, 40 Ind. 361; *Citizens' Nat. Bank v. Elliott*, 55 Iowa 104; *First Nat. Bank v. Drake*, 29 Kan. 311; *Missouri River Co. v. Richards*, 8 Kan. 101; *Santa Clara Min. Assoc. v. Meredith*, 49 Md. 389; *Jones v. Morrison*, 31 Minn. 140; *Rogers v. Hastings etc. R. Co.*, 22 Minn. 25; *Shackelford v. New Orleans etc. R. Co.*, 37 Miss. 202; *Lafayette etc. R. Co. v. Cheeney*, 87 Ill. 446; *Gardner v.*

7. Directors of Insolvent Corporations Have No Preference as Creditors.—It may be stated as a general rule that directors of an insolvent corporation cannot, as creditors of such corporation, secure to themselves a preference. They must share ratably in the distribution of the company's assets.¹

Butler, 30 N. J. Eq. 702-711; Chandler v. Monmouth Bank, 13 N. J. L. 255; Blatchford v. Ross, 5 Abb. Pr., N. S. (N. Y.) 434; 54 Barb. (N. Y.) 42. *Compare* New York etc. R. Co. v. Ketchum, 27 Conn. 170; Levisse v. Shreveport City R. Co., 27 La. Ann. 641; Pew v. Gloucester Nat. Bank, 130 Mass. 391; Davis v. Memphis City R. Co., 22 Fed. Rep. 883; New Orleans etc. Packet Co. v. Brown, 36 La. Ann. 138; 51 Am. Rep. 5; New York etc. R. Co. v. Ketchum, 27 Conn. 170.

Thus, if a director of a railway company, under a proper employment by the company, performs services outside of the line of his duty as an officer, and which are usually performed by other agencies, and which are not required of him by the the charter or by-laws of the company, such as procuring right of way and soliciting subscriptions, he will be entitled to compensation for such services. *Lafayette etc. R. Co. v. Cheeney*, 87 Ill. 446.

One who was a director in a corporation, rendered services outside his duties as such, as secretary, under a resolution of appointment which did not specify his compensation. *Held*, that he might recover the reasonable value of such services. *Rogers v. Hastings etc. R. Co.*, 22 Minn. 25.

Where a director renders extra services for the corporation, and presents no account, and makes no claim for compensation, during eight years thereafter, and continues director during that time, he cannot recover on an implied promise to pay. *Utica Ins. Co. v. Bloodgood*, 4 Wend. (N. Y.) 652.

Where a corporation uses its director's patented invention, he is not precluded from claiming compensation by the fact that he is a director. *Deane v. Hodge*, 35 Minn. 146.

It is not competent for the directors of a foreign steamship corporation to create a trust in certain of their own number who are American citizens, for the purpose of giving their steamships the privileges of American vessels, and thereby create a claim to compensation in favor of such trustees for the per-

formance of their duties. *Ogden v. Murray*, 39 N. Y. 202.

1. *Smith v. Putnam*, 61 N. H. 632; *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263; *Corbett v. Woodward*, 5 Sawy. (U. S.) 403; *Marr v. Bank of West Tennessee*, 4 Coldw. (Tenn.) 471; *Bradley v. Farwell*, 1 Holmes (U. S.) 433; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610; *Barings v. Dabney*, 19 Wall. (U. S.) 1; *Jackson v. Ludeling*, 21 Wall. (U. S.) 616; *Howe Co. v. Sanford Fork etc. Co.*, 44 Fed. Rep. 231.

Compare *Garrett v. Burlington Plow Co.*, 70 Iowa 697; *Rollins v. Shafer Wagon etc. Co.* (Iowa, 1890), 45 N. W. Rep. 1037.

The directors of an insolvent corporation gave a preference to the estate of the deceased president. The board voting the preference consisted of but three persons, two of whom were brothers of the deceased and one the agent of his estate. *Held*, that the preference was invalid as against other creditors. *Adams v. Kehlor Milling Co.*, 35 Fed. Rep. 433.

In *Stout v. Yaeger Milling Co.*, 13 Fed. Rep. 802, it was held that where A, a bank, which held stock in B, an insolvent corporation, and which was a representative in B's board of directors, took security from B for money due it from B and for advances to be made on B's account, and thereafter made large advances on the faith of the security received, A was bound to account to nonsecured creditors for their *pro rata* of the proceeds of such securities.

And in *Hopkins' Appeal*, 90 Pa. St. 69, an insolvent corporation being indebted to its officers and directors, they executed the notes of the corporation in their own favor, and having obtained judgment by default, issued execution thereon. In the distribution of the proceeds of the sheriff's sale of the personal property of the corporation, *held*, that this conduct of the officers was a fraud in law, which gave them no preference over general creditors in the distribution.

There are many decisions, however, which hold that although directors are

8. Directors Cannot Favor Particular Shareholders.—Nor can directors benefit or favor any particular shareholder or class of shareholders. They can make no distribution of the corporate property which shall not inure to the equal benefit of all the stockholders. If they attempt to divide, they must so divide that each shall receive his proportionate share. They cannot agree for, or bind stockholders to, any other provision.¹

9. Assignment for Benefit of Creditors.—A corporation, unless restrained by its charter or by general law, by a majority of its board of directors, may cease to do business and assign its property to a trustee to be sold, the proceeds to be applied to the payment of the debts of the corporation, and the surplus, if any, to be divided pro rata among the stockholders. Such action of the corporation will not constitute a surrender of its franchise as a corporation, or work its dissolution.² Under the statutes of some States, a valid,

bound to discharge their duties prudently, diligently and faithfully, and apply the assets in case of insolvency for the benefit of creditors instead of stockholders and other persons, yet they are not technically trustees, nor bound to apply the assets ratably among the general creditors. These decisions hold that they may not only make a preference between creditors, but such preference may be made in their own favor if they be creditors, and in such cases they must act with the utmost good faith. See *Planters' Bank v. Whittle*, 78 Va. 737; 6 Am. & Eng. Corp. Cas. 298; *Smith v. Skeary*, 47 Conn. 47; *Catlin v. Eagle Bank*, 6 Conn. 233; *Sargent v. Webster*, 13 Met. (Mass.) 497.

This was distinctly held in the well considered case of *Buell v. Buckingham*, 16 Iowa 284. There the controversy was between a judgment creditor of an insolvent corporation and one of its directors. An execution in favor of the former was levied on certain property which the latter claimed by purchase in discharge of a debt due him by the company. The property was sold and conveyed to him pursuant to an order made by the directors, at a meeting at which he was and voted, his presence being necessary to make a quorum for business. The transaction was assailed by the judgment creditor as illegal and void, but it was held to be valid. Judge Dillon, in his opinion, said: "Being an officer in the corporation did not deprive him (the purchaser) of the right to enter into competition with other creditors, and run a race of diligence

with them, availing himself in the contest of his superior knowledge and of the advantages of his position to obtain security for, or payment of, his debt. He has an advantage, it is true, but it is one which results from his position, and which is known to every person who deals with and extends credit to a corporation. This is one of the causes which has operated to bring corporate companies into discredit, and may constitute a good legislative reason for giving priority to outside creditors; but the legislature must furnish the remedy."

The same doctrine was laid down in *Whitwell v. Warner*, 20 Vt. 425, where a preference by a corporation in favor of one of its stockholders was upheld against the claims of creditors. The court, REDFIELD, J., said: "As a constructive fraud, it is not competent certainly to predicate this of the mere fact of a stockholder's availing himself of his superior advantages to obtain security for debts due to himself, to the exclusion of other creditors. The stockholder and the stranger, who are both creditors of the corporation, no doubt stand in very unequal positions. But it is an inequality which the law allows, and which is understood by those who contract with corporations."

1. *Percy v. Millandon*, 3 La., O. S. 568; *Chase v. Vanderbilt*, 62 N. Y. 307; *Barton v. Port Jackson etc. Plank Road Co.*, 17 Barb. (N. Y.) 397; *Jones v. Terre Haute etc. R. Co.*, 29 Barb. (N. Y.) 359.

2. *Roan v. Winn*, 93 Mo. 503; 19 Am. & Eng. Corp. Cas. 102; *Chase v. Tuttle*, 55 Conn. 455; *Bouton v. De-*

general assignment may be made by a majority of the directors.¹

VI. PRESIDENT—1. Powers—(a) **GENERALLY.**—The ordinary affairs of a corporation, such as custom has imposed upon, or necessity requires of, the president of a corporation, may be performed by him without express authority.² So in the absence of legislative enactment or provision made in the by-laws, corporations usually act through their president, or those representing him. He being the legal member of the body, when an act is performed by him, the presumption will be indulged that the act is legally done and is binding upon the body, and as a general rule in the absence of the president, or where a vacancy occurs in the office, the vice-president may act in his stead and perform the duties which devolve upon the president.³ The board of di-

ment, 123 Ill. 311; 19 Am. & Eng. Corp. Cas. 122; *Chamberlain v. Bromberg*, 83 Ala. 576; 19 Am. & Eng. Corp. Cas. 302; *Pyles v. Riverside Furniture Co.*, 30 W. Va. 123; 17 Am. & Eng. Corp. Cas. 102; *Hutchinson v. Green*, 91 Mo. 367; 15 Am. & Eng. Corp. Cas. 614; *Paulding v. Chrome Steel Co.*, 94 N. Y. 334; 6 Am. & Eng. Corp. Cas. 306; *Planters' Bank v. Whittle*, 78 Va. 737; 6 Am. & Eng. Corp. Cas. 298; *Reichwold v. Commercial Hotel Co.*, 106 Ill. 439; 5 Am. & Eng. Corp. Cas. 248; *Sargent v. Webster*, 13 Met. (Mass.) 497; *Dana v. Bank of U. S.*, 5 W. & S. (Pa.) 223; *Union Bank v. Ellicott*, 6 Gill & J. (Md.) 363; *Merrick v. Bank of Metropolis*, 8 Gill (Md.) 59; *Gilson v. Goldthwaite*, 7 Ala. 281; *Decamp v. Alward*, 52 Ind. 468; *Flint v. Clinton Co.*, 12 N. H. 435; *Haxton v. Bishop*, 3 Wend. (N. Y.) 13; *Hill v. Reed*, 16 Barb. (N. Y.) 281; *McCallie v. Walton*, 37 Ga. 612; *State v. Bank of Maryland*, 6 Gill & J. (Md.) 219. *Compare* *Eppright v. Nickerson*, 78 Mo. 482; 4 Am. & Eng. Corp. Cas. 138; *Bank Commrs. v. Bank of Brest*, 1 Harr. Ch. (Mich.) 106.

The directors of a corporation have the power to make an assignment of its property without the express authority of the stockholders so to do. *Sargent v. Webster*, 13 Met. (Mass.) 497; *Catlin v. Eagle Bank*, 6 Conn. 23; *Dana v. Bank of U. S.*, 5 W. & S. (Pa.) 223; *Union Bank v. Ellicott*, 6 Gill & J. (Md.) 363; *Merrick v. Bank of Metropolis*, 8 Gill (Md.) 59; *Gilson v. Goldthwaite*, 7 Ala. 281; *DeCamp v. Alward*, 52 Ind. 468.

In *Eppright v. Nickerson*, 78 Mo. 482; 4 Am. & Eng. Corp. Cas. 138, it is held that the directors of an insolvent

corporation have no authority to make an assignment for the benefit of its creditors, but the stockholders are the only persons who can object to this unwarrantable exercise of authority, and if they remain silent, they may, after a lapse of time, be taken to have ratified the act.

1. Two of the five directors of a business corporation were in distant States at a time when it became a matter of importance that the corporation should make an immediate assignment for the benefit of its creditors. *Held*, that the remaining three directors could make a valid assignment. *Chase v. Tuttle*, 55 Conn. 455.

2. *Olcott v. Tioga R. Co.*, 40 Barb. (N. Y.) 179; *Dougherty v. Hunter*, 54 Pa. St. 380; *Blen v. Bear River etc. Min. Co.*, 20 Cal. 602; *Mitchell v. Deeds*, 49 Ill. 416; *Chicago etc. R. Co. v. Coleman*, 18 Ill. 297; *Kennedy v. Otoe Co. Nat. Bank*, 7 Neb. 59; *Adrian v. Roome*, 52 Barb. (N. Y.) 399; *Soper v. Buffalo etc. R. Co.*, 19 Barb. (N. Y.) 310; *Risley v. Indianapolis etc. R. Co.*, 1 Hun (N. Y.) 202; *First Nat. Bank v. Hoch*, 89 Pa. St. 324.

For any other acts he must have the authority of the board of directors. *Mitchell v. Deeds*, 49 Ill. 417; *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116; *Titus v. Cairo etc. R. Co.*, 37 N. J. L. 98; *Leggett v. New Jersey Mfg. etc. Co.*, 1 N. J. Eq. 541; *Marine Bank v. Clements*, 3 Bosw. (N. Y.) 600; *Farmers' Bank v. McKee*, 2 Pa. St. 318; *Hodges v. Rutland etc. R. Co.*, 29 Vt. 220; *Westerfield v. Radde*, 7 Daly (N. Y.) 326.

3. *Crowley v. Genesee Min. Co.*, 55 Cal. 273; *Smith v. Smith*, 62 Ill. 493; *Mitchell v. Deeds*, 49 Ill. 417; *Union Mut. L. Ins. Co. v. White*, 106 Ill. 67; *Irwin v. Bailey*, 8 Biss. (U. S.) 523;

rectors may invest the president with authority to act as chief executive officer of the company. This may be done either by express resolution or by acquiescence in the course of dealing.¹ The person dealing with the president of the corporation in the usual manner, and within the powers which the president has been accustomed to exercise without the consent of the directors, would be entitled to assume that the president had actually been invested with those powers.² So while acting upon the business of the corporation, all his acts, within the scope of his authority

Reno Water Co. v. Leete, 17 Nev. 203; Kraft v. Freeman Printing etc. Assoc., 87 N. Y. 628; Merchants' Bank v. Goddin, 76 Va. 503; Keokuk etc. Packet Co. v. Davidson, 95 Mo. 467. Compare Stanley v. Sheffield etc. Coal Co., 83 Ala. 260; Asher v. Sutton, 31 Kan. 286; Castle v. Belfast Foundry Co., 72 Me. 167; Mitchell v. Vermont Copper Min. Co., 67 N. Y. 280; Twelfth Street Market Co. v. Jackson, 102 Pa. St. 269; Second Ave. R. Co. v. Mehrbach, 49 N. Y. Super. Ct. 267.

The power of the president to bind the company as its agent, may be implied from facts and circumstances. Northern Cent. etc. R. Co. v. Bastian, 15 Md. 494.

If the president of a company was in the habit of acting as a business agent for the company with its knowledge and without objection, actual authority will be inferred from such acts, and the company will be bound by them. Dougherty v. Hunter, 54 Pa. St. 380.

1. Farmers' Loan etc. Co. v. Mann, 4 Robt. (N. Y.) 356; Preston Nat. Bank v. Smith (Mich.), 47 N. W. Rep. 502.

A resolution of a corporation authorized its president to sell certain bonds at a certain price. The president loaned the bonds. Held, in an action against him for their conversion, that the question of his general powers as president had no bearing upon the case; that, as to these bonds, the extent of his authority was measured by the resolution. Second Ave. R. Co. v. Mehrbach, 49 N. Y. Super. Ct. 267.

A by-law giving the president of a corporation "the general charge and direction of the business of the company, as well as all matters connected with the interests and objects of the corporation" does not authorize him to do an act which, by another by-law, is expressly given to a separate committee. Twelfth Street Market Co. v. Jackson, 102 Pa. St. 269.

2. Morawetz Priv. Corp., § 538. See

Sherman Center Town Co. v. Swigart, 43 Kan. 292; First Nat. Bank v. Kimberlands, 16 W. Va. 555, 580. Compare Stokes v. New Jersey Pottery Co., 46 N. J. L. 237.

Powers of a president of a corporation *virtute officii* over its business and property are strictly the powers of an agent, delegated to him by the directors or the managers of the corporation and the persons in whom as its representatives, the control of its business and property is vested. If the corporation be organized for business purposes, the president is its chief executive officer; and he may without any special authority from the board of directors perform all acts of an ordinary nature which by usage or necessity are incident to his office, and may bind the corporation by contracts, matters arising in the usual course of its business, or the powers which usage and custom and the necessities and conveniences of business require in the executive officer of the corporation. He has no more control over the corporate property and funds than any other director. Stokes v. New Jersey Pottery Co., 46 N. J. L. 240.

In Titus v. Cairo etc. R. Co., 37 N. J. L. 98, the court held that the power of attorney executed by the president of the corporation authorizing the sale of its bonds in the market, gave the agent no power to sell, and that the president could not execute such a power without the authority of the board of directors. Delivering the opinion VAN SYCKEL, J., said, "In the absence of anything in the act of incorporation bestowing especial power upon the president, he has, from his mere official station, no more control over the corporate property and funds than any other director. The affairs of corporate bodies, are within the exclusive control of their boards of directors, from whom authority to dispose of their assets must be derived. The act of a president or

as president, must be regarded as official. He cannot put off his official character at will and deny to those who have business with the corporation access through him.¹

A president of a private corporation has no authority by virtue merely of his official position to make contracts binding the corporation except in relation to matters arising in the ordinary course of the business of the corporation.² The simple fact that a person is president does not of itself afford any evidence of his authority to bind the company by a contract.³ The president's

other officer, unless it is shown to pertain to his official duty or to be within the scope of his employment, cannot be regarded as the act of the corporation, and is not binding upon it. The authority requisite to charge the company must therefore be derived from the board of directors.

1. *Union Gold Mining Co. v. Rocky Mt. Nat. Bank*, 1 Colo. 532.

2. *Blen v. Bear River etc.*, Min. Co., 20 Cal. 602; *Farmers' Bank v. McKee*, 2 Pa. St. 318; *St. Nicholas Ins. Co. v. Howe*, 7 Bosw. (N. Y.) 450. See *Bright v. Metairie Cemetery Assoc.*, 33 La. Ann. 58; *Seeley v. San José Independent Mill etc. Co.*, 59 Cal. 22.

Where the directors of a corporation authorized the president to provide for a debt of the company by procuring the joint note of the stockholders and giving them a bond of indemnity, and instead of this he gave the note of the corporation—*held*, that such note was unauthorized and could not be enforced. *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116.

The president of a packet corporation tried to procure mail contracts for it, but was unsuccessful. *Held*, that his relations to the corporation did not preclude his procuring the contracts himself, but that he could not profit by the use of the facilities afforded by the packets of the corporation. *Keokuk etc. Packet Co. v. Davidson*, 95 Mo. 467.

Contracts between the president and a corporation by which the president agrees, for a commission, to effect and become liable for a loan to the corporation, while looked upon with suspicion and disfavor by the court, may be enforced, if shown to have been for the benefit of the corporation. *Trust Co. v. Weed*, 14 Phila. (Pa.) 422.

A lease of an office taken on behalf of a corporation by its president, will bind the corporation. *Steamboat Co. v. McCutcheon*, 13 Pa. St. 13.

3. *Dabney v. Stevens*, 10 Abb. Pr., N.

S. (N. Y.) 39; *Adriance v. Roome*, 52 Barb. (N. Y.) 390; *Risley v. Indianapolis etc. R. Co.*, 1 Hun (N. Y.) 204.

The president of a railroad company has no power, merely by virtue of his office, to bind the company by a contract for the construction of its railroad. Particularly is this true when the same is already under contract by the board of directors. *Templin v. Chicago etc. R. Co.*, 73 Iowa 548; 34 Am. & Eng. R. Cas. 107.

An agreement of the president of a private corporation will not bind the corporation unless it is shown to be within the scope of his authority. *Farmers' Bank v. McKee*, 2 Pa. St. 318.

In the case of *Griffith v. Chicago, etc. R. Co.*, 74 Iowa 85, it was held that the president of a railroad company has no power, merely by virtue of his office, to bind the company by a contract for the construction of its railroad. The court says: "Plaintiff claims to have done the work under a contract with the New Sharon Coal Valley & Eastern Railroad Company; the agreement being entered into on the part of the corporation by S. C. Cook, its president. The name of the corporation was subsequently changed to the Chicago, Burlington & Pacific Railroad Company. The evidence shows that the work was in fact done under a contract entered into by plaintiff with Cook; but defendants claim that the latter was acting for the Trunk Line Construction Company, and that, consequently, plaintiff was a sub-contractor. If that claim is true, it is conceded that plaintiff cannot recover as against these defendants, for the reason that he did not take the steps requisite to preserve his lien as against them. The evidence leaves little doubt, we think, but that plaintiff understood, when he entered into the contract with Cook, that the latter was representing the railroad company; and if Cook had been clothed with power to contract for that company, it probably would have

authority may, however, be extended by the charter or by-laws, or by the directors, so as to authorize him to do any act which is within the general scope of the corporation's business.¹ Authority to make contracts which otherwise would be *ultra vires*, may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he was allowed, without interference, to conduct the affairs of the company.² So the subsequent acquiescence of the directors will operate as a ratification of an act otherwise beyond the authority of the will of the president.³

been bound by the contract. But there is no evidence that he had that power, and it is shown that the board of directors of the company had already entered into a contract with another person for the performance of the same work, and that that contract had been transferred to the Trunk Line Construction Company, which company has been paid for the work.

The case, in its facts, is like *Templin v. Railroad Co.*, decided at December term, 1887, in which we held that the president of a railroad company does not have power, by virtue of his office merely, to bind the company by a contract for the construction of its railroad. That holding is conclusive of the rights of these parties." See *Templin v. Chicago etc. R. Co.*, 73 Iowa 548.

A vote of the directors of a corporation, that the president have full power and control of its business, authorizes him to purchase the materials to be used in its operations, and to borrow money for the corporation, and give its note for the money borrowed. *Castle v. Belfast Foundry Co.*, 72 Me. 167.

1. *Pixley v. Western Pac. R. Co.*, 33 Cal. 183; *Mitchell v. Deeds*, 49 Ill. 417; *Burrill v. Nahant Bank*, 2 Metc. (Mass.) 163; *Olcott v. Tioga R. Co.*, 27 N. Y. 546; *Mechanics' Bank v. New York etc. R. Co.*, 13 N. Y. 632; *Dabney v. Stevens*, 10 Abb. Pr., N. S. (N. Y.) 39.

Where the charter of a corporation empowered the president and directors to make by-laws—*held*, that the power might be exercised by the president and a majority only of the directors. *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124.

Where the directors of a corporation authorized the president to provide for a debt of the company by procuring the joint note of the stockholders and giving them a bond of indemnity, and instead of this he gave the note of the corporation—*held*, that such note was

unauthorized and could not be enforced. *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116.

The president and cashier cannot use the common seal without the authority of the board. *Hoyt v. Thompson*, 5 N. Y. 320.

2. *Mount Sterling etc. Road Co. v. Looney*, 1 Metc. (Ky.) 550; *Northern Cent. R. Co. v. Bastian*, 15 Md. 494; *Kraft v. Freeman etc. Printing Assoc.*, 87 N. Y. 628; *Hoyt v. Thompson*, 5 N. Y. 320, 323; *Dabney v. Stevens*, 10 Abb. Pr., N. S. (N. Y.) 39; *Elwell v. Dodge*, 33 Barb. (N. Y.) 336; *Scott v. Johnson*, 5 Bosw. (N. Y.) 213; *Lee v. Pittsburgh Coal etc. Co.*, 56 How. Pr. (N. Y.) 373; *Martin v. Niagara Falls Paper Mfg. Co.*, 44 Hun (N. Y.) 130; *Fulton Bank v. New York etc. Canal Co.*, 4 Paige (N. Y.) 127; *Dougherty v. Hunter*, 54 Pa. St. 380; *Neiffer v. Bank of Knoxville*, 1 Head (Tenn.) 162; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46.

The official character of the president and secretary of an incorporated company, who have contracted with the plaintiff for the erection of a station for the company, and assigned to him in part payment an agreement between the company and the defendant, is sufficiently proved in an action on that agreement, by evidence that after the station was erected the company occupied it and thus recognized these persons as their officers. *Kennedy v. Cotton*, 28 Barb. (N. Y.) 59.

3. *Sherman v. Fitch*, 98 Mass. 59; *Rich v. State Nat. Bank*, 7 Neb. 201; 29 Am. Rep. 382; *Titus v. Cairo etc. R. Co.*, 37 N. J. L. 98; *Olcott v. Tioga R. Co.*, 27 N. Y. 546; *Chicago etc. R. Co. v. James*, 22 Wis. 198; s. c., 24 Wis. 388; *Indianapolis Rolling Mill Co. v. St. Louis etc. R. Co.*, 120 U. S. 256. Compare *Crum's Appeal*, 66 Pa. St. 474.

The president of a corporation had

When a corporation has virtually ceased to exist, and all its powers have been taken, its property all expended and the company hopelessly insolvent, it is not improper for the president of the company to enter into arrangements on his own behalf in carrying on, and continuing for his own benefit, business formerly conducted by the company under an agreement not imposing any duty or obligation upon the corporation or involving any use of its property.¹

(b) SELLING PROPERTY, BORROWING MONEY, ETC.—He cannot sell the company's property, borrow money in the name of the company, or make a mortgage on corporate property.² But it would seem to be held that this is so only if the sale, assignment, or transfer of the property of the corporation requires the use of the common seal. It can only be made in that event with the

general discretionary powers as to all matters in the prosecution of the company projects; he bought a house, to be used as an office, and the trustees held their meetings in it during six weeks. *Held*, that even if he had no authority the trustees had ratified his acts, and therefore that a subsequent rejection of the contract was of no avail and could not excuse the company from payment. *Shaver v. Bear River etc. Min. Co.*, 10 Cal. 396.

Where the president of a mining company, without authority and without the assent of the board of trustees, who alone were vested with authority to lease the property of the company, leased a portion of the company's mining ground to defendant, together with certain privileges connected therewith, and the money, as rent from such lease, was not known to the trustees to have been received as rent—*held*, that the court below properly granted an injunction restraining defendant from entering upon the premises leased. *Yellow Jacket etc. Min. Co. v. Stevenson*, 5 Nev. 224.

The president of a corporation entered into a contract beyond his powers for the purchase of property; a written report was made on the subject, omitting some details of the contract, but not professing to set it forth wholly, and presented to the board of trustees, who unanimously ratified the "report and proceedings," the president being present and voting on the occasion. Suit being afterward brought upon the contract against the corporation, they sought to defend on the ground that they acted upon the report alone, and so with information insufficient to make

the ratification binding. *Held*, that without evidence of any actual mistake on the part of the board, this defence was insufficient, the circumstances not being strong enough to overthrow the inference of knowledge which every ratification implies. *Blen v. Bear River etc. Min. Co.*, 20 Cal. 602.

1. *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140.

2. *Bliss v. Kaweah Canal etc. Co.*, 65 Cal. 502; 6 Am. & Eng. Corp. Cas. 247; *Hollowell Bank v. Hamlin*, 14 Mass. 178; *Titus v. Cairo etc. R. Co.*, 37 N. J. L. 98; *Leggett v. New Jersey Mfg. etc. Co.*, 1 N. J. Eq. 541; *Life & Fire Ins. Co. v. Mechanics' F. Ins. Co.*, 7 Wend. (N. Y.) 31; *Crump v. United States Min. Co.*, 7 Gratt. (Va.) 352; *Chicago etc. R. Co. v. James*, 22 Wis. 194; *Jesup v. City Bank*, 14 Wis. 331; *Walworth Co. Bank v. Farmers' Loan & Trust Co.*, 14 Wis. 325.

A deed describing the grantor as a corporation, executed by the president thereof in his own name and under his own seal, does not pass the title from the corporation. As president, and in that character, he cannot convey the real estate of the company. *Hatch v. Barr*, 1 Ohio 390.

The president of a corporation is not *ex officio* an agent to sell the property, and his representations as to property to be sold, unless he be specially authorized, are not binding on the company. *Crump v. U. S. Mining Co.*, 7 Gratt. (Va.) 352.

Facts may exist from which the authority of the president and managing agent of a corporation to borrow money in its behalf may be implied. *Spangler v. Butterfield*, 6 Colo. 356.

assent and authority of the board of directors.¹ The power of the president of a corporation to borrow money for it and to give its paper therefor may, however, be inferred from the fact that he has long been accustomed, without interference, to conduct its entire business.²

(c) TRANSFER OF NEGOTIABLE INSTRUMENTS.—If, however, the property is conveyed as in the form of negotiable instruments, it may be endorsed and transferred in the usual course of business by the president or other officer having charge of the company's business without any special authority.³ It has been said that the president of an insurance company has no implied authority to endorse and negotiate notes belonging to it.⁴ But authority to do so may be inferred from the course of the company's business.⁵

(d) REPAYMENT OF LOAN, RELEASE OF SUBSCRIPTIONS, ETC.—The president has no authority as such to undertake, in the corporate name, the repayment of an unauthorized loan made to the superintendent of the company.⁶ And he has of himself no authority to release subscriptions to the stock of the corporation.⁷

(e) RELEASE OR SURRENDER OF CLAIM—STAY OF EXECUTION.—The president of a bank has no authority *virtute officii* to surrender or release the claim of the corporation against anyone;⁸

1. Hoyt v. Thompson, 5 N. Y. 320, 335. See Ft. Worth Pub. Co. v. Hitson (Tex.), 14 S. W. Rep. 843.

The authority of the president and secretary of a corporation to execute a deed for the corporation must be presumed where the corporate seal is affixed and the signatures are proven. Morse v. Beale, 68 Iowa 463.

2. Martin v. Niagara Falls Paper Mfg. Co., 44 Hun (N. Y.) 130.

3. McLaron v. First Nat. Bank of Milwaukee, 76 Wis. 259; Paxton Cattle Co. v. Arapahoe Bank, 21 Neb. 621; Hoyt v. Thompson, 5 N. Y. 320, 335; Patten v. Moses, 49 Me. 255; City Bank v. McClellan, 21 Wis. 112; Irwin v. Bailey, 8 Biss. (U. S.) 523; Mitchell v. Deeds, 49 Ill. 416; Park Bank v. German American Mut. Warehousing etc. Co., 53 N. Y. Super. Ct. 367.

Presidents and cashiers of incorporated companies, acting as their executive officers, can make endorsements in their behalf, by simply endorsing their own names with their titles of office. State Bank v. Fox, 3 Blatchf. 431.

Such an endorsement is sufficient to charge the corporation and to enable the endorsee to bring a suit in his own name. State Bank v. Fox, 3 Blatchf. (U. S.) 431.

A president of a corporation is the proper officer to endorse securities for transfer. Caryl v. McElrath, 3 Sandf. (N. Y.) 176.

Where the by-laws of a corporation required the endorsement of its secretary on a promissory note, to pass the title of such corporation to the note—*held*, that the endorsement of such a note by the president of the corporation did not pass the title, where the endorsee was chargeable with knowledge of the fact that the endorsement was unauthorized by the corporation. Leavitt v. Connecticut Peat Co., 6 Blatchf. (U. S.) 139.

An endorsement of a promissory note, payable to an insurance company, by an ex-president acting as president, passes the title to the endorsee, especially when the company receives and converts to its own use the proceeds of the endorsement. Patten v. Moses, 49 Me. 255.

4. Marine Bank v. Clements, 3 Bosw. (N. Y.) 600.

5. Clark v. Titcomb, 42 Barb. (N. Y.) 122; Scott v. Johnson, 5 Bosw. (N. Y.) 213.

6. Union Gold Min. Co. v. Rocky Mt. Nat. Bank, 2 Colo. 565.

7. Custar v. Titusville Gas etc. Co., 63 Pa. St. 381.

8. Olney v. Chadsey, 7 R. I. 224;

nor has the president of an insurance company.¹ He has no power to stay the collection of an execution in favor of the corporation.²

(*f*) ASSUMING DEBTS, PURCHASING PROPERTY, ETC.—The president of a corporation will not be permitted to create such relation between himself and the trust property as will make his own interest antagonistic to that of his beneficiary. If he has bought a small debt against a corporation and taken valuable property thereof, he will be enjoined from levying for the balance.³ So the president of a corporation has no authority by virtue of his office to purchase property for the corporation at his discretion. The power can be conferred only by the board of trustees.⁴ But where a corporation is embarrassed and without funds to purchase its past-due outstanding bond, its president may purchase the same and hold it as against the company, but not if he purchase with the funds or credit of the company.⁵

(*g*) ACTING ALSO AS SUPERINTENDENT AND FINANCIAL AGENT.—Where, however, the president is also superintendent and general agent of the company, he is authorized to make any contract which is within the general scope of the company's business and necessary to the proper conduct of the same.⁶ Thus, the president of a manufacturing company who is also superintendent, and has a general authority to contract by parol for making or selling its manufactured goods, has also authority to authorize the termination and release of such a contract.⁷ If he is the company's financial officer, he may receive payment of a judgment in favor of the corporation and may execute and deliver a satisfaction piece.⁸

(*h*) PAYMENT OF DEBTS.—Where the president of a corporation, in order to save its property as well as his own interest as a

Hodge *v.* First Nat. Bank, 22 Gratt. (Va.) 51.

1. Brouwer *v.* Appleby, 1 Sandf. (N. Y.) 158.

2. Spyker *v.* Spence, 8 Ala. 333.

3. Brewster *v.* Stratman, 4 Mo. App. 41.

4. Bliss *v.* Kaweah Canal etc. Co., 65 Cal. 502; Blen *v.* Bear River etc. Min. Co., 20 Cal. 602.

5. Bradley *v.* Williams, 3 Hughes (U. S.) 373.

6. Seeley *v.* San Jose etc. Lumber Co., 59 Cal. 22; Castle *v.* Belfast Foundry Co., 72 Me. 167; Lee *v.* Pittsburgh Coal etc. Co., 56 How. Pr. (N. Y.) 373.

When a corporate body entrusts its president, or other principal officer with the conduct of its proper business, it thus clothes him with the power of a

general agent, and the restrictions imposed privately on him will be immaterial to third parties. Graffius *v.* Land Co., 3 Phila. (Pa.) 447.

Where a charter gives to a board of directors the management of the affairs of the corporation, the president and cashier cannot, without authority from the board, assign choses in action, except when done in the usual course of business. Such assignments are void. Hoyt *v.* Thompson, 5 N. Y. (1 Seld.) 320.

A lease of an office taken on behalf of a foreign corporation by its president, binds the corporation. Steamboat Co. *v.* McCutcheon, 13 Pa. St. 13.

7. Indianapolis Rolling Mill Co. *v.* St. Louis R. Co., 120 U. S. 256.

8. Booth *v.* Farmers' etc. Nat. Bank, 50 N. Y. 396.

bondholder and stockholder, pays from his own money certain mortgages on the corporate property, he is entitled to be subrogated to the rights of the mortgagees.¹ So, where he takes to himself a deed of the land in settlement of the debt due from the grantor to the corporation and improves the land with the money of the corporation, charging his own account with the debt and the expenditure he holds in trust for the corporation.²

(2) AUTHORITY TO COMMENCE AND DEFEND ACTIONS.—The president of a corporation, being its chief executive officer, may appear and answer for it and employ counsel for its defence.³ Counsel whom he thus employs can bind the corporation by their actions in the case, within the ordinary powers of counsel, and this, too, even though the circumstances show that the president acted so improperly in employing the counsel that he might properly be held responsible for his breach of trust in the employment of the counsel.⁴

In the general course of business of corporations it often becomes necessary to institute legal proceedings for the enforcement of their rights. Prompt action is frequently indispensable, and the delay consequent upon the calling together of the board of directors and the passing of a formal resolution of authorization might produce damaging results. So the president as such officer is presumably empowered to commence suits in its name and perform such other acts in its behalf as the necessities of the case demand.⁵ But he cannot however confess judgment against the company.⁶

(3) AUTHORITY TO CONVENE MEETINGS.—The president of a corporation has power to convene the board of directors for the purpose of laying before them any matter affecting the business of the corporation.⁷ But where the by-laws of a corporation provide that meetings of the stockholders shall be called by the trustees, the action of the board of trustees is necessary to convene a legal meeting. The president of the corporation has no authority to call such a meeting.⁸

1. *Bush v. Wadsworth*, 60 Mich. 253.

2. *Palmetto Lumber Co. v. Risley*, 25 S. Car. 309.

3. *Savings Bank v. Benton*, 2 Metc. (Ky.) 240; *Oakley v. Workingmen's Union*, 2 Hilt. (N. Y.) 487; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496; *Wetherbee v. Fitch*, 117 Ill. 67; *Slee v. Bloom*, 5 Johns. Ch. (N. Y.) 366.

An attorney has no authority *ex officio* to execute a bond and warrant of attorney for an entry of judgment against the corporation. *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237.

4. *Colman v. West Virginia Oil Co.*, 25 W. Va. 148; 15 Am. & Eng. Corp. Cas. 649.

5. *Reno Water Co. v. Leete*, 17 Nev. 203.

In *Ashuelot Mfg. Co. v. Marsh*, 1 Cush. (Mass.) 507, it is held that the president of a manufacturing corporation has no implied authority to commence an action in the company's name.

6. *Joliet Electric Light & Power Co. v. Ingalls*, 23 Ill. App. 45; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237.

Compare *Chamberlin v. Monmouth Mining Co.*, 20 Mo. 96.

7. *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 1 Colo. 532.

8. *State v. Petteneti*, 10 Nev. 141.

An article in the by-laws of a relig-

2. Absence or Death of President.—As a general rule, in the absence of the president or when a vacancy occurs in the office, the vice-president may act in his stead and perform the duties which devolve upon the president.¹ The death of a president in whose name a judgment is obtained will not abate a suit in behalf of the company.²

VII. TREASURER.—The ordinary duties of the treasurer are to receive, safely keep and disburse under the supervision of the directors the funds of the company. The directors cannot lawfully deprive the corporation of the benefit of this responsibility by depositing the funds with others for safekeeping, or causing such disposition of the funds to be made, and may be restrained by injunction from so doing at the suit of any stockholder.³

A treasurer cannot control the business of the company when only authorized by the charter to receive assessments due from the stockholders, and has no authority to pay the debts of the company unless by the order of the directors, nor to cancel, compromise or offset claims due from the company by those due to it. Such attempts to control the business would be to assume powers specifically conferred by the charter upon the directors, and all such acts unless ratified by the company would be void.⁴ So a treasurer of a corporation, acting in his own behalf, and not by the authority of the company, will be personally liable, notwithstanding he signed his name as treasurer, and might have expected that the company would adopt and ratify his doings.⁵

ious corporation provided that the president should convene the board of trustees at least once in every month, and might call extra meetings whenever, in his opinion, or in the opinion of three members of that body, it should be deemed necessary for the interest or welfare of the congregation. Another article provided that a majority of the board might admit new members. The president, on application by four members of the board, refused to call a meeting thereof, after which a majority of the board convened without such call, after giving the president notice of the time and place of their intended meeting. *Held*, that the board thus convened had no power to elect new members of the corporation, and that all their acts were illegal and void. *State v. Ancker*, 2 Rich. (S. Car.) 245.

1. *Colman v. West Virginia Oil Co.*, 25 W. Va. 148; 15 Am. & Eng. Corp. Cas. 649; *Smith v. Smith*, 62 Ill. 493.

2. *Wright v. Rogers*, 26 Ind. 218.

3. *Brown v. Weymouth*, 36 Me. 414; *Pearson v. Lower*, 55 N. H. 215.

A treasurer of a corporation has no authority to pay himself a claim he

holds against it, unless the claim has been approved and its payment authorized by the corporation. *Peterborough R. Co. v. Wood*, 61 N. H. 418.

A payment by the manager of an unincorporated association with the knowledge and in the presence of the treasurer—*held*, equivalent to a payment ordered by the treasurer, within the intent of a resolution. *Sunder v. Edling*, 13 Daly (N. Y.) 238.

Responsibility of Sureties.—Where the charter of a corporation creates the office of treasurer, it becomes one of his duties, from the nature of his office, to receive and account for money; and his sureties in his official bond, conditioned that he shall perform his duties agreeably to the regulations, requirements, and restrictions of the charter, are responsible for the money which may come into his hands as treasurer. *Portage Co. Mut. Ins. Co. v. Wetmore*, 17 Ohio 330.

4. *Brown v. Weymouth*, 36 Me. 414.

A note given on an arrangement made with the treasurer as to debts and credits is void, and cannot be enforced. *Brown v. Weymouth*, 36 Me. 414.

5. *Haynes v. Hunnewell*, 42 Me. 276.

But where the acts of the treasurer of a company are performed at the office of the company, and are of a public character, long continued, it is reasonable to presume that they are in conformity with the instructions of the managers.¹ If it is proved that the treasurer had been in the habit of doing such business with the knowledge and sanction of the company; that he was, in fact, the sole manager and agent of the company, such acts are valid.²

1. Negotiating Bills and Notes.—The general agent or treasurer of a corporation or joint stock company has the right to negotiate notes or bills taken in the name of his office; and, in declaring, the plaintiff need not set forth the authority of such treasurer or agent.³

2. Assuming Debts.—The assuming of a debt against a third person is not within the ordinary powers of the treasurer of a corpora-

A promise made by the treasurer of an incorporated company to pay an account transferred to a third person, is sufficient to authorize the assignee to sue the company in his own name, unless it is shown that the treasurer had no authority to bind the company. *Mt. Olivet Cemetery v. Shubert*, 2 Head (Tenn.) 116.

Where a draft was drawn personally upon one who was a treasurer of a company, and who accepted it "as treasurer"—*held*, that he was *prima facie*, personally liable, but that he might discharge himself by showing that he was authorized so to do, and did accept it as agent of the company, and that of this, the plaintiff had notice. *Bruce v. Lord*, 1 Hilt. (N. Y.) 247.

1. *Elwell v. Dodge*, 33 Barb. (N. Y.) 336.

Where a mortgage was assigned to T, as treasurer of a corporation, and "to his successors in office," and he foreclosed it in his official character for the corporation, stating in the notice of sale of the mortgaged premises that he, "as such treasurer," was the "owner and holder" of the mortgage—*held*, that in absence of all proof on the subject, the court would presume that T, as such treasurer, had authority to foreclose the mortgage by advertisement, and sell the premises; and having such authority, his purchase of the premises at the sale for himself, for a less sum than was due on the mortgage, did not render the sale void, or prevent him from conveying a good title to a purchaser. *Howard v. Hatch*, 29 Barb. (N. Y.) 297.

2. *Phillips v. Campbell*, 43 N. Y. 271; *Bank of U. S. v. Dandridge*, 12

Wheat. (U. S.) 79; *Conover v. Mutual Ins. Co.*, 1 N. Y. 290; *Moss v. Rossie Lead Min. Co.*, 5 Hill (N. Y.) 137.

3. *Perkins v. Bradley*, 24 Vt. 66; *Lester v. Webb*, 1 Allen (Mass.) 34; *Holmes v. Willard* (N. Y.), 25 N. W. Rep. 1083.

Where the treasurer of a corporation was authorized by vote to hire money on such terms and conditions as he might think most conducive to the interests of the company, to meet certain acceptances by the defendant of the drafts of the company on him—*held*, that by this vote, authority to raise money was given, and to endorse drafts drawn by himself to accomplish that object, and that the acceptance of such drafts by the defendant, one of the directors, who was present at the meeting when such vote was passed, and who was thereby to be benefited, precluded him from disputing the authority of the corporation to pass such vote. *Belknap v. Davis*, 19 Me. 455.

An endorsement by the treasurer of a corporation, upon notes signed by himself, and running to the corporation, is sufficient evidence to render the sureties upon his bond liable for the amount endorsed, as for moneys received by him in his official capacity, without any further evidence of actual payments of money. *Lexington etc. R. Co. v. Elwell*, 8 Allen (Mass.) 371.

And it would be a sufficient description of the endorsement to say, "and by them endorse to the plaintiff," or "that the agent of said company endorsed said note to the plaintiff," without describing said agent, or his authority. *Perkins v. Bradley*, 24 Vt. 66.

tion. It is not in the usual course of business, and some special authority so to do must be shown. The directors of a corporation have not power to assume such a debt, except in case of urgent necessity, which is a question of fact for the jury.¹ Nor has the treasurer of a corporation power as such to confess judgment for it.²

3. Misapplication of Funds.—It is the duty of a treasurer to keep the moneys of his principal distinct from his own (unless a special agreement be made to the contrary), and to be able and ready at all times to pay over what balance he owes to his principal, and to pay it upon demand.³ If he holds money to pay a dividend which has been declared, and refuses to pay the dividend upon certain shares upon the ground that he is himself the owner of the shares, he is liable personally to an action of assumpsit for money had and received, brought in the name of the real owner of the shares to recover the amount of such dividend.⁴ So where the treasurer of a corporation obtains permission to borrow the funds in his hands, upon giving his note with a mortgage, and he gives his note for them without the mortgage, he is not exonerated from liability as treasurer for the amount.⁵

VIII. SECRETARY.—The secretary of a corporation has no authority to bind the company by letters or documents signed by him.⁶ But ordinarily, the signature of a corporation by their secretary is *prima facie* their act and must be denied under oath.⁷ So the secretary of a company is the proper person to prove their books.⁸

1. Assignment by Secretary.—An assignment made by the secretary, not executed by the corporation, is not a corporate act unless the secretary is not only authorized to make the assignment but also to make it in his official capacity. The secretary is not vested with such authority by virtue of his office.⁹

2. Secretary Pro Tempore.—Every assembly, in the absence of its regular secretary, must decide for itself whether its minutes shall be kept by a person other than its presiding officer, who may be fittest, or the only fit person present to act as scribe. Even

1. *Stark Bank v. United States Pottery Co.*, 34 Vt. 144.

2. *Stevens v. Carp River Iron Co.*, 57 Mich. 427.

3. *Second Avenue R. Co. v. Coleman*, 24 Barb. (N. Y.) 300.

4. *Williams v. Fullerton*, 20 Vt. 346.

5. *Bluehill Academy v. Ellis*, 32 Me. 260.

6. *Williams v. Chester etc. R. Co.*, 15 Jur. 828; 5 Eng. L. & Eq. 497; *First Nat. Bank v. Hogan*, 47 Mo. 472; *Gregory v. Lamb*, 16 Neb. 205.

It will not be presumed that the secretary of a corporation, who has authority to renew notes, has the right to release one of the makers of the notes

from liability thereon, when no such authority is given him by the charter or by-laws, and no express authority from the corporation is proven. *Moskannon Land etc. Co. v. Sloan*, 109 Pa. St. 532.

7. *Frye v. Tucker*, 24 Ill. 180.

Evidence that an endorsement of a note held by a corporation was made by their secretary, with the knowledge and consent of their directors, is evidence from which a jury may infer the secretary's authority to endorse. *Williams v. Cheney*, 3 Gray, (Mass.) 215.

8. *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479.

9. *Blood v. Marcuse*, 38 Cal. 590.

though the president and secretary be charged by statute with incompatible functions, the former officer would not thereby be prevented, in the absence of the latter, from accepting and discharging *pro tempore* for the latter a function not incompatible.¹

3. Resignation.—The secretary of a corporation, unless the laws of the State or the by-laws of the corporation provide otherwise, remains in office until another is chosen.² So when a secretary resigns, his resignation does not take effect until another is appointed to record such resignation.³

IX. OFFICERS AND AGENTS—GENERALLY—1. Powers.—It is well settled that the law of agency applies to officers of corporations. Thus, if an officer of a corporation is allowed to exercise general authority in respect to the business of the corporation or a particular branch of it for a considerable time, in other words, if he is held out to the world as having authority of the premises, the corporation is bound by his acts in the same manner as if the authority were expressly granted.⁴ So if he occupies the position

1. *Budd v. Walla Walla Printing etc. Co.*, 2 Wash. Ter. 347.

2. *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547.

3. A corporation established under the statute relating to joint-stock corporations for manufacturing purposes passed a by-law providing that the president, secretary and treasurer should be chosen annually; and should hold their offices until others should be chosen in their stead. The corporation carried on its business in the town of K for some time, and being unsuccessful it disposed of all its property and closed its business without the intention of resuming it except for the purpose of collecting and paying out moneys and holding a meeting of the stockholders. At a meeting subsequently held of the stockholders, all except G transferred to him all their shares of stock and all the officers including M the secretary, resigned their offices, which resignations were accepted. These transfers of stock and resignations were made for the purpose and with the intention of preventing the bringing of any suit or the legal service of any writ of process against said corporation. A writ against such corporation was soon afterward served by attaching its property and leaving copies with M as secretary and G as president who had held these offices respectively up to date of said resignations. Upon the question of resignation ELLSWORTH, J., said: "No new secretary was appointed, and if the last cannot record the acceptance of his own resignation, it cannot be re-

corded at all, and this admitted act of the company can have no existence, because there is no technical proof in the record; and if, indeed, such be the case, it can avail nothing to the defendants, for if there is no proof of the acceptance of the resignation, the old secretary remains in office and can be treated as if nothing had been done. We think it proper for a succeeding clerk, when there is one, to record the resignation of his predecessor; but too much technicality must not be required in this matter; for it may be asked, what is the exact time when a clerk ceases to be in office? Is it when he resigns, or when his resignation is accepted, or after its acceptance is recorded, and so becomes complete? It is a common practice for corporate bodies to choose a presiding officer before there is any clerk to make a record; the clerk, when chosen, is often sworn into office, by this presiding officer; and yet the clerk can make a record of these transactions. If, when chosen, he is present to attest what was done, or knows the truth of what he records, he may make a valid record; and this is all that is generally required in this case. A more precise rule would be attended with much inconvenience." *Evarts v. Killingworth Mfg. Co.*, 20 Conn. 457.

4. *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 248; *Chicago etc. R. Co. v. Coleman*, 18 Ill. 298; *St. Louis etc. R. Co. v. Dalby*, 19 Ill. 375; *Daugherty v. Hunter*, 54 Pa. St. 382; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 150; *Com-*

of agent, superintendent, conductor, station agent, or attorney for a company, and is in the open and notorious exercise of the duties of such position, the presumption is that he has been appointed by the proper authorities of the company to such place and has been authorized by the company to do any act properly pertaining to such position and within the chartered powers of the company to do.¹ Under an enlarged and liberal construction of such powers, and within such appropriate sphere, the company must be responsible for all his acts, as much as if an express order of the board of directors or stockholders were shown ordering him to do the particular act.² The public cannot deal with the corporation in person but only through its agents, and cannot be required to go and examine the written records of its proceedings to see who have been appointed to the ordinary places and with what specific powers they have been clothed. It is enough if the company suffers particular persons openly and notoriously to occupy particular places of responsibility in its services without contradiction. Such acquiescence estops the company to deny the appointment and the proper authority thereto. Such is universally and avowedly the rule in the relation to contracts, and it applies with equal propriety to torts.³ The result of the cases undoubtedly is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and their employment, the corporation is responsible as an individual is responsible under similar circumstances.⁴ The rule in such cases is, that corporations, like natural persons, are bound and bound only by the acts and contracts of their agents done and made within the scope of their authority.⁵

mercant Mut. Mar. Ins. Co. v. Union Mut. Ins. Co., 19 How. (U. S.) 322; Peyton v. Governor of St. Thomas Hospital, 3 C. & P. 363; Olcott v. Tioga R. Co., 40 Barb. (N. Y.) 179; Lovett v. German Reformed Church, 12 Barb. (N. Y.) 67; Covington v. Covington etc. Bridge Co., 10 Bush (Ky.) 69.

1. St. Louis etc. R. Co. v. Dalby, 19 Ill. 375; Elwell v. Dodge, 33 Barb. (N. Y.) 340; Lee v. Pittsburgh Coal & M. Co., 56 How. (N. Y.) Pr. 373; Bank of U. S. v. Dandridge, 12 Wheat. (U.S.) 64; Melledge v. Boston Iron Co., 5 Cush. (Mass.) 175; Hoyt v. Thompson, 19 N. Y. 208; Olcott v. Tioga R. Co., 27 N. Y. 559; 84 Am. Dec. 208; Eureka Iron & Steel Works v. Bresnahan, 60 Mich. 332; Spangler v. Butterfield, 6 Colo. 356. See New York etc. R. Co. v. Schuyler, 34 N. Y. 30, 70.

The courts will presume from the ordinary meaning of the term "general manager" that such an officer has the general direction and control of the af-

fairs of the corporation and authority to bind it by contract for nursing, etc., of persons injured on the line of the railway. Louisville etc. R. Co. v. McVey, 98 Ind. 391; 22 Am. & Eng. R. Cas. 382.

2. St. Louis Alton etc. R. Co. v. Dalby, 19 Ill. 375.

3. St. Louis, Alton etc. R. Co. v. Dalby, 19 Ill. 375; Lovett v. German Reformed Church, 12 Barb. (N. Y.) 67; Page v. Fall River Warren etc. R. Co., 31 Fed. Rep. 257.

4. Philadelphia etc. R. Co. v. Quigley, 21 How. (U. S.) 202.

In *Adrian v. Roome*, 52 Barb. (N. Y.) 410, GILBERT, J., said: "No doubt a corporation may be bound by the acts of the general agent in the same manner as private individuals; and persons dealing in good faith with such an agent are not presumed to know the private instructions which may have been given to him by his principal."

5. Chicago etc. R. Co. v. James, 22 Wis. 199; Mahone v. Manchester etc. R. Co., 111 Mass. 72; Nulling v. May-

Unless the act of incorporation expressly prescribes the contrary, the duly authorized agents of corporations as of natural persons, may, with the scope of their authority, bind them by simple as well as sealed contracts.¹ To enable its agents to bind the company, they must act pursuant to the requisites of the incorporating act.² So where the charter of a company requires contracts of a particular description to be in writing and signed by specified officers, or approved in a specified manner, no agent can bind the company to a contract of that description unless it was executed in the manner prescribed.³ So where an act incorporating the company requires the concurrence of a certain number of directors in the making of a contract or the doing of a corporate act, they cannot bind the company, unless the action is taken at a meeting of the board of directors, constituted according to the act, and by a majority of them present.⁴ Persons

or etc. of Shreveport, 5 La. An. 660; *Rice v. Peninsular Club*, 52 Mich. 87; *Boyton v. Lynn Gas Light Co.*, 124 Mass. 197; *Bocock v. Allegheny Coal & Iron Co.*, 82 Va. 913; *Fawcett v. New Haven Organ Co.*, 47 Conn. 224; *Lamm v. Port Deposit etc. Assoc.*, 49 Md. 233; *Culver v. Reno Real Estate Co.*, 91 Pa. St. 367.

To render a corporation responsible for the acts of its agent, a treasurer, in illegally receiving or passing bank notes of less denomination than five dollars, it is necessary that the agent should have express authority from the corporation. *Christian University v. Jordan*, 29 Mo. 68.

A corporation is not bound by the declaration or acts of individual members thereof, made or done at a time when they were not acting as agents of such corporation. *Ruby v. Abyssinian Soc.*, 15 Me. 306.

1. *McCullough v. Talladega Ins. Co.*, 46 Ala. 376; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496; *Bellinger v. Bentley*, 4 Thomp. & C. (N. Y.) 71; *1 Hun* (N. Y.) 562; *Augusta Bank v. Hamblet*, 35 Me. 491; *Downing v. Mount Washington Road Co.*, 40 N. H. 230; *Morris etc. R. Co. v. Green*, 15 N. J. Eq. 469; *Mulcrone v. American Lumber Co.*, 55 Mich. 622; *Swisshelm v. Swissvale Laundry Co.*, 95 Pa. St. 367.

The trustees or agents of a corporation may contract under the corporate seal for payment of money in furtherance of the business of the corporation. They need not sign their names to such contract, but their doing so will not vitiate the corporate act. *Clark v. Far-*

mers' Woolen Mfg. Co., 15 Wend. (N. Y.) 256. See also *M'Donough v. Templeman*, 1 Har. & J. (Md.) 156.

An officer of a corporation binds the corporation only by his acts in the usual course of business. *Fulton Bank v. New York etc. Canal Co.*, 4 Paige (N. Y.) 127.

2. *Adrianse v. Roome*, 52 Barb. (N. Y.) 399.

A stockholder and director of a manufacturing company, and overseer of part of its business, is not by virtue of his office authorized to bind the company by contract to aid in the extension of a railroad. *New Haven etc. Co. v. Hayden*, 107 Mass. 525.

3. *Beatty v. Marine Ins. Co.*, 2 Johns. (N. Y.) 109; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Badger American etc. L. Ins. Co.* 103 Mass. 244; *Henning v. United States Ins. Co.*, 47 Mo. 425; *Head v. Providence Ins. Co.*, 2 Cranch (U. S.) 127; *McCullough v. Moss*, 5 Den. (N. Y.) 567; *Murphy v. Louisville*, 9 Bush (Ky.) 189; *Safford v. Wyckoff*, 4 Hill (N. Y.) 446; *Crampton v. Varna R. Co.*, L. R., 7 Ch. App. 562; *French Spiral Spring Co. v. New England Car Trust*, 32 Fed. Rep. 44. *Compare Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318; *In re General Prov. Ins. Co.*, L. R., 14 Eq. 507.

Where the charter requires contracts to be signed by certain officers and approved in a certain manner, an agent cannot bind the corporation by a contract not so signed and approved. *Dobbins v. Etowah etc. Mfg. Co.*, 75 Ga. 238.

4. *Beatty v. Marine Ins. Co.*, 2 Johns.

dealing with the agents of a corporation in good faith may ordinarily assume that all formalities described by the charter, as conditions precedent to the authority of the agents, have been complied with.¹ This doctrine cannot, however, be invoked by those persons who are under an obligation to see to the observance of formalities. Managing agents of a corporation, therefore, cannot as a rule, hold the company bound by an informal act, unless it has been ratified by the corporation.² But an act performed in disregard of a prescribed formality may be ratified by the corporation, in some instances by its managing agents.³

(a) LIMITATION OF POWER.—The powers of officers or agents of corporations, like those of natural persons, are limited to their authority.⁴ Their authority depends upon the terms of their appointment and the provisions of the company's charter. No matter what the terms of their appointment may be, no agent of a corporation can, under any circumstances have authority to do an act which is in excess of the company's chartered powers, or in

(N. Y.) 109; *Dawes v. North River Ins. Co.*, 7 Cow. (N. Y.) 462; *Gordon v. Preston*, 1 Watts (Pa.) 385; *Card v. Carr*, 1 C. B., N. S. 197; *Kirk v. Bell*, 16 Q. B. 290; *Ridley v. Plymouth etc. Banking Co.*, 2 Exch. 711; *Howard v. Maine Industrial School etc.*, 78 Me. 230; *Spelman v. Fisher Iron Co.*, 56 Barb. (N. Y.) 151. Compare *Thames Haven Dock etc. Co. v. Rose*, 4 M. & G. 552.

1. See *Lee v. Pittsburgh Coal & Min. Co.*, 56 How. Pr. (N. Y.) 373; *Farmers' etc. Bank v. Butchers' etc. Bank*, 16 N. Y. 125; s. c., 69 Am. Dec. 678; s. c., 28 N. Y. 425; *Wild v. New York etc. Min. Co.*, 59 N. Y. 644; *Emmet v. Reed*, 8 N. Y. 312; *New Hope etc. Bridge Co. v. Phenix Bank*, 3 N. Y. 156; *Mumford v. Hawkins*, 5 Den. (N. Y.) 355; *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604; *Bates v. Keith Iron Co.*, 7 Met. (Mass.) 224; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496; s. c., 38 Am. Dec. 561; *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. (N. Y.) 592; *Sherman Center Town Co. v. Surgart*, 43 Kan. 292; *Wilson v. King's County*, 114 N. Y. 487.

2. *Morawetz Priv. Corp.*, § 584. See *In re Native Iron Ore Co.*, L. R., 2 Ch. D. 345; *In re Wynn Hall Coal Co.*, L. R., 10 Eq. 515; *In re New Castle Marine Ins. Co.*, 19 Beav. 97; *Ex parte Valpy*, L. R., 7 Ch. 289. Compare *In re General South Am. Co.*, L. R., 2 Ch. D. 337; *In re General Provident Assur. Co.*, L. R., 14 Eq. 507; *Chambers v. Manchester etc. R. Co.*, 5

B. & S. 588; *Lebanon & Gravel Road Co. v. Adair*, 85 Ind. 244; *Madison Co. v. Paxton*, 57 Miss. 701; *Leggett v. New Jersey Mfg. etc. Co.*, 1 N. J. Eq. 541.

3. *Morawetz Priv. Corp.*, §§ 584, 618, 634.

Where the acts of an agent or director of a corporation are wholly unauthorized by the charter of such corporation, it is in excess of the power of the majority, and can only be ratified by the unanimous consent of the shareholders. *Chamberlain v. Pacific Wool Growing Co.*, 54 Cal. 103; *Ryan v. Lynch*, 68 Ill. 160; *Tracy v. Guthrie Co. Agricultural Soc.*, 47 Iowa 27; *Dudley v. Kentucky High School*, 9 Bush (Ky.) 578; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *New Orleans R. Co. v. Harris*, 27 Miss. 537; *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 573; *In re St. Mary's Church*, 7 S. & R. (Pa.) 517; *Boston R. Co. v. New York R. Co.*, 13 R. I. 260; *Hazard v. Durant*, 11 R. I. 106; *Stevens v. Rutland etc. R. Co.*, 29 Vt. 545; *Marsh v. Fulton Co.*, 10 Wall. (U. S.) 676-684; bk. 19, L. ed. 1040; *Athenæum L. Assoc. v. Poorley*, 3 De G. & J. 294; *Burgess & Stock's Case*, 31 L. J., Ch. 749; s. c., 2 J. & H. 441; *Pickerling v. Stevenson*, L. R., 14 Eq. 340; *Lindley on Partnership* (4th ed.) 608.

4. *Burrows v. Norwich etc. R. Co.*, 100 Mass. 26; *Silliman v. Fredericksburg etc. R. Co.*, 27 Gratt. (Va.) 120; *Chicago etc. R. Co. v. James*, 22 Wis. 194; *Bank of Metropolis v. Guttschlick*, 14 Pet. (U. S.) 19.

violation of law.¹ The power conferred on officers and agents of corporations is a statutory one and must be exercised within the exact limits prescribed by law.²

The authority of the subordinate agents of a corporation is not unfrequently dependent upon the course of dealing which the company and the officers charged with its direction have sanctioned, and may be established without reference to the officer's record of the proceedings of such company or its officers, by proof of the usage which has been permitted to grow up in the transaction of its business, and of the acquiescence of its managing officers charged with the duty to provide and control the company's business.³

(b) NOTICE—(1) *Generally*.—The only mode to give notice or communicate knowledge to corporations is to give such notice and to communicate such knowledge to some agent authorized to receive it. So, notice given to a proper agent of a corporation is notice to the corporation.⁴ This general rule has no application,

1. *Planters' Warehouse Co. v. Johnson*, 62 Ga. 308; *Alexander v. Cauldwell*, 83 N. Y. 480.

2. *Com. v. Ruggles*, 6 Allen (Mass.) 588.

3. See *Talladega Ins. Co. v. Peacock*, 67 Ala. 253; *Protection L. Ins. Co. v. Foote*, 79 Ill. 361; *Fulton Bank v. New York etc. Canal Co.*, 4 Paige (N. Y.) 127; *Lohman v. New York R. Co.*, 2 Sandf. (N. Y.) 39, 52; *Perkins v. Bradley*, 27 Vt. 66; *Martin v. Webb*, 110 U. S. 7, 15; *Mahoney Min. Co. v. Anglo-Cal. Bank*, 104 U. S. 102; *Foster v. Ohio Colorado Reduction etc. Co.*, 17 Fed. Rep. 130. See also *McKiernan v. Lenzen*, 56 Cal. 61; *Fawcett v. New Haven Organ Co.*, 47 Conn. 224; *Bradlee v. Warren Sav. Bank*, 127 Mass. 107; *Phillips v. Campbell*, 43 N. Y. 271; *McCullough v. Moss*, 5 Den. (N. Y.) 567. Compare *New England F. Ins. Co. v. Schettler*, 38 Ill. 366; *Witney v. South Paris Mfg. Co.*, 39 Me. 316.

4. *Second Nat Bank of St. Paul v. Howe*, 40 Minn. 390; *New England Car Spring Co. v. Union India Rubber Co.*, 4 Blatchf. (U. S.) 1; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *Danville Bridge Co. v. Pomroy*, 15 Pa. St. 151. See *Schoharie Valley R. Co's Case*, 12 Abb., 1 Pr., N. S. (N. Y.) 394; *Fulton Bank v. New York etc. Canal Co.*, 4 Paige (N. Y.) 127; *Dock v. Elizabethtown etc. Mfg. Co.*, 34 N. J. L. 317; *New Hope etc. Bridge Co. v. Phoenix Bank*, 3 N. Y. 156; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553, 360; *McEwen v. Montgomery Co. Mut. Ins. Co.*, 5 Hill (N. Y.) 101; *Nat.*

Security Bank v. Cushman, 121 Mass. 490; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24; *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117; *Danville Bridge Co. v. Pomroy*, 15 Pa. St. 151; *Bank of Pittsburgh v. Whitehead*, 10 Watts (Pa.) 397; s. c., 36 Am. Dec. 186; *Boggs v. Lancaster Bank*, 7 W. & S. (Pa.) 331; *Tagg v. Tennessee Nat. Bank*, 9 Heisk. (Tenn.) 479; *Ex parte Larking*, L. R., 4 Ch. Div. 566; *Wing v. Harvey*, 5 De G. M. & G. 265; s. c., 27 Eng. L. & Eq. 140; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Bank of U. S. v. Davis*, 2 Hill (N. Y.) 451; *Jackson v. Sharp*, 9 Johns. (N. Y.) 163; s. c., 6 Am. Dec. 267; *Branch Bank v. Steele*, 10 Ala. 915; *Smith v. Board of Water Commissioners*, 38 Conn. 208; *First Nat. Bank v. Town of New Milford*, 36 Conn. 93; *Lawrence v. Tucker*, 7 Me. 195. See *Bank of Pittsburgh v. Whitehead*, 10 Watts (Pa.) 397; s. c., 36 Am. Dec. 186. Compare *Bank of Virginia v. Craig*, 6 Leigh (Va.) 399.

Where the business of a company is such as to require it to be conducted through agents, notice to one, in a matter in which he acted within the scope of his employment, and in the usual course of the company's business, will bind the company. *Pontchartrain R. Co. v. Heirne*, 2 La. An. 129.

Where a servant of a mining company was killed by the falling of a rock from the roof of a common gangway in a coal mine, and it was sought to charge the company with negligence in not keeping the roof in a safe condition—

however, to a case in which the one party does not act as agent but avowedly for himself, and adversely to the interest of the other; in other words, neither the acts nor knowledge of an officer of a corporation will bind it in a matter in which the officer acts for himself, and deals with the corporation as if he had no official relations with it.¹ And the notice to be binding upon the corporation must be notice to the agent acting within the scope of his agency, and must relate to the business, or as most of the authorities have it, the very business in which he is engaged, or is

held, that notice to the superintendent of the dangerous situation of the roof was notice to the company; and, if this was long enough before the accident to have given time to repair, the same was sufficient to fix negligence upon the company. *Quincy Coal Co. v. Hood*, 77 Ill. 68.

Notice to the President.—A notice officially addressed to the president of a corporation, who is also its general agent, in relation to matters under his supervision and control as such general agent, is notice to the corporation. *Smith v. Board of Water Commissioners*, 38 Conn. 208.

Notice to the president of a banking corporation that stock upon the books of the bank in the name of one person was held by him in trust for another should be considered as notice to the corporation. *Porter v. Bank of Rutland*, 19 Vt. 510.

Any knowledge or information acquired by the president of a corporation relating to the business of the corporation under his control, and acquired in the course of his official duties, is notice to the corporation of the facts within his knowledge. See *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 248; *Smith v. Board of Water Commissioners*, 38 Conn. 208; *Factors' etc. Ins. Co. v. Marine Dry Dock etc. Co.*, 31 La. An. 149; *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402; *Central Nat. Bank v. Levin*, 5 Mo. App. 543; *Mechanics' Bank v. Schauburg*, 38 Mo. 228; *Miller v. Illinois Cent. R. Co.*, 24 Barb. (N. Y.) 312; *Van Leuven v. First Nat. Bank*, 6 Lans. (N. Y.) 373; *Porter v. Bank of Rutland*, 19 Vt. 410. Thus, it has been held that knowledge on the part of the president of a bank, sufficient to put him on enquiry that stock held by a stockholder is held in trust for another, is notice to the bank. *Porter v. Bank of Rutland*, 19 Vt. 410. Compare *Bank of Virginia v. Craig*, 6 Leigh (Va.) 399.

Notice to Corporator.—The fact that a corporator who is not an agent in forming the company knows of an encumbrance on the property purchased by the corporation will not charge his associates with notice, whatever may be the effect on his own interest. *Burt v. Batavia Paper Mfg. Co.*, 86 Ill. 66.

1. *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481; *Fulton Bank v. New York etc. Co.*, 4 Paige (N. Y.) 127; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270; *Kennedy v. Green*, 3 M. & K. 699; *In re European Bank*, L. R., 5 Ch. App. 358; *In re Marseilles Extension R. Co.*, L. R., 7 Ch. App. 161; *Winchester v. Baltimore etc. R. Co.*, 4 Md. 231; *Koehler v. Dodge*, 47 N. W. Rep. 913; *Holland v. Citizens' Sav. Bank* (R. I.), 20 Atl. Rep. 231.

Where as is said in *Barnes v. Trenton Gaslight Co.*, 37 N. J. Eq. 33, his interest is opposed to that of the corporation, the presumption is not that he will communicate the knowledge of any secret infirmity of the title to the corporation, but that he will conceal it. *Barnes v. Trenton Gas-light Co.*, 27 N. J. Eq. 33; *La Farge F. Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54; *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. (Ky.) 545. So the knowledge of an officer will not bind the corporation in a case where a director procures a discount on a note for his own benefit, having knowledge that it is founded upon an illegal consideration. *First Nat. Bank v. Christopher*, 40 N. J. L. 435, or that it was made for his accommodation. *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270; or that it was obtained under false pretence of having it discounted for the maker. *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24.

Knowledge of officer dealing with corporation for himself in the same way as any other person might do, is not imputed to the corporation, and will not be notice of such facts. See *First Nat. Bank v. Gifford*, 47 Iowa 575;

represented as being engaged by authority of the corporation.¹ It must be the knowledge of the agent coming to him while he is concerned for the corporation, and in the course of the very transaction which is the subject of the suit, or so near before it that the agent must be presumed to recollect it.²

So notice given to an officer privately, or which he acquires from rumor or through channels open to all alike, and which he does not communicate to his associates, will not bind the company;³ and it is only during the agency that the agent represents and stands in the shoes of his principal. Notice to him is then notice to the corporation, but notice to him before the relation commences or after it has ceased is not notice to the corporation.⁴

Wickersham v. Chicago Zinc Co., 18 Kan. 481; *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. (Ky.) 545; *Louisiana State Bank v. Senecal*, 13 La., O. S. 525; *West Boston Sav. Bank v. Thompson*, 124 Mass. 506; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24; *Loomis v. Eagle Bank*, 1 Disney (Ohio) 285; *Barnes v. Trenton Gas-light Co.*, 27 N. J. Eq. 33; *First Nat. Bank v. Christopher*, 40 N. J. L. 435; s. c., 8 Cent. L. J. 181; *La Farge F. Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54; *Seneca Co. Bank v. Neass*, 5 Den. (N. Y.) 329; *In re European Bank, L. R.*, 5 Ch. App. 358.

Where Same Person Agent for Two Corporations.—It seems that in some cases his knowledge as the agent of one corporation will not be notice to the other corporation; thus, where the common officer of two corporations borrows money from the one to be used by the other for a purpose which is illegal or in furtherance of a contract, which is *ultra vires*, the corporation from which the money is borrowed will not be charged with the knowledge of the facts in the case. *In re Marseilles Co.*, L. R., 7 Ch. App. 161; *In re Contract Corporation, L. R.*, 8 Eq. 14; *Gale v. Lewis*, 9 Q. B. 730.

1. *First Nat. Bank v. Gifford*, 47 Iowa 575; *National Security Bank v. Cushman*, 121 Mass. 490; *First Nat. Bank v. Christopher*, 40 N. J. L. 435; *Westfield Bank v. Cornen*, 37 N. Y. 320; *Trenton Banking Co. v. Woodruff*, 3 N. J. Eq. 210; *New Hope etc. Bridge Co. v. Phenix Bank*, 3 N. Y. 166; *Fulton Bank v. New York etc. Canal Co.*, 4 Paige (N. Y.) 127; *Bank of Pittsburgh v. Whitehead*, 10 Watts (Pa.) 397; s. c., 36 Am. Dec. 186; *Porter v. Bank of Rutland*, 19 Vt. 410.

Compare Bank of Virginia v. Craig, 6 Leigh (Va.) 399.

The officer or agent must have notice in his representative character or the corporation will not be bound. *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Conger v. Chicago etc. R. Co.*, 24 Wis. 157; s. c., 1 Am. Rep. 164.

And any knowledge or information acquired by the president in the course of his official duty relating to the business of the corporation under his control will be notice to the corporation. *Van Leuvan v. First Nat. Bank*, 6 Lans. (N. Y.) 373; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Central Bank v. Levin*, 6 Mo. App. 543.

2. *Conger v. Chicago etc. R. Co.*, 24 Wis. 157; s. c., 1 Am. Rep. 164. See *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Bank of Virginia v. Craig*, 6 Leigh (Va.) 399; *Farrell Foundry v. Dart*, 26 Conn. 376; *Winchester v. Baltimore etc. R. Co.*, 4 Md. 231; *Miller v. Illinois Cent. R. Co.*, 24 Barb. (N. Y.) 312; *Smith v. South Royalton Bank*, 32 Vt. 341; *Holt's Case*, 22 Breeve 48.

3. *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Miller v. Illinois Cent. R. Co.*, 24 Barb. (N. Y.) 314; *Winchester v. Baltimore etc. R. Co.*, 4 Md. 231; *Bank of Virginia v. Craig*, 6 Leigh (Va.) 399; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *State Savings Assoc. v. Nixon-Jones Printing Co.*, 25 Mo. App. 642.

4. *Great Western R. v. Wheeler*, 20 Mich. 419; *Houseman v. Girard Mut. Bldg. etc. Assoc.*, 81 Pa. St. 256. See *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394; *Bridgeport Bank v. New York etc. R. Co.*, 30 Conn. 231; *Farmers' etc. Bank v. Payne*, 25 Conn. 450;

(2) *Notice of Agent's Authority*.—He who deals with a corporation is chargeable with notice of the purpose for which it was formed, and when he deals with its agents or officers, he is bound to know their powers and the extent of their authority.¹ This rule applies to foreign corporations² as well as to domestic corporations, and to corporations chartered by private acts of the legislature as well as to those whose charters are part of the general laws.³ But where a party deals with an agent of a corporation in good faith and is unaware of any secret instructions limiting the authority of such agent, the corporation is bound by the contract, if not *ultra vires*.⁴ So rules and regulations defining

Bank of the United States v. Davis, 2 Hill (N. Y.) 451.

The knowledge of an agent binds his principal to the same extent as though it were the knowledge of the principal when the agent acquires the knowledge while acting within the scope of his authority. See Holden v. New York etc. Bank Co., 72 N. Y. 286; Union Bank v. Campbell, 4 Humph. (Tenn.) 394; Hart v. Farmers' etc. Bank, 33 Vt. 252; Mihill's Mfg. Co. v. Camp, 49 Wis. 130; Waynesville Nat. Bank v. Irons, 8 Fed. Rep. 1. Compare Terrell v. Branch Bank, 12 Ala. 502; Houseman v. Girard Mut. Bldg. etc. Assoc., 81 Pa. St. 256.

While it is true that the knowledge acquired by a party before he became the agent of a corporation will not be noticed to the corporation after the inception of the agency (Houseman v. Girard etc. Assoc., 81 Pa. St. 256), yet no knowledge or information possessed by an agent at the time of acting as agent for a corporation, with respect to the matter with which he is to act, is notice to the corporation, except in those cases where express formal notice must be given to charge the principal. See Bridgeport Bank v. New York etc. R. Co., 30 Conn. 231; Union Bank v. Campbell, 4 Humph. (Tenn.) 394; Hart v. Farmers' etc. Bank, 33 Vt. 252; Fairfield Sav. Bank v. Chase, 72 Me. 226.

1. Alexander v. Cauldwell, 83 N. Y. 485; Davis v. Old Colony R. Co., 131 Mass. 258; Relfe v. Rundle, 103 U. S. 222; Haden v. Farmers' etc. F. Assoc., 80 Va. 691; Bocock v. Allegheny Coal etc. Co., 82 Va. 913; Dabney v. Stevens, 2 Sweeney (N. Y.) 415; Schetter v. Southern Or. Co. (Oreg.), 24 Pac. Rep. 25; De Bost v. Albert Palmer Co., 35 Hun (N. Y.), 386; Smith v. Co-operative Dress Assoc., 12 Daly (N. Y.) 304. See UNAUTHORIZED ACTS, *supra*.

In Adriance v. Roome, 52 Barb. (N. Y.) 411, GILBERT, J., said: "The principle, however, that persons dealing with the officers of a corporation are charged with notice of the authority conferred upon them, and of the limitations and restrictions upon it contained in the charter and by-laws, is too well established to require to be supported by a citation of authorities, and we cannot assent to the proposition that there is any grant of power in the name by which the officer is designated; especially when the authority given is specified in the by-laws."

Where nothing appears concerning the functions and powers of a corporation beyond what may be implied from its name, "The Woman's Christian Temperance Union," and nothing concerning the powers of a certain agent, the corporation will not be held liable for articles purchased by such agent without authority. Woman's Christian Temperance Union v. Taylor, 8 Colo. 75.

2. Morawetz Priv. Corp., § 591. See Relfe v. Rundle, 103 U. S. 222-226; Bishop v. Globe Co., 135 Mass. 132; Flagstaff etc. Min. Co. v. Patrick, 2 Utah 304; Davis v. Flagstaff Silver Min. Co., 2 Utah 74, 88; Hoyt v. Thompson, 19 N. Y. 208, 222. Compare City F. Ins. Co. v. Carrugi, 41 Ga. 660.

The officer of a company must be presumed to know its by-laws adopted before his appointment, and is bound by them as to his tenure of office. Hunter v. Sun Mut. Ins. Co., 26 La. An. 13.

3. Morawetz Priv. Corp., § 591; Merritt v. Lambert, Hoffm. Ch. (N. Y.) 168.

4. Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604; Southern L. Ins. Co. v. McCain, 96 U. S. 84; Wild v.

the powers and duties of the various officers through whose agency the corporate powers and franchises are exercised found only upon the minutes of the director's proceedings, or other private records of the corporation, will not charge persons dealing with such officers with notice of the authority thus conferred.¹ So persons dealing with agents of a corporation are not bound by the specifically incorporated powers of the officers of such corporations as expressed in its by-laws.²

(3) *Notice of the fraud of an officer or agent* of a corporation who takes advantage of his official position, while acting in an official character regarding the matter within the sphere of his duty, to perpetrate a fraud upon a third party, the corporation is presumed to have notice of all facts within his knowledge affecting the validity of the transaction.³

(4) *Courts Will Not Take Judicial Notice of Agent's Authority.*—Courts will not take judicial notice of the duties of officers of railway companies.⁴ They will not take judicial notice of the duties required or performed by the different servants engaged in managing a railway train, nor the degree of supremacy or

Bank of Passamaquoddy, 3 Mason (U. S.) 506; Union Gold Min. Co. v. Rocky Mt. Nat. Bank, 2 Cal. 248; Walker v. Wilmington, Columbia etc. R. Co., 26 S. Car. 80.

If an officer of a corporation openly exercises a power which presupposes a delegated authority for the purpose, and the corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officer will be deemed rightful, and the delegated authority will be presumed. *Fayles v. National Ins. Co.*, 49 Mo. 380.

1. *Lee v. Pittsburgh Coal & Min. Co.*, 56 How. Pr. (N. Y.) 377.

2. *Fay v. Noble*, 12 Cush. (Mass.) 1; *Smith v. Smith*, 62 Ill. 497; *Lee v. Pittsburgh Coal etc. Co.*, 56 How. Pr. (N. Y.) 376; *Mechanics' etc. Bank v. Smith*, 19 Johns. (N. Y.) 115; *Union Mut. L. Ins. Co. v. White*, 106 Ill. 67; *Kingsley v. New England Mut. F. Ins. Co.*, 8 Cush. (Mass.) 393; *In re County L. Assoc. Co.*, L. R., 5 Ch. 288; *Royal Bank of India's Case* L. R., 4 Ch. 252; *Rathburn v. Snow* (N. Y.), 25 N. E. Rep. 379.

One who contracts with the agent of a corporation for a sale of land to the corporation cannot hold the corporation, if its by-laws show that the agent was without authority in the premises. *Bocock v. Allegheny Coal etc. Co.*, 82 Va. 913.

3. See 6 S. L. Rev. 821; *First Nat.*

Bank v. Town of New Milford, 36 Conn. 93; *Atlantic Bank v. Merchants' Bank*, 10 Gray (Mass.) 532; *Holden v. New York etc. Bank*, 72 N. Y. 286; *Fishkill Sav. Inst. v. Bostwick*, 19 Hun (N. Y.) 354.

4. *Brown v. Missouri Pac. R. Co.*, 67 Mo. 122.

They will take judicial notice of the authority of a railway superintendent, and presume that such officer has power to conduct its ordinary business transactions, such as receiving or refusing cordwood for transportation. *Saccharias v. Eureka etc. R. Co.*, 18 Nev. 155; s. c., 16 Am. & Eng. R. Cas. 580. But the courts cannot judicially know or presume without further proof of the duties and powers of a "roadmaster" than what the term indicates, that such an employee has authority to bind the corporation by a contract with a third party for nursing a person injured upon the line of the railway. *Louisville etc. R. Co. v. McVey*, 98 Ind. 391; s. c., 22 Am. & Eng. R. Cas. 382. And whether the station agents along the line of a railroad have authority to bind the company by contracts to furnish cars is a question of fact, and the courts cannot take judicial notice that such agents possess such power or are held out to the world as possessing it; and it is error to reject testimony offered to prove that they have such power. *Wood v. Chicago R. Co.*, 59 Iowa, 196; s. c., 6 Am. & Eng. R. Cas. 314.

subordination existing between them.¹

(c) **AUTHORITY TO BORROW MONEY.**—Officers and agents of a corporation usually have authority to borrow money for its use. Such authority may be inferred from the charter and the character of the agency, their habit of borrowing money for the corporation, and the fact of the application of the money for the use of the corporation, without any direct authority being shown by resolution of the board of directors.² So where general banking powers are conferred by the charter of a banking corporation, the corporation may borrow money without having more specific authority therefor. In order to show the cashier's authority to borrow money for his bank, it is not necessary to prove a power specially conferred upon him by the board of directors or a distinct ratification by them of the act after its consummation. His acts done in the ordinary course of business actually confided to him as such cashier are *prima facie* evidence that they fall within the scope of his duty.³ Where officers of a corporation have power to borrow money to a limited extent and to issue its negotiable notes therefor, the *bona fide* holders of such notes may recover upon them, although the indebtedness of the corporation at the time of giving the notes already exceeds the limits prescribed by its articles of association.⁴

A statute providing that "no member of a committee or officer of a domestic insurance company, who is charged with the duty of investing its funds, shall borrow the same," is directory only, and a company so lending money, regardless of the statute and also of a rule of its directors, can hold the negotiable securities pledged therefor and not belonging to the pledgor, the company having no notice.⁵

(d) **TO EXECUTE NOTES AND BILLS OF EXCHANGE.**—The general agent of a corporation has no authority to make promissory notes in the name of the company without being specially

1. McGowan v. St. Louis etc. R. Co., 61 Mo. 528.

2. Allen v. Citizens' Steam Nav. Co., 22 Cal. 28; Lebanon etc. Gravel Road Co. v. Adair, 85 Ind. 244.

If an officer of a company, who usually transacts its financial business, borrows money in the name of the company, he binds the company, unless the company proves it was borrowed for an illegal purpose, or was misapplied. Beers v. Phoenix Glass Co., 14 Barb. (N. Y.) 358; S. P. Elwell v. Dodge, 33 Barb. (N. Y.) 336.

In a suit for money loaned a corporation and used by it, the corporation cannot plead that it exceeded its statutory power to contract debts, or that the officers negotiating the loan were

not properly authorized. Connecticut River Savings Bank v. Fiske, 60 N. H. 363.

3. Donnell v. Lewis Co. Sav. Bank, 80 Mo. 171; City Bank v. Perkins, 4 Bosw. (N. Y.) 420; Barnes v. Ontario Bank, 19 N. Y. 156.

4. Auerbach v. Le Sueur Mill Co., 28 Minn. 291; Nichols v. Mase, 94 N. Y. 160; Humphrey v. Patrons' Mercantile Assoc., 50 Iowa 607; Ossipee etc. Mfg. Co. v. Canney, 54 N. H. 295; Gordon v. Sea Fire Assoc. Co., 1 H. & N. 599. Compare *Re Pooley Hall Colliery Co.*, 21 L. T., N. S. 690; Fountaine v. Carmarthen R. Co., L. R., 5 Eq. 316.

5. Bowditch v. New England Mut. L. Ins. Co., 141 Mass. 292; s. c., 55 Am. Rep. 474.

empowered so to do;¹ nor does the general power given to the business manager of a corporation authorize him to bind the company or corporation as drawer of a promissory note.² But the officers of a corporation by its charter may confer authority upon its agents to draw and execute notes and bills of exchange in behalf of the company, and no action in writing on the part of boards of directors is necessary in order to vest such authority in the agent.³ Where the officers openly exercise this power, and other corporation acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers shall be deemed lawful, and the delegated authority will be presumed.⁴ So a note signed by an agent of a corporation is

1. *New York Iron Mine v. Megaunee Bank*, 39 Mich. 644; *Lebanon etc. Gravel Road Co. v. Adair*, 85 Ind. 244; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205. See *Black River Ins. Co. v. New York State Loan and Trust Co.*, 73 N. Y. 282.

An agent of a manufacturing corporation is not necessarily authorized to make a note on behalf of the corporation. To render such a note valid as against the company, the powers of the agent must be shown. *Benedict v. Lansing*, 5 Den. (N. Y.) 283.

The authority of an officer of a corporation to execute its note depends upon the by-laws or upon the custom of the corporation. *Foster v. Ohio-Colo-rado Reduction etc. Co.*, 17 Fed. Rep. 130.

2. *Culver v. Leavy*, 19 La. An. 202. If the power of the treasurer of an association, incorporated for the purpose of erecting and obtaining a monument, is expressly limited in the by-laws to the payment of such bills as have been approved by the directors in a particular form, he cannot bind the corporation by a negotiable promissory note on demand, given in part payment for the monument, although the directors have authorized a committee to contract for the same, and draw on the treasurer for the price, and the committee have accordingly contracted for the same, and the monument has been erected and approved by the corporation, and the committee have verbally authorized the treasurer to pay the price, and he thereupon, not having on hand sufficient money for the purpose, has executed the note. *Torrey v. Dustin Monument Assoc.*, 5 Allen (Mass.) 327.

3. *Preston v. Missouri etc. Lead Co.*, 51 Mo. 43; *American Ins. Co. v.*

Oakley, 9 Paige (N. Y.) 259; s. c., 38 Am. Dec. 561; *Magill v. Kauffman*, 4 S. & R. (Pa.) 317; s. c., 8 Am. Dec. 713; *Christian University v. Jordan*, 29 Mo. 68; *Southern Hotel Co. v. Newman*, 30 Mo. 118; *Buckley v. Briggs*, 30 Mo. 452; *Fayles v. National Ins. Co.*, 49 Mo. 380; *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa 276; *Dunn v. Rec-tor etc. St. Andrew's Church*, 14 Johns. (N. Y.) 118; *Bonaffe v. Fowler*, 7 Paige (N. Y.) 576.

The directors of a manufacturing corporation authorized its agent, under the Massachusetts statute of 1808, ch. 65, to raise money for his own use, on the credit of the corporation, and gave therefor a "company note." Held, that these words included a bill of exchange drawn by the agent, in the name of the company, the dishonor of which would not subject them to damages. *Tripp v. Swanzev Paper Co.*, 13 Pick. (Mass.) 291.

4. *Olcott v. Tioga R. Co.*, 27 N. Y. 546; s. c., 84 Am. Dec. 305; *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 175; s. c., 51 Am. Dec. 59; *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 18; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; *Hoyt v. Thompson*, 19 N. Y. 208; *Siebs v. Joshua Hendy Machine Works (Cal.)*, 25 Pac. Rep. 14; *Hannibal Bank v. North Missouri Coal etc. Co.*, 86 Mo. 125.

The trustees of a corporation who consign notes as such trustees, with the intention of not binding themselves personally, are not personally liable, even if they had no authority from the corporation to make notes, nor if there is no such corporation. *Blanchard v. Kaull*, 44 Cal. 440.

Complaint.—In a complaint upon a promissory note against a railroad company, it is not necessary to aver that

presumed to be a corporate debt.¹ But if the agent uses words that import a personal agreement and merely adds to the signature of his name the word "sec." "agent," "trustee," without disclosing the principal, he is personally bound.² One who undertakes to bind a corporation by the execution of a promissory note, must show that he had authority to bind it, and that

the agent of the company who made the note was appointed by a written or sealed commission. *Hamilton v. New-castle R. Co.*, 9 Ind. 359.

1. *Bradley v. McKee*, 5 Cranch (C. C.) 298; *Butts v. Cuthbertson*, 6 Ga. 166. The execution of a note to a corporation by its corporate name is an admission of the fact and *prima facie* evidence of the existence of the charter of the company, and *user* under it, under the plea of *multiel corporation*. *Montgomery R. Co. v. Hurst*, 9 Ala. 513.

2. *Guthrie v. Imbrie*, 12 Ore. 182; *Schmittler v. Simon*, 101 N. Y. 554; s. c., 54 Am. Rep. 737; *Davis v. England*, 141 Mass. 587; *American Ins. Co. v. Stratton*, 59 Iowa 696; *Tilden v. Barnard*, 43 Mich. 376; s. c., 68 Am. Rep. 512; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441; *Lockwood v. Coley*, 22 Fed. Rep. 192; *Toledo Agricultural Works v. Heisser*, 51 Mo. 128; *Tannatt v. Rocky Mountain Nat. Bank*, 1 Colo. 278; *Barker v. Mechanic Fire Ins. Co.*, 3 Wend. (N. Y.) 94; s. c., 20 Am. Dec. 664; *Haight v. Naylor*, 5 Daly (N. Y.) 219; *Mott v. Hicks*, 1 Cow. (N. Y.) 533; *Chamberlain v. Pacific Wool-Growing Co.*, 54 Cal. 106; *Village of Cahokia v. Rautenberg*, 88 Ill. 220; *Burlingame v. Brewster*, 79 Ill. 515; s. c., 22 Am. Rep. 177; *Hays v. Crutcher*, 54 Ind. 261; *Sturdivant v. Hull*, 59 Me. 172; s. c., 8 Am. Rep. 409; *Towne v. Rice*, 122 Mass. 67; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 102; *Bank v. Cook*, 38 Ohio St. 442; *Scott v. Baker*, 3 W. Va. 290; *Aimen v. Hardin*, 60 Ind. 119; *Societe Des Moines D'Argent etc. Mackintosh* (Utah), 24 Pac. Rep. 669; *Willson v. Nicholson*, 61, Ind. 241.

It is held by many cases where the signature is attached in this manner "for A. B. by C. D.," that this imports the signature and the obligation on behalf of another and will exempt the party signing from personal responsibility. *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237; *Long v. Colburn*, 11 Mass. 97; *Ballou v. Talbot*, 16 Mass. 461; *Rice v. Gove*, 22 Pick. (Mass.) 158; *Means v. Swarmstedt*, 32

Ind. 87; s. c., 2 Am. Rep. 330; *Alexander v. Sizer*, L. R., 4 Ex. 102; *Deslandes v. Gregory*, 2 El. & El. 602. But a contrary view is expressed by other well considered cases. *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 24; s. c., 2 Am. Dec. 120; *De Witt v. Walton*, 9 N. Y. 571; *Offutt v. Ayres*, 7 Mon. (Ky.) 356; s. c., 22 Am. Dec. 120; *Tannatt v. Rocky Mountain Nat. Bank*, 1 Colo. 278; s. c., 9 Am. Rep. 156.

Promissory notes bind the agent and not the company when signed as follows: "Independence Mfg. Co.," and directly underneath "B. I. Brownwell, Pres." *Heffner v. Brownwell*, 70 Iowa 591. See *Lacy v. Dubuque*, 43 Iowa 510. "I promise to pay," and signed by E., Pres. & Treas. of Co. *Davis v. England*, 141 Mass. 587.

"One year after date, we, or either of us, as directors, promise to pay," signed by their individual names without designation of official capacity. *Titus v. Kyle*, 10 Ohio St. 445.

But notes of this character, "We promise to pay," etc., and signed "Houston Flour Mills Co., D. P. Shepard, Pres." *Houston Flour Mills Co.*, 68 Tex. 127; *Robinson v. Kanawha Valley Bank*, (Ohio) 8 N. E. Rep. 586. Or, "We promise," etc., signed in the secretary's name with "Sec." affixed thereto and bearing the seal of the corporation. *Means v. Swarmstedt*, 32 Ind. 87. Or, "We two, the directors of the A. L. & A. S., by and on behalf of the said society, do hereby promise to pay," etc., signed "Charles Nicholson and H. Wood." *Aggs v. Nicholson*, 1 H. & N. 165. Or, three months after date, "We jointly promise to pay," etc., on account of the L. & B. Co., and signed, affixing directors to their names, bind the company.

A promissory note signed by three persons, in the body of which they, as trustees of a company, promise to pay to another a sum of money, and which has the same designation of "trustees," etc., appended to their signatures—held, not on its face to purport to be the note

it had the faculty of becoming bound for the payment of money. An agent, when sued upon a contract made by him, can only exonerate himself from liability by showing that he had authority to bind those for whom he assumes to act.¹ But one who, as an officer in a corporation, has united in subscribing a note for its debt, is estopped from setting up, when sued to enforce his individual liability on such note, that the officers making it had not power to do so.²

Oral testimony cannot be given to control or vary a written contract made on the behalf of another,³ but if there are upon the face of the instrument indications suggestive of agency, such as the addition of words of office or agency to the signature, or any imprint of the corporate title on the paper, parol evidence is competent to show who the parties intended should be bound or benefited.⁴

(e) TO TRANSFER NEGOTIABLE INSTRUMENTS.—The negotiable paper of a corporation, which upon its face appears to have been duly issued by the proper officers or agents of such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice.⁵ And it

of the person signing it, and they are not personally liable in a suit on it. *Blanchard v. Kaull*, 44 Cal. 440.

In an action against directors, &c., on a note wherein "the directors of" a certain "turnpike company" promise to pay, etc., and signed themselves "directors," a plaintiff recovering judgment against the company is estopped from claiming the note to be that of the directors individually. Such a note is, by its terms, the note of the company. *Aimen v. Hardin*, 60 Ind. 119.

1. *Howard v. Humes*, 9 Ala. 659.

2. *Brown v. Torrey*, 42 N. Y. Super. Ct. 1.

3. *Davis v. England*, 141 Mass. 587; *Rowell v. Oleson*, 32 Minn. 288; *Wing v. Glick*, 56 Iowa 473; s. c., 41 Am. Rep. 118.

4. *Bean v. Pioneer Min. Co.*, 66 Cal. 451; s. c., 56 Am. Rep. 106; *Rowell v. Oleson*, 32 Minn. 288. *Compare Brewster v. Baxter*, 2 Wash. 135; *Nutt v. Humphrey*, 32 Kan. 100.

In an action to recover on a note which read as follows: "Four months after date, we, the president and directors of the Dulaney's Valley & Sweet Air Turnpike Company of Baltimore Co., promise to pay to William F. Pierce, or order, one thousand dollars, with interest, for value received," and was signed by C. T. H., Pres., J. N. H. & J. G. D.,

directors, and E. R. S. secretary, it was held that parol evidence was admissible to show that the drawers of the note signed it as agents of the company and not as individuals, and that the note was accepted as the note of the company. *Haile v. Pierce*, 32 Md. 327; s. c., 3 Am. Rep. 139.

5. *Madison etc. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457; *Ridgway v. Farmers' Bank*, 12 S. & R. Pa. 256; *Philadelphia etc. R. Co. v. Lewis*, 33 Pa. St. 33; *Rowland v. Apothecaries' Hall Co.*, 47 Conn. 384; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; *La Fayette Bank v. St. Louis etc. Co.*, 2 Mo. App. 299; *McIntire v. Preston*, 10 Ill. 48; *Stoney v. American L. Ins. Co.*, 11 Paige (N. Y.) 635; *Mechanics' Banking Assoc. v. New York etc. White Lead Co.*, 35 N. Y. 505; *Matthews v. Massachusetts Nat. Bank*, 1 Holmes 396; *Re General Estates Co.*, L. R., 3 Ch. 758; *Re Land Credit Co. of Ireland*, L. R., 4 Ch. 460; *Ex parte Eastabrook*, 2 Low. (U. S.) 547; *Cooke v. Pearce*, 23 S. Car. 239; *Planters' Bank v. Sharp*, 6 How. (U. S.) 301; *Marvine v. Hymers*, 12 N. Y. 223.

An agent of a corporation may have authority to transfer a note by endorsement but no authority to bind the corporation as endorser. This authority may be shown by other evidence than the by-laws. *Brown v. Donnell*, 49 Me. 421.

is even held that a person who in good faith and without notice receives a note or draft issued or endorsed, or a check certified good, by the cashier of a banking corporation, will be entitled to hold the company liable, although the act of the cashier may have been unauthorized by its charter.¹ A citizen who deals directly with a corporation or who takes its negotiable paper, is presumed to know the extent of its corporate power. But when the paper is upon its face in all respects such as the corporation has authority to issue, and its only defect consists in some extrinsic fact, such as the purpose or object for which it was issued, to hold that the person taking the paper must enquire as to such extraneous facts, of the existence of which he is no in way apprised, would obviously conflict with the whole policy of law in regard to negotiable paper.² Nor can a corporation evade liability on negotiable paper endorsed with their name by their agent for the accommodation of a third person, on the ground that the agent had no authority so to endorse it, if it appears that the agent had frequently before endorsed their paper and procured it to be discounted by the plaintiff and received the avails and that the corporation had recognized the validity of such previous transaction.³

The cashier of a bank is, *virtute officii*, generally entrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank as its general agent, in the negotiation and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and endorse negotiable securities held by the bank for its use and in its behalf. No special authority for this purpose is necessary.⁴

1. Morawetz's Priv. Corp., § 597, *Cooke v. State Nat. Bank*, 52 N. Y. 96; *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604; *Faneuil Hall Bank v. Bank of Brighton*, 16 Gray (Mass.) 534; *Everett v. United States*, 6 Port. (Ala.) 166; *Genesee Bank v. Patchin Bank*, 13 N. Y. 309; s. c., 19 N. Y. 312; *City Bank v. Perkins*, 29 N. Y. 554; *Barnes v. Ontario Bank*, 19 N. Y. 156; *Farmers' etc. Bank v. Butchers' etc. Bank*, 14 N. Y. 623; s. c., 16 N. Y. 133; s. c., 4 Duer (N. Y.) 219; *Meads v. Merchants' Bank*, 25 (N. Y.) 143; *Booth v. Farmers' etc. Nat. Bank*, 4 Lans. (N. Y.) 301. Compare *Mussey v. Eagle Bank*, 9 Met. (Mass.) 306.

In the absence of any proof that the charter of a bank contains any restriction or limitation on the power of the bank to negotiate or endorse notes or bills of exchange, or on the authority of its cashier to endorse such negotiable paper for the bank, the presumption is that the bank has power, and its cashier authority, to endorse paper of that

description. *Robb v. Ross County Bank*, 41 Barb. (N. Y.) 586.

Where the agents of a corporation are authorized to issue and sell its negotiable bonds at a certain price or upon complying with certain formalities, an innocent purchaser of the bonds will be entitled to charge the company upon the bonds although they were sold below the prescribed price or without complying with the prescribed formalities. *Ellsworth v. St. Louis etc. R. Co.*, 98 N. Y. 553.

2. *Farmers' etc. Bank v. Butchers' etc. Bank*, 16 N. Y. 125.

3. *Bank of Auburn v. Putnam*, 1 Abb. App. Dec. (N. Y.) 80.

4. *Kimball v. Cleveland*, 4 Mich. 608; *Wild v. Bank of Passamaquoddy*, 3 Mason (U. S.) 506; *Robb v. Ross Co. Bank*, 41 Barb. (N. Y.) 586; *Western Md. R. Co. v. Franklin Bank*, 60 Md. 36; *Genesee Co. Sav. Bank v. Michigan Barge Co.*, 52 Mich. 438; *Ex parte Chorley*, L. R., 11 Eq. 157; *Hulett's Case*, 2 J. & H. 306.

(f) TO CONFESS JUDGMENT.—Hopeless insolvency works the dissolution of a corporation, and the officers of a corporation dissolved by insolvency are trustees of the corporation and jointly and severally responsible for the misappropriation of assets. If after its dissolution they confess judgment on its notes to escape liability as endorsers, they misapply the assets; but those creditors who in good faith thus obtained possession of the assets will not be required to refund.¹

(g) TO INCREASE CAPITAL STOCK.—The officers of a company cannot bind the corporation by an agreement to increase its capital stock. It is not within the implied powers of any corporate officer to obligate the corporation to any such increase, and thus directly do what the law permits to be done by the body of corporators specially convened for that purpose.²

(h) TO USE COMMON SEAL.—The officer or agent of a corporation who executes a deed in the name of the corporation by affixing thereto the impression of the common or corporate seal entrusted to his care is the party executing the deed, as it is impossible that a corporation aggregate should execute or acknowledge a deed in person. The officer of a corporation entrusted with its common seal and who subscribes his name to the deed as the evidence that he is the person who has affixed the common seal to the same, stands also in the character of a subscribing witness to the execution of the deed by the corporation, and may be examined by the commissioner of deeds to prove that the seal affixed by him is the common seal of the corporation whose deed, conveyance or instrument to which it is affixed purports to be.³

The president cannot use the common seal without the authority of the board.⁴ But when the common seal of a corporation

In the case of *Bank of the State v. Wheeler*, PERKINS, J., said: "It would certainly greatly embarrass monetary and mercantile transactions, if every man, who bought and sold gold and silver and commercial paper, at the counter of the bank, of or to the cashier, was compelled to call for the records of the bank, to see that the cashier had the powers he assumed, they being within the general scope of the authority of such officer. The directors of banks are not usually in perpetual session, while the business of banks is occurring every day, and must, of necessity, be transacted by the officers in charge, or not at all. The public interest requires that the banks should be bound by the acts of their officers in their ordinary business."

Evidence of Authority to Endorse.—Proof of the acts and proceedings of the president and directors of a com-

pany, from which it may be inferred that the assistant secretary was authorized to endorse the notes of the company, is competent evidence of such authority. *Nicholas v. Oliver*, 36 N. H. 218.

1. *Sprague-Brinnine Mfg. Co. v. Murphy Furnishing Goods Co.*, 26 Fed. Rep. 572.

2. *Finley Shoe etc. Co. v. Kurtz*, 34 Mich. 89.

3. *Lovett v. Steam Sawmill Assoc.*, 6 Paige (N. Y.) 54; *Crowley v. Genesee Min. Co.*, 55 Cal. 273.

4. *Hoyt v. Thompson*, 5 N. Y. 320. If a committee of three directors has discretionary power for the execution and delivery of a lease of the corporate property, two of the members may seal it with the corporate seal, where the third is absent, but has approved its terms and concurred with the others in directing its engrossment for execution.

appears to be affixed to an instrument and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority.¹ The contrary must be shown by the objecting party. The corporate seal affixed to a contract or conveyance does not render the instrument a corporate act unless it is affixed by an agent or officer duly authorized. It must be affixed by the officer to whose custody it is confided or by some person specially authorized.²

A writ of *mandamus* will not issue on the petition of a majority of the members of a corporate body, to compel the trustees to affix the common seal to alterations and amendments of the charter, contrary to their own judgment.³

(i) TO ACT THROUGH COMMITTEES.—Where a corporation acts through a committee, a majority of the committee must concur in making any contract or in varying one.⁴ If the act is not pursuant to their authority, they cannot bind the corporation;⁵ but a ratification by a corporation will cure any defects in the action of the committee.⁶

(j) TO EMPLOY SURGICAL AID.—It is a matter of frequent occurrence for railway officials, as conductors and station agents, to engage physicians and nurses to attend upon employees and passengers injured in railway accidents. The bills for services so rendered are often disputed, on the ground that the officer or servant contracting for them acted *ultra vires*. Primarily, where a physician attends upon persons injured in a railway accident,

So *held*, one of the members executing being president of the corporation and custodian of its seal. *Union Bridge Co. v. Troy etc. R. Co.*, 7 Lans. (N. Y.) 240.

1. Angell & Ames on Corp., § 224; *Flint v. Clinton Co.*, 12 N. H. 430.

2. *Bliss v. Kaweah Canal etc. Co.*, 65 Cal. 503.

A corporation by vote authorized its president and secretary to cancel one of two mortgages held against a debtor, but by mistake the president discharged both. The charter provided that the president should keep the corporate seal, and that the corporation should be bound by all instruments which it should lawfully make, when executed in its name and pursuant to its rules, being signed and delivered by the president, secretary, or other persons as it should appoint, and sealed by its common seal. *Held*, that the discharge of the other mortgage was without authority from the corporation, and was void. *Smith v. Smith*, 117 Mass. 72.

3. *In re St. Mary's Church*, 6 S. & R. (Pa.) 508.

4. *Howard v. Industrial School*, 78 Me. 231. Where a board of directors refers a matter to a committee of three, one of whom is the president of the corporation, the president cannot act alone so as to bind the corporation. *Third Ave. R. Co. v. Ebling*, 12 Daly (N. Y.) 99.

The regulations of an association provided for a standing committee to act as arbitrators to settle disputes between the members; their report to be in writing, and to be binding and final as to the parties to the arbitration. Upon a voluntary submission to parties without regard to their official capacity, but merely as arbitrators—*held*, that a finding of the arbitrators under such submission was binding, though rendered orally. *Murdock v. Blesdell*, 106 Mass. 370.

5. *Reservoir Co. v. Chase*, 14 Conn. 122.

6. *Madison Ave. Baptist Church v*

the liability of the railroad company for such services must depend upon the contract,¹ and the physician's services must have been rendered upon the credit of the company.²

The general superintendent,³ manager or agent,⁴ of a railway company, may, in the exercise of his powers as such, bind the company for the payment of expenses for nursing and medical attendance necessary to cure an injured employee. See AGENCY, vol. 1, p. 365.

(*k*) TO EMPLOY ATTORNEYS.—Managing officers of corporations have power to employ attorneys and counsellors without delegations of power or formal resolutions to that effect; and the authority of an agent of a corporation to employ counsel in its behalf may be implied from the adoption or recognition of his acts by the company.⁵ If, however, such officers transcend their powers, as limited by the particular corporation, they are responsible to their employers.⁶

(*l*) TO EMPLOY WORKMEN.—Where an agent of a corporation is authorized by its by-laws "to manage the affairs of the corporation and to exercise the powers committed to him, according to his best ability and discretion, and promptly to collect all assessments and other sums that shall become due to the corporation and to disburse them according to the order of the board," he has authority to employ workmen to carry on the business of the corporation and to pay them with its funds, or, not being in funds, to give the note of the corporation in payment, if the

Baptist Church, 2 Abb. Pr., N. S. (N. Y.) 254; s. c., 32 How. Pr. (N. Y.) 335.

1. *Ellis v. Central Pac. R. Co.*, 5 Nev. 255.

2. *Northern Cent. R. Co. v. Prentiss*, 11 Md. 119.

3. *Toledo etc. R. Co. v. Prince*, 50 Ill. 26; *Indianapolis etc. R. Co. v. Morris*, 67 Ill. 295; *Cairo etc. R. Co. v. Mahoney*, 82 Ill. 73.

4. *Walker v. Great Western R. Co.*, L. R., 2 Ex. Ch. 228, 36 L. J., Ex. Ch. 123; *Bigham v. Chicago etc. R. Co.* (Iowa, 1890), 44 N. W. Rep. 805.

Engineer.—In an action by a physician against a railroad company, for professional services rendered to an employee of the company who had sustained an injury on its cars, evidence that the engineer of the train on which the injury happened telegraphed to a station agent to have a doctor at the station when the train arrived, does not show an employment of plaintiff by the company, in the absence of evidence of the authority of the engineer to bind the company. *Cooper v. New York Cent. etc. R. Co.*, 6 Hun (N. Y.) 276.

Attorney.—The attorney for a railroad company has no authority to employ a physician on its behalf. *St. Louis etc. R. Co. v. Hoover* (Ark. 1890), 13 S. W. Rep. 1092.

5. *Southgate v. Atlantic etc. R. Co.*, 61 Mo. 89; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496; 38 Am. Dec. 561. See *Western Bank v. Gilstrap*, 45 Mo. 419; *Turner v. Chillicothe etc. R. Co.*, 51 Mo. 605; *Thompson v. School District No. 4*, 71 Mo. 495; *Holmes v. Board of Trade*, 81 Mo. 142; *Ex parte Holmes*, 5 Cow. (N. Y.) 426; *Holmes v. Board of Trade*, 81 Mo. 137. Compare *Maupin v. Virginia Lead. Mining Co.*, 78 Mo. 24.

The presumption is that a railroad corporation is liable for the services of an attorney retained by the general manager of the corporation. *St. Louis etc. R. Co. v. Grove*, 39 Kan. 731.

An attorney who renders valuable legal services for a corporation under a contract with its president, is entitled to require payment from the corporation. *Potter v. New York Infant Asylum*, 44 Hun (N. Y.) 367.

6. *Western Bank v. Gilstrap*, 45 Mo. 419.

board of directors do not interpose to control his proceedings.¹ If an officer employs a person to perform a service for the corporation and it is performed with the knowledge of the directors, and they receive the benefit of such services without objection, the corporation is liable upon an implied assumpsit.²

(*m*) PURCHASES AND SALES OF PROPERTY.—Officers vested with the general powers of making contracts may purchase or sell property for the corporation.³ But a general agent of a corporation is not authorized to transfer its real estate by deed, unless he has special power so to do.⁴ So directors of corporations have generally no authority to alienate or otherwise part with the property of the corporation essential to the carrying on of its business.⁵ But where a corporation is authorized to hold and convey real estate under certain circumstances, or for certain pur-

1. *Bates v. Keith Iron Co.*, 7 Met. (Mass.) 224.

A company passed a resolution to pay a certain sum to a certain class of its workmen. *Held*, that the officials were not precluded by the resolution from hiring additional workmen on the same terms. *Hardy v. Tittabawassie Boom Co.*, 52 Mich. 45.

But where a superintendent is authorized to enter into negotiations with contractors and others for work in his discretion, subject to the approval of the board, this does not empower him to employ a broker to find a suitable contractor, in the absence of evidence that such a course is necessary and usual in the ordinary course of business. *Harris v. San Diego Flume Co.* (Cal.), 25 Pac. Rep. 758.

2. *Hooker v. Eagle Bank*, 30 N. Y. 86; *Dunn v. St. Andrew's Church*, 14 Johns. (N. Y.) 118; *Fister v. La Rue*, 15 Barb. (N. Y.) 323; *Danforth v. Schoharie Turnpike Co.*, 12 Johns. (N. Y.) 227; *Long Island R. Co. v. Marquand*, 6 Leg. Obs. 160.

3. *Buell v. Buckingham*, 16 Iowa 284; *Einsphar v. Wagner*, 12 Neb. 458; *Martin v. Zellerbach*, 38 Cal. 300; *Harts v. Brown*, 77 Ill. 226.

The president and superintendent of a corporation had authority to buy and sell material, and to make contracts for it. *Held*, that their authority extended to releasing the purchaser (who had become unable to meet his payments) and to substituting a third person in his stead. *Indianapolis Rolling-Mill Co. v. St. Louis etc. R. Co.*, 26 Fed. Rep. 140.

Revocation.—A change of time and place of sale, from that published, where

a resolution was passed directing a manager to purchase stock for the benefit of the corporators, is no revocation of the authority. *Kimmell v. Gerting*, 2 Grant Cas. (Pa.) 125.

4. *Stow v. Wyse*, 7 Conn. 214; *Burr v. McDonald*, 3 Gratt. (Va.) 215.

5. *Abbott v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 587; *Penobscot etc. R. Co. v. Dunn*, 39 Me. 587; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Burke v. Smith*, 16 Wall. (U. S.) 395; *White Mountain R. Co. v. Eastman*, 34 N. H. 124; *Burke v. Smith*, 16 Wall. (U. S.) 395; *Bank of St. Mary's v. St. John*, 25 Ala., N. S. 566; *Alford v. Miller*, 32 Conn. 543; *Rollins v. Clay*, 33 Me. 132.

It may be asserted as a general rule that courts of equity will enjoin on behalf of the stockholders of an incorporated company any improper alienation or disposition of the corporate property for other than corporate purposes. *Manderson v. Commercial Bank*, 28 Pa. St. 379; *Sears v. Hotchkiss*, 25 Conn. 171; *Bagshaw v. Eastern etc. R. Co.*, 7 Hare 114; *Coleman v. Eastern etc. R. Co.*, 10 Beav. 1; *Gifford v. New Jersey etc. R. Co.*, 10 N. J. Eq. 171; *Simpson v. Westminster etc.*, 8 H. L. Cas., 317; *Bissell v. Michigan etc. R. Co.*, 22 N. Y. 258; *Fisk v. Chicago etc. R. Co.*, 53 Barb. (N. Y.) 513.

Where an insolvent corporation has no means to contest attachment suits, it is not a breach of trust for the directors, on advice of counsel, and in good faith, to make an advantageous sale of the corporate assets to an attaching creditor, on condition that he cancel his own debt and discharge the debts

poses, it will be presumed, in the absence of proof to the contrary, that real estate conveyed by its officers was held and conveyed in pursuance of their powers.¹

Where the statute of the State or the charter of the corporation provides a particular officer or officers, by whom conveyances of the corporation shall be made, or that the authority to make conveyances shall be given in a particular way, such provision must be strictly complied with.² But the manager, trustees, board of directors, or other body which has the management and control of the affairs of the corporation may execute such conveyances where there is no general statute governing, and no express provision in the charter or act of incorporation as to whom and by whom authority shall be given for executing such conveyances by the corporation.³ The board of directors may authorize other officers to sign and seal a deed,⁴ but the power to sell and convey can only be conferred by the directors when assembled and acting as a board. Individual members of such managing board cannot make a valid conveyance without previous action of the whole body.⁵ This authority may be conferred by vote of the board through whom its business is transacted, without a power under the corporate seal.⁶ And such authority includes the power to execute special instruments and

of the other attaching creditors. *White etc. Mfg. Co. v. Pettes Importing Co.*, 30 Fed. Rep. 864.

1. *Alward v. Holmes*, 10 Abb. N. Cas. (N. Y.) 96; *Moss v. Rossie Lead Min. Co.*, 5 Hill (N. Y.) 137, 140; *Yates v. Van De Bogert*, 56 N. Y. 526; *Ex parte Peru Iron Co.*, 7 Cow. (N. Y.) 540; *Chatauqua Co. Bank v. Risley*, 19 N. Y. 381; *Farmers' Loan etc. Co. v. Curtiss*, 7 N. Y. 466; *Steamboat Co. v. McCutcheon*, 13 Pa. St. 13; *Despatch Line of Packets v. Ballamy Mfg. Co.*, 12 N. H. 205.

2. *Berkes etc. Turnpike Co. v. Myers*, 6 Serg. & R. (Pa.) 12; s. c., 9 Am. Dec. 402; *Cape Sable Company's Case*, 3 Bland Ch. (Md.) 606; *Warner v. Mower*, 111 Vt. 385; *Wheelock v. Moulton*, 15 Vt. 519; *Ishman v. Bennington Iron Co.*, 19 Vt. 230.

Under Wis. Rev. St., section 2216, the deed of a corporation, to be good, must be countersigned by the secretary as well as signed by the president. And a ratification before such countersigning will not affect the lien of an intervening judgment creditor of the corporation. *Galloway v. Hamilton*, 68 Wis. 651.

3. *Hendee v. Pinkerton*, 14 Allen (Mass.) 381; *McDonough v. Templeman*, 1 Harr. & J. (Md.) 156; s. c., 2

Am. Dec. 510; *Gordon v. Preston*, 1 Watts (Pa.) 385; *In re St. Mary's Church*, 6 S. & R. (Pa.) 508; *Union Turnpike Co. v. Jenkins*, 1 Cai. (N. Y.) 381; *Leggett v. New Jersey Banking Co.*, 1 N. J. Eq. 541; s. c., 23 Am. Dec. 728; *United States Bank v. Dandridge*, 12 Wheat. (U. S.) 64.

4. *Sav. Bank v. Davis*, 8 Conn. 191; *Bellows v. Todd*, 39 Iowa 209; *Burrill v. Nahant Bank*, 2 Met. (Mass.) 163; s. c., 35 Am. Dec. 395; *Jackson v. Brown*, 5 Wend. (N. Y.) 590; *Arms v. Conant*, 36 Vt. 744.

The by-laws of a corporation giving to the directors "a general superintendence and control over the affairs of the corporation," with power to sell lands and tenements on such terms as they may deem advantageous, gives the directors no authority to delegate to an attorney power to lease lands. *Gillis v. Bailey*, 21 N. H. 149.

5. *Kerr on Business Corps.* § 328; *Gashwiler v. Willis*, 33 Cal. 11; s. c., 91 Am. Dec. 607.

6. *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 84; s. c., 22 Am. Dec. 120; *New Haven Sav. Bank v. Davis*, 8 Conn. 191; *Burr v. McDonald*, 3 Gratt. (Va.) 215; *Decker v. Freeman*, 3 Me. 338.

to affix the corporate seal.¹

To give validity to a deed executed by an agent of a corporation, it is an indispensable requisite that it should be made in the name of the corporation.² If he conveys the land in his own name without disclosing his agency, nothing passes by the deed.³ In such case credit will be given to the agent and he will be personally liable, because the conveyance is the act of the agent and not the principal.⁴ But where the agent of a corporation enters into a contract in his own name under seal with another person, and in the body of the contract states that the agent contracted in behalf of the corporation, the agent will not be liable.⁵ It must clearly appear, however, that the deed was made for and on behalf of the corporation, and where an agent makes a deed to a third person in terms sufficient to bind him as principal, the mere addition of the word "agent" or other description of his office or capacity, to his signature, does not change or vary the legal effect of the deed itself. Where the agent describes himself as an agent of a corporation but does not sign the contract in the name of the corporation, the corporation is not bound by such contract but he himself is personally liable thereon.⁶

1. *Burrill v. Nahant Bank*, 2 Met. (Mass.) 163; s. c., 35 Am. Dec. 395; *Jackson v. Brown*, 5 Wend. (N. Y.) 590.

2. *Struchfield v. Little*, 1 Me. 231; s. c., 10 Am. Dec. 65; *Brinley v. Mann*, 2 Cush. (Mass.) 337; s. c., 48 Am. Dec. 669; *Bellas v. Hays*, 5 S. & R. (Pa.) 427; s. c., 9 Am. Dec. 385; *Locke v. Alexander*, 2 Hawks (N. Car.) 155; *Hale v. Wood*, 10 N. H. 470; s. c., 31 Am. Dec. 176; *Elwell v. Shaw*, 16 Mass. 42; s. c., 8 Am. Dec. 126; *Abbey v. Chase*, 6 Cush. (Mass.) 56; *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 84; s. c., 22 Am. Dec. 120.

3. *Scott v. McAlpin*, N. Car. Term Rep. 155; s. c., 7 Am. Dec. 703.

4. *Echol v. Cheney*, 28 Cal. 157; *Carter v. Chaudron*, 21 Ala. 72; *Morrison v. Bowman*, 29 Cal. 337; *Briggs v. Partridge*, 64 N. Y. 357; s. c., 21 Am. Rep. 617; *Stone v. Wood*, 7 Cow. (N. Y.) 453; s. c., 17 Am. Dec. 529; *Townsend v. Corning*, 23 Wend. (N. Y.) 435; *Bogart v. De Bussy*, 6 Johns. (N. Y.) 94; *Hancock v. Yunker*, 83 Ill. 208; *Fowler v. Shearer*, 7 Mass. 14; *Elwell v. Shaw*, 16 Mass. 42; s. c., 8 Am. Dec. 126; *Grubbs v. Wiley*, 9 Smed. & M. (Miss.) 29; *Hopkins v. Mehaffy*, 11 S. & R. (Pa.) 126; *Providence v. Miller*, 11 R. I. 272; *Webster v. Brown*, 2 S. Car. 428; *Martin v. Flowers*, 8 Leigh (Va.) 158; *Lutz v. Linthicum*, 8 Pet. (U. S.) 165; bk. 8 L. ed. 904; *Combes's Case*, 9 Co. 76; *Stinchfield v. Little*, 1 Me. 231; s. c., 10 Am.

Dec. 65; *Fullam v. West Brookfield*, 9 Allen (Mass.) 1; *Brinley v. Mann*, 2 Cush. (Mass.) 337; s. c., 48 Am. Dec. 669.

5. *McDonough v. Templeman*, 1 Harr. & J. (Md.) 156; s. c., 2 Am. Dec. 510.

In *Hopkins v. Mahaffey*, 11 S. & R. (Pa.) 126, it was held that if in the body of a sealed instrument, the covenants are stated as if they were made with the corporation directly and with the plaintiff, without the agency of any one, and the defendant was not named, and signs the instrument and seals it with his own seal as president of the corporation and on their behalf, an action cannot be sustained upon it against him individually.

6. *Detroit v. Jackson*, 1 Doug. (Mich.) 115; *Price v. Taylor*, 5 H. & N. 540; *Stone v. Wood*, 7 Cow. (N. Y.) 453; s. c., 17 Am. Dec. 52; *Taft v. Brewster*, 9 Johns. (N. Y.) 334; *Sumwalt v. Ridgely*, 20 Md. 114. See *Buffalo Catholic Institute v. Bitter*, 87 N. Y. 250; *Kiersted v. Orange etc. R. Co.*, 69 N. Y. 343; s. c., 25 Am. Rep. 199; *Briggs v. Partridge*, 64 N. Y. 357; s. c., 21 Am. Rep. 617; *Willis v. Bellamy*, 20 J. & S. (N. Y.) 373; *White v. Skinner*, 13 Johns. (N. Y.) 307; s. c., 7 Am. Dec. 381; *Taft v. Brewster*, 9 Johns. (N. Y.) 334; s. c., 6 Am. Dec. 280; *Jones v. Morris*, 61 Ala. 518; *Barlow v. Congregational Soc.*, 8 Allen (Mass.) 460; *Haverhill Mut. F. Ins. Co. v. Newhall*,

(*n*) ASSIGNMENTS.—Where the management of the affairs of a corporation is entrusted to the general managing agent, he has power to assign its choses in action to its creditors either in payment or as security for a debt of the corporation without express authority from the directors.¹ So an acceptance of an assignment of an employee made in writing by one who is not an officer of the corporation but a confidential clerk in their office, apparently having authority to do the act, is not void.²

Assignments made for the benefit of creditors by the board of directors without consent of the stockholders is void, as against the stockholders, but not as against a mere creditor.³

An assignee of a non-negotiable engagement can claim no greater rights than belong to his assignor.⁴ However, a corporation may become liable directly to the assignee of a non-negotiable contract by an acceptance of the assignment, operating as a novation.⁵

(*o*) DECLARATIONS OF OFFICERS AND AGENTS.—The declarations and admissions of the agents of a corporation stand in the same footing with those of an individual.⁶ Where a corporation has power to do some act, and, as incident to that act, to render

1 Allen (Mass.) 130; Fiske v. Eldridge, 12 Gray (Mass.) 474; Sargent v. Webster, 13 Met. (Mass.) 497; s. c., 46 Am. Dec. 743; Fowler v. Shearer, 7 Mass. 14; Tucker v. Bass, 5 Mass. 164; Tip-pets v. Walker, 4 Mass. 595; Endsley v. Strock, 50 Mo. 508; Scott v. McAl-pin, N. Car. Term Rep. 155; s. c., 7 Am. Dec. 703; Fisher v. Salmon, 1 Cal. 413; s. c., 54 Am. Dec. 297; Deming v. Bullitt, 1 Blackf. (Ind.) 241; Banks v. Sharp, 6 J. J. Marsh. (Ky.) 180; Sturdivant v. Hull, 59 Me. 172; Stinchfield v. Little, 1 Me. 231; s. c., 10 Am. Dec. 65; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101; Fullam v. West Brookfield, 9 Allen (Mass.) 1; Welsh v. Usler, 2 Hill (S. Car.) Eq. 167; s. c., 29 Am. Dec. 63; Lutz v. Linthicum, 8 Pet. (U. S.) 165; bk. 8, L. ed. 904; Duvall v. Craig, 15 Wheat. (U. S.), 45; bk. 4, L. ed. 180; Locke v. Alexander, 2 Hawks (N. Car.) 155; s. c., 11 Am. Dec. 750; Quigley v. DeHaas, 82 Pa. St. 267; Bellas v. Hays, 5 S. & R. (Pa.) 427; s. c., 9 Am. Dec. 385.

1. McKiernan v. Leuzen, 56 Cal. 61. See Planters' Bank v. Whittle, 78 Va. 737.

But where a charter gives to the board of directors the management of the affairs of the corporation, the president cannot, without the authority from the board, assign choses in action except when done in the usual course of business. Such assignments are void.

Graffins v. Land Co., 3 Phila. (Pa.) 447.

In Gillett v. Campbell, 1 Den. (N. Y.) 522, where an indebtedness has been assigned by the president and cashier of a bank for the purpose of securing a debt which the bank owed, objection was made, upon the ground that no authority to make the assignment has been shown either by the laws of the company or a resolution of the board of directors. See Emporium Real Estate etc. Co. v. Emrie, 54 Ill. 345.

2. O'Neil v. Dunn, 63 N. H. 393.

3. Eppright v. Nickerson, 78 Mo. 402.

4. Athenæum L. Assoc. v. Pooley, 3 DeG. & J. 294; Brunton's Claim, L. R., 19 Eq. 312. See Hentig v. Sweet, 33 Kan. 244; Van Cott v. Van Brunt, 82 N. Y. 535; Poole v. West Point Butter and Cheese Assoc., 30 Fed. Rep. 513.

5. Morawetz on Priv. Corp., § 605; Brunton's Claim, L. R., 19 Eq. 202.

The treasurer of a savings bank who had been authorized by a vote of the trustees to discharge and release mortgages, fraudulently interpolated in the record of the vote the word "assign" between the words "discharge and "release." Held, that as between the bank and one who, misled by the record, took an assignment of a mortgage for value in good faith, the bank must bear the loss. Holden v. Phelps, 141 Mass. 456.

6. Custar v. Titusville Gas etc. Co., 63 Pa. St. 381; Henderson v. Railroad

itself liable for representations made in and about the doing of that act, it can appoint an agent to do the act; and from the mere fact of such appointment the same powers will flow to the agent as if he had been appointed by an individual, provided only that the powers so flowing could have been exercised by the corporation itself.¹ To bind the principal they must be within the scope of the authority confided to the agent and must accompany the act or contract which he is authorized to make.² Where representations made by an agent are a part of a scheme or fraud participated in by the officers authorized to manage its affairs, or where they are such as the agent may reasonably be presumed by those dealing with him, to have the authority of the corporation to make them, his representations may be given in evidence to show the fraud.³

Co., 17 Tex. 560; *Montgomery R. Co. v. Hurst*, 9 Ala. 513; *Covington R. Co. v. Ingles*, 15 B. Mon. (Ky.) 637; *Burnham v. Ellis*, 39 Me. 319; *McGinnis v. Adriatic Mills*, 16 Mass. 177; *Maleck v. Tower Grove R. Co.*, 57 Mo. 17; *Des Moines & D. Land etc. Co. v. Polk County Homestead & Trust Co.* (Iowa), 45 N. W. Rep. 773; *Whitworth v. Detroit L. & N. R. Co.*, 81 Mich. 98; *Sears v. Kings Co. El. R. Co.* (Mass.), 25 N. E. Rep. 98. Declarations of the officers of a corporation are competent evidence against the corporation. *McGenness v. Adriatic Mills*, 116 Mass. 177.

1. *Sharp v. Mayor etc. of N. Y.*, 40 Barb. (N. Y.) 256; 25 How. Pr. (N. Y.) 389; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380.

2. *Chicago etc. R. Co. v. James*, 22 Wis. 194. See *Evans v. Atlanta R. Co.*, 56 Ga. 498; *Huntingdon etc. R. Co. v. Decker*, 82 Pa. St. 119; *Custar v. Titusville Gas Co.*, 63 Pa. St. 381; *Maleck v. Tower Grove R. Co.*, 57 Mo. 17; *Lee v. Pittsburgh Coal & Min. Co.*, 56 How. (N. Y.) Pr. 373.

Where a bill alleges that a corporation itself made false representations, it will not be presumed that those for whom the corporation may have acted exceeded their authority, or made the representations without sufficient authority. *Carey v. Cincinnati etc. R. Co.*, 5 Iowa 357.

It was held in *Bank of U. S. v. Dunn*, 6 Pet. (U. S.) 51; *Bank of Metropolis v. Jones*, 8 Pet. (U. S.) 12, and *Stewart v. Huntingdon Bank*, 11 S. & R. (Pa.) 267, that the declarations and assurances of the officers of a bank, that an endorser, or other party would incur no responsibility by his endorsement or

signature, are unauthorized and not binding on the bank without authority from the directors.

The agent of a corporation is not the agent of the individual stockholders; and his fraudulent representations concerning the value of the stock will not vitiate a sale of stock by a stockholder who has no notice of the fraud. *Moffat v. Winslow*, 7 Paige (N. Y.) 124.

The possession, by the transfer agent of a corporation of the transfer books of its stock, and his authority to allow them to be used, do not constitute the *indicia* of an authority to make representations as to the ownership of stock, so as to render the company liable for the falsity of such representations made by him. *Henning v. New York etc. R. Co.*, 9 Bosw. (N. Y.) 283.

3. *Custar v. Titusville Gas etc. Co.*, 3 Pa. St. 38.

In *Crossman v. Penrose Ferry Bridge Co.*, 26 Pa. St. 69, it was said by JUSTICE KNOX that a subscription to capital stock, induced by the fraudulent representations or statements of an agent appointed to obtain subscriptions, may be avoided by the subscriber.

And in *Coil v. Pittsburgh Female College*, 40 Pa. St. 439, it was held that representations by agents of the college, that enough had been and would be subscribed before the subscriptions for scholarships would be collected, to pay off the entire indebtedness of the college, and make the scholarships worth the notes given for them, are to be treated as expressions of opinion only, no fraud being alleged; from which it might be inferred that fraud being alleged, the falsehood of the representations would invalidate the subscription.

(*p*) UNAUTHORIZED ACTS.—Corporations like natural persons are bound only by the acts and contracts of their officers and agents done and made within the scope of their authority.¹ Persons dealing with such agents are bound to know their powers and the extent of their authority, so far as they are defined by its charter or articles of association.² Some cases hold that the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong.³ But this has reference merely to the effect of the legal prohibition against unauthorized corporate acts; they mean that the fact that a transaction is in excess of the charter of a corporation should not be a defence, if there would be a liability according to the general principles of law applicable to unincorporated companies.⁴

1. *Alexander v. Cauldwell*, 83 N. Y. 480; *Murphy v. Louisville*, 9 Bush (Ky.) 189; *Hanf v. Northwestern Masonic Aid Assoc.*, 76 Wis. 450; *Houston etc. R. Co. v. McKinney*, 55 Tex. 176; *Pearce v. Madison etc. R. Co.*, 21 How. (U. S.) 441; *Allegheny County Workhouse v. Moore*, 95 Pa. St. 408; *Foot v. Rutland etc. R. Co.*, 32 Vt. 633; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *Brooklyn Gravel Road Co. v. Slaughter*, 33 Ind. 185; *Cheever v. Gilbert Elevated Road Co.*, 43 N. Y. Super. Ct. 478; *Thomson v. Sixpenny etc. Bank*, 5 Bosw. (N. Y.) 293; *Martin v. Great Falls Mfg. Co.*, 9 N. H. 51.

If the officers, whose appropriate business is to make loans for a corporation, make unlawful loans, the corporation is bound by their acts. *Life & Fire Ins. Co. v. Mechanic F. Ins. Co.*, 7 Wend. (N. Y.) 31.

A corporation is liable on a draft drawn or accepted by an authorized agent, though the name of the corporation is not used, if it be drawn or accepted under a name adopted by the corporation. *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27.

2. *Hoyt v. Thompson*, 19 N. Y. 207; *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 29; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 260; *Silliman v. Fredericksburgh etc. R. Co.*, 27 Gratt. (Va.) 119, 130, 131; *Root v. Wallace*, 4 McLean (U. S.) 8; *Pearce v. Madison etc. R. Co.*, 21 How. (U. S.) 443; *Alexander v. Cauldwell*, 83 N. Y. 480; *Merritt v. Lambert, Hoffm. Ch.* (N. Y.) 168. Compare *Bank of Chillicothe v. Dodge*, 8 Barb. (N. Y.) 233, *City F. Ins. Co. v. Carrugi*, 41 Ga. 660, *Underwood v. Newport Lyceum*, 5 B

Mon. (Ky.) 129; *Holt v. Winfield Bank*, 25 Fed. Rep. 812.

In *Davis v. Old Colony R. Co.*, 131 Mass. 260, it is held that every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, especially where all acts of incorporation are deemed public acts, and every corporation organized under general laws is required to file in the office of the secretary of State a certificate showing the purpose for which the corporation is constituted. See *Whittenton Mills v. Upton*, 10 Gray (Mass.) 582, 598; *Richardson v. Sibley*, 11 Allen (Mass.) 65, 72; *Pearce v. Madison etc. R. Co.*, 21 How. (U. S.) 441, 443; *East Anglian R. Co. v. Eastern Co. R. Co.*, 11 C. B. 775, 811; *Ashbury Railway Carriage etc. v. Riche, L. R.*, 7 H. L. 653.

3. *Ohio etc. R. Co. v. McCarthy*, 96 U. S. 258; *Rider Life Raft Co. v. Roach*, 97 N. Y. 378; *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620; *Morris etc. R. Co. v. Sussex R. Co.*, 20 N. J. Eq. 542; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

4. *Morawetz Priv. Corp.*, § 581. See *Pearce v. Madison etc. R. Co.*, 21 How. (U. S.) 441; *Murphy v. Louisville*, 9 Bush (Ky.) 189; *Zottman v. San Francisco*, 20 Cal. 96; *Boynton v. Lynn Gas Light Co.*, 124 Mass. 197; *Ex parte Williamson, L. R.*, 5 Ch. 309.

In *Bateman v. Mayor of Ashton*, 3 H. & N. 340, BRAMELL, B., said: "I cannot help adding an observation on the objection made to the honesty of a defence of this description. It is said the company has contracted and the company repudiates its contract. There cannot be a more perfect fallacy. 'Per-

A transaction which is not within the scope of the general powers of the agent, is not binding upon the company.¹ Thus a cashier being the ostensible executive officer of a bank is presumed to have, in the absence of positive restrictions, all the powers necessary for such an officer in the transaction of the legitimate business of banking, who is generally understood to have authority to endorse the commercial paper of the bank and bind the bank by the endorsement; so, too, in the absence of restrictions, if he has procured a *bona fide* rediscount of the paper of the bank, his acts are binding because of his implied power to transact such business; but he is not presumed to have power by reason of his official position to bind his bank as an accommodation endorser of his own promissory note. There are no presumptions in favor of such a delegation of power.² So if a person deals with an agent of a corporation within the scope of his apparent authority, and without notice of the nonperformance of any formality prescribed by charter or by-laws as a condition precedent to the agent's authority to act, he will have a right to assume, in the absence of anything suggesting enquiry, that the agent has proceeded regularly in the execution of his powers, and the corporation will be estopped from showing that the agent had no authority to bind it by reason of a failure to comply with the prescribed conditions.³ Proof that a person has dealt with an agent of a corporation in good faith within the scope of his apparent authority, and relied upon this apparent authority, will render the corporation liable for the act whether the agent exceeded his authority or not; and, in order to establish a defence, it must be shown not only that the act of the agent was unauthorized but also that the party dealing with the agent had notice thereof or that he did not rely upon the apparent powers conferred upon

sons with authority have affected to contract for the company, and the company repudiates the act,' is the true expression. A, B, and C are in partnership as hatters. A buys boots in the name of the firm, and the sellers sue A, B and C, who say they did not contract. It may be wrong in A, but are B and C to blame? I do not say the corporation cases are cases of partnership, but the principle is the same."

1. West St. Louis Sav. Bank v. Shawnee Co. Bank, 95 U. S. 557. See *Clafin v. Farmers' etc. Bank*, 25 N. Y. 293; *Rollins v. Clay*, 33 Me. 132.

2. West St. Louis Sav. Bank v. Shawnee Co. Bank, 95 U. S. 557.

So if the agents of a corporation have no authority to issue negotiable paper on behalf of the company except under special circumstances, the purchaser of negotiable paper issued by such agents cannot presume that the

paper was properly issued, and in order to hold the company liable, he must show the existence of the special circumstances upon which the authority of the agent to bind the company rested. *Morawetz Priv. Corp.*, § 606, citing the *Floyd Acceptances*, 7 Wall. (U. S.) 666, 680; *Mayor etc. of Nashville v. Ray*, 19 Wall. (U. S.) 468; *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116; *Silliman v. Fredericksburg etc. R. Co.*, 27 Gratt. (Va.) 120; *Sheffield School Township v. Andress*, 56 Ind. 157; *Lucas v. Pitney*, 27 N. J. L. 221; *Hackettstown v. Swackhamer*, 37 N. J. L. 191; *Knight v. Lang*, 4 E. D. Smith (N. Y.) 381.

3. *Morawetz Priv. Corp.*, § 610; *Connecticut Mut. L. Ins. Co. v. Cleveland etc. R. Co.*, 41 Barb. (N. Y.) 27; *Samuel v. Holladay*, 1 Woolw. (U. S.) 400; *Madison etc. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457; *Granger v.*

the agent by the corporation.¹ But when there is no reasonable presumption of authority, and no actual authority to make them, the corporation should not be prejudiced by the unauthorized acts of the agent.²

(q) FRAUDULENT ISSUE OF CERTIFICATES.—Where there has been a fraudulent over issue of stock, evidenced by certificates under the genuine seal of the corporation, the corporation is liable to *bona fide* holders of such fraudulent certificates, because, like individuals, they are responsible for the fraudulent exercise of the power entrusted by them to their officers or agents.³ The *bona fide* holder of such fraudulent certificates has a right of action against the corporation, and his measure of damages is the market value of the stock at the time the transfer was demanded.⁴

(r) MISAPPLICATION OF FUNDS.—When directors of a corpo-

Original Empire Mill etc. Co., 59 Cal. 678; McDougald v. Bellamy, 18 Ga. 412; McDougald v. Lane, 18 Ga. 445. See *Ex parte* Holmes, 3 W. W. & A. B. (Victoria) 162; *In re* Athenæum Life Ass. Soc., 4 K & J. 549; Colonial Bank v. Willan, L. R., 5 P. C. 417; Mahoney v. East Holyford Mining Co., L. R., 7 H. L. 869; Smith v. Hull Glass Co., 11 C. B. 897. Compare Fountaine v. Catmarthen R. Co., L. R., 5 Eq. 316.

1. Morawetz Priv. Corp., § 615; Woodman v. York etc. R. Co., 50 Me. 549; Stebbins v. Merritt, 10 Cush. (Mass.) 27, 34; Susquehanna Bridge etc. Co. v. General Ins. Co., 3 Md. 305; Blackshire v. Iowa Homestead Co., 39 Iowa 624; Bliss v. Kaweah Canal etc. Co., 65 Cal. 502; Solomon's Lodge v. Montmollin, 58 Ga. 547; Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 715; Union Gold Min. Co. v. Rocky Mt. Bank, 2 Colo. 226; Phillips v. Coffee, 17 Ill. 154; Reed v. Bradley, 17 Ill. 351; Morris v. Keil, 20 Minn. 531; Conine v. Junction etc. R. Co., 3 Houst. (Del.) 288; Musser v. Johnson, 42 Mo. 74; Evans v. Lee, 11 Nev. 194; Lovett v. Steam Sawmill Assoc., 6 Paige (N. Y.) 54; Bank of Middlebury v. Rutland etc. R. Co., 30 Vt. 159.

With reference to contracts under the corporate seal the rule seems to be that when the common seal of a corporation is affixed to an instrument and the signatures of the proper officers are approved, courts are to presume that the officers did not exceed their authority and the seal itself is *prima facie* evidence that it was affixed by

the proper authority. The contrary must be shown by the objecting party. Trustees of Canandaigua Academy v. McKechnie, 90 N. Y. 618, 629; New England Iron Co. v. Gilbert El. R. Co., 91 N. Y. 154; Southern Cal. Colony Assoc. v. Bustamante, 52 Cal. 192; Mickey v. Stratton, 5 Sawy. (U. S.) 475; Wood v. Whelen, 93 Ill. 153, 162; Thorington v. Gould, 59 Ala. 461; Angell & Ames on Corporations, § 224; Tenney v. Warren Lumber Co., 43 N. H. 534; Flint v. Clinton Co., 12 N. H. 434; Lovett v. Steam Sawmill Assoc., 6 Paige (N. Y.) 60; Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 717; Leggett v. New Jersey Mfg. Co., 1 N. J. Eq. 550; Berks etc. Turnpike Co. v. Myers, 6 S. & R. (Pa.) 16; St. Louis Public School v. Risley, 28 Mo. 419; Benedict v. Denton, Walk. Ch. (Mich.) 337; Chouquette v. Barada, 28 Mo. 497; Reed v. Bradley, 17 Ill. 325.

2. Custar v. Titusville Gas Co., 63 Pa. St. 381.

3. People's Bank v. Kurtz, 99 Pa. St. 344; New York etc. R. Co. v. Schuyler, 34 N. Y. 39. See Tome v. Parkersburg etc. R. Co., 39 Md. 36; Willis v. Fry, 13 Phila. (Pa.) 33; Mandlebaum v. North American Min Co., 4 Mich. 465; Bridgeport Bank v. New York etc. R. Co., 30 Conn. 231; Mechanics' Bank v. New York etc. R. Co., 13 N. Y. 599; Western Maryland R. Co. v. Franklin Bank, 60 Md. 36.

The corporation can maintain assumpsit against the officer to recover the money received by him for such illegal stock. Rutland R. Co. v. Haven, 19 Atl. Rep. 769.

4. People's Bank v. Kurtz, 99 Pa. St.

ration have the means of knowledge, ignorance will not excuse them for allowing the funds thereof to be diverted from the purposes of the trust, and they are individually responsible therefor.¹ So a bill in equity can be maintained against a director for waste, for misapplication of funds, though an adequate remedy at law exist.²

When an act of the officers is in excess of their authority done with a *bona fide* intent of benefiting the corporation, and the shareholders, knowing it, do not dissent within reasonable time, their assent will be presumed and they cannot gainsay it.³ Thus an unauthorized conveyance, or an unauthorized issue of certificates of paid-up shares, or an unauthorized issue of bonds and negotiable paper of a corporation, has been held binding upon the corporation by the unanimous ratification or consent of its shareholders.⁴

(s) USE OF OFFICER'S PROPERTY BY THE CORPORATION.—When an agent or officer of a corporation in good faith, in the

344; Mount Holly Paper Co.'s Appeal, 99 Pa. St. 513.

1. Shea v. Mabry, 1 Lea (Tenn.) 319; Robinson v. Smith, 3 Paige (N. Y.) 222; Aston v. Dashaway Assoc., 84 Cal. 61.

In United States v. Underwood, 9 Bush (Ky.) 617, directors were held liable for misappropriation by a bank of special deposits where they ought or could have known of wrong being done. They are liable severally, and not jointly, as directors, unless the act complained of be done by a majority of the board of directors, when, by the charter, a majority only is competent to transact business. Franklin F. Ins. Co. v. Jenkins, 3 Wend. (N. Y.) 130. See McCarty's Appeal, 110 Pa. St. 379.

If directors of a limited company apply the money of the company for purposes so outside its powers that the company could not sanction such application, they may be made personally liable as for a breach of trust; but if they apply the money of the company, or exercise any of its powers, in a manner which is not *ultra vires*, then a strong and clear case of misfeasance must be made out to render them liable for a loss thereby occasioned to the company. *In re Faure etc. Co.*, L. R., 40 Ch. D. 141; s. c., 24 Am. & Eng. Corp. Cas. 42.

2. Citizen's Loan Assoc. v. Lyon, 29 N. J. Eq. 110; Brinkerhoff v. Bostwick, 88 N. Y. 52; Butts v. Wood, 38 Barb. (N. Y.) 181; s. c., 37 N. Y. 317; St. Mary's Bank v. St. John, 25 Ala.,

N. S. 566; Taylor v. Miami Exporting Co., 5 Ohio 162; Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84; Robinson v. Smith, 3 Paige (N. Y.) 222; Tippecanoe Co. v. Reynolds, 44 Ind. 509; s. c., 15 Am. Rep. 251; Wilkerson v. Dodd, 40 N. J. Eq. 142; Ackerman v. Halsey, 37 N. J. Eq. 362. Spring's Appeal, 71 Pa. St. 23; s. c., 10 Am. Rep. 692; Havens v. Hoyt, 6 Jones (N. Car.) Eq. 115; Kean v. Johnson, 9 N. J. Eq. 401; Simpson v. Westminster Palace Hotel Co., 8 H. & L. Cas., 717; Ernest v. Nichols, 6 H. & L. 401; Dodge v. Woolsey, 18 How. (U. S.) 331; Davenport v. Down, 18 Wall. (U. S.) 626; Hersey v. Veazie, 24 Me., 9; Smith v. Hurd, 12 Metc. (Mass.) 371; Allen v. Curtis, 26 Conn. 456; Western R. Co. v. Nolan, 48 N. Y. 513; March v. Eastern R. Co., 40 N. H. 548; s. c., 43 N. H. 515; Lauman v. Lebanon, 30 Pa. St. 46; Samuel v. Holliday, 1 Woolw. (U. S.) 400; Heath v. Erie R. Co., 8 Blatchf. (U. S.) 347; Brewer v. Proprietors, 104 Mass. 378; Brown v. Vandyke, 9 N. J. L. 795; Butts v. Woods, 38 Barb. (N. Y.) 181; s. c., 37 N. Y. 317; Green's Brice's Ultra Vires, 485; Lewis v. St. Alban's I. & S. Wks., 50 Vt. 481; Mutual Building Fund v. Bosseux, 3 Fed. Rep. 817.

3. Watt's Appeal, 78 Pa. St. 370; Omaha Hotel Co. v. Wade, 97 U. S. 13; Twin Lick Oil Co. v. Marbury, 91 U. S. 587; Chicago etc. R. Co. v. Howard, 7 Wall. (U. S.) 393; Gray v. Chaplin, 2 Russ. 126; Eastern Co.'s R. Co. v. Hawkes, 5 H. L. Cas. 331.

4. Morawetz Priv. Corp., § 625.

proper discharge of his duty, applies his own money, or makes use of his own chattels, for the proper use of the corporation, he may recover for such money or such use.¹

(*t*) **AUTHORITY TO REPRESENT TWO COMPANIES IN THEIR MUTUAL DEALINGS.**—The directors or other agents of a corporation have no implied authority to bind the company by making a contract with another corporation which they also represent. Each company would be interested in obtaining an advantageous bargain at the expense of the other, and each would have a claim of the best endeavors of its agents unbiased by failure to others.² Such contracts would be void because their duties and their interests are incompatible. No man can faithfully serve two masters.³

So a director of a corporation who is actively interested in the organization of a rival company has no right to examine the letter files of the old company for the purpose of making memoranda for the benefit of the new one.⁴

(*u*) **AGENTS AND OFFICERS ACTING IN A FOREIGN STATE.**—In the absence of any provision in general corporation laws, that the majority of the directors of the company incorporated under the laws, shall be residents of the State, there is no rule requiring the directors and officers, any more than the corporators forming

1. *Rider v. Union India Rubber Co.*, 5 Bosw. (N. Y.) 86.

Where a corporation uses its director's patented invention, he is not precluded from claiming compensation by the fact that he is a director. *Deane v. Hodge*, 35 Minn. 146.

2. *Morawetz on Priv. Corp.*, § 528; *New York Cent. Ins. Co. v. National etc. Ins. Co.*, 14 N. Y. 85; *Mercantile Mut. Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408. See *Alexander v. Relfe*, 74 Mo. 495. *Compare Booth v. Robinson*, 55 Md. 419.

A contract between two corporations is not void because all the directors of one of the corporations are members of the board of directors of the other corporation. *Alexander v. Williams*, 14 Mo. App. 13.

3. *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. (N. Y.) 132; *Memphis etc. R. Co. v. Woods*, 88 Ala. 630; s. c., 44 Am. & Eng. R. Cas. 257; *Thomas v. Brownsville etc. R. Co.*, 1 McCrary (U. S.) 392.

The same person may fill the office of president of two distinct corporations, and such identity does not of itself invalidate dealings between the two corporations. *Leathers v. Janney*, 41 La. An. 1120; s. c., 31 Am. & Eng. Corp. Cas. 399.

Directors of one telegraph company,

who are also directors of another company which owns two-fifths of the stock of the former company, cannot properly vote to lease the former company to the latter. Such a lease is voidable, but not at the instance of an individual stockholder who fails to show that he has exhausted all means to obtain redress within the corporation, or that he has made proper effort to induce action on the part of other stockholders. *Bill v. Western Union Tel. Co.*, 16 Fed. Rep. 14.

The coal contract entered into July 16th, 1868, by the Union Pacific R. Co., by direction of the executive committee of the board of directors, with Godfrey and Wardell, which the latter assigned, without consideration, to a new company, in which a majority of the stock was taken by six directors of the old company—declared to be fraudulent and void. *Wardell v. Union Pac. R. Co.*, 103 U. S. 651.

Courts of Equity.—A court of equity will refuse equitable relief under such a contract, it appearing upon its face that the railroad directors received a pecuniary consideration for making it. *Thomas v. Brownsville etc. R. Co.*, 1 McCrary (U. S.) 392.

4. *Hemingway v. Hemingway*, 58 Conn. 443.

the company, to reside within the State.¹ The ordinary managing agents of the corporation are impliedly authorized to represent it abroad as well as at home.² The directors may even hold their meetings out of the State;³ but a corporation cannot be formed in one State for the purpose of evading laws of another State.⁴

2. Ratification.—The salutary rule in relation to agencies, that when the principal, with a knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, he cannot be heard afterward to impeach them under the pretence that they were done without authority, or even contrary to instructions, applies as well to corporations as to natural persons, and is equally to be presumed from the absence of dissent.⁵ A ratification of the act of an agent of a corporation may be implied by

1. Morawetz on Priv. Corp., § 361. See *Humphreys v. Mooney*, 5 Colo. 282; *State v. Milwaukee etc. R. Co.*, 45 Wis. 579.

2. The agents and officers of a corporation chartered in one State may bind it by contracts and engagements made in other States; and the minutes of its board of directors may be used as evidence of the acts of the board, even though the meetings of the board appear to have been held out of the chartering State. *Wood Hydraulic etc. Co. v. King*, 45 Ga. 34.

3. *Bellogs v. Todd*, 39 Iowa 209; *McCall v. Byram Mfg. Co.*, 6 Conn. 428; *Bassett v. Monte Christo etc. Min. Co.*, 15 Nev. 293; *Corbett v. Woodward*, 5 Sawy. (U. S.) 403; *Arms v. Conant*, 36 Vt. 745; *Ohlo etc. R. Co. v. McPherson*, 35 Mo. 13; *Wright v. Bundy*, 11 Ind. 404; *Smith v. Alvord*, 63 Barb. (N. Y.) 415; *Galveston etc. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 477; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Wood Hydraulic etc. Co. v. King*, 45 Ga. 40. Compare *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623; *Hillis v. Parish*, 1 McCarter 380.

4. Morawetz on Priv. Corp., § 361.

5. *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Church v. Sterling*, 16 Conn. 388; *Kelsey v. National Bank*, 69 Pa. St. 426; *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520; *Atlantic etc. Ins. Co. v. Sanders*, 36 N. H. 252; *Whitwell v. Warner*, 20 Vt. 425; *Armstrong v. Stokes, L. R.*, 7 Q. B. 598; *Re New Zealand Bank Co., L. R.*, 3 Ch. 131; *Bargate v. Shortridge*, 5 H. L. Cas. 297; 31 Eng. Law & Eq. 44; *Reuter v. Electric Tel. Co.*, 6 El. & B. 341; *Mow-*

rey v. Indianapolis etc. R. Co., 4 Biss. (U. S.) 78; *Planters' Bank v. Sharp*, 4 Smed. & M. (Miss.) 75; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; *Hoyt v. Bridgewater Copper Min. Co.*, 6 N. J. Eq. 253; *Stewart v. St. Louis, Ft. S. & W. R. Co.*, 41 Fed Rep. 736.

In *Kelsey v. National Bank*, WILLIAMS, J., said: "The law is well settled that a principal who neglects promptly to disavow an act of his agent, by which the latter had transcended his authority, makes the act his own, and the maxim which makes ratification equivalent to a precedent authority is as much predicable of ratification by a corporation as it is of a ratification by any other principal, and it is equally to be presumed from the absence of dissent."

"No maxim is better settled in reason and law than the maxim *omnis ratihabitio retrotrahitur, et mandato priori equiparatur*; at all events, where it does not prejudice the rights of strangers." Per STORY, J., in *Fleckman v. Bank of the United States*, 8 Wheat. (U. S.) 363. See *Essex Turnpike Corp. v. Collins*, 8 Mass. 202; *Hayden v. Middlesex Turnpike Corp.*, 10 Mass. 403; *Salem Bank v. Gloucester Bank*, 17 Mass. 28, 29; *White v. Westport Cotton Mfg. Co.*, 1 Pick. (Mass.) 220; *Bulkley v. Derby Fishing Co.*, 2 Conn. 252; *Witte v. Derby Fishing Co.*, 2 Conn. 260; *Hoyt v. Thompson*, 19 N. Y. 207; *Peterson v. Mayor etc. of N. Y.*, 17 N. Y. 449; *Baker v. Cotter*, 45 Me. 236; *Church v. Sterling*, 16 Conn. 388; *Bank of Pennsylvania v. Reed*, 1 W. & S. (Pa.) 101; *Hayward v. Pilgrim Society*, 21 Pick. (Mass.) 270; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; *Planters' Bank v. Sharp*, 4

the acts of the corporation as well as expressed by its vote.¹ So it may be implied from the acquiescence of the directors,² or other governing body of the corporation; or it may be presumed from a lapse of time.³ If a corporation assents to an expenditure

Smed. & M. (Miss.) 75; Burrill v. Nahant Bank, 2 Met. (Mass.) 167; Fox v. Northern Liberties, 3 W. & S. (Pa.) 103; Bank of Kentucky v. Schuylkill Bank, 1 Parsons Sel. Cas. (Pa.) 267, 268; New Hope etc. Bridge Co v. Phenix Bank, 3 N. Y. 56; Everett v. United States, 6 Port. (Ala.) 166; Medomak Bank v. Curtis, 24 Me. 38; Whitewell v. Warner, 20 Vt. 425; Detroit v. Jackson, 1 Doug. (Mich.) 106; Merchants' Bank v. Central Bank, 1 Ga. 428; Hoyt v. Bridgewater Copper Min. Co., 6 N. J. Eq. 253; Stuart v. London R., 15 Beav. 513; 10 Eng. L. & Eq. 57; MacLae v. Sutherland, 3 El. & B. 1; 25 Eng. L. & Eq. 92; Reuter v. Electric Tel. Co., 6 El. & B. 341; 37 Eng. L. & Eq. 189; Durar v. Hudson Co. Mut. Ins. Co., 24 N. J. L. 171; Emmet v. Reed, 8 N. Y. 312.

The trustee of a corporation does not assent to the creation of an indebtedness exceeding its capital stock by a failure to dissent, when afterwards informed that the indebtedness has been created. Patterson v. Robinson, 36 Hun (N. Y.) 622.

1. Howe v. Keeler, 27 Conn. 538; Rich v. State Nat. Bank, 7 Neb. 201; Ridgway v. Farmers' Bank, 12 Sm. & R. (Pa.) 256; Fleckman v. United States Bank, 8 Wheat. (U. S.) 338; St. George's Harbor Co., 2 De G. & J. 547; Chicago etc. R. Co. v. James, 22 Wis. 194; Slee v. Bloom, 5 Johns. (N. Y.) Ch. 366; Southard v. Inhabitants of Bradof, 53 Me. 389; Salt Lake Foundry & Machine Co., 23 Pac. Rep. 60; Anglo-California Bank v. Mahoney Min. Co., 5 Sawy. C. Ct. 255; Kelley v. Newburyport etc. R. Co., 141 Mass. 496; St. James Parish v. Newburyport etc. R. Co., 141 Mass. 500; Bommer v. American Spiral etc. Mfg. Co., 81 N. Y. 468; St. Louis etc. R. Co. v. Tierman (Kan.), 15 Pac. Rep. 544.

2. Taylor v. Albemarle Steam Navigation Co., 105 N. Car. 484; Alabama etc. R. Co. v. Kidd, 29 Ala. 221; Walworth Co. Bank v. Farmers' Loan etc. Co., 16 Wis. 629; Payson v. Stoevers, 2 Dill. (U. S.) 427; Phosphate of Lime Co. v. Green, L. R., 7 C. P. 43; Williams v. Evans, L. R., 19 Eq. 547; Speckman v. Evans, L. R., 3 H. L. 171; Story

v. Furman, 25 N. Y. 214; Mowrey v. Indianapolis etc. R. Co., 4 Biss. (U. S.) 78; Hoyt v. Thompson, 19 N. Y. 207; New York etc. R. Co. v. Schuyler, 34 N. Y. 30; Olcott v. Tioga R. Co., 27 N. Y. 546; s. c., 84 Am. Dec. 298; Caldwell v. National Mohawk Valley Bank, 64 Barb. (N. Y.) 342; Bezou v. Pike, 23 La. An. 788; Pratt v. Hudson River R. Co., 21 N. Y. 305; Lee v. Pittsburgh Coal & Min. Co., 56 How. Pr. (N. Y.) 373; Chouteau v. Allen, 70 Mo. 290; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Martin v. Victor Mill etc. Co., 19 Nev. 180.

Where a corporation sues to set aside a contract claimed to have been agreed to by its directors in fraud of its rights, the other party to the contract cannot contend that the acquiescence of the corporation precludes its action. Metropolitan El. R. Co. v. Manhattan El. R. Co., 11 Daly (N. Y.) 373; s. c., 14 Abb. (N. Y.) N. Cas. 103.

3. McLaron v. First Nat. Bank, 76 Wis. 259; Union Bank v. Call, 5 Fla. 409; Walker v. Detroit Transit R. Co., 47 Mich. 338; Beers v. Phoenix Glass Co., 14 Barb. (N. Y.) 358; Caldwell v. National Mohawk Valley Bank, 64 Barb. (N. Y.) 342; Chouteau v. Allen, 70 Mo. 290.

However, lapse of time merely will never make valid that which was originally void. Ormsby v. Vermont Copper Min. Co., 56 N. Y. 623.

In Sherman v. Fitch, 98 Mass. 59, a mortgage executed by the president of a manufacturing corporation was held to have been ratified by the board of directors by reason of their long continued acquiescence with knowledge of the facts. See Walworth Co. Bank v. Farmers' Loan & Trust Co., 16 Wis. 629; Hoyt v. Thompson, 19 N. Y. 207, 218; Darst v. Gale, 83 Ill. 136; First Nat. Bank v. Kimberlands, 16 W. Va. 555, 581; Burrill v. Nahant Bank, 2 Metc. (Mass.) 163; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Chouteau v. Allen, 70 Mo. 290, 324; Wood v. Whelan, 93 Ill. 155.

So in Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315, where a contract was made for goods with the knowledge and sanction

it cannot afterwards hold the officer, liable for such money;¹ or if a corporation receives or accepts the benefits of a contract such acts will ratify the contract.² A corporation may through its officers adopt any contract made by the *de facto* officers, provided the ratifying officers have authority to make such a contract.³ But a corporation cannot ratify an act or contract by their officers which they could not lawfully authorize.⁴ The proper parties to ratify a contract are those who could in the first instance have legally made such a contract.⁵

of all the officers and stockholders except one, and the one was informed of it soon after the goods were purchased, no action was ever had repudiating it, a similar rule was applied. *Wilson v. West Hartlepool R. Co.*, 2 De G. J. & S. 475; *Shaver v. Bear River etc. Min. Co.*, 10 Cal. 396; *Olcott v. Tioga R. Co.*, 27 N. Y. 546; *Blenn v. Bear River etc. Min. Co.*, 20 Cal. 602.

1. *Bay View Homestead Assoc. v. Williams*, 50 Cal. 353.

2. *Episcopal Charitable Soc. v. Episcopal Church*, 1 Pick. (Mass.) 372. See *Bank of Columbia v. Patterson*, 7 Cranch (C. C.) 299; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; *Slee v. Bloom*, 5 Johns. Ch. (N. Y.) 366; *Shaver v. Bear River etc. Min. Co.*, 10 Cal. 396; *Houghton v. Dodge*, 5 Bosw. (N. Y.) 326; *Witt v. Mayor etc. of N. Y.*, 5 Robt. (N. Y.) 249; *Brown v. Winnisimmet Co.*, 11 Allen (Mass.) 326; *Hillard v. Gould*, 34 N. H. 230; *Gooday v. Colchester etc. R. Co.*, 17 Beav. 132; *Lee v. Pittsburgh-Coal etc. Co.*, 56 How. Pr. (N. Y.) 373, affirmed 75 N. Y. 601. See *Lander v. Frank St. M. E. Church*, 97 N. Y. 119; and *Alexander v. Cauldwell*, 83 N. Y. 480; *Castle v. Lewis*, 78 N. Y. 131, 134, 135; *Parish v. Wheeler*, 22 N. Y. 494, 508, 509; *Bissell v. Michigan etc. Co.*, 22 N. Y. 258; *Brown v. Wright*, 25 Mo. App. 54; *Texas Western R. Co. v. Gentry*, 69 Tex. 625.

If an officer employs a person to perform services for the corporation, and they are performed with the knowledge of the directors, and they receive the benefit of such services without objection, the corporation is liable upon an implied assumpsit. *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496; s. c., 38 Am. Dec. 561; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348; *Kortright v. Buffalo Commercial Bank*, 20 Wend. (N. Y.) 91; *Hooker v. Eagle Bank*, 30 N. Y. 83, 86; s. c., 86 Am. Dec. 351. See *Peterson v. Mayor etc.*

of N. Y., 17 N. Y. 449; *Long Island R. Co. v. Marquand*, 6 N. Y. Leg. Obs. 160; *Fister v. La Rue*, 15 Barb. (N. Y.) 323; *Ex parte Peru Iron Co.*, 7 Cow. (N. Y.) 540; *Dunn v. Rector etc. of St. Andrew's Church*, 14 Johns. (N. Y.) 118; *Danforth v. Schoharie etc. Turnpike Co.*, 12 Johns. (N. Y.) 227.

Where an officer makes contracts in excess of his authority the corporation can only affirm and rescind it in toto. It is not in its power to rescind it so far as it imposes an obligation upon the corporation and affirm the transaction so far as it operates to its advantage. *Peninsular Bank v. Hanmer*, 14 Mich. 207.

When the directors of a corporation have allowed the president to purchase locomotives, and have afterwards taken possession of them, and acquiesced in their use on the company's road for several years, they cannot repudiate the president's authority to draw bills in payment for them. *Olcott v. Tioga R. Co.*, 27 N. Y. 546.

3. *Dubuque Female College v. Dubuque*, 13 Iowa 555.

4. *Martin v. Zellerbach*, 38 Cal. 300; *Barton v. Port Jackson etc. Plank Road Co.*, 17 Barb. (N. Y.) 397; *Estey v. Inhabitants of Westminster*, 97 Mass. 324; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230; *Dubuque Female College v. Dubuque*, 13 Iowa 555; *Peterson v. Mayor etc. of N. Y.*, 17 N. Y. 449; *Taymouth v. Koehler*, 35 Mich. 22. And see *McCracken v. San Francisco*, 16 Cal. 591.

A resolution of the board of trustees of a corporation, carried by the casting vote of the president, ratifying an unauthorized act of the president, in a matter in which he was personally interested, is void. *Chamberlain v. Pacific Wool Growing Co.*, 54 Cal. 103.

5. *Taymouth v. Koehler*, 35 Mich. 27.

The officers are not competent to ratify their unauthorized act. *Hotchkin v. Kent*, 8 Mich. 526.

The ratification must not be made too late.¹ To be effective and conclusive, the principal must at the time of ratification be fully aware of every material fact, and his act of ratification be an independent substantive act founded on complete information, and he must not only be aware of the facts, but apprised of the law as to how these facts would be dealt with if brought before a court of equity.²

Bringing suit by the corporation upon an unauthorized contract is a ratification thereof.³ So ratification may be proved by the statement of the president made in his official capacity.⁴ So evidence that an order addressed to a corporation by workmen in their employ was received by the paymaster and treated by him as he treated all such orders drawn on the corporation by their workmen, is competent evidence of the acceptance of this order by the corporation.⁵ But the presence in an official capacity of officers of a corporation at an interview between the contractor for the corporation and its agent for a particular purpose, is no evidence of their assent or the assent of the corporation to an arrangement then made in behalf of the corporation by such agent and exceeding his powers with the contractor.⁶

1. *Reed v. Buffum*, 79 Cal. 77; *Crabtree v. St. Paul Opera House*, 39 Fed. Rep. 746. See *In re Portuguese Consolidated Mines Limited*, 42 Ch. D. 160.

2. *Cumberland Coal etc. Co. v. Sherman*, 20 Md. 117; *Salt Lake Foundry & Machine Co.*, 23 Pac. Rep. 60; *Pennsylvania etc. Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248; *Stark Bank v. United States Pottery Co.*, 34 Vt. 144; *Greer v. Mayor etc. of N. Y.*, 4 Robt. (N. Y.) 675; *Blen v. Bear River etc. Min. Co.*, 20 Cal. 602; *Downes v. Ship, L. R.*, 3 H. L. 343; *Stewart's Case, L. R.*, 1 Ch. 511. And See *Kent v. Quicksilver Min. Co.*, 12 Hun (N. Y.) 53; *Hoyt v. Quicksilver Min. Co.*, 17 Hun (N. Y.) 169.

If a member of a board of directors of a corporation be present at the adoption of a resolution and aware of what is being done, and makes no opposition to its adoption, he must be presumed to have assented to it. But if such proceeding be merely preliminary to a decision by a subsequent vote of the stockholders on the consolidation of the corporation with another corporation, which can only be ultimately decided by the vote of all the stockholders, and not of the board of directors, such consent so given by a member of the board of directors, who is also a stockholder, does not estop him from afterwards objecting to the

consolidation. *Mowrey v. Indianapolis etc. R. Co.*, 4 Biss. (U. S.) 78.

3. See *Rowe v. Pierce*, 2 Camp. 96; *Planters' Bank v. Sharp*, 4 Smed. & M. (Miss.) 75; *Fishmongers Co. v. Robertson*, 5 M. & G. 131. Compare *Mayor of Kidderminster v. Hardwick*, L. R., 9 Exch. 13; *Lathrop v. Commercial Bank*, 8 Dana (Ky.) 114; *Copper Miners Co. v. Fox*, 16 Q. B. 229.

If the treasurer of a corporation misappropriates his funds, and lends them to a third person, an action of contract by the corporation against such person is not a ratification of the treasurer's acts, and does not discharge him from liability to the corporation. *Goodyear Dental Vulcanite Co. v. Caduc*, 144 Mass. 85.

A compromise of a suit by the attorneys of a corporation, held ratified, it appearing that the president and secretary knew of the compromise and of the negotiations leading to it, and that the corporation accepted the benefit. *Wetherbee v. Fitch*, 117 Ill. 67. Compare *Green v. Southern Ex. Co.*, 41 Ga. 515.

4. *Merrick v. Burlington etc. Road Co.*, 11 Iowa 74; *Slee v. Bloom*, 19 Johns. (N. Y.) 456.

5. *Lannan v. Smith*, 7 Gray (Mass.) 150.

6. *Barcus v. Hannibal Falls Co. etc. Plank Road Co.*, 26 Mo. 102.

A corporation which has recognized and ratified the acts of one assuming to be its agent, cannot afterwards dispute his authority on the ground that he was not regularly appointed by the directors.¹

3. Compensation.—An officer of a corporation cannot recover of the corporation for his ordinary official services except by virtue of a special contract for compensation.² Compen-

Nor do trustees assent who attend no meetings, are never consulted, and do nothing but sign annual reports on the strength of their reliance in the truth of the statements of a co-trustee. *Patterson v. Robinson*, 36 Hun (N. Y.) 622.

1. *Flynn v. Des Moines & St. Louis R. Co.*, 63 Iowa 490; *Peterborough R. Co. v. Nashua etc. R. Co.*, 59 N. H. 385.

Where stockholders sanctioned a contract under which moneys were loaned to a corporation by its directors, and its bonds therefor, secured by a mortgage, given, and the moneys have been properly applied, the corporation is estopped from setting up that the bonds and mortgage are void by reason of the trust relations which the directors sustained to it. *Hotel Company v. Wade*, 97 U. S. 13.

2. *Citizens' Bank v. Elliot*, 55 Iowa 104; s. c., 39 Am. Rep. 167. See *Nebraska R. Co. v. Lett*, 8 Neb. 251; *Kilpatrick v. Penrose etc. Bridge Co.*, 49 Pa. St. 118; *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Carr v. St. Louis*, 9 Mo. 191; *Martindale v. Wilson Case Co.*, 134 Pa. 348; *Thompson v. Wilamette etc. Co.*, 15 Oreg. 604; *Com. v. Eagle Ins. Co.*, 14 Allen (Mass.) 344.

An officer of a corporation can recover on an implied contract for services rendered the corporation, provided such services are outside of the scope of his duties as such officer. *Santa Clara Min. Assoc. v. Meredith*, 49 Md. 389; *Topuce v. Corrinne Mill Canal etc. Co.*, 24 Pac. Rep. 538; *Edwards v. Fargo etc. R. Co. (Dak.)*, 33 N. W. Rep. 100.

Secretary.—In *New York* there need not be an agreement that the secretary of a corporation, who is not a director or stockholder, shall be compensated in order that he shall be entitled to compensation. (*Reversing* 32 Hun (N. Y.) 38) *Smith Long Island R. Co.*, 102 N. Y. 190. See *Bennett v. St. Louis Car Roofing Co.*, 23 Mo. App. 587. See *McCracken v. Halsly Fire Engine Co.*, 57 Mich. 361.

Treasurer.—A treasurer of a corporation is entitled to compensation. When he claims compensation for his services, the auditors appointed by the directors to audit the treasurer's report, are the proper persons to act upon the question as to the amount of such compensation. *Waite v. Windham Co. Min. Co.*, 36 Vt. 18.

President.—The president of a corporation is not entitled, in the absence of an agreement, to any compensation for his services performed in the discharge of his duties. *Barril v. Calendar Insulating etc. Co.*, 2 N. Y. Supp. 758; *Ellis v. Ward (Ill.)*, 25 N. E. Rep. 530. But if a president renders services to his corporation which are not within the scope of and are not required by his duties as president, but are such as are properly to be performed by an agent, broker or attorney, he may recover compensation for such services upon an implied promise. *Citizens' Nat Bank v. Elliott*, 55 Iowa 104; *Missouri River Co. v. Richards*, 8 Kan. 101; *Santa Clara Min. Assoc. v. Meredith*, 49 Md. 389; s. c., 33 Am. Rep. 264; *Rogers v. Hastings etc. R. Co.*, 22 Minn. 25; *Shackleford v. New Orleans etc. R. Co.*, 37 Miss. 202; *Gardner v. Butler*, 30 N. J. Eq. 702, 721; *Jackson v. New York Cent. R. Co.*, 2 Thomp. & C. (N. Y.) 653; *Cheaney v. Lafayette etc. R. Co.*, 68 Ill. 570; *Rockford etc. R. Co. v. Sage*, 65 Ill. 328.

Agents and Servants.—In the absence of express contract under which the services were performed the agents and servants of a corporation, other than the director, president and treasurer, like the agent of a natural person, are entitled in presumption of law to be paid for such services what they are reasonably worth. *Spence v. Whitaker*, 3 Port. (Ala.) 297; *Bee v. San Francisco etc. R. Co.*, 46 Cal. 248; *Waljer v. Bank of Kentucky*, 3 J. J. Marsh. (Ky.) 206; *Tyler v. Tualatin Academy*, 14 Oreg. 485; *Goodwin v. Union Screw Co.*, 93 N. H. 378; *Bill v. Darenth V. R. Co.*, 1 Hen. & M. (Va.)

sation of corporate officers is usually fixed by a by-law or resolution either of the directors or stockholders, and where no salary is fixed, none can be recovered. These offices are usually filled by the chief promoters of the corporation whose interest in the stock or other incidental advantages is supposed to be a motive for executing the duties of the offices without compensation, and this presumption prevails until overcome by express pre-arrangement of salary.¹ But where the charter provides for the election of a president, agent, and treasurer of the corporation, and authorizes the board of directors to fix the respective salaries of such officers, and the president is elected, but without any express agreement as to his salary, the law raises an assumpsit on the part of the company to pay him a reasonable compensation for his services.² So in other cases, if an officer employs a person to perform a service for the corporation and it is performed with the knowledge of the directors and they receive the benefit of such service without objection, the corporation is liable upon an implied assumpsit.³ And where it is the expectation of both parties that the officer is to be paid for his services, such understanding and expectation, although not sufficient perhaps to amount to an agreement, still removes all presumption that the services were performed gratuitously, if such a presumption is proper in such a case.⁴ And it matters

305. See *Stocking v. Sage*, 1 Conn. 522; *Howe v. Buffalo etc. R. Co.*, 37 N. Y. 297; *Powell v. Trustees etc. of Newburgh*, 19 Johns. (N. Y.) 284. But in such cases much must depend upon the custom with regard to compensation of the particular services and the expectation of the parties. See *Fraylor v. Sonora Min. Co.*, 17 Cal. 594; *Eagle Mfg. Co. v. Browne*, 58 Ga. 240; *Lafayette etc. R. Co. v. Cheeney*, 87 Ill. 447; *Gridley v. Lafayette etc. R. Co.*, 71 Ill. 200; *Holder v. Lafayette etc. R. Co.*, 71 Ill. 106; *Santa Clara Min. Assoc. v. Meredith*, 49 Md. 389; *Pew v. Gloucester Nat. Bank*, 130 Mass. 391; *Sawyer v. Pawnors' Bank*, 6 Allen (Mass.) 207; *Rogers v. Hastings etc. R. Co.*, 22 Minn. 25; *Nebraska R. Co. v. Lett*, 8 Neb. 251; *Benson v. Heathorn*, 1 Y. & Col. Ch. 326.

Where a corporation has employed an agent for a term of years, the inability of the corporation to continue its business throughout such term will not excuse its breach of contract with such agent. *Revere v. Boston Copper Co.*, 15 Pick. (Mass.) 351; *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534; *People v. Globe Mut. L. Ins. Co.*, 91 N. Y. 174.

1. *Gridley v. Lafayette etc. R. Co.*, 71 Ill. 200; *Kilpatrick v. Penrose Ferry Bridge Co.*, 49 Pa. St. 121.

2. *Grundy v. Pine Hill Coal Co.*, 10 Ky. L. Rep. 833; s. c., 23 Am. & Eng. Corp. Cas. 612. Compare *Illinois Linen Co. v. Hough*, 91 Ill. 63.

When the by-laws of a corporation provide that the officers shall receive such compensation for their services as the board of directors shall fix and allow, and the board has not fixed any compensation, a secretary who has rendered services is entitled to recover therefor, unless there was an understanding that he was to render the services without any compensation, and when the compensation or salary of such clerk or officer is not fixed by contract, or by law, he may recover such sum as he may by competent evidence prove his services to be worth. *Missouri etc. R. R. Co. v. Richards*, 8 Kan. 101.

3. *Hooker v. Eagle Bank*, 30 N. Y. 83; *Stewart v. St. Lewis etc. R. Co.*, 41 Fed. Rep. 736; *Fister v. La Rue*, 15 Barb. (N. Y.) 323.

4. *Stewart v. St. Louis etc. R. Co.*, 41 Fed. Rep. 736; *Rosborough v. Shasta River Canal Co.*, 22 Cal. 556.

A person employed as secre-

not, therefore, whether the order covers past services, the officer is entitled to recovery therefor upon an implied contract to pay what the services were worth.¹

If the officer accepts and serves under a known by-law providing that official salaries are to be fixed by the president and directors, he is to be understood as undertaking the performance of his duties for such salary as may be established in fair and honest execution of the by-law.²

Officers and agents of corporations cannot recover for past services,³ or when their relations as agents of the corporation cease,⁴ nor can they fix their own salaries.⁵

The salary allowed to an officer of a corporation is presumed to be for service to be performed by him as such. Where, therefore, with the assent and co-operation of such officer, all the property and business franchises are sold so that he has no other duty to perform, there is no basis in law or equity for a claim upon his part, that the salary continues, and the contract, as to salary, will be deemed to be cancelled, although the corporation itself is not dissolved.⁶ So the officers of an insolvent corporation are not entitled to have their salaries paid in full in preference to the debts of other creditors. They are only entitled to be paid their ratable proportion of the assets of the company as between them and their creditors.⁷

Where stock is issued by a corporation to an officer thereof for services rendered by him, such officer thereby becomes a stockholder and liable to the creditors of the corporation to the extent of the difference between the value of his services and the par value of his stock, though he cancelled and returned his

tary of a private corporation at a fixed rate of compensation, cannot demand extra pay for services in that capacity which were not anticipated at the time of his appointment. *Carr v. Chartier Coal Co.*, 25 Pa. St. 337. The same rule applies to a president. *Gill v. New York Cab Co.*, 48 Hun (N. Y.) 524.

1. *Stewart v. St. Louis Ft. S. & W. R. Co.*, 41 Fed. Rep. 736. See *Bartlett v. Mystic River Corp.*, 151 Mass. 433.

2. *Eagle etc. Mfg. Co. v. Browne*, 58 Ga. 240.

3. *Jones v. Morrison*, 31 Minn. 140; *Frames v. Bulfontein Min. Co.*, L. R., 1891, 1 Ch. D. 140. See *Smith v. Woodville etc. Silver Min. Co.*, 66 Cal. 398.

4. *Safford v. Vermont & Canada R. Co.*, 60 Vt. 185.

5. *Kelsey v. Sargent*, 40 Hun (N. Y.) 150; *Copeland v. Johnson Mfg. Co.*, 47 Hun (N. Y.) 235; *Shattuck v. Oakland Smelting & Refining Co.*, 58 Cal. 550, *Nebraska R. Co. v. Lett*, 8 Neb. 251; *Grairs v. Mono Lake Hydraulic*

Min. Co., 81 Cal. 303; *Butts v. Wood*, 38 Barb. (N. Y.) 181; *McNaughton v. Osgood*, 41 Hun (N. Y.) 109; *Gardner v. Butler*, 39 N. Y. Eq. 702. Compare *St. Louis R. Co. v. Tiernan*, 37 Kan. 606.

Nor have the executive committee of a company any right to vote money to themselves, in addition to their regular compensation, for their services as promoters and originators of the company, or in consideration of the members retiring from the executive committee. And if large sums are granted for those purposes, this affords a good reason for the appointment of a receiver. *Blatchford v. Ross*, 54 Barb. (N. Y.) 42; s. c., 5 Abb. P. R., N. S. (N. Y.) 434; s. c., 37 How. Pr. (N. Y.) 110.

6. *Long Island Ferry Co. v. Terbell*, 48 N. Y. 427.

7. *In re Croton Ins. Co.*, 3 Barb. Ch. (N. Y.) 642; *Bruyn v. Receiver of Middle Dist. Bank*, 1 Paige (N. Y.) 584.

certificates.¹

4. Resignation.—An office in a corporation may be resigned in two ways—by an express agreement between the officer and the corporation, or by an agreement implied from his being elected to another office in the same corporation incompatible with it, and such resignation is not complete until the corporation shall have manifested its acceptance of his offer to resign, either by an entry in its books, or by electing another person to fill the place, treating it as vacant.² When the directors of a corporation find that the corporation is insolvent, that its affairs are growing worse every day, and the remaining property will be wasted, leaving the bulk of its creditors unpaid, they may lawfully resign for the purpose of securing a fair and equal distribution of the corporate property among its creditors, and such resignation becomes effective to vacate the respective offices without any affirmative act of the corporation.³ So a contumacious resignation by officers of the company cannot prevent the company from filing a petition of bankruptcy, if a majority of the shareholders authorize it to be done.⁴

5. Removal of Officers.—The removal of mere private or ministerial officers of a corporation is a right which belongs to the corporation alone, and the courts have no jurisdiction to order such removal, or it seems to enjoin such officers from acting.⁵ If the members of a corporation have the power of amotion, they cannot exercise it except for just cause.⁶ An officer cannot be removed without the agency of a tribunal competent to investigate the cause and pronounce the sentence of loss of right. The office is not vacant by neglect or abuse, but an act

1. *Chouteau v. Dean*, 7 Mo. App. 210.
2. *University of Maryland v. Williams*, 9 Gill & J. (Md.) 365.

3. *Smith v. Danzig*, 64 How. Pr. (N. Y.) 320. See *Chandler v. Hoag*, 63 N. Y. 624; *Sprague v. Dunton*, 14 Hun (N. Y.) 492; *Van Amburgh v. Baker*, 81 N. Y. 46.

4. *Davis v. Railroad Co.*, 1 Woods (U. S.) 661.

5. *Neall v. Hill*, 16 Cal. 145; *Hughes v. Parker*, 20 N. H. 58.

Every corporation has power, inherently to expel members in certain cases. 1. Where a member commits an infamous offence, rendering him unfit for the society of honest men: In such case there must be a previous conviction at law. 2. Where the offence is against the party's duty as a corporator: In this case he may be expelled on trial and conviction by the corporation. 3. Where the offence is of a mixed nature against the party's duty as a corporator, and also against the

law of the land. *Com. v. St. Patrick Benevolent Soc.*, 2 Binn. (Pa.) 448.

6. *Fuller v. Trustees of Plainfield Academic School*, 6 Conn. 532.

Where the return of the members of a corporation to a writ of *mandamus*, seeking the restoration of an expelled member, alleged as the grounds of amotion, 1st, Disrespectful and contemptuous language toward his associates, and 2nd, Neglect of official duty in not acting on committees—*held*, that these charges were insufficient to justify an amotion. *Fuller v. Trustees of Plainfield Academic School*, 6 Conn. 533.

The mere misemployment of money is no cause of amotion; but charging the corporation with money which the member never paid, is sufficient cause. *Com. v. Guardians of the Poor*, 6 S. & R. (Pa.) 469; *Ramsey v. Erie R. Co.*, 7 Abb. Pr., N. S. (N. Y.) 156.

Courts will not interfere to suspend

or exercise of power is requisite to work the forfeiture and determine the title to the office.¹ Where the charter of a corporation prescribes the terms under which the power of motion is to be exercised, they must be pursued; but where the organic law is silent, the corporation itself possesses the inherent power to ascertain and declare the forfeiture either of franchise or office.² An expulsion of a member without notice to him and without a vote of the corporation, is unlawful.³ Where the statute designates the members individually as persons holding office, and not as a corporation, they cannot be regarded as a corporation, but only as officers of a State appointed to exercise certain public functions and employments. As public officers the power of a motion is not given to them by the statute.⁴

6. Duties and Liabilities.—Although the general agent of a corporation is not responsible for the bad debts or for the negligence or faithlessness of agents necessarily employed by him, yet it is his duty to see that the debts due to the company are collected, and must show that he exercised ordinary diligence for that purpose.⁵ So where a duty is imposed by statute upon the officers of a corporation, as an official act, and for a public purpose, they are thereby constituted officers for that purpose, and a wilful disobedience on their part is a misdemeanor.⁶

(a) BOOKS—(1) *Duty to Keep Books.*—Although the by-laws of a corporation require the officers and agents to enter all the business of the company in its books, their neglect to do so, though it may subject them to liability if the company sustain damage from such neglect, will not operate as a forfeiture, or otherwise to deprive such officers of a just compensation for the use of such property loaned to the company in good faith.⁷

(2) *Failure to Produce.*—The agents of a corporation cannot in their individual capacities be compelled to discover the books of the corporation, and on motion to require them to do so the court will not enter into the question whether the incorporation

directors of a corporation on charges of personal immorality. *Ramsey v. Erie R. Co.*, 7 Abb. Pr., N. S. (N. Y.) 156.

1. *State v. Trustees of Vincennes University*, 5 Ind. 77.

2. *State v. Trustees of Vincennes University*, 5 Ind. 77.

Where the constitution of a charitable corporation reserves to a member expelled by the board of trustees the right to appeal to the members of the corporation at a corporate meeting, *mandamus* will not issue in favor of an expelled member who has taken no appeal from the action of the board, though the order of expulsion may be contrary to law and void. *Screwmen's Ben. Assoc. v. Benson*, 76 Tex. 552.

3. *Com. v. Pennsylvania Ben. Institution*, 2 S. & R. 141.

An expulsion of a member without notice to him, and without a vote of the corporation—*held* to be unlawful, though the charter provided that if any member should neglect for three months to pay his arrearages, he should be expelled. *Com. v. Pennsylvania Ben. Institution*, 2 S. & R. (Pa.) 141.

4. *State v. Kuehn*, 34 Wis. 229.

5. *Williams v. Gregg*, 2 Strobb. Eq. (S. Car.) 297.

6. *Com. v. Dunham*, Thatch. Cr. Cas. (Mass.) 538.

7. *Rider v. Union India Rubber Co.*, 5 Bosw. (N. Y.) 85.

is fictitious.¹ On a trial of an order to show cause why defendant should not be punished for contempt in failing to obey an order to produce certain books of a corporation of which they are officers, the corporation being required by law to keep such books, there is a presumption that they have been kept, and the burden is on the defendant to show that the books are not in existence or under their control.² So when the statute requires the officer having charge of corporation books to furnish the names of the shareholders on demand of an officer holding an execution against the corporation, such demand must be made before the court will order the names to be furnished.³

(b) INDIVIDUAL LIABILITY.—A servant of a corporation who does an act forbidden by law is responsible for it in his own person, and the corporation is not presumed to have given him any authority to do such an act.⁴ But where he makes a contract in terms binding only the corporation, without authority, he is not liable at common law on the contract, but only for the wrong done exceeding his authority.⁵

So where persons enter into a contract, claiming to be directors of a corporation, if no such corporation really exists such persons are individually liable on the contract.⁶ But where individuals hold themselves out as a society with corporate power, hold meetings as such, and in one duly called, employ a person to render service for them, they cannot require such person to prove by their incorporation or written constitution that they are empowered to act as they have assumed to do.⁷

(c) LIABILITY FOR PERSONAL INJURIES.—A corporation may be charged with trespass for personal injuries committed by their agents under their express order. They may also be so charged in all cases where such personal violence will be the probable and natural consequences resulting from the execution of the order given to their agents.⁸

(d) LIABILITY FOR MAINTAINING NUISANCES.—The officers

1. *Opdyke v. Marble*, 8 Abb. Pr. (N. Y.) 266.

2. *Fenlon v. Dempsey*, 50 Hun (N. Y.) 131; 2 N. Y. Supp. 763.

3. *Cleveland Rolling Mill Co. v. Texas etc. R. Co.*, 23 Fed. Rep. 720.

4. *Com. v. Ohio etc. R. Co.*, 1 Grant Cas. (Pa.) 329. See *Union Pac. R. Co. v. Durant*, 3 Dill. (U. S.) 343; *South Covington etc. R. Co. v. Gest*, 34 Fed. Rep. 628; *Williams v. Riley*, 34 N. J. Eq. 398.

5. *Hall v. Crandall*, 29 Cal. 569.

The president of an omnibus company directed its drivers to exclude all colored persons. *Held*, that he was individually liable for the ejection and personal injury of such persons, al-

though an action might have been maintained against the company. (SCHOLFIELD, C. J., dissenting.) *Peck v. Cooper*, 112 Ill. 192; s. c., 54 Am. Rep. 231.

6. *Herod v. Rodman*, 16 Ind. 241.

7. *Stone v. Congregational Soc.*, 14 Vt. 86.

8. *Hewett v. Swift*, 3 Allen (Mass.) 420.

The president of a corporation is not made liable to an action for a personal injury, merely by transmitting an order of the corporation to a servant, who in executing it uses illegal force; but if the order is issued by him on his own responsibility, he is liable. *Hewett v. Swift*, 3 Allen (Mass.) 420.

of a corporation, as well as the corporation itself, may be held responsible for the maintenance of a nuisance consisting of the corporation's business.¹ But the president of a private corporation not individually acting in the matter, is not personally liable for the acts of the corporation in maintaining a public nuisance by operating a railroad for private purposes.²

X. ACTIONS BY AND AGAINST OFFICERS AND AGENTS—1. Generally.

—It cannot be considered the province of a court to superintend the current business of corporations with the view to measure the degree of industry, skill and shrewdness to be required of or exercised by the directors or other officers or agents. So a court of equity will not interfere to review and correct their proceedings on the ground of fraud or mismanagement, unless there is cause for an absolute displacement of the officer or officers complained of, or for a final winding up of the affairs of the corporation.³

2. Parties.—As a general rule, a suit brought for the purpose of compelling officers and agents of a private corporation to account for a breach of official duty, or for misapplication of corporate funds, must be brought in the name of the corporation.⁴ But where the corporation for any cause refuses to bring suit to redress such injuries, the stockholders, who are regarded as the real parties in interest, will be permitted to file a bill in their own names, making the corporation a party defendant.⁵

1. *People v. Detroit Lead Works* (Mich. 1890), 46 N. W. Rep. 735.

2. *Fanning v. Osborne*, 102 N. Y. 441.

3. *Hedges v. Paquett*, 3 *Oreg.* 77.

4. *Byers v. Rollins*, 13 *Colo.* 22; *Cogswell v. Bull*, 39 *Cal.* 320; *Brown v. Vandyke*, 8 *N. J. Eq.* 799; *Smith v. Poor*, 40 *Me.* 415; *Forbes v. Whitlock*, 3 *Edw. Ch. (N. Y.)* 446; *Deaderick v. Wilson*, 8 *Baxt. (Tenn.)* 108; *Austin v. Daniels*, 4 *Den. (N. Y.)* 301; *Hersey v. Veazie*, 24 *Me.* 12; *s. c.*, 41 *Am. Dec.* 364; *Abbott v. Merriam*, 8 *Cush. (Mass.)* 588, 590; *Smith v. Hurd*, 12 *Met. (Mass.)* 371; *s. c.*, 46 *Am. Dec.* 690; *Bayless v. Orne*, 1 *Freem. Ch. (Miss.)* 175; *Hodges v. New England Screw Co.*, 1 *R. I.* 312; *s. c.*, 53 *Am. Dec.* 626; *Mozley v. Alston*, 1 *Phill. Ch. (Eng.)* 790.

5. *Hazard v. Durant*, 11 *R. I.* 207; *Robinson v. Smith*, 3 *Paige (N. Y.)* 222; *s. c.*, 34 *Am. Dec.* 212; *New York etc. R. Co. v. Schuyler*, 17 *N. Y.* 596; *Newby v. Oregon Cent. R. Co.*, *Deady (U. S.)* 619. See *Verplanck v. Mercantile Ins. Co.*, 1 *Edw. Ch. (N. Y.)* 84; *Butts v. Wood*, 37 *N. Y.* 317; *s. c.*, 38 *Barb. (N. Y.)* 181; *Greaves v. Gouge*, 69 *N. Y.* 154; *Cunningham v. Pell*, 5 *Paige*

(*N. Y.*) 607; *Charleston Ins. Trust Co. v. Sebring*, 5 *Rich. Eq. (S. Car.)* 342; *Hodges v. New England Screw Co.*, 1 *R. I.* 312; *s. c.*, 53 *Am. Dec.* 624; *Sperling's Appeal*, 71 *Pa. St.* 11; *Bayless v. Orne*, 1 *Freem. Ch. (Miss.)* 161; *Samuel v. Holladay*, 1 *Woolw. (U. S.)* 400; *Davenport v. Dows*, 18 *Wall. (U. S.)* 626; *Deaderich v. Wilson*, 8 *Baxt. (Tenn.)* 108; *Colquitt v. Howard*, 11 *Ga.* 556; *Ryan v. Leavenworth etc. R. Co.*, 21 *Kan.* 365; *Peabody v. Flint*, 6 *Allen (Mass.)* 52; *Wilcox v. Bickel*, 11 *Neb.* 154; *March v. Eastern R. Co.*, 40 *N. H.* 548; *s. c.*, 77 *Am. Dec.* 732; *Brown v. Vandyke*, 8 *N. J. Eq.* 795, 799, 800; *s. c.*, 55 *Am. Dec.* 250; *Dodge v. Woolsey*, 18 *How. (U. S.)* 331; *Wardell v. Union Pac. R. Co.*, 4 *Dill. (U. S.)* 331; *Gregory v. Patchett*, 33 *Beav.* 595; *Salomons v. Laing*, 12 *Beav.* 339; *Myers v. Machado*, 6 *Abb. Pr. (N. Y.)* 198; *Habicht v. Pemberton*, 4 *Sandf. (N. Y.)* 657; *Hill v. Frazier*, 22 *Pa. St.* 320; *Tutwiler v. Tuscaloosa Coal etc. Co.*, 89 *Ala.* 391; *s. c.*, 31 *Am. & Eng. Corp. Cas.* 445.

In *Dodge v. Woolsey*, 18 *U. S.* 331, WAYNE, J., said: "It is now no longer doubted, either in *England* or the *United*

Many cases hold that stockholders may sue in their own name officers of a corporation.¹ But the decisions outside of the federal courts are not numerous, and while they admit the right of the stockholder to sue in cases where the corporation is the proper party to bring the suit, they limit this right to cases where the directors are guilty of fraud, or a breach of trust, or are proceeding *ultra vires*.²

Courts never permit a wrong to go unredressed merely for the sake of form. So if it appears that the directors of the corporation refuse to prosecute by collusion with those who have made themselves answerable by their negligence or fraud, or if the corporation is still under the control of those who must be made the defendants in the suit, the stockholders who are the real parties in interest will be permitted to file a bill in their own names, making the corporation a party defendant,³ and if the stockholders are so numerous as to render it impossible or very incon-

States, that courts of equity in both have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction to restrain those who administer them from doing acts which would amount to a violation of the charters, or to prevent any misapplication of their capital or profits, which might result in the lessening of the dividends of the stockholders or of the value of their shares, as either may be protected by the franchise of the corporation if the acts intended to be done create what is in law denominated a breach of trust."

1. *Allen v. Curtis*, 26 Conn. 456; *Hersey v. Veazie*, 24 Me. 9; s. c., 41 Am. Dec. 364; *Brewer v. Boston Theater*, 104 Mass. 397; *Robinson v. Smith*, 3 Paige (N. Y.) 222; s. c., 34 Am. Dec. 212; *Gregory v. Patchett*, 33 Beav. 595; *Atwood v. Merryweather*, L. R., 5 Eq. 464; *Hodges v. New England Screw Co.*, 1 R. I. 312; s. c., 53 Am. Dec., 626; *March v. Eastern R. Co.*, 40 N. H. 548, 567; s. c., 77 Am. Dec. 732; *Peabody v. Flint*, 6 Allen (Mass.) 52.

2. *Hawes v. Contra Costa Water Co.*, 104 U. S. 450; *March v. Eastern R. Co.*, 40 N. H. 548; *Peabody v. Flint*, 6 Allen (Mass.) 52; *Brewer v. Boston Theater*, 104 Mass. 378.

In *Hawes v. Contra Costa Water Co.*, 104 U. S. 450, MILLER, J., said: "We understand that doctrine to be, that to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is

the appropriate plaintiff, there must exist, as the foundation of the suit, some action or threatened action of the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction, completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors, or a majority of them, are acting for their own interest in a manner destructive of the corporation itself or of the rights of the other shareholders; or where the majority of shareholders themselves are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. Possibly other cases may arise in which, to prevent irremediable injury or a total failure of justice, the court would be justified in exercising its powers; but the foregoing may be regarded as an outline of the principles which govern this class of cases."

3. *Gardiner v. Pollard*, 10 Bosw. (N. Y.) 674; *Charitable Corporation v. Sutton*, 2 Atk. 404; *Robinson v. Smith*, 3 Paige (N. Y.) 222; s. c., 34 Am. Dec. 212; *Allen v. New Jersey S. R. Co.*, 49 How. Pr. (N. Y.) 15; *Gray v. New York etc. S. S. Co.*, 5 Thomp. & C. (N. Y.) 224; *Camp v. Taylor*, 19 Atl. Rep. 969.

venient to bring them all before the court, a part might file a bill in behalf of themselves and all others standing in the same situation.¹

But in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation, which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain from the corporation itself the redress for his grievances or an action in conformity to his wishes.² He must make an earnest, not simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body in the matter of which he complains, and he must show a case if this is not done where it could not be done, or it was not reasonable for him to require it.³

Officers are improperly joined as defendants in a bill filed by a stockholder when no bad faith or other misconduct is charged against them and no relief is prayed against them.⁴

3. Officers and Agents Acting in Behalf of the Company.—The directors of a corporation acting *bona fide*, and in the exercise of

1. Jones v. Johnson, 10 Bush (Ky.) 649; Robinson v. Smith, 3 Paige (N. Y.) 222; s. c., 34 Am. Dec. 212; Butts v. Wood, 37 N. Y. 317; Brinckerhoff v. Bostwick, 88 N. Y. 60.

2. See Robinson v. Smith, 3 Paige (N. Y.) 222; s. c., 24 Am. Dec. 212; Anderton v. Aronson, 3 How. Pr. (N. Y.) 218; Brewer v. Boston Theatre, 104 Mass. 378; Kennebec etc. R. Co. v. Portland etc. R. Co., 54 Me. 173; Leslie v. Lorillard, 31 Hun (N. Y.) 305; Dannemeyer v. Coleman, 9 P. C., L. J. 281; Cogswell v. Bull, 39 Cal. 320; Hawes v. Contra Costa Water Co., 104 U. S. 450; Huntington v. Palmer, 104 U. S. 482; Greaves v. Gouge, 69 N. Y. 154.

The failure or refusal of the corporation itself, upon demand made upon it, to seek redress, is a condition precedent to the right of a stockholder to sue in his own name. Thompson on L. of O. and A. of Corp. 385; Huntington v. Palmer, 104 U. S. 482; Dannemeyer v. Coleman, 9 P. C., L. J. 281. And a complaint which fails to allege that the corporation, on request, has refused to bring the proper action, is bad on demurrer. Mozley v. Alston, 1 Phila. (Pa.) 800; Foss v. Harbottle, 2 Hare

461; Hawes v. Contra Costa Water Co., 104 U. S. 450.

Where the corporation is under the control of the persons who must be sued, and an excuse is given for the bringing of the suit by the stockholders, which is equivalent to a refusal by the directors on request to bring the suit, the suit may be brought by the stockholders without showing such request and refusal. Heath v. Erie R. Co., 8 Blatchf. (U. S.) 347; Mussina v. Goldthwaite, 34 Tex. 125; 7 Am. Rep. 281. But an averment in the complaint that the board is composed "nearly if not entirely" of the same persons who committed the wrong complained of is insufficient as an excuse for not applying to them before bringing suit. Cogswell v. Bull, 39 Cal. 320.

3. Hawes v. Contra Costa Water Co., 104 U. S. 450. A complaint which fails to allege that the corporation, on request, refuses to bring proper action, will be held bad on demurrer. See Mozley v. Alston, 1 Phila. (Pa.) 790; Foss v. Harebottle, 2 Hare 461.

4. Tutwiler v. Tuscaloosa Coal, Iron and Land Co., 89 Ala. 391; 31 Am. & Eng. Corp. Cas. 445; Norwood v. Memphis etc. R. Co., 72 Ala. 563.

their best judgment, have authority to settle a pending action.¹

So the general manager and agent of a corporation must be presumed, *prima facie*, at least, to have authority to direct the issue of a replevin writ, for the improper service of which the corporation is sued.² But the general or managing local agent of a foreign corporation is not an "officer" who may make the affidavit required upon an application for change of venue.³

4. Service of Process.—Corporations are artificial creations existing by virtue of law, which necessarily act through agents, and it is only through agents that the public can deal with them. So in a suit against a corporation, process must be served upon the agent or officer having authority to receive such service. The manner of service is generally regulated by statute in the various States, which designate the particular officer or agent upon whom service must be made. This subject is fully treated under the title SERVICE OF PROCESS. See also CORPORATIONS, vol. 4, p. 283; FOREIGN CORPORATIONS, vol. 8, pp. 382–389.

(a) PROPER OFFICERS AND AGENTS FOR SERVICE.—See SERVICE OF PROCESS.

(b) CONCLUSIVENESS OF RETURN.—The officer's return must show a compliance with all the statutory requirements.⁴ Thus when the statute only authorizes service upon other officers or agents in the event of the non-residence of the president, in or absence from the country, the return must show that the president did not reside in or was absent from the country.⁵ (See SERVICE OF PROCESS.)

5. Effect of Appearance.—The appearance of the defendant is equivalent to the proper service of the summons upon it,⁶ even though the defendant should be a foreign corporation.⁷ Appearance of the defendant by attorney and a consent to a continuance of the case is sufficient to dispense the service of process.⁸ And if the defendant appears and submits to the trial of the case upon

1. *Donohoe v. Mariposa Land & Min. Co.*, 66 Cal. 317.

2. *Frost v. Domestic Sewing Machine Co.*, 133 Mass. 563.

3. *Wheeler & Wilson Mfg. Co. v. Lawson*, 57 Wis. 400.

4. *Union Pac. R. Co. v. Pillsbury*, 29 Kan. 652. See also *Cairo v. Oregon etc. R. Co.*, 10 Oreg. 510; *Cairo etc. R. Co. v. Joiner*, 72 Ill. 520; *Hoen v. Atlantic & Pac. R. Co.*, 64 Mo. 561; *Com. v. Wilmington etc. R. Co.*, 2 Pearson (Pa.) 408; *Missouri etc. R. Co. v. Crowe*, 9 Kan. 496; *Ohio etc. R. Co. v. Quier*, 16 Ind. 440; *Cincinnati etc. R. Co. v. McDougall*, 108 Ind. 179.

A return of *nulla bona* is not sufficient to found a bill under the Pa. act of 1863, making the officers of certain corporations liable in equity for their debts. The return must set out

that no real or personal property of the corporation was exhibited to the officer, sufficient to satisfy the debt, as required by the act. *Bacon v. Morris*, 10 Phila. (Pa.) 93.

5. *Cairo etc. R. Co. v. Rea*, 32 Ark. 29; *Cairo etc. R. Co. v. Trout*, 32 Ark. 17; *St. Louis etc. R. Co. v. Dorsey*, 47 Ill. 288; *St. Louis etc. R. Co. v. Dawson*, 3 Ill. App. 118.

6. *Buckfield Branch R. Co. v. Benson*, 43 Me. 374; *Carpenter v. New York etc. R. Co.*, 11 How. Pr. (N. Y.) 481; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140; *Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 11 Supr. Ct. Rep. 36.

7. *Congar v. Galena etc. R. Co.*, 17 Wis. 477.

8. *St. Louis etc. R. v. Barnes*, 35 Ark. 95.

its merits, the defects are waived, although a motion to dismiss be given them and had been first made and overruled.¹ A defendant, however, upon whom a summons has not been properly served may appear specially in the action for the purpose of having the legal action set aside.²

6. Pleas in Abatement.—An agent of a corporation who has been served with process may deny by plea in abatement that he sustains any relation to the corporation which authorizes the service of process on him, and he may plead in abatement in his own name that the corporation is extinct, or he may make the same defence by motion to dismiss the suit or by suggestion of an attorney of record supported by affidavit showing the facts;³ but a plea in abatement for want of sufficient service must contain a direct and specific averment to what the service was, and that no service was in fact made. An averment "that it appears that the only service of said writ was," etc., is insufficient.⁴

Where the creditor files a bill against the directors of an insolvent company, and the assignee of the company subsequent to the insolvency brings an action against the directors for the same cause in the name of the company, the pending of the bill may be pleaded in abatement in the action at law.⁵

7. Verification.—Under a statute providing that where the party is a domestic corporation, pleadings must be verified by an officer thereof," and that service of summons may be made on the "president or other member of the corporation, the secretary or clerk, the cashier, the treasurer or the director, or managing agent," the answer of a defendant domestic corporation, which is verified by one who simply affirms that he is the "general manager" thereof, stating nothing in regard to his duties, is defective. The affidavit or verification under such a statute is defective, unless it states that the affiant is an officer of the defendant corporation, either expressly, or by stating the duties he performs, from which it may be inferred that he is an officer of the corporation.⁶ So under such a statute a verification by an ex-officer is unauthorized and insufficient.⁷

8. Evidence—(a) GENERALLY.—An agent's authority may be

1. *Kronski v. Missouri Pac. R. Co.*, 77 Mo. 362.

2. *Lung Chung v. Northern Pac. R. Co.*, 19 Fed. 254; 16 Am. & Eng. R. Cas. 548.

Although the defendant voluntarily appears in an action, he may yet object to the jurisdiction of the court over the subject matter. *Robinson v. West*, 1 Sandf. (N. Y.) 19; *Ervin v. Oregon R. & Nav. Co.*, 62 How. Pr. (N. Y.) 490. See *Carpenter v. Central Park etc. R. Co.*, 11 Abb. Pr., N. S. (N. Y.) 416;

Barnett v. Chicago etc. R. Co., 4 Hun (N. Y.) 114.

3. *Kelly v. Mississippi Cent. R. Co.*, 2 Flipp (U. S.) 581.

4. *Perry v. New Brunswick etc. R. Co.*, 71 Me. 359.

5. *Pennsylvania Bk. v. Hopkins*, 111 Pa. St. 328; 16 Am. & Eng. Corp. Cas. 71.

6. *Meton v. Isham Wagon Co.*, 4 N. Y. Supp. 215; 15 N. Y. Civ. Proc. Rep. 269.

7. *Kelly v. Woman Pub. Co.*, 4 N. Y. Supp. 99.

proved by written,¹ parol,² or presumptive evidence.³ Admissions of the officers and agents of a corporation made in the execution of the duties imposed upon them concerning a matter upon which they are called upon to act, and which matter is within the scope of the authority usually exercised by them, are evidence against the corporation.⁴

(b) BOOKS OF THE CORPORATION.—In an action under the New York Manufacturing act against a trustee of a corporation for inserting in the annual report a falsehood as to complete payment of capital stock, the books of the corporation are evidence to show the corporate acts.⁵ So the minutes in the minute book of a corporation, made shortly after the action of the board of directors, and at all times accessible to them, are *prima facie* evidence against the directors as to their official action.⁶

(c) EVIDENCE OF MISAPPROPRIATION.—Where a treasurer of a company, having deposited trust funds in a bank, withdraws the same, without being required to do so by reason of checks drawn on him by the company, such a withdrawal is evidence to go to the jury to aid them in determining, in connection with other circumstances, when said treasurer misappropriated the trust funds.⁷

9. Judgments.—A corporation, as well as an individual, may,

1. Hayward v. Pilgrim Society, 21 Pick. (Mass.) 270.

2. Ross v. Madison, 1 Ind. 281; Sears v. King's Co. El. R. Co. (Mass.), 25 N. E. Rep. 98.

The existence of the authority of an agent of a corporation to receive and hold a certificate of stock in another corporation, may be proved by facts and circumstances, written evidence not being necessary. Elysville Mfg. Co. v. Okisko Co., 5 Md. 152. Parol evidence is admissible to prove the official character of persons who acted as defendant's officers, without producing the records of the corporation. Pusey v. N. J. West Line R. Co., 14 Abb. (N. Y.) Pr., N. S. 434.

3. Gregory v. Lamb, 16 Neb. 205; Twelfth Street Market Co. v. Jackson, 102 Pa. St. 269; De Bost v. Albert Palmer Co., 35 Hun (N. Y.) 386; Orr Water Ditch Co. v. Reno Water Co., 17 Nev. 166.

Where a proposition from plaintiff to the defendant—a corporation—offers to perform certain duties for the corporation upon conditions, the presumption that such proposition was presented to the board of trustees of the corporation and acted on by them favorably, which arises from the fact that the plaintiff performed the duties, and the board allowed

his bill therefor, may be overcome by direct and positive proof to the contrary. Hillyer v. Overman etc. Min. Co., 6 Nev. 51.

4. Northrup v. Mississippi etc. Ins. Co., 47 Mo. 435; Lewis v. Brainard, 53 Vt. 519.

In an action for balance claimed to be due the plaintiff for services as superintendent of a corporation, a certificate by the treasurer of the company, who was also consulting director, that the company was indebted to plaintiff in a given sum for balance of salary, is not admissible in evidence as an admission binding on the company, in the absence of any showing of authority in such treasurer and consulting director to make such admissions. A treasurer has not implied authority to make such certificates. Kalamazoo etc. Mfg. Co. v. McAlister, 36 Mich. 327.

5. Blake v. Griswold, 103 N. Y. 429; 16 Am. & Eng. Corp. Cas. 66.

The secretary of a company is the proper person to prove their books. Smith v. Natchez Steamboat Co., 2 Miss. (1 How.) 479.

6. Allison v. Coal Creek etc. Coal Co., 87 Tenn. 60; 24 Am. & Eng. Corp. Cas. 34.

7. Screwmen's Ben. Assoc. v. Smith 70 Tex. 168.

independently of statutory provisions, confess judgment in order to prefer creditors; so a judgment confessed to a director by the corporation of which he was a member cannot destroy its validity on the ground of fraud, the corporation being insolvent.¹

10. Costs.—The awarding of costs in suits against officers of corporations rests entirely in the discretion of the court, and are awarded or withheld from the prevailing party according to circumstances.²

OFFICERS OF MUNICIPAL CORPORATIONS.—See PUBLIC OFFICERS.

OFFICIAL BONDS—See BONDS, vol. 2, p. 448; OFFICERS OF PRIVATE CORPORATIONS.

OFFSPRING—(See also ISSUE, vol. 11, p. 874, n.).—The word "offspring," in its proper and natural sense, extends to any degree of lineal descendants, and has the same meaning as "issue."³

OIL.—See also BURNING FLUID, vol. 2, p. 698 n.; FIRE INSURANCE, vol. 7, p. 1034; GASOLINE, vol. 8, p. 1291; NATURAL GAS; MINES AND MINING, vol. 15, p. 510, n., 592 n., 596 n.⁴

1. *Stratton v. Allen*, 16 N. J. Eq. 229.

2. *Commercial Bank of Buffalo v. Bank of State of New York*, 4 Edw. Ch. (N. Y.) 32.

The directors of a corporation, against which judgment of ouster has been pronounced, are individually answerable for the costs of the proceeding, though they had no direct agency in defending the suit. *People v. Ballou*, 12 Wend. (N. Y.) 277.

3. "When a man uses the terms 'offspring,' 'issue' or 'descendants,' they are vague expressions, which no doubt, on the particular context, may mean 'children,' or remote descendants; but *prima facie* it can hardly be supposed to mean 'children' when that simple word is so obvious a one to use." Per *KINDERSLEY*, V. C., in *Young v. Davies*, 2 Dr. & Sm. 167; 9 Jur., N. S. 399. See also *Thompson v. Beasley*, 3 Drew. 7; 2 Jarman on Wills, 101, n.; *Powell v. Brandon*, 24 Miss. 343; *King v. LaCrosse*, 42 Minn. 286. In *Lister v. Tidd*, 29 Beav. 618, "offspring" was construed "children," to the exclusion of grandchildren.

4. **Petroleum.**—Petroleum or rock oil is essentially composed of carbon and hydrogen, and is a liquid, inflammable substance or bitumen exuding from the earth, and is collected in various parts of the world—on the surface of the

water, in wells and fountains, or oozing from cavities in rocks. *Kier v. Peterson*, 41 Pa. St. 361.

As Mineral.—Petroleum being a mineral substance obtained from the earth by a process of mining, the lands from which it is obtained may be called mining lands, and as such lessees are authorized in express terms by the act of *Pennsylvania*, 1855, to mortgage their terms. *Gill v. Weston*, 110 Pa. St. 313.

"Mineral products," as used in a revenue law, includes coal oil. *Thompson v. Noble*, Pittsb. (Pa.) 201; 11 Min. Rep. 137.

Though petroleum oil is technically a mineral, a reservation of the minerals will not include petroleum, the evident intention of the parties and the ordinary meaning of the word mineral overcoming the technical meaning. *Dunham v. Kirkpatrick*, 101 Pa. St. 43.

Miner.—An oil miner killed by an explosion occasioned by his lighted lantern in passing near an oil well, from which he could smell and hear gas escaping, is chargeable with contributive negligence; and the owners of the well are not liable, although they had not exercised usual care. *McClafferty v. Fisher* (Pa. 1885), 2 Atl. Rep. 610.

A Profit a Prendre.—In *Funk v. Halde- man*, the right granted was that of ex-

perimenting on the land for oil, and a right of all oil raised, reserving one-third of such oil to the grantor, with the condition that if the experiment was abandoned all property rights reverted to the grantor. It was held, that this was an incorporeal hereditament—*i. e.*, a profit *à prendre* in *alieno solo*; and the court, quoting Bainbridge on Mines and Minerals, p. 246, says: "There is a great distinction between a lease of mines and a license to work mines. The former is a distinct conveyance of a natural interest or estate in lands, while the latter is only a mere incorporeal right to be exercised in the lands of others. It is a profit *à prendre*, and may be held apart from the possession of land. In order to ascertain whether an instrument must be construed as a lease or license, it is only necessary to determine whether the grantee has acquired by it any estate in the land in respect of which he might bring ejectment. If the land is still to be considered in the possession of the grantor, the instrument will only amount to a license, and though the licensee will certainly be entitled to search and dig for mines according to the terms of the grant, and appropriate the produce to his own use, on payment of the stipulated rent or proportion, yet he will acquire no property in the minerals till they are severed from the land and have thus become liable to be recovered in an action of trover." *Funk v. Haldeman*, 53 Pa. St. 243.

A guardian has, ordinarily, power to lease any of his ward's property that is of such character as makes it the subject of a lease; but without the approval of the orphans' court he cannot dispose of any part of the realty. Oil, however, is a mineral, and being a mineral is part of the realty. In this it is like coal or any other natural product which *in situ* forms part of the land. It may become, by severance, personalty; or there may be a right to use or take it originating in custom or prescription, as the right of a life tenant to work opened mines, or to use timber for repairing buildings or fences on a farm, or for fire bote. Nevertheless, whenever conveyance is made of it, whether that conveyance be called a lease or deed, it is in effect the grant of part of the *corpus* of the estate and not of a mere incorporeal right. In the case above cited, this is said to be so as to leases of coal lands for the purpose of mining, and there is no reason why the same doctrine should not apply

to oil leases. *Stoughton's Appeal*, 88 Pa. St. 198.

An agreement between vendors of an oil well, by which they sold and transferred all their interest in such well and the machinery, apparatus, etc., containing a provision in substance that in case of failure on the part of the purchaser to make the payments at the times of their falling due, all oil produced upon the premises should thereafter be run into the lines of one of the vendors as security for such payment. *Held*, that the vendors being owners of the fee of the lands, their interest in the wells and all the machinery used in operating the same must be regarded as personal property. *Willetts v. Brown*, 42 Hun (N. Y.) 140.

Benzine.—Benzine is a "rock or earth oil," made from petroleum. *Buchanan v. Exchange F. Ins. Co.*, 61 N. Y. 29; *Bennet v. North British etc. Ins. Co.*, 81 N. Y. 275; *Morse v. Buffalo F. & M. Ins. Co.*, 30 Wis. 534; *And. L. Dict.*

If a policy of insurance forbids the keeping of gasoline or benzine on the premises, authority to use gasoline gas does not warrant keeping either fluid there for any other purpose than for the manufacture of gas. *Liverpool etc. Ins. Co. v. Gunther*, 116 U. S. 113, 126.

Nitro-benzole is not an essential oil, but is made by mixing benzole and nitric acid. These substances combine by reason of their chemical affinity, and nitro-benzole is the result. *Murphy v. Arnson*, 6 Otto (U. S.) 131.

Oil Cloth.—See CLOTH, vol. 2, p. 722, n.

Oil Leakage.—In *Kinnaird v. Standard Oil Co.* (Ky. 1890), 12 S. W. Rep. 937, the defendant company was held liable for damages to the plaintiff's spring of water, caused by coal oil leaking from its storehouse and soaking into the ground and mingling with the unknown veins of water which fed the spring. But in the recent case of *Dillon v. Acme Oil Co.*, 49 Hun (N. Y.) 565, the supreme court of *New York* refused an injunction against the defendant oil company, the leakage from whose refinery had permeated the ground until it reached some underground current and was carried by it to the plaintiff's wells; the reason given by the court being that the defendant had the right to use its own property for legitimate purposes, provided that in doing so it

OLD.—See also **NEW**.¹

OLEOMARGARINE—(See also **ADULTERATION**, vol. 1, p. 207; **POLICE POWER**).—The legislature has the power to enact laws to prevent a simulated article of butter from being put upon the market in such form and manner as to be calculated to deceive. Such a law is a valid exercise of police power by a State, and is not a violation of the United States

exercised reasonable care and skill to prevent injury to others.

In regard to the question of negligence, the *Kentucky* court by PRYOR, J., in *Kinnaird v. Standard Oil Co.* (Ky. 1890), 12 S. W. Rep. 937, said: "It is argued that the appellee was ignorant of the existence of the nuisance or injury to appellant's spring, and had no reason to suppose that its oil was affecting the water in the spring of the plaintiff. This may be so, and still the defendant is responsible for the injury, although it was not aware that its neglect in permitting the oil to leak from the casks and stand in pools outside the building, had or would work an injury to the plaintiff. If a nuisance, whether neglected or not, the appellee is liable."

1. In a statute giving power to lay out new roads and discontinue old ones, "old" does not necessarily mean long-existing, ancient. The phrase "a new road," in such a statute, means a road newly laid out where one was not; and the words "old road" are the opposite thereto, and mean one laid out and used, whether long ago or of more recent date. *People v. Griswold*, 67 N. Y. 59.

Old Enclosures.—This phrase is, ordinarily, equivalent to "old enclosed land," or "old closes," and in that ordinary sense it is used in § 62, Enclosure act, 1845, 8 & 9 Vict., ch. 118. *Hornby v. Silvester*, 20 Q. B. Div. 797. "The term 'ancient enclosures' and 'old enclosures' almost invariably used in private enclosure acts to denote enclosed lands in the ordinary sense of the words." *Per LOPES, L. J.*

Oldest.—Where by the tenor of a will the word "oldest" is evidently by mistake written for the word "youngest," the will will be construed as if it read "youngest." *Tayloe v. Johnson*, 63 N. Car. 381.

Oldest Surviving Son.—The testator, at the time of his will and of his decease, had four sons, George, Thomas, John and Frederick. By his will he devised the copyhold hereditaments now in question to his son Frederick during

his life, then to John (described as my next youngest son, John Pedder), for his life, and then the testator proceeds in these words: "At his demise to be enjoyed by the next surviving son of the younger branch for his life, and so on from son to son till it arrives to the oldest son, then the said copyhold estate to be forever enjoyed by the oldest surviving heir of my oldest surviving son then living for their life or lives forever."

"We are of opinion that by the words, 'the next surviving son of the younger branch,' the testator signified the next of his sons in the ascending order of seniority who should be living at the death of John Pedder (*i. e.*, in the events which happened, Thomas Pedder); that the testator's eldest son, George, took a life interest, and a life interest only, under the terms of the will; that by the word 'then' after the words 'oldest son,' the testator indicated the devolution after the death of the eldest son; that the words, 'my oldest surviving son,' meant the last survivor of my sons; that the words 'then living' are referable to the words 'surviving heir,' and not to the words 'surviving son;' and that the intention of the testator was, after the gift to his eldest son for life, to create a series of life estates forever, each of such estates vesting in the heir for the time being of the last survivor of his sons." *Pedder v. Hunt*, 18 Q. B. Div. 571.

A testator devised land to his daughter, C, for life, "and at her death to her oldest son, in case she had one; otherwise to her oldest daughter; and in case C died without children of her born," then to the children of a son of the testator. By another clause of the will he devised other land to another son for his life, and at his death to his oldest surviving son. *Held*, that "oldest son" in the first instance did not mean "oldest son surviving" his mother; that W, C's oldest son at testator's death, took an indefeasible vested remainder in fee simple after C's life estate in the first parcel of land. *Gardiner v. Guild*, 106 Mass. 25.

constitution.¹

1. *People v. Arensberg*, 105 N. Y. 123, where it was held that such an act was not a violation of the constitution of *New York*. See also *POLICE POWER*.

Oleomargarine Not Necessarily an Imitation of Butter.—A *New York* statute prohibits the manufacture or sale of any article not produced from milk or cream and "in imitation or semblance of, or designed to take the place of, butter." It was held, where the trial court charged that "if the defendant did sell this article called oleomargarine, and that it was not a production of pure, unadulterated milk or cream, then he committed an offense under the law," that the charge was erroneous, the proof showing that when oleomargarine was put upon the market in its normal condition, and before the addition of ingredients designed to modify its natural taste and color, it was of pearl white hue, resembling tallow. *People v. Arensberg*, 103 N. Y. 388; 57 Am. Rep. 741.

Violations of the Various Statutes.—It is a sale of oleomargarine, within the meaning of the *Pennsylvania* statute, May 21st, 1885, enacted for the prohibition of the sale of oleomargarine, where a restaurant serves it to its patrons as a part of a meal ordered by them, though not eaten by the customer, but carried away by him. *Commonwealth v. Miller*, 131 Pa. St. 118.

The fact that a failure to attach a label to imitation butter on sale, was the result of inadvertence and unintentional, was no defence to a prosecution under *Massachusetts* statute of 1886, ch. 317, § 1. The act is forbidden by positive law, and guilty intent is no element of the offense. *Commonwealth v. Gray*, 150 Mass. 327.

The *New Jersey* act of March 22nd, 1886, provides that no person shall sell any imitation of butter or oleomargarine, etc., at retail, "unless he shall first inform the purchaser that the substance is not natural butter or cheese, but imitation," and also provides that at the time of sale he shall "give to the purchaser a card, printed on which shall be the name of the substance sold and the name and address of the seller or vendor. It is not sufficient, under this statute, for the seller to give the name of the substance orally to the vendee, if he neglects to furnish him with such a card. *Bayles v. Newton*, 50 N. J. L. 549.

An unlawful sale made by one member of a partnership, is a sale by the partnership, for which partners are all liable. *State v. Newton*, 50 N. J. L. 549. See also *State v. Newton*, 50 N. J. L. 534.

The legislative design in enacting this section was to secure to dairymen, and to the public generally, a fuller and fairer enjoyment of their property, by excluding from the market a commodity prepared with a view of deceiving those purchasing it, and of obtaining thereby an improper advantage over rival commodities offered for sale. Hence it is immaterial that the prohibited commodity is a wholesome food, since it would be equally wholesome if prepared without the deceptive ingredient. *State v. Newton* (N. J. 1888), 14 Atl. Rep. 604. See also 50 N. J. L. 549.

Statutes Complied With—License.—A person having a license to carry on the business of a retail dealer in oleomargarine in the town of W, peddles oleomargarine at retail from a wagon through the streets. *Held*, that he was not carrying on the business of a retail dealer without having paid the special tax. *United States v. Dube*, 40 Fed. Rep. 576.

Oleomargarine was exposed for sale in the original package, namely, a tub, the top of the cover of which had been duly marked, as well as the side and bottom, but from which the cover had been removed, disclosing the superficial surface of the oleomargarine without any mark. *Held*, that the terms of the statute of 1866, ch. 317, § 1, which provides that the word "butterine" shall be stamped, labelled, or marked upon the top or bottom of every tub, firkin, box, etc., containing any substance or compound made in imitation or semblance of butter, had been complied with. *Commonwealth v. Bean*, 148 Mass. 172.

New Jersey Act.—In an action for a penalty under the "act to prevent deception in the sale of oleomargarine, butterine, or any imitation of dairy products, and to preserve the public health," passed March 22nd, 1886 (Pamph. L., p. 107), *held*, that notice must be given to each purchaser according to the terms of the statute; that if the suit be brought before a justice of the peace, an endorsement on the affidavit on the writ, and at the head of the transcript, "in the court for the trial of small causes."

OMISSION—(See also **MISTAKE**).—The neglect to perform what the law requires. When a public law enjoins on certain officers, duties to be performed by them for the public, and they omit to perform them, they may be indicted. For example, supervisors of the highways are required to repair the public roads; the neglect to do so will render them liable to be indicted.¹

OMNIBUS—(See also **CARRIERS**, vol. 2, p. 783).—For all; containing two or more independent matters. Applied to a count in a declaration, and to a bill of legislation, and perhaps to a clause in a will, which comprises more than one general subject.²

etc., will not invalidate, but will be controlled by, the body of the affidavit, the summons and entry of judgment; that the statute does not require it to be shown that the article sold is deleterious, or that deception was practiced—it is sufficient if notice be not given; that costs are given by the statute; that the appellate court shall give such judgment as the court appealed from should have given. *Bayles v. Newton*, 51 N. J. L. 549. Affirmed, 51 N. J. L. 553.

Proceedings.—The proceedings under the *New Jersey* act (March 22nd, 1886) are summary, and the right to trial by jury does not exist. *State v. Newton*, 49 N. J. L. 617; *Carter v. Camden* Dist. Ct., 49 N. J. L. 600.

Original Package Decision.—The act of assembly of *Pennsylvania*, of May 21st, 1885, prohibiting the sale of oleomargarine, is so limited by the law of the *United States* that it does not apply to a person who has received from another State and sells in its original package, the article known as oleomargarine. *Commonwealth v. Paul*, 3 Cur. Com. & Leg. Miscel. 78. See also **POLICE POWER**.

1. Bouv. L. Dict.

An "omission" to perform a duty, involves the idea that the person to act is aware that performance is required or needful. *London & S.W. R. v. Flower*, 1 C. P. D. 77.

Where, in a contract between M and S for the building of a house by M for S, the contract contained certain provisions for deviations by M from the specifications of the contract as the work progressed, to be made at the request of S, and among others for "omissions from said contract" which "shall in no manner" affect or make void the contract, but shall be deducted from said contract price by a fair and reason-

able valuation, it was held that obviously such omissions were intended to be limited to things which upon the conditions specified might be entirely left out of the building, and did not extend to anything within said specifications which owner might elect to take off the contractor's hands and perform or finish himself. *Shaver v. Murdock*, 36 Cal. 294.

Where an act permits amendments by changing or adding the names of parties where a "mistake" or "omission" has been made, these words mean "something done or left undone in the bringing of the suit that would prevent a trial of the cause upon its merits." *McLoney v. Edgar*, 7 Pa. Co. Ct. Rep. 27.

Where a statute provides for an appointment of commissioners to allow claims against the estate of a deceased person, and further provides that in case such appointment shall be omitted, no person having any contingent or other lawful claim against such deceased person shall be precluded from pursuing such claim against the decedent's administrator or executor, it was held that in a case where commissioners had not been appointed for seven years, that such failure to appoint did constitute an omission within the statute. *Wilkinson v. Winne*, 15 Minn. 128.

Where a statute provides that, notwithstanding any mistake in the name or names or omission to name the real owner of real estate, an assessment shall be valid, it was held that the proper meaning of the phrase, "omission to name real owner," does not go to the length of justifying the total omission of the owner's name. *State v. Town of Bergen*, 33 N. J. 39.

2. And. L. Dict.; *Parkinson v. State*, 14 Md. 193; *Yeager v. Weaver*, 64 Pa. 428.

ON—(See also **ALL**, vol. 1, p. 487; **APPLICATION**, vol. 1, p. 631; **BOARD**, vol. 2, p. 489; **CALL**, vol. 2, p. 114; **COMPLAINT**, vol. 3, p. 381; **FILE**, vol. 7, p. 960; **INDICTMENT**, vol. 10, p. 588; **REASONABLE TIME**).—As denoting contiguity or neighborhood, may mean “near to” as well as “at.”¹ It is interchangeable with “upon.”²

1. *Burnan v. Banks*, 45 Mo. 349. The phrase “on the line of the railroad,” is not a misdescription of the land.

2. See *Caldwell's Case*, 19 Wall. (U. S.) 264; *Sutton v. Commonwealth*, 85 Va. 128.

Where it is provided that “it shall be the duty of the commissioners on receiving the report of the viewers aforesaid, to cause the same to be read before the meeting,” it was held that the word “on” is not equivalent to “immediately on.” *Masters v. M'Holland*, 12 Kan. 25.

Where in extent the line round the land was described as “running to a stake at the river, thence on the river northwest . . . thence northwest . . . to a stake by the river,” it was held, that the words “on the river,” being fairly considered “as intended to apply to the line in its whole extent,” this description made the river a boundary. *Rix v. Johnson*, 5 N. H. 520.

The question whether the day mentioned in the letting is to be computed or not, is frequently involved in cases of suits for trespass, and in actions in which the length of a notice is in question. In such instances nice distinctions have been taken relative to the language of the letting, whether the term is to commence “on,” or “from,” or “from the date,” or “from the day of the date.” *Wilcox v. Wood*, 9 Wend. (N. Y.) 345; *Sheets v. Sheldon*, 2 Wall. (U. S.) 177; *Pugh v. Duke of Leeds*, Cowp. 714; *Steffens v. Earl*, 40 N. J. L. 128.

Where, by the terms of a bill of lading, freight was to be paid “on right delivery of the cargo,” it was held that the delivery and payment were to be concurrent acts, and that the master was not bound to deliver the cargo unless the consignee paid or was ready and willing to pay at the same time. *Paynter v. James*, L. R., 2 C. P. 348. The court said, quoting from *TINDAL*, C. J. [10 Ad. & El. 369]: “The words of the act ‘upon his admission’ do not, as it appears to us, mean after the ad-

mission had taken place, but upon the occasion of, or at the time of, his admission. . . . And we hold it therefore to be unnecessary to refer to instances of the legal meaning of the word ‘upon,’ which, in different cases, may undoubtedly mean either before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason and good sense require the interpretation with reference to the context and the subject matter of the enactment,” and then added: “That is a very clear statement of the various meanings of the words ‘on’ or ‘upon.’”

In a Devise.—Where there is a devise to A in fee, and if he “dies without issue,” then “at,” or “on,” or “upon” his death, over. A takes an estate in fee with an executory devise over, in case he leaves no issue living at his death. *Doe d. King v. Frost*, 3 B. & Ald. 546; *Ex parte Davies*, 2 Sim., N. S. 114; *Parker v. Birks*, 1 K. & J. 156; *Coltsmann v. Coltsmann*, L. R., 3 H. L. 121. In this last case the words were “die without heirs of the body.” But if the phrase is “after” his death, over—that is not quite so strong (per Wood, V. C., *Parker v. Birks*, 1 K. & J. 165), pointing, as it does, less precisely to the moment of his death; and accordingly, the construction in the latter case will frequently give A an estate-tail. *Walter v. Drew*, 1 Comyn 372; *Doe d. Cock v. Cooper*, 1 East 229; *Jones v. Ryan*, 9 Ir. Eq. 249; 2 Jarm. 516–522.

Does Not Always Create a Condition Precedent.—The terms of payment for a quantity of bricks furnished were “four months’ account, and at the end of four months the settlement shall be made, and eight months longer will be given on your paying interest on the amount.” Held, that the payment of interest was not a condition precedent to the debtor’s having eight months’ credit. *Dodd v. Ponsford*, 6 C. B., N. S. 324.

“On or About.”—The actual day may be before or after the day stated. Con-

roy v. Oregon Construction Co., 23 Fed. Rep. 73; Paine v. Commissioner, 66 Mich. 247.

Where a contract—as, for instance, to deliver goods—is by its terms to be performed “on or about” a date named, it is interpreted to mean that it must be performed within a reasonable time after such date; and what is a reasonable time in such a case, is a question of fact for the jury under all the circumstances. *Kipp v. Wiles*, 3 Sandf. (N. Y.) 585, 588. Compare *Ellis v. Thompson*, 3 Mees. & W. 445; *Thomp. on Tr.*, § 1532. See also REASONABLE TIME.

On or about, unless otherwise provided by statute, may not recite a date or an occurrence with sufficient certainty. And. L. Dict.

In an indictment.—An allegation in an indictment that the accused did the act “on or about” a certain day may be void for uncertainty, as not showing but that the action is barred by lapse of time. *United States v. Winslow*, 3 Sawy. (U. S.) 342; And. L. Dict. See also INDICTMENT, vol. 10, p. 588.

On Account.—The words “on account” in a receipt show “that the party signing such receipt does not consider the amount to which it refers a finality.” *Fickett v. Cohn*, 14 Daly (N. Y.) 550, 558.

On—Or As Soon As.—A written agreement to convey land on the 1st of August, 1835, “or as soon as the vendee shall pay \$2,000,” is limited to the 1st of August for execution. The words “or as soon as the vendee,” etc., refer to the period between the date of the contract and the same 1st of August; and a tender of a deed after that time will not be sufficient to support an action for the purchase-money. *Felter v. Weybright*, 8 Ohio 167.

On, All, or Either.—See ALL, vol. 1, p. 487.

On Allotment.—Payment on shares “on allotment,” means “as and when allotted.” *Browne v. Pickering*, 4 Times Rep. 726.

On Application.—See APPLICATION, vol. 1, p. 631.

On Approval.—Words “on approval” have well-understood meaning in diamond trade, and as ordinarily interpreted are neither inconsistent with an authority “to show” or an obligation “to return on demand.” *Smith v. Clews*, 114 N. Y. 190.

On Attaining.—Devise to T for life,

remainder to his second son “on his attaining twenty-one, but in default of there being a second son,” then over, does not give to a second son dying under twenty-one an estate in fee with an executory devise over, but only a remainder contingent on his attaining twenty-one. *Alexander v. Alexander*, 16 C. B. 59.

A gift by will of lands to one “on his attaining twenty-three,” is contingent upon his attaining that age, and he is not entitled to the rents and profits accruing before he has reached it. *Love v. Love*, 7 L. R., I. 306.

On or Before.—See BEFORE, vol. 2, p. 162, n.

Where an agent is authorized to sell land “one-half payable on or before one year,” a contract to sell, “one-half payable in one year,” is in pursuance of the authority; the legal rights of the vendor being the same in either case. *Deakin v. Underwood*, 37 Minn. 98.

Where a party stipulates to pay “on or before” a certain day, he has a right to pay before the day, and to demand performance of the agreement of the other contracting party. *Wall v. Simpson*, 6 J. J. Marsh. (Ky.) 155.

“The promise to pay ‘on or before’ a certain date inserted in a promissory note, gives the maker the option to pay before the time fixed if he chooses, but the holder cannot require payment before the end of the period. *Bates v. Leclair*, 49 Vt. 229; *Jordan v. Tate*, 19 Ohio St. 586; *Mattison v. Marks*, 31 Mich. 421; *Helmer v. Krolick*, 36 Mich. 371. Whether such a provision would destroy the negotiability of a note because of uncertainty in the time of payment, is a question which has been pretty generally held in the negative.” 1 Bank L. Journ. 26-27, and cases there cited and commented on.

In the present case, the words of the return are, that the road shall be opened “on or before the first day of September next.” The natural, legal and correct construction of these words is, that the surveyors shall open the road between the date of the return and the first day of September, a period of nearly a year. *Matter of Public Road in the counties of Middlesex and Monmouth*, 4 N. J. L. 329.

A notice by a landlord to his tenant to move “on or before” the date when the lease expires is not a continuing offer to accept a surrender of the existing lease whenever the tenant elects to make it, but simply means that the

landlord will insist on his legal right to have the tenant move out before the last day of the term. *Koehler v. Scheider*, 10 N. Y. Supp. 101. See also *Geddes v. Thomastown*, 46 Mich. 319.

An act to be done "on or before" a day named, permits a doing on that last day. *Wall v. Simpson*, 6 J. J. Marsh. (Ky.) 155; *James v. Benjamin*, 72 Ga. 185; *Scheerer v. Manhattan L. Ins. Co.*, 16 Fed. Rep. 720; *And. L. Dict.*

On Behalf.—Where security is to be given "on behalf" of a person—*e. g.*, for costs that may become payable by an election petitioner, § 6 (4), *Parl. Elec. act*, 1868, 31 and 32 Vict., ch. 125—it cannot be given by the person himself. *Pease v. Norwood*, L. R., 4 C. P. 235.

The defendants, who were the solicitors to the assignees of a bankrupt, wrote to the plaintiff's solicitor as follows: "We hereby, on behalf of the assignees, consent that net proceeds shall be paid to the plaintiff." It was held that the defendants were not contracting parties, but that the words "on behalf of the assignees" were meant to express a contract by the assignees. *Lewis v. Nicholson*, 18 Ad. & E. 503.

On Board.—A bequest of goods "on board" a ship, may pass goods on board at the date of the will, but removed thence at the testator's death. *Chapman v. Hart*, 1 Ves. Sen. 271. See also *Board*, vol. 2, p. 429.

On Call.—See also *CALL*, vol. 2, p. 714, "n."

On Complaint.—See *COMPLAINT*, vol. 3, p. 381, n.

"On Dutch Terms."—A clause in an insurance policy to pay "all claims and losses on Dutch terms" applies only to claims made for a loss incurred for particular average; where the ship was stranded, sunk or burnt, and that is to be ascertained according to a statement to be made up by a Dutch average stater according to Dutch terms; that is, Dutch law. *Hendricks v. Australasian Ins. Co.*, 9 L. R., Com. Pl. 460; 10 Moak's 248.

On Decease of.—If an estate be vested in trustees upon trust for A for life, and "on the decease of A" to sell, the trustees have no power to sell during the life of A, however beneficial it may be to the parties interested in the trust. *Johnstone v. Baber*, 8 Bea. 233; *Blacklow v. Laws*, 2 Hare 40; *Mosley v. Hide*, 17 Q. B. 91; *Want v. Stallibrass*,

L. R., 8 Ex. 175. But if an estate be devised to A for life and after her decease to trustees upon trust to sell "as soon as conveniently may be after the testator's decease," the trustees, with the concurrence of A, can make a good title. *Mills v. Dugmore*, 30 Bea. 104; *Lewin*, 430.

On Decree.—The power to grant alimony "on any such decree," § 32, *Matrimonial Causes act*, 1857, 20 and 21 V. ch. 85, "if not confined to the time of making the decree, must mean shortly after." Per *JESSEL*, M. R., *Robertson v. Robertson*, 8 P. D. 96; 31 W. R. 652.

"On a decree" being made, means after the decree is made—contemporaneously or immediately after. *Bradley v. Bradley*, L. R., 3 P. D. 50.

"On Deposit to be Paid."—In the absence of any explanatory evidence, a writing by which the depositary acknowledges to have received a certain number of dollars in gold "on deposit, to be paid" to the depositor "on demand," will be held a contract for loan of money, payable presently or on demand; and the statute of limitations will begin to run against it from the date of the writing. *Wright v. Paine*, 62 Ala. 340; 34 Am. Rep. 24.

On duty at all times (as used in a policy of insurance of a steamboat, relative to the watchman) means on or about the boat, so that a fire thereon would not progress without discovery. *Gibson v. Farmers' etc. Ins. Co.*, 1 Cinc. (Ohio) 410.

"On Each Entry."—The 14th section of the act of June 30th, 1864 (13 U. S. St. at Large 214) provides that, on the entry of any goods, the decision of the collector as to the rate and amount of duties to be paid on such goods shall be final and conclusive, unless the importer shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the custom, give notice in writing to the collector on each entry, if dissatisfied with his decision. *WOODRUFF*, J., in discussing this clause says: "These latter words, *i. e.*, 'on each entry,' do not mean, and are not claimed to mean, on each entry, whether for warehousing or for withdrawal for consumption so as to require a protest on the withdrawal of the goods from the warehouse, *i. e.*, 'on each entry' of the same merchandise, one protest when entered in bonds and one when entered for withdrawal, but the reading which

alone gives meaning and effect to these words is, that in all cases, whether of entry in bond or for consumption, the owner shall give notice in writing on each entry to the collector, etc., not meaning on the paper or record all the entry, but in respect to each entry. *Ullman v. Murphy*, 11 Blatchf. (U. S.) 354.

On Either Side.—Where an act forbids the erecting of any house or building beyond the front main walls of "a house . . . on either side thereof," the expression "house . . . on either side thereof" means a building standing within some degree of proximity, and not one standing some considerable distance away from such house. *Rimstrophe v. Henscliff*, 24 Q. B. Div. 171.

"On the Faith Thereof."—For a discussion, as to meaning of this term, see 1 R. & Corp. L. J. 277.

On File.—See also **FILE**, vol. 7, p. 960.

Where a plat was described in a deed as being on file in the office of the register of deeds, and there was no provision for the filing of town plats in the registry office, but only a provision that they shall be recorded, it was held that the use of the words "on file" in reference to the plat were inaccurate, and meant deposited as distinguished from a technical filing of the plat, and that there was no ambiguity. *Slosson v. Hall*, 17 Minn. 95.

On Freight.—The words "on freight," in a memorandum acknowledging the receipt of a quantity of grain, import a bailment rather than a sale; but the words are open to explanation by evidence of a custom or usage, in the particular trade, which goes to explain the memorandum and establish a sale. *Dawson v. Kittle*, 4 Hill (N. Y.) 107.

In an action upon a memorandum acknowledging the receipt of a quantity of corn in store "on freight," it was held that the trial court erred in refusing to receive evidence of a usage explaining the meaning of these words. In *Outwater v. Nelson*, 20 Barb. (N. Y.) 29, the court by HARRIS, J., says: "It is obvious that the party receiving the corn did not become the absolute purchaser. The defendant in the court below offered evidence to show that for forty years it had been the practice at the landing where this corn was delivered to pay for grain left on freight after the owner had ordered it to be freighted and not before, and it was error to exclude this evidence."

"On Goods."—An underwriter who has subscribed an insurance "on goods" may reinsure by the same description, and the policy need not be expressed to be a re-insurance. *Mackenzie v. Whitworth*, 15 Moak's 286; L. R., 1 Ex. D. 36.

On Hand.—A legacy provided for in a will "of all the money on hand or in bank at the time of my decease," will pass money in the hands of an agent. *Copia's Estate*, 5 Phila. (Pa.) 214.

The words in a will, "wheat and corn on hand," pass only that which was in the granaries of the testator at the time of his death, and not the un-gathered crop. *Adams v. Jones*, 6 Jones Eq. (N. Car.) 221.

"On Lakes and Rivers."—A carrier received freight to be transported partly by rail and partly by water, and in the bill of lading it was stipulated that "it is especially agreed and understood that the company is not responsible for loss or damage on lakes or rivers." The loss occurred while the goods were stored in a wharf-boat awaiting arrival of a packet wherein to ship them. It was held that "on lakes and rivers" was intended to mean that the carrier was not to be responsible for loss or damage occurring in the navigation of lakes or rivers, and the loss while upon the wharf-boat was not a loss occurring in navigation. *St. Louis etc. R. Co. v. Smuck*, 49 Ind. 302.

"On the Line Thereof," and "On Each Side Thereof."—Where a statute was enacted "that for the purpose of aiding in the construction of said road, there be, and hereby is granted, to said Burlington & Missouri River Railroad company, every alternate section of public lands, designated by odd numbers, to the amount of ten sections per mile on each side of said road, on the line thereof," held, first, that the words "on the line thereof" do not mean contiguous to the road bed, or to the land taken for the road bed, but the land shall be taken along a parallel to the general direction of the road, on each side of it, and within lines perpendicular to its terminus at each end; second, that under the words, "on each side of said road," the company was not entitled to twenty sections per mile, but to ten sections on each side. If the required number of sections could not be found on one side, it was a loss which Congress had made no provision to supply.

On Marriage.—Read “at twenty-one or marriage.” *Lang v. Pugh*, 1 Y. & C. Ch. 718. See further 1 Jarmon on Wills 488, and cases there cited.

“On Notice.”—By stat. 59 Geo. III, ch. 134, § 39, an order of the church-building commissioners for stopping paths through a churchyard, is to be made with consent of two justices, and on notice being given in the manner and form prescribed by the Highway act, 55 Geo. III, ch. 68; and no appeal lies against the order. *Held*, that an order of the commissioners, being final when made, must be preceded by notice; and that the words “on notice being given,” in stat. 59 Geo. III, ch. 134, § 39, must, with reference to such an order, be read “after notice given.” *Queen v. Arkwright*, 12 Ad. & El. 960.

On Payment of Freight.—“The meaning of the words ‘on payment of freight’ in bills of lading and charter parties, is not that freight is to be paid either immediately before or immediately after the delivery of the cargo, but that the two acts are to be concurrent, and the master may demand payment of the freight each day on the cargo delivered.” 1 Maude & P. 153, citing *Black v. Rose*, 2 Moo. P. C. C., N. S. 277; *Paynter v. James*, L. R., 2 C. P. 348.

On the Premises.—A beer retailer, having only an off license, placed a bench just outside his street door, and his customers sat on the bench while drinking the ale he supplied. *Held*, that the ale was sold “to be consumed on the premises.” *Cross v. Watts*, 13 C. B., N. S. 239. But ale handed through a window to a customer who called for it and drank part of it while standing on the highway, was held not to have been sold “to be consumed on the premises,” though he drank the remainder of the ale while sitting on the window-sill of the house. *Deal v. Schofield*, L. R., 3 Q. B. 8; 8 B. & S. 760.

Under an indictment which charges one, not having obtained the license of a retailer, with selling liquor which was “drunk on or about the premises,” the person so charged may be convicted, though the liquor was drunk in the public road about five yards from his door, but in full view of his premises. *Whaley v. State*, 87 Ala. 83.

On a Passage.—A vessel insured for a year by a policy which provided that if she was “on a passage at the end of

the term” the risk should continue until arrival at port of destination,” sailed from the Chincha Islands on a voyage to Europe, and put into Callao on the mainland, one hundred and twenty miles from the islands, but which is the port of entry for the islands, and where vessels bound from the islands obtain the necessary clearance, water and crew for the further voyage. While there, the year expired. *Held*, that the vessel was not “on a passage” within the meaning of the policy; and that the risk ended with the year. *Washington Ins. Co. v. White*, 103 Mass. 238; 4 Am. Rep. 543.

“On payment of costs of the action to the present time” (in an order allowing an amendment of pleading), such costs as would go to the party against whom the amendment is allowed, in case there had been a determination favorable to him, at the date of the order granting leave to amend. *Havemeyer v. Havemeyer*, 44 N. Y. Super. Ct. 170.

Where the order of a court is “that the nonsuit rendered herein be set aside upon payment of costs,” the payment of costs is not a condition precedent which is to be performed before the full operation of the order. Such order has no other effect than to subject the plaintiff to the payment of the costs of the nonsuit, and if he does not pay them, it may furnish good cause for an attachment to compel such payment. *Dana v. Gill*, 5 J. J. Marsh. (Ky.) 244.

On judgment against a party demurring, with leave to withdraw the demurrer and plead, on payment of costs, he must seek the opposite attorney and tender him the costs; or offer to pay on their being taxed; and this is a condition precedent to pleading. *Sands v. M'Clelan*, 6 Cow. (N. Y.) 582.

On the Road.—In *Newhall v. Ireson*, 8 Cush. (Mass.) 595, the court held that a boundary “to a road” and “on the road” extended to the middle of the road, but in *Goodridge v. Inhabitants of Lunenburg*, 9 Gray (Mass.) 38, where the boundaries were described as beginning “at an angle from the stone wall on the easterly side of the aforesaid road,” the words were held to exclude the presumption that half the road was included within said boundaries.

The presumption that a conveyance of land bordering on a highway carries the fee to the center of the street will not prevail when, from the description

in the deed, it is evident that the road-bed was intended to be excluded; so where the grantee's line was expressly made to bound "on the west side" of a street, it was held that he took no fee in the street. *Baltimore etc. R. Co. v. Gould*, 67 Md. 60.

"On Their Own Responsibility."—A testatrix bequeathed certain sums to her sisters, each to be paid to them "on their own responsibility," they to use it during their natural lives, and at their decease the principal so paid them to go share and share alike to their lawful heirs. It was held that the direction that the funds should be paid over to them "on their own responsibility" meant that they should be entitled to receive the fund, without giving security therefor; but where one of the sisters threatened to dispose of the fund expressly with a view to depriving one of the remaindermen of his share, she might be compelled to give security for the fund in equity. *Sherman v. Sherman*, 36 N. J. Eq. 126.

"On the Sea or Flats."—The grant of land "bounded on the sea or flats" passes flats appurtenant to land granted. In *Saltonstall v. Proprietors Long Wharf*, 7 Cush. (Mass.) 195, the court, by FLETCHER, J., said: "If the deed had said only 'easterly on the sea,' the expression 'on the sea' would undoubtedly have carried the grant to low-water mark, and have included the flats. The expression 'on the sea' legally and technically imports low-water mark. The grantor cannot be supposed to have intended different things by the expression 'sea or flats,' and having fixed the boundary easterly on the sea he cannot be supposed to have intended to abandon the boundary thereby fixed, by the succeeding words 'or flats.'"

On the Section Line.—Where, under an agreement relinquishing to a railroad company a right of way one hundred feet wide over a tract of land situated in two sections of a township, the railroad was to be located "on the section line," it was held that the company would not forfeit its right to the land because its track was not laid immediately on and along the section line, provided it was constructed within the limits of the one hundred feet, and this strip embraced that line. *Munkers v. Kansas City etc. R. Co.*, 60 Mo. 334.

On the Shore.—The phrase "on the shore of any sea or tidal water," in § 458, Merchant Shipping act, 1854 (17 and 18 Vict., ch. 104), means, according

to its nautical interpretation, near the shore, not hard and fast on the shore. *The Leda*, Swabey 40; *The Mac*, 51 L. J., P. D. & A. 81.

The words "on shore" in a statute mean "on land," and it was held that an officer making a seizure at an inland place at any distance from the sea was within the scope of the act. *Rex v. Brady*, 1 Bos. & Pul. 188.

On the Stocks.—An insurance on "a bark on the stocks" covers only the vessel as far as its construction may have proceeded. It does not cover timbers not united to the keel or the structure thereon of the contemplated bark, although completely prepared to be used in it. *Hood v. Manhattan F. Ins. Co.*, 11 N. Y. 532.

On Trial.—The provision of Massachusetts Stat. of 1863, ch. 33, allowing a term to be continued until a case on trial at the end thereof is finished, must be taken literally, and does not apply to a case begun and suspended at some previous time during the term. *Commonwealth v. MacLellan*, 121 Mass. 31.

Under an act allowing an amendment "on the trial," plaintiff may amend his declaration during the argument. *Franklin F. Ins. Co. v. Findlay*, 6 Whart. (Pa.) 483; 37 Am. Dec. 430.

Additional counts filed after the evidence in a case had been closed and the defendant's counsel had concluded his address to the jury, were held to be filed "on the trial." The court said: "The amendment complained of here must be considered as having been allowed within the time prescribed by the act, though perhaps done near to the close of the last hour. It was after the trial had been commenced; but, being before the court had charged the jury in regard to the law of the case, and before any verdict was made or ready to be delivered by the jury, it was certainly done before the close of the trial of the cause, and must therefore have been done on the trial of it—which brings it, as to time, within the express terms of the act." *Yohe v. Robertson*, 2 Whart. (Pa.) 155.

On View.—Where, by a Fisheries act, implements used in contravention thereof "may be seized and confiscated on view by any fishery officer," it was held that the term "on view" was not to be limited to seeing the net in the water while in the very act of drifting; but that if the party acting "on view" saw what, if testified to by him,

ONCE—(See also JEOPARDY, vol. 11, p. 926).¹

ONE.—See note 2.

would be sufficient to convict of the offense charged, that was sufficient for the purposes of the act. *Mowat v. McFee*, 5 Can. Sup. Ct. Rep. 66.

On Water.—A stipulation in a contract for the hire of a slave, that he should not be "employed on water," is not violated by sending him with horses to water in the shallow part of a deep river, with express instructions from the hirer not to ride them into deep water, although the slave is drowned by riding into the deep part of the stream. *Madre v. Saunders*, 3 Jones (N. Car.) 1.

1. "If a statute requires some act to be done periodically and recurrently once in a certain space of time—*e. g.*, the inspection of the boilers of steamers 'once in six months'—it would, probably, be understood to mean that not more than six months should elapse between the two acts. It would not be satisfied by dividing the year into two equal periods, and doing the act once in the beginning of the first, and once at the end of the second period. *Virginia etc. Nav. Co. v. United States*, Taney & Camp. Maryland Rep. 418"; Maxwell 423.

"Once in Each Week."—An affidavit of the publisher of a newspaper, made May 7th, 1880, that the notice of a tax sale "was published in such newspaper for the period of five weeks, and commencing on the 9th day of April, 1880," does not show that it was published once in each week, for four successive weeks, as is required by § 1130, Rev. Stat. Wisconsin; nor does proof that notice of sale was published "for five weeks successively, commencing on the 9th day of April, and ending on the 7th day of May, 1880," satisfy the statute where sale occurred on May 13th. *Ramsey v. Hommel*, 68 Wis. 12. See also *Ronkendorf v. Taylor*, 4 Pet. (U. S.) 361; *Early v. Doc*, 16 How. (U. S.) 610. See also NEWS-PAPER.

At Once.—Where the guarantee was worded as follows: "We hereby authorize the Chicago, etc., Co. to furnish to T A W such building materials as he may wish, not exceeding the value of \$2,000 'at once,' the words at once were held to mean at one and the same time." In *Platter v. Green*, 26 Kan. 268,

the court, VALENTINE, J., said: "We think this limitation fairly construed would prevent the company from furnishing to T A W on the credit of the defendants, building materials to an amount exceeding at one time the value of \$2,000; and this whether the building materials were procured at only one time or several times; but we do not think that this limitation confines the parties to one transaction alone."

2. "When an act of parliament gives power or interest to one person certain, by that express designation of one, all others are excluded, although such statute be in the affirmative." *Foster's Case*, 11 Rep. 59 a. See further 11 Rep. 64.

"Where a statute appoints a conviction to be 'on the oath of one witness,' this ought not to be by the single oath of the informer, for if the same person shall be allowed to be both prosecutor and witness it would induce profligate persons to commit perjury for the sake of the reward." *Dwar*, 672, citing 2 Ld. Raym. 1545.

In a Devise—One.—"It has often been laid down that if a devise be to 'one' of the sons of J S (he having several sons) the devise is void for uncertainty, and cannot be made good." 1 Jarman on Wills 370. But see *Watson Eq*, 1298. So an appointment of "either one" of testator's three sisters as sole executrix (*Re Blackwell*, 2 P. D. 72. Or of "any two" of his sons as executors. *Re Baylis*, 31 L. J., P. M. & A. 119; 2 Sw. & Tr. 613) is void.

But a devise "to one of my cousin A's daughters that shall marry with a Norton within fifteen years" has been held to mean the daughter who shall first marry a Norton, and consequently a good devise. *Bate v. Amherst*, T. Raym. 82. See thereon *Smithwick v. Hayden*, 19 L. R., Ir. 497. And in *Ashburner v. Wilson*, 19 L. J., Ch. 330; 17 Sim. 204. A remainder, after certain estates for life, "to a son of James Wilson, in marriage, his heirs and assigns," was construed as giving an estate in fee to the first-born son of James Wilson. See further 1 Jarman on Wills 433, n. x.

One and All.—A bequest "to each of my nephews, one and all," will include those already given specific legacies

ONEROUS.—See note 1.

under the will. *Bartlett v. Houdlette*, 147 Mass. 25.

One Calendar Month's Notice.—See *CALENDAR*, vol. 2, p. 714, n.

One Day.—Notice of taxation given before nine o'clock, P. M. of one day for the day following at twelve, *held* "one day's notice" within the rule of *Trinity Term*, 1 Wm. IV, § 12; *Edmunds v. Cates*, 4 M. & W. 66.

The Code of Criminal Procedure, art. 554; *Pasc. Dig.*, art. 3022, directs that "no defendant in a capital case shall be brought to trial until he has had one day's service of a copy of the names of persons summoned under a special *venire facias*," unless he waives the same." *Held* that, in computing the "one day's service," both the day of the service and the day of the trial must be excluded. At least one entire day must intervene between the day on which the service was had and the day on which the trial begins. *Speer v. State*, 2 Tex. App. 246.

"One-Half"—"One-Fourth"—Where a deed conveys "one-half" of a piece of land, without specifying which half, it is construed to mean the undivided half. *Baldwin v. Winslow*, 2 Minn. 213.

And so when the grant was of "one-fourth." *McCaul v. Kilpatrick*, 46 Mo. 434.

A written agreement between the owner of real estate and a broker, contained an authority to sell it "for fifteen thousand dollars, about one-half cash." *Held*, that the broker was authorized to sell it "for fifteen thousand dollars cash on delivery of the deed." *Witherell v. Murphy*, 147 Mass. 417.

One Month.—Under a statute which directs that no attorney shall commence an action for his fees until the expiration of one month or more after he shall have delivered his bill, the words "one month or more" were held to mean that the client was intended to have a full month after the delivery of the bill. *Blunt v. Feslock*, 8 A. & E. 577.

One Pair of Boots.—See *BOOTS*, vol. 2, p. 476, n.

One Time.—A covenant to settle property which may "at any one time" be acquired, means "from one and the same source." *Elph. 526, citing Hood v. Franklin*, L. R., 16 Eq. 496; *Re*

Hooper, 13 W. R. 710; 11 Jur., N. S. 479. But it is added: "In neither of these cases had the wife any interest in either fund at the date of the settlement. But in *Mackenzie's Settlement*, 2 Ch. 345, where the wife was entitled at the date of the settlement to two different reversions which fell into possession at the same instant, it was held that, in estimating the value for the purpose of the covenant, the aggregate value of the two shares, and not the value of each share separately, must be taken." So in *St. Leger v. Magniac*, W. N. (80) 183, it was held that "at one time" included sums of money coming from different sources, but falling into possession at the same time, *e. g.*, the death of the wife's mother.

"One Town Lot."—In view of the enlightened public policy which dictated the Homestead act, and its obvious intent, the phraseology "one town or city lot" must be understood as the lot or piece of ground on which the head of a family has a house, with the appurtenances, which he uses as a home, no matter whether it contains more or less than one lot, according to the plat and survey of the town or city. *Wassell v. Tunnah*, 25 Ark. 101.

One Year in Virginia Statute.—A *Virginia* statute, Code 1873, ch. 134, *Distress Law*, provides that if a lien be created on the goods of the lessee or his assignee, etc., while they are upon the leased premises, they shall be liable to distress, but for not more than one year's rent. If, after the commencement of any tenancy, a lien is created on goods on the premises of any person liable for the rent, the person having such lien may remove the said goods from the premises on the following terms; that is to say on paying to the person entitled to the rent so much as is in arrear and securing to him so much as is to become due. What is paid or secured not being more altogether than a year's rent in any case. "One year's rent" and "a year's rent," are used in the statute to denote the amount of rent to be distrained for in the one case and to be paid or secured in the other. *Wades v. Figgatt*, 75 Va. 582.

1. **"Onerous Act"—"Onerous Covenant."**—In English Bankry act, see *Re Vaughan*, *Ex parte Monkhouse*, 14 Q. B. Div. 956; *Re Cock*, *Ex parte*

ONLY.—See note 1.

Shilson, 57 L. J., Q. B. 169; *Re Gee*, 59 L. J., Q. B. 16.

Onerous Title.—Under the *Spanish* and *Mexican* law, property acquired by husband and wife during the marriage, while living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belonged to the community; while property acquired by either of them, by lucrative title solely, constituted the separate property of the party making the acquisition. The fruits and profits and increase of the separate property also belonged to the community. By onerous title was meant that which was created by a valuable consideration, as the payment of money, the rendition of services, and the like, or by the performance of conditions, or payment of charges, to which the property was subject. Lucrative title was created by donation, devise or descent. *Scott v. Ward*, 13 Cal. 458; *Yates v. Houston*, 3 Tex. 433, 452; *Fuller v. Ferguson*, 26 Cal. 546. See also *Wilkinson v. Wilkinson*, 20 Tex. 242; *Panaud v. Jones*, 1 Cal. 514. See also COMMUNITY OF PROPERTY, vol. 3, p. 350.

1. A deed of gift, by which a father conveyed a slave to his married daughter, contained in the *habendum* clause the words, "to the only proper use of the said M and her bodily heirs." *Held*, that the words, "only proper use," created a separate estate in the grantee. *Caldwell v. Pickens*, 39 Ala. 514.

An acceptance of a bill of exchange "in favor of the drawer only" does not render it not negotiable. *Decroix v. Meyer*, 6 Times L. Rep. 444.

"In trust only for E W (a married woman), her executors, administrators and assigns," is not a trust for her separate use. *Spirett v. Willows*, 1 Ch. 520.

The clause in an act of sale restricting warrantee to troubles, evictions, etc., "arising from the acts and promises of the vendor only," is equivalent to a stipulation of no warranty against troubles, evictions, etc., arising from the acts or promises of others than the vendor. *New Orleans etc. R. Co. v. Jourdain*, 34 La. Ann. 648.

Where a factory with its appurtenances is leased with the following reservation: "and in case there shall not,

at any time, be water sufficient to carry the works of the factory and machine shop together, the lessors are to connect their works with the wheel of the factory so as to use only so much water as is sufficient to carry the wheel of the factory at speed," the court by PUTNAM J., said: "The word 'only,' in the reservation, is to be regarded as indicating in some measure the meaning of the reservation. We think the factory wheel was to be kept at full speed at all events; the lessees were in no event to throw off their belts or stop their machinery; it was only the surplus power water which should be enjoyed or so reserved by the lessors. *Hatch v. White*, 22 Pick. (Mass.) 520.

Where, by a rule of procedure in marking a ballot paper, a vote in favor of a candidate was to be denoted by a cross "opposite his name only," the word "only" was so construed as to exclude a ballot where the cross was equally opposite another name, though the ballot was for only one candidate at a time. *Reg. v. Ferguson*, 10 Can. L. T. (Ocll. N.) 98.

A leased certain premises, including dwelling-house, to B for life by a lease containing this provision, "but only for herself to occupy for a residence." *Held*, that this clause did not mean the lessee shall occupy the premises alone; and therefore, when B subsequently married C, who with four children came to reside with her upon the leased premises, A could not maintain summary action to eject her. *Schroeder v. King*, 38 Conn. 78.

In Insurance Policy.—The policy contained this clause: "Carpenter's risk granted during the term of this policy; and it is understood and agreed, and this policy is upon the express condition that the property shall not be operated as a distillery during the term of this insurance, it being intended by this policy to cover carpenter's risk only." *Held*, that the word "only" must be construed as excluding merely the other extraordinary risk named (viz, running the property as a distillery), and not as excluding the general risk common to all property; and the assured may recover for a loss occurring after the occupation for the carpenter work ceased. *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136.

ONUS—ONUS PROBANDI—(See also BURDEN OF PROOF, vol. 2, p. 650, n.)¹

OPEN (To Begin).—I. Spoken of a trial or hearing, to open is to make oral explanation, at the commencement, of the questions involved, and general nature and course of the evidence to be offered.²

To set aside, vacate ; as, to open a decree, a judgment.³

Spoken of a decree, judgment, or order already passed, to open is to grant the party against whom it bears a new opportunity to be heard, in the exercise of judicial discretion, upon considerations of fairness and justice, and not of strict right.⁴

Spoken of a court of tribunal, to open it is to announce in form that it is convened, and ready for transaction of business.⁵

Spoken of a highway, to open means to establish it and make it available to public travel ; but the meaning is often restricted or extended by the context.⁶ Also to clear from obstructions.⁷

In Statute.—The word "only," in the constitutional definition of treason, was used to exclude the odious doctrines of constructive treason. Its use, however, while limiting the definition to plain overt acts, brings these acts into conspicuous relief, as being always and in essence treasonable. *Shortridge v. Macon*, 1 Abb. (U. S.) 58.

Where a bill of exchange has once been so delivered in payment on account of a debt as to raise an implication of a promise to pay the balance, the statute of limitations is answered,¹ as from the time of such delivery, whatever afterwards becomes of the bill; the promise implied from such delivery not being, within the meaning of Stat. 9, Geo. IV, ch. 14, § 1, "an acknowledgment or promise by words only." *Turney v. Dodwell*, 3 E. & B. 134.

The Criminal Practice act, which declares what shall be grounds for new trial, and uses the words, "in the following cases only," clearly excludes all other grounds whatsoever. *People v. Fair*, 43 Cal. 137.

1. The word *onus*, though Latin, is incorporated into the English language, and its use in a charge to the jury is not error. *In re Lawrence Convey*, 52 Iowa 197.

2. Abb. L. Dict. See also OPEN AND CLOSE.

3. And. L. Dict.

4. Abb. L. Dict.

Opening a Judgment—In Practice.—

An act of the court by which a judgment is so far annulled that it cannot be executed, although it still retains some qualities of a judgment; as, for example, its binding operation or lien upon the real estate of the defendant. *Bouv. L. Dict.*

5. Abb. L. Dict.

6. Abb. L. Dict.; *State v. Hudson Co. Ave. Commrs.*, 37 N. J. L. 14.

A highway laid out and established through wild and unfenced land, and afterwards travelled by the public, is "lawfully opened" within the meaning of § 1330, *Wisconsin Rev. St.* *State v. Wertzell*, 62 Wis. 190.

A road that is not closed, or enclosed, or shut up or obstructed, must be an "open road." *Topeka v. Russam*, 30 Kan. 559.

A road may be opened without either notice or work. Travel alone upon such a road would be a sufficient opening of the same. And certainly, whenever a road is in fact used as a public highway by the public, it cannot be considered as an "unopened road," within the meaning of § 1, ch. 150, Laws 1879. *Wilson v. Janes*, 29 Kan. 233.

7. And. L. Dict.; *Gaines v. Hudson*, 37 N. J. L. 14.

To order a resale: as, to open biddings received on judicial sale for irregularity, fraud, or gross inadequacy of price.¹

II. The Adjective.—Subject to alteration and correction, unliquidated, unsettled, as an open account;² accessible to all,

Open and Extend.—The power conferred by an act on the authorities of a city to "open and extend" streets was held to include construction, as well as laying out, in *Sugar Refining Co. v. Mayor etc. of Jersey City*, 26 N. J. Eq. 247.

Open and Keep in Repair.—A power to "open and keep in repair" streets, etc., was held to carry an implied power to alter the grade or level, in *Smith v. Corporation of Washington*, 20 How. (U. S.) 135.

Opened and Worked.—A highway cannot be said to be opened and worked unless it is passable for its entire length. It must be opened as a highway over its entire route. It need not be worked in every part, but it must be worked sufficiently to be passable for public travel. *Beckwith v. Whalen*, 70 N. Y. 430.

"Opened and Dedicated."—Paths marked out, graded, paved, repaired and kept clear of snow by a town or city, crossing common ground used by the inhabitants as a place of public resort or recreation, and serving as one means of communication between public streets with which they connect, between posts such as are usual at the entrance of walks designed for foot passengers, are not ways "opened and dedicated to the public use," within the meaning of the Massachusetts Gen. Stat., ch. 43, § 82, for damages arising from defects in which the town or city may be liable to an action under section 83. *Oliver v. Worcester*, 102 Mass. 489.

Where the owners of land in a city open and dedicate it to public use, as a footway, placing a fence across it, which allows foot passengers to pass, but is dangerous to horses and carriages, the city, whether they have accepted the way or not, are not liable for an injury occasioned by the fence to a horse and carriage, though driven with ordinary care and skill. *Hemphill v. Boston*, 8 Cush. (Mass.) 195.

1. And. L. Dict.

Opening Biddings—Ordering a Resale.—When estates are sold under decree of equity to the highest bidder, the court will, on notice of an offer of a

sufficient advance on the price obtained, open the biddings, *i. e.*, order a resale. But this will not generally be done after the confirmation of the certificate of the highest bidder. So, by analogy, a resale has been ordered of an estate sold under bankruptcy. *Bouv. L. Dict.*; *Wright v. Cantzon*, 31 Miss. 514; *Lupton v. Almy*, 4 Wis. 242. See also *JUDICIAL SALES*, vol. 12, p. 234.

2. Abb. L. Dict.

Open Account.—See *ACCOUNT*, vol. 2, p. 109.

By the term "open accounts" are meant those debts which are subject to future adjustment, and which may be reduced or modified by proof. *Nisbet v. Lawson*, 1 Ga. 275.

An open account is one in which some item of the contract is not settled by the parties, whether the account consists of one item or many; or when there have been running or current dealings between the parties, and the account is kept open, with the expectation of further dealings. *Purvis v. Kroner*, 18 Oregon 414.

Open account (in an exception in the statute of limitations) is used in opposition to stated account, or one which has been closed by the assent of the person charged to its correctness. The fact that a balance is struck between charges on both sides does not make it any less an open account. *Whittlesey v. Spofford*, 47 Tex. 13.

The phrase "open account," in a statute of limitations, does not include the current account of a general agent of his expenditures for his principal. *Dolhoude v. Laurans*, 21 La. Ann. 406.

An account cannot be considered as an open account, where it was signed and returned by the debtor, with a statement in detail of its debtor and creditor items. *Dixon v. Lyons*, 13 La. Ann. 160.

An open account is one in which some item of the contract is not settled by the parties, whether the account consists of one item or many; as, where several loads of corn are sold at the same time and delivered, and there is no stipulation as to the price, and the account is open. *Sheppard v. Wilkins*, 1 Ala. 62.

free to the public, as an open court; ¹ apparent, known, made public, unconcealed public, opposed to secret, not shut or closed. ²

OPEN AND CLOSE, RIGHT TO—(See also BURDEN OF PROOF; CRIMINAL PROCEDURE; TRIAL).

- I. Meaning of the Term, 195.
- II. Effect of Denial of the Right, 195.
- III. To Whom It Belongs, 196.
 1. In Ordinary Actions, 197.
 - (a) To Plaintiff, 197.
 - (1) In Actions for Unliquidated Damages, 198
 - (2) In Actions on Contracts Not Liquidating Damages, 199.
 - (b) To Defendant, 200.
 - (1) In Pleas by Way of Confession and Avoidance, 200.
 - (2) In Actions on Contracts Which Liquidate Damages, 202.
 2. In Special Proceedings, 203.
 - (a) *Devisavit vel Non*, 203.
 - (b) In Proceedings to Condemn Land, 204.
 - (c) In Replevin, 205.
 - (d) In Claim Cases, 205.
 - (e) In Cases of Fraud, 206.
 - (f) In Criminal Cases, 206.
 - (g) In Other Cases, 206.
- IV. Other General Rules, 207.
 1. Rules Established in *Mercer v. Whall*, 207.
 2. Rules Established by American Cases, 208.
 3. Where No Evidence Is Produced, 208.

1. Abb. L. Dict.

Open Court.—This expression is to be understood as conveying the idea that the court must be in session, organized for the transaction of judicial business; or may possibly mean public—free to all. The object of a statute that divorce cases shall be tried in open court, is not merely to prevent secret proceedings therein, by providing that no one shall be refused admittance to the court while such cases are on hearing, but rather that the trials shall be before the courts themselves, and not elsewhere or at any other times, than the law prescribes for the sessions of courts. *Hobart v. Hobart*, 45 Iowa 501.

"In open court," § 5 (1a), Debtors' act, 1869, means "what any one would take to be a court, with the usual accompaniments of the jury box, the witness box, the judge's seat, and seats for solicitors, counsel and others" (per COLERIDGE, C. J.), and does not include the private room of a county court judge, though often used by him for hearing causes. *Kenyon v. Eastwood*, 56 L. J., Q. B. 455.

2. Open corporation (of a city) is where all the citizens or corporators have a vote in the election of the officers of the corporation. *McKim v. Odom*, 3 Bland Ch. (Md.) 416, n.

Open and peaceable entry (as used in *Massachusetts Gen. Stat.*, ch. 140, § 1) means an entry not opposed by the mort-

gagor or person claiming the premises, and made in the presence of two competent witnesses, whose certificate thereof is sworn to and duly recorded within thirty days in the registry for the county where the land lies. *Thompson v. Kenyon*, 100 Mass. 108.

Open Cover.—An "open cover" is a proposal to insure before the goods to be insured are shipped. *Bhugwandass v. Netherlands Ins.*, 14 App. Cas. 83.

An "open place," for the sale of goods, means "open" to the public, not to the sky. Per BOWEN, arg. *Hooper v. Kenshole*, 46 L. J., M. C. 162.

Open Possession.—See ADVERSE POSSESSION, vol. 1, p. 228, n.

Open Policy.—See MARINE INSURANCE, vol. 14, p. 335.

Open Lewdness.—See LEWD AND LASCIVIOUS COHABITATION AND CONDUCT, vol. 13, p. 274.

"Open and Notorious."—In an action for damages caused by a defective sidewalk, an instruction that if the defect in the sidewalk was "open and notorious," the city was chargeable with notice thereof, was not objectionable on the ground that the jury would understand the court to refer to a defect consisting of an open hole in the sidewalk. The word "open" would be understood to mean "not hidden or concealed." *Kelleher v. Keokuk*, 60 Iowa 473.

I. MEANING OF THE TERM.—Since, in all cases whether tried by jury or otherwise, the tribunal is influenced in a great measure by the argument of the counsel, and since the extent of that influence in favor of one side or the other is greatly dependent upon which of the parties has the closing speech, it becomes important to know which party is entitled to the right to close the argument. The right of opening the argument is equally important,¹ and the right to one involves the other; he who opens the argument is the one to close it.²

II. EFFECT OF DENIAL OF THE RIGHT.—This right is considered so important that a refusal of it to one entitled to it and claiming it at the proper time, is substantial error, and, if rightly presented, ground for reversal.³

Open and Notorious Insolvency.—It implies, not the want of sufficient property to pay all one's debts, but the absence of all property within the reach of the law applicable to the payment of any debt. *Hardesty v. Kinworthy*, 8 Blackf. (Ind.) 305.

"Open Sore."—Where an insured person was asked whether he had any "open sores," held, that the words "open sores," as here used, must be taken to mean sores which result from some functional derangement, and not from wounds or accidental injuries. *Life Assoc. v. Gillespie*, 110 Pa. St. 84.

1. See generally, *Bouv. L. Dict.*, Open and Close; *Greenl. on Ev.*, §§ 75, 76; *Thomp. on Tr.*, §§ 226, 227.

But it is said that the exercise of the right to open and close is not necessarily an assumption of the burden of proof. *Shaw v. Abbott*, 6 N. H. 564.

2. *Robinson v. Hitchcock*, 8 Metc. (Mass.) 64; *Judge of Probate v. Stone*, 44 N. H. 593; *Elwell v. Chamberlin*, 31 N. Y. 611; *Penbryn Slate Co. v. Meyer*, 8 Daly (N. Y.) 61.

Where the plaintiff, entitled to the opening and conclusion, waives his right as to the opening argument, although he does not forfeit his right to the closing argument, still he will be compelled to confine his remarks to a comment upon the argument of the defence, and he will not be allowed to discuss the case generally. *Brown v. Swineford*, 44 Wis. 282; s. c., 28 Am. Rep. 582. If the plaintiff opens the argument and defendant submits his case without argument, the plaintiff may not make a concluding speech. *Tyre v. Morris*, 5 Harr. (Del.) 3.

3. *Thomp. on Tr.*, § 226; *Penbryn Slate Co. v. Meyer*, 8 Daly (N. Y.) 61; *Tobin v. Jenkins*, 29 Ark. 151; *Colwell v. Brower*, 75 Ill. 516.

The court has some discretionary power in controlling the argument of a cause; but, unless special reasons in justification are shown, they cannot disregard the regulations of Indiana Code, 112, § 326, which gives to the party holding the affirmative the right to open and close, and the right to reply to new matter, etc. *Ashing v. Miles*, 16 Ind. 329.

Thus it is said that "for the court to deny the party holding the affirmative of an issue of fact, upon the trial of an action, the right of opening and closing the proof, or of replying in the summing up to the jury, is error. It is not a matter within the discretion of the court, but one of absolute right." *Miller v. Thorn*, 56 N. Y. 402.

And in *Royal Ins. Co. v. Schwing*, 87 Ky. 410, that when a party who is entitled to conclude the argument is deprived of that right, the error does not fall within Code Ky., § 134, requiring the court to disregard any error or defect not affecting a substantial right; but requires a reversal, unless the evidence is so palpably against the party as to render it idle to grant a new trial.

In *Missouri*, the right to open and close rests in the sound discretion of the trial court, and an error committed in that respect will not be a ground for reversal, unless it plainly appear that injury has resulted. *Elder v. Oliver*, 30 Mo. App. 575.

In *Iowa*, it has been held that while the right to review the question as to the right to open and close is not absolutely denied, yet there must be a clear case of prejudice, in order to justify a reversal upon that ground. *Preston v. Walker*, 26 Iowa 205.

And in another case it is said that only upon a plain case of error will the exercise of the discretion of the trial court be reviewed in determining, upon

or for a new trial.¹

In other cases it is held that it is entirely within the discretion of the court to determine which party is entitled to open and close and its decision is not revisable;² while still other and high authorities maintain that such refusal is never a proper subject for a bill of exceptions or writ of error, since it is purely a matter of practice as to who shall open and close, determined by the rules of each court, and therefore not subject to revision.³

If there is a statutory regulation on the subject, that is to govern, and it is to be considered mandatory.⁴ The denial of the right to open the argument is an error which is not cured by allowing the right to conclude.⁵ It must be observed, however, that in order for a party to be entitled to a reversal or a new trial on the ground of the refusal of this right, he must claim it at the proper time, not after the trial has considerably progressed.⁶

III. TO WHOM IT BELONGS.—Following the well-known maxim, *Ei uncumbit probatio qui dicit, non qui negat*, the very general rule is adopted that the party who holds the affirmative of an issue, having the burden of proof, shall have the right to open and close. This is founded in principle, since the presumption is

a complicated state of pleading, whether a plaintiff who does not hold the affirmative on all the issues ought to open and close. *Montgomery v. Swindler*, 32 Ohio St. 224; *Marshall v. American Express Co.*, 7 Wis. 1.

1. *Huntington v. Conkey*, 33 Barb. (N. Y.) 218. But a mistake in that respect would be no ground for a new trial, unless injustice was shown to have resulted from it. *Central Bank v. St. John*, 17 Wis. 157.

2. *Wade v. Scott*, 7 Mo. 509; *Pogue v. Joyner*, 7 Ark. 462; *Cothran v. Forsyth*, 68 Ga. 560; *Huntington v. Conkey*, 33 Barb. (N. Y.) 218; *Reichard v. Manhattan etc. Ins. Co.*, 31 Mo. 518; *Ayrault v. Chamberlin*, 33 Barb. (N. Y.) 229; *Fry v. Bennett*, 28 N. Y. 324.

In the cases of *Comstock v. Hadlyme Eccles. Soc.*, 8 Conn. 254; *s. c.*, 20 Am. Dec. 100; and *Scott v. Hull*, 8 Conn. 296, it was decided that a refusal of the right was not ground for a new trial, on the ground that it was a matter entirely within the court's discretion.

In the case of *Carpenter v. First Nat. Bank*, 119 Ill. 352, the doctrine is thus clearly stated: "Whether the plaintiff or defendant shall have the opening and close of the case is generally a matter of discretion to be ordered by the judge at the trial, as he may think most conducive to the administration of justice; and a refusal to grant that privilege to defend-

ants, who set up the defence that the consideration of the note in suit was a conditional sale, and that the payees had failed to comply with the condition, is no ground for a new trial in the Supreme Court of Illinois, where the appellate court has found that the defendants had a fair trial, and were not prejudiced by such ruling."

3. *Day v. Woodworth*, 13 How (U. S.) 363; *Lancaster v. Collins*, 115 U. S. 222; *Hall v. Weare*, 92 U. S. 728.

4. *Heffron v. State*, 8 Fla. 73.

In *Georgia*, this whole subject is regulated by statute. See *Bertody v. Ison*, 69 Ga. 317.

5. "Depriving a party of one part of his legal rights is certainly not cured by allowing another part." To open and conclude the argument is a *right*, not a *privilege*. *Penhryn Slate Co. v. Meyer*, 8 Daly (N. Y.) 61; *Porter v. Still*, 63 Miss. 357.

6. It should be claimed before any proceedings in the trial are had. Therefore, it is too late after the plaintiff has gone on and a reply has been made, to raise the question as to who has the right to open and conclude. *McKibbin v. Folds*, 38 Ga. 235.

After the jury has been sworn, the defendant cannot, as a matter of right, withdraw the general issue and assume the burden of proof with the open and close. It is within the legal discretion

always in favor of the negative side, and if no proof be produced the negative is upheld.¹

It is also a rule to govern, that he who attempts to rebut a presumption of law has always the burden of proof.²

1. In Ordinary Actions—(a) TO PLAINTIFF.—In ordinary actions between parties, the plaintiff being usually the one upon whom the burden of proof devolves has the right to begin the argument and to close it;³ but owing to many intricacies of pleading, to the variety of issues, and to other causes, this general rule is frequently inapplicable. However, whenever he has anything to prove, even if only damages, he is entitled to the right in question.⁴ And where there are several issues, and the plaintiff has the affirmative *in any one of them* he is still entitled to the right.⁵

Where the *general issue* is pleaded, the plaintiff has the right to open and close, even though the defendant may have put in an affirmative plea.⁶

of the court to permit or refuse this. *Mason v. Seitz*, 36 Ind. 516.

1. *Greenleaf's Ev.*, §§ 75, 76; *Hudson v. Wetherington*, 79 N. Car. 3; *Davidson v. Henop*, 1 Cranch (C. C.) 280; *Dunlop v. Peter*, 1 Cranch (C. C.) 403; *Beall v. Newton*, 1 Cranch (C. C.) 404; *Henderson v. Casteel*, 3 Cranch (C. C.) 365; *Mason v. Croom*, 24 Ga. 211; *Kimble v. Adair*, 2 Blackf. (Ind.) 320; *Waller v. Morgan*, 18 B. Mon. (Ky.) 136; *Judge of Probate v. Stone*, 44 N. H. 593; *Colt v. Beaumont*, 32 Mo. 118.

The right to open and close is not a privilege, but a right. It belongs to him on whom is the burden of proof, looking to the substance, and not to the mere form of the pleadings. *Porter v. Still*, 63 Miss. 357.

2. Thus, in an issue of sanity, since the law presumes every person sane, the party who seeks to establish the fact of insanity has the burden of proof, and therefore may commence and conclude. *Com. v. Haskell*, 2 Brew. (Pa.) 491; 1 *Thomp. on Tr.*, § 238. So also in cases of fraud, etc. 1 *Greenleaf on Ev.*, § 18, *et seq.* But as to sanity of testator in case of an application to admit a will to probate, the rule is otherwise. *Post*, subtit, 2, (a).

3. This is so well established as scarcely to need authority. But see *Mercer v. Whall*, 5 Ad. & El., N. S. (48 E. C. L.) 447 (overruling *Cooper v. Wakely*, 1 Mood. & M. 248); *Chamberlain v. Gaillard*, 26 Ala. 504; *Benham v. Rowe*, 2 Cal. 387; s. c., 56 Am. Dec. 342; 1 *Greenleaf on Ev.*, §§ 74, 75; 4 *Minor's Inst.* (2nd ed.) 734.

Plaintiff has the right to open and

close, whenever the general issue is pleaded, whatever may be the nature of the controversy. *Toppan v. Jenness*, 21 N. H. 232.

When the affirmative of any issue made by the pleadings is upon the plaintiff, it is his right to open the case to the jury, and make the closing argument. *Buzzell v. Snell*, 25 N. H. 474; *Belknap v. Wendell*, 21 N. H. 175; *Chesley v. Chesley*, 37 N. H. 229; *Huntington v. Conkey*, 33 Barb. (N. Y.) 218; *Lexington etc. Ins. Co. v. Paver*, 16 Ohio 324.

4. *Minor's Inst.* (2nd ed.) 734; *Cox v. Vickers*, 35 Ind. 27; *Baltimore etc. R. Co. v. McWhinney*, 36 Ind. 436; *Mizer v. Bristol* (Neb. 1890), 46 N. W. Rep. 293.

Where the plaintiff is not entitled to recover unless he establishes the *bona fide* ownership of certain property in controversy, he cannot be deprived of his right to open and conclude by reason of the fact that the defendant alleges that the plaintiff's title is fraudulent and void, and insists that that raises an affirmative issue on his part. *Churchill v. Lee*, 77 N. Car. 341.

5. *Bertrand v. Taylor*, 32 Ark. 470; *Jackson v. Pittsford*, 8 Blackf. (Ind.) 194; *Churchill v. Lee*, 77 N. Car. 341; *Johnson v. Maxwell*, 87 N. Car. 18.

Where there are two paragraphs in the complaint, to one of which only affirmative answers, and to the other the general denial are pleaded, if the plaintiff introduces proof tending to sustain the latter, he is entitled to open and close. *Shaw v. Barnhart*, 17 Ind. 183.

6. *Denny v. Booker*, 2 Bibb (Ky.) 427;

(1) *In Actions for Unliquidated Damages.*—In all actions for unliquidated damages, since it rests upon the plaintiff to establish in every case the amount of his damage, he is entitled to the opening and concluding argument.¹

He can only be deprived of it by the defendant pleading by way of confession and avoidance, by means of which he (the defendant) assumes the affirmative by admitting the plaintiff's cause of action, *and the damages claimed* by the plaintiff.²

The most frequent cases under this class are in actions for slander or libel,³ though the question also arises in actions for assault and battery, where defendant pleads *son assault demesne* and the replication is *de injuria*.⁴

Carpenter v. First Nat. Bank, 119 Ill. 352.

1. Mercer v. Whall, 5 Ad. & El., N. S. 447; Cunningham v. Gallagher, 61 Wis. 170; Aurora v. Cobb, 21 Ind. 493; 4 Minor's Inst. (2nd ed.) 734; Steptoe v. Harvey, 7 Leigh (Va.) 501; 1 Greenleaf on Ev., § 76.

Though the general issue is not pleaded, it is the plaintiff's right, in an action for unliquidated damages, whether it is *ex contractu* or *ex delicto*, to go forward. Young v. Highland, 9 Gratt. (Va.) 16.

Where, in an action for the recovery of damages, for the alleged wrongful seizure and conversion of goods, to which the plaintiff claims title, the defendant answers, simply alleging fraud in the assignment under which the plaintiff claims, the plaintiff on the trial is entitled to open and close the case. Beatty v. Hatcher, 13 Ohio St. 115.

Though the principle stated in the text seems to be of almost universal acceptance, it has yet been held in Kentucky that in an action against a railroad company for killing live stock on the track, where the statute makes the fact of killing *prima facie* evidence of negligence, the defendants, by admitting the killing, assume the burden of proof as to the issue, and as a consequence have the right to make the closing argument, notwithstanding the value of the animal killed has to be proved. Louisville etc. R. Co. v. Brown, 13 Bush (Ky.) 475.

2. See subtit. (b), (1), CONFESSION AND AVOIDANCE.

3. Since even where defendant admits the writing and pleads justification, or privilege, he thereby denies malice. See Visquain v. Finch, 15 Neb. 505; Burckhalter v. Coward, 16 S. Car. 435; Shulse v. McWilliams, 104 Ind. 512;

Fry v. Bennett, 3 Bosw. (N. Y.) 200; s. c. aff'd, 28 N. Y. 324; Hecker v. Hopkins, 16 Abb. Pr. (N. Y.) 301, note. The rule in these cases was first fixed by the famous English case of Mercer v. Whall, 5 Ad. & El., N. S. 447, 463.

Where all the allegations of a complaint for libel, except the amount of damages, are admitted by the answer, the plaintiff will still have the right to open, to show malice and the extent of the injury, even where no special damages have been laid, and malice has not been in terms alleged. Opdyke v. Weed, 18 Abb. Pr. (N. Y.) 223, note; S. P. Hecker v. Hopkins, 16 Abb. Pr. (N. Y.) 301.

But in *Georgia*, it is held that where the defendant in libel justifies he assumes the burden of proof, and is entitled to open and close. Withdrawing the plea and afterwards renewing it does not affect this right, unless by the court's imposing terms. Ransome v. Christian, 56 Ga. 351. And where, in slander, the only plea justifies the words as true, the affirmative of the issue being on the defendant, he has the right to open and reply in evidence and argument. Moses v. Gatewood, 5 Rich. (S. Car.) 234. But these two cases are not considered now to be authority, being opposed by both principle and the weight of authority. 1 Thomp. on Tr., § 230, note 3.

So also where the sole defence is a reliance on facts in mitigation of damages, the defendant is entitled to open and close. McCoy v. McCoy, 106 Ind. 492.

4. Young v. Highland, 9 Gratt. (Va.) 16; Johnson v. Josephs, 75 Me. 544; 1 Thomp. on Tr., § 230; Seymour v. Bailey, 76 Ga. 338.

and in other cases.¹

(2) *In Actions on Contracts Not Liquidating Damages.*—Beyond the cases mentioned, there are a number of others founded upon contract, express or implied, where the contract itself does not liquidate the damage, and where, although the existence of the contract is admitted in the pleadings, the damages claimed are not admitted; or where defensive matter is set up, apparently in avoidance, but which really amounts to a denial of the grounds on which the right of recovery is predicated. In all of these cases, the right to begin and reply is with the plaintiff.²

In an action for assault and battery, where the defendant pleaded a justification, the court allowed him to open and close. It was held error, but not ground for reversal of judgment. *Dille v. Lovell*, 37 Ohio St. 415.

There are three old cases, holding that where *son assault* is pleaded, the defendant has a right to open and close. *McKenzie v. Milligan*, 1 Bay (S. Car.) 248; *Goldsberry v. Stuteville*, 3 Bibb (Ky.) 345; *Downey v. Day*, 4 Ind. 531. But these cannot now be sustained by principle or authority. 1 Thomp. on Tr., § 230.

1. Thus in trespass *de bonis asportatis*, the defendant pleaded the general issue, and filed a brief statement alleging that, as an officer, he attached the goods as the property of a stranger, the plaintiff was entitled to the opening and closing argument before the jury, notwithstanding the defendant admitted that the property was once in the plaintiff, and assumed the burden of proving a transfer to such stranger. *Ayer v. Austin*, 6 Pick. (Mass.) 225; *Bangs v. Snow*, 1 Mass. 181; *Lunt v. Wormell*, 19 Me. 102.

2. Thomp. on Tr., § 232.

For example: In an action for goods sold where the general issue is pleaded, excepting as to a part of the sum demanded, as to a plea of tender. *Buzzell v. Snell*, 25 N. H. 474.

In an action of assumpsit, for the unworkman-like execution of a contract, where the plea is that the work was properly done. *Amos v. Hughes*, 1 Mood. & R. 464.

In an action on an account, cause of action not admitted, where defence of payment is made. *Wright v. Abbott*, 85 Ind. 154.

In an action to foreclose mortgages for the reason that the plaintiff must prove the mortgage debt and all other facts preliminary to his right of foreclosure. *Mason v. Croom*, 24 Ga. 211.

In an action of defendant on a penal bond, where the plea is *nil debet*, performance, set-off, etc., since these pleas do not dispense with the necessity of proving the breaches and the damages. *Sullivant v. Reardon*, 5 Ark. 141.

In an action for goods sold, where the answer admits the sale and delivery, but alleges that the goods are not equal to the quality agreed upon and claims a recoupment. *Penhryn Slate Co. v. Meyer*, 8 Daly (N. Y.) 61.

In an action for the value of a physician's services, and the plea in reconvention admitted the services, but alleged damages by reason of want of skill, etc. *Graham v. Gautier*, 21 Tex. 112.

In an action of covenant for dismissing a servant, where the plea is justification and replication, is *de injuria*, since the damages in this case are unliquidated and must be proven by the plaintiff. *Mercer v. Whall*, 5 Ad. & El., N. S. 447. The two cases of *Paige v. Carter*, 8 B. Mon. (Ky.) 192; and *Sutton v. Mandeville*, 1 Cranch (C. C.) 187, are contrary to the principle of this case (*Mercer v. Whall*), but are generally considered as having been wrongfully decided. 1 Thomp. on Trials, § 232, note 6.

In a suit brought for the price of a carriage, where the defendant answered by a general denial of the debt, and secondly by alleging that he had delivered to the plaintiff an order for the sum due, which the plaintiff had accepted in lieu of payment of his claim. *Perkins v. Ermel*, 2 Kan. 325.

On complaint by a commission merchant for commissions in the purchase of wheat, defendant answered that no wheat was purchased, but the transaction was simply a wager on the future price, to which plaintiff replied by the general denial. *Whitesides v. Hunt*, 97 Ind. 191.

(b) TO DEFENDANT.—It frequently happens that, through the character of the pleading or of the cause, the real burden of proof is upon the party defendant; in all such cases he has the right to open and close.¹ Where there are several defendants, it seems that one who pleads affirmatively has the same rights that the affirmative of a single issue gives a sole defendant.²

(1) *In Pleas by Confession and Avoidance*.—This is particularly the case in pleadings by way of confession and avoidance, or in any similar proceeding where the defendant admits all the plaintiff's allegations and pleads a justification or discharge, or any other plea in avoidance.³ He must, however, admit the facts,

Where the plaintiff declared upon a contract under which he made and delivered a machine capable of performing certain work. Defendant denied that the machine was capable of performing the work. *Howard v. Hayes*, 47 N. Y. Super. Ct. 89.

See also as to actions upon promissory notes, in which the plaintiff has the opening and conclusion: *Dalulman v. Hammell*, 45 Wis. 466; *Jarboe v. Scherb*, 34 Ind. 350; *Loggins v. Buck*, 33 Tex. 113; *Bates v. Forelet*, 89 Mo. 121; *Redmond v. Tone*, 10 N. Y. Supp. 506.

1. *List v. Kortepeter*, 26 Ind. 27; *Harvey v. Ellithorpe*, 26 Ill. 418; *Tip-ton v. Triplet*, 1 Metc. (Ky.) 570; *Page v. Carter*, 8 B. Mon. (Ky.) 192; *Davies v. Arbuckle*, 1 Dana (Ky.) 525; *Elwell v. Chamberlin*, 31 N. Y. 611; *Lafayette County Bank v. Metcalf*, 29 Mo. App. 384. See also *Maurice v. Worden*, 54 Md. 233; *Cheesman v. Hart*, 42 Fed. Rep. 98.

The right of the defendant to open and conclude the argument, upon an affirmative plea, cannot be derived from a sham plea, or a count entirely unsupported by proof. *Young v. Hayden*, 3 Dana (Ky.) 145; *Vanzant v. Jones*, 3 Dana (Ky.) 464.

Where defendant claims that he holds the affirmative, and consequently has the right to open and close, he must make his right appear beyond a reasonable doubt; he cannot compel the court to make a critical examination of the pleadings to determine whether he is entitled to the privilege claimed. *Claflin v. Baere*, 28 Hun (N. Y.) 204.

2. And therefore is entitled to open and close. *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267.

It is held, however, that in an action against a principal and surety, where the former answered by general denial,

and the latter by confession and avoidance, the plaintiff was entitled to open and close. *Kirkpatrick v. Armstrong*, 79 Ind. 384.

And in a later case the proposition in the text is directly controverted. *Clodfelter v. Hulett*, 92 Ind. 426.

3. *Aurora v. Cobb*, 21 Ind. 492; *Katz v. Kuhn*, 9 Daly (N. Y.) 166; *Chicago etc. R. Co. v. Bryan*, 90 Ill. 126; *Blackledge v. Pine*, 28 Ind. 466; *Brown v. Kirkpatrick*, 5 S. Car. 267; *Cross v. Pearson*, 17 Ind. 612; *Shank v. Fleming*, 9 Ind. 189; *Burckhalter v. Coward*, 16 S. Car. 435; *Seymour v. Bailey*, 76 Ga. 338; *Hittson v. State* (Tex. 1890), 14 S. W. Rep. 780.

The fact that the complaint alleges facts not essential for plaintiff to aver or prove, and that the same are denied by the answer, does not deprive defendant of such right. (Reversing s. c., 19 Hun (N. Y.) 350.) *Murray v. New York L. Ins. Co.*, 85 N. Y. 236; s. c., 10 Abb. N. Cas. (N. Y.) 309.

In a suit on a note, where the defendant put in no general denial, but alleged matter in set-off, and the plaintiff replied, denying the set-off, and alleging affirmative matter, it was held that the defendant should have the opening and the closing. *Bowen v. Spears*, 20 Ind. 146.

Thus in an action upon a promissory note against an endorser, where the allegations of the complaint were not denied, but defendant set up in his answer that he was an accommodation endorser, and that the note had been paid out of moneys in certain hands applicable thereto, the defendant holds the affirmative of the issue, and is entitled to open and conclude. *Conselyea v. Swift*, 103 N. Y. 604.

Plaintiff sued on a note, the making of which was not denied. Defendant took the ground that nothing was due,

and not generally that the plaintiff has a *prima facie* case.¹ But where he pleads both the general issue and special affirmative pleas, he must withdraw the general issue before he can demand the right.² And the *whole* of the plaintiff's cause of action must be admitted—not merely a portion; nor must there be an evasive or doubtful admission.³

and plaintiff relied solely on the note. It was held that defendant had the right to open and close. *Plenty v. Rendle*, 43 Hun (N. Y.) 568.

In a suit on a contract where answer was that it was obtained by fraud; reply in denial; the defendant was allowed to open and close. *Patton v. Hamilton*, 12 Ind. 256.

An admission of the plaintiff's case, by the defendant, must be entered upon the record, in order to entitle the latter to the reply, under the 62nd rule of court in *South Carolina*. *Johnson v. Wideman, Dudley* (S. Car.) 325.

Instances of pleas by confusion and avoidance are seen in these, viz:

Payment.—*Saulsbury v. Ford*, 5 Del. 575; *Love v. Dickerson*, 85 N. Car. 5.

Where the defendant pleads payment with leave, and afterwards a discharge in bankruptcy, the plea of payment being traversed, and the discharge impeached for fraud, the defendant is entitled to open and close the argument of the case. *Richards v. Nixon*, 20 Pa. St. 19.

Set-Off.—*Williams v. Shup*, 12 Ill. App. 454. *Compare* *Camp v. Brown*, 48 Ind. 575.

Usury.—*Huntington v. Conkey*, 33 Barb. (N. Y.) 218; *Ayrault v. Chamberlain*, 33 Barb. (N. Y.) 229; *Sammons v. Hawver*, 25 W. Va. 678; *Katz v. Kuhn*, 9 Daly (N. Y.) 166.

Tender.—*Auld v. Hepburn*, 1 Cranch (C. C.) 122.

Statute of Limitations.—The most frequent instance of this method of pleading is where defendant pleads the statute of limitations. See *Payne v. Hathaway*, 3 Vt. 212.

But where a defendant pleaded the statute, and the replication was that defendant was beyond the limits of the State when the cause of action accrued, and the same did accrue within six years, concluding with a verification, the affirmative of the issue was with the plaintiff, and he was entitled to the opening and conclusion. *Thornton v. West Feliciana R. Co.*, 29 Miss. 143.

Want of Consideration.—*McShane v. Braender*, 66 How. Pr. (N. Y.) 294.

Determined by Pleadings.—Where the answer admits some allegations of the petition and denies others, the burden of proof is still on the plaintiff as to the latter, and an oral admission of their truth at the trial obviates the necessity of further proof, but will not deprive plaintiff of the right to open and close the case, since the right to the closing argument must be determined by the state of the pleadings when the parties go to trial. *Lake Ontario Nat. Bank v. Judson* (N. Y.), 25 N. E. Rep. 367.

1. *Wigglesworth v. Atkins*, 5 Cush. (Mass.) 212.

But it has been held elsewhere that where the admission in the answer established a *prima facie* case for plaintiff, the onus rested on defendant, thereby giving him the right to open and conclude. *Stronach v. Bledsoe*, 85 N. Car. 473.

2. *Carpenter v. First Nat. Bank*, 119 Ill. 352; *Blackledge v. Pine*, 28 Ind. 466.

A plea of justification under code Ga., § 3051, operates as an abandonment of the general issue, and the defendant becomes entitled to open and conclude the argument. *Rigdon v. Jordan*, 81 Ga. 668. *Compare*, however, *Johnson v. Bradstreet Co.*, 81 Ga. 425.

3. *Seymour v. Bailey*, 76 Ga. 338; *Saunders v. Bridges*, 67 Tex. 93; *Camp v. Brown*, 48 Ind. 575; *Doe v. Warren v. Bray*, 1 Mood. & M. 166.

Therefore an admission by defendant of the cause of action, except as to the value of the subject matter, is not a sufficient admission to entitle defendant to open and close. *Saunders v. Bridges*, 67 Tex. 93. *Compare* *Ney v. Rothe*, 61 Tex. 374.

So one's answer that there are stipulations in the contract other than those stated in the complaint, does not admit the cause of action alleged, and does not entitle him to open and close. *McConnell v. Kitchens*, 20 S. Car. 430; s. c., 47 Am. Rep. 845.

Where the defendant admits the plaintiff's cause of action, and the only issue for the jury is on the defendant's declaration in set-off, the plaintiff is still

If a complaint is confessed and avoided, and this answer is wholly denied, the defendant has the opening and concluding argument, even though there may be also confession and avoidance to the matter in the answer in addition to the denial.¹

The admission, in order to secure the right to the defendant, must be made in season, and is of no avail if made too late.² Unless the pleading is by way of confession and avoidance, or a similar plea, by which the plaintiff's cause of action is admitted, the defendant cannot claim the right to open and conclude, even though his answer may be all affirmative.³

(2) *In Action on Contract Which Liquidates Damages.*—Where the action is on a contract which, by its terms, "liquidates" the damages, since the plaintiff has nothing to prove as regards damages in order to recover, the defendant has the right to begin after admitting the plaintiff's cause of action.⁴ There are many examples of this character of contract: *e. g.*, a policy of life⁵ or fire insurance,⁶ a bill of exchange,⁷ promissory note,⁸

entitled to open and close the case. *Page v. Osgood*, 2 Gray (Mass.) 260.

Where all the plaintiff's case is admitted save only an immaterial part which is denied, the defendant retains the right to open and conclude. *Miller v. Thorne*, 56 N. Y. 402.

Where, in an action on a negotiable promissory note, the defendant answered, admitting the execution of the note, and the assignment thereof, "after maturity and dishonor," and pleading a set-off against the payee of the note, it was held that the defendant had not so admitted the plaintiff's cause of action as to allow his claim and entitle himself to the opening and close of the case. *Goodpaster v. Vorris*, 8 Iowa 334; s. c., 74 Am. Dec. 313.

Where an answer does not make an admission of the facts alleged in the complaint sufficient to entitle plaintiff to a judgment without introducing evidence, he is properly allowed to open and conclude the case. *Rahm v. Deig*, 121 Ind. 283.

1. *Judah v. Vincennes University*, 23 Ind. 273. The ruling in this case has since been modified. *Felters v. Muncie Nat. Bank*, 34 Ind. 251; s. c., 7 Am. Rep. 225.

2. Therefore it should be filed before the trial commences; and it is too late to do so after the writ and declaration and specification of defence have been read to the jury. *Wigglesworth v. Atkins*, 5 Cush. (Mass.) 212; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40.

Defendant does not admit "by his

pleadings" any part of plaintiff's case, so as to have the right to open and close, by an oral admission on appeal from the justice's court, he having made no admission below where pleadings may be oral or written. *Mitchell v. Fowler*, 21 S. Car. 298.

3. Thus where the defendant's answer contained but a single affirmative paragraph, but not in confession or avoidance, he was not entitled to the opening and close. *Kinney v. Dodge*, 101 Ind. 573.

4. 1 Thomp. on Trials, § 231.

This class of contracts included those in which the damages are ascertained or capable of being ascertained; therefore where nothing remains to be done save to compute the interest due, the contract is embraced under the above head. *Brennan v. Security L. Ins. Co.*, 4 Daly (N. Y.) 296.

5. *Brennan v. Security L. Ins. etc. Co.*, 4 Daly (N. Y.) 296. Compare, however, *Ashly v. Bates*, 15 M. & W. 589.

6. *Viele v. Germania Ins. Co.*, 26 Iowa 10, 44; s. c., 96 Am. Dec. 83.

7. *Warner v. Haines*, 6 Carr. & P. (Eng.) 666; *List v. Kortepeter*, 26 Ind. 27.

8. *Kimble v. Adair*, 2 Blackf. (Ind.) 320; *Bowen v. Spears*, 20 Ind. 146; *Harvey v. Ellithorpe*, 26 Ill. 418; *Tip-ton v. Triplett*, 1 Metc. (Ky.) 570; *Ayrault v. Chamberlin*, 33 Barb. (N. Y.) 229; *Hudson v. Wetherington*, 79 N. Car. 3; *McShane v. Braender*, 66 How. Pr. (N. Y.) 294.

bank check,¹ or similar written instruments.²

In all such cases, where the defendant, admitting the execution of the instrument, sets up matter in avoidance or any other affirmative defence—*e. g.*, tender,³ set-off,⁴ release by bankrupt or insolvency laws,⁵ fraud or duress,⁶ usury,⁷ want of jurisdiction,⁸ want of title in plaintiff,⁹ or a similar defence¹⁰—he has the affirmative, the burden of proof, and therefore the right to open and conclude the argument.¹¹ While this is the general rule there are numerous exceptional cases, and somewhat of a conflict of authority.¹²

2. In Special Proceedings.—The governing principle which should furnish an adequate rule in every proceeding is this: That the right to open and close belongs to *the party who seeks to alter the existing state of things.*¹³

(a) *DEVISAVIT VEL NON.*—Applying this rule in the case of an issue of *devisavit vel non*, the rule would be that when a will is first brought into court and exhibited for probate, whether in an original or appellate proceeding, the right is with the proponent or party affirming the will,¹⁴ and that after the will has been ad-

1. *Elwell v. Chamberlin*, 31 N. Y. 611.

2. *Richards v. Nixon*, 20 Pa. St. 19; *Scott v. Hull*, 8 Conn. 296; *Aurora v. Cobb*, 21 Ind. 492.

3. *Auld v. Hepburn*, 1 Cranch (C. C.) 122. See *Buzzell v. Snell*, 25 N. H. 474.

4. *Bowen v. Spears*, 20 Ind. 146; *Brown v. Kirkpatrick*, 5 S. Car. 267. Compare *Penhryn State Co. v. Meyer*, 8 Daly (N. Y.) 61; *Graham v. Gautier*, 21 Tex. 112.

5. *Warner v. Haines*, 6 Carr. & P. 666; *Richards v. Nixon*, 20 Pa. St. 19.

6. *Elwell v. Chamberlain*, 31 N. Y. 611; *Brennan v. Security L. Ins. etc. Co.*, 4 Daly (N. Y.) 296; *Hoxie v. Green*, 37 How. Pr. (N. Y.) 97.

7. *Harvey v. Ellithorpe*, 26 Ill. 418; *Ayrault v. Chamberlin*, 33 Barb. (N. Y.) 229; *Huntington v. Conley*, 33 Barb. (N. Y.) 218.

8. *Tipton v. Triplett*, 1 Metc. (Ky.) 570; *Hoxie v. Green*, 37 How. Pr. (N. Y.) 97.

9. *Hoxie v. Green*, 37 How. Pr. (N. Y.) 97. Compare *Hudson v. Wetherington*, 79 N. Car. 3.

10. *Blackledge v. Pine*, 28 Ind. 466; *Judah v. Vincennes University*, 23 Ind. 272.

11. 1 Thomp. on Trials, § 230.

12. Thus it is held in several cases that the party who first denies the validity of a paper as a testamentary paper, and asks for issues to determine the question, is entitled to open and close

the case before a jury. *Edelen v. Edelen*, 6 Md. 288; *Townshend v. Townshend*, 7 Gill (Md.) 10; *Farrell v. Breman*, 32 Mo. 328; *McClintock v. Curd*, 32 Mo. 411; *Higgins v. Carlton*, 28 Md. 143; *Stockdale v. Cullison*, 35 Md. 324. See also *Yingling v. Hesson*, 16 Md. 120.

13. 1 Thomp. on Trials, § 239.

14. 1 Thomp. on Trials, § 239; *Rau-
debaugh v. Shelley*, 6 Ohio St. 307; *Kennedy v. Upshaw*, 66 Tex. 442; *Vancleave v. Beam*, 2 Dana (Ky.) 155. See also *Goss v. Turner*, 21 Vt. 437; *Perkins v. Perkins*, 39 N. H. 163; *Comstock v. Hadlyme Eccles. Soc.*, 8 Conn. 254; s. c., 20 Am Dec. 100.

This principle (that proponent of the will must assume the affirmative) is held in some States to be so strong that where the only issue was the sanity of the testator, the executor must open and close, since he has the burden of proof—and this notwithstanding the strong presumption the law affords in favor of the sanity of everyone. *Phelps v. Hartwell*, 1 Mass. 71; *Williams v. Robinson*, 42 Vt. 658; *Beaubien v. Cicotte*, 8 Mich. 9; *Boardman v. Woodman*, 47 N. H. 120; *Knox's Appeal*, 26 Conn. 22; *Brooks v. Barrett*, 7 Pick. (Mass.) 94.

And the principle applies, it is said, in all cases, no matter in what form the issues for trial may be drawn. *Hardy v. Merrill*, 56 N. H. 227; s. c., 22 Am. Rep. 441.

mitted to probate in common form in any future proceeding to contest its validity, whether in the same or another tribunal, the right is with the contestant, called variously the plaintiff, the petitioner, the caveator, or the objector.¹

(b) IN PROCEEDINGS TO CONDEMN LAND, ETC.—In a proceeding to condemn land for public use, such as railroads, highways, etc., and for the assessment of the compensation to be made to the land owner, the petitioner holds the affirmative of the issue, and consequently has the right to begin and reply both in the introduction of evidence and in the argument to the jury.² On

Again, it is said that the trial of an issue of *devisavit vel non* is a proceeding *in rem* to which there are strictly no parties; and when, upon the trial of such issue, the caveators admitted the execution of the will according to the forms of law, and that the testator was of age, leaving only the question of his sanity to be tried, the *caveators* were *not* entitled to open and conclude the case. *Syme v. Broughton*, 85 N. Car. 367.

Likewise, in an appeal from a decree of the judge of probate establishing a will, an issue is formed to the jury upon the sanity of the testator, the opening and closing of the cause belonging to the executor. *Ware v. Wäre*, 8 Me. 42; *Buckminister v. Perry*, 4 Mass. 593. *Compare*, however, as to the issue of sanity, *Dunlop v. Peter*, 1 Cranch (C. C.) 403; 1 *Thomp. on Trials*, § 238.

When Sanity of Testator Is in Issue.—

The doctrine on this question (*i. e.*, where sanity is the issue) is by no means well settled, however; many authorities maintaining that the presumption of sanity always prevails and is sufficiently strong to throw the burden of proof upon the party opposed to the probate of the will. See *Whitenach v. Stryker*, 2 N. J. Eq. 11; *Sloan v. Maxwell*, 3 N. J. Eq. 563; *Den v. Gibbons*, 22 N. J. L. 155; *Grabill v. Baar*, 5 Pa. St. 441; s. c., 47 Am. Dec. 418; *Werstler v. Custer*, 46 Pa. St. 502; *Egbert v. Egbert*, 78 Pa. St. 326; *Grubb v. McDonald*, 91 Pa. St. 236; *Saxon v. Whitaker*, 30 Ala. 237; *Copeland v. Copeland*, 32 Ala. 512; *Cotton v. Ulmer*, 45 Ala. 378; s. c., 6 Am. Rep. 703; *McDaniell v. Crosby*, 19 Ark. 545; *Mears v. Mears*, 15 Ohio St. 90; *Menkins v. Lightner*, 18 Ill. 282; *Payne v. Banks*, 32 Miss. 292; *Mullins v. Cottrell*, 41 Miss. 316; *Burton v. Scott*, 3 Rand. (Va.) 399; *Singleton's Will*, 8 Dana (Ky.) 315; *Hawkins v. Grimes*,

13 B. Mon. (Ky.) 258; *Panaud v. Jones*, 1 Cal. 488; *Mayo v. Jones*, 78 N. Car. 402; *Rush v. Megee*, 36 Ind. 69; *In re Coffman*, 12 Iowa 491; *Chandler v. Barrett*, 21 La. An. 58; s. c., 99 Am. Dec. 701; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *Fear v. Williams*, 7 Baxt. (Tenn.) 250; *Higgins v. Carlton*, 28 Md. 141; *Taylor v. Cresswell*, 45 Md. 422; *Harris v. Hays*, 53 Mo. 93; *Stevens v. Vancleve*, 4 Wash. (U. S.) 269; *Hall v. Unger*, 4 Sawy. (U. S.) 672; *Suffield v. Morris*, 2 Harr. (Del.) 379. See also *WILLS*, Am. & Eng. Encyc. of Law:

1. *Banning v. Banning*, 12 Ohio St. 437. The reason here is patent; a will once admitted to probate is presumed to be valid and binding in law, and any party attempting to deny such validity has the burden of proof, since he wishes to alter the existing state of things.

2. *Thomp. on Trials*, § 247; *South Park Commissioners v. School Trustees*, 107 Ill. 489; *McReynolds v. Burlington etc. R. Co.*, 106 Ill. 152; *Neff v. Cincinnati*, 32 Ohio St. 215. See also for a collection of authorities *EMINENT DOMAIN*, 6 Am. & Eng. Encyc. of Law 613.

The reason of this rule is that the petitioner, being the party seeking to condemn the land, is the moving party. The land cannot be taken without just compensation being made to the owner, and the proceeding of the petitioner, therefore, is a proceeding to ascertain what is just compensation, and should he offer no proof he would be defeated. *McReynolds v. Burlington etc. R. Co.*, 106 Ill. 152.

The contrary, however, has been held in Arkansas, the court maintaining that the land owner is the real actor; that the extent of the damage is the object of the enquiry, and the burden of proof is upon him; no matter which party initiates the proceedings. *Springfield etc. R. Co. v. Rhea*, 44 Ark. 258.

an appeal from an award of damages the rule is otherwise, and the land owner is considered the plaintiff.¹

(c) IN REPLEVIN.—It was said, in an early English case,² that there was no distinction to be made between an action of replevin and any other action: and this idea has been maintained to some extent in this country.³ Where the defendant pleaded in avoidance a lien on the goods, it was considered that he sufficiently admitted the plaintiff's claim to entitle him to the opening and conclusion.⁴

(d) IN CLAIM CASES.—In all such cases (consisting principally of claims for property taken under execution or similar process), the burden of proof lies upon the party attempting to establish his claim, and he is therefore entitled to begin and conclude.⁵

1. Omaha etc. R. Co. v. Walker, 17 Neb. 432; EMINENT DOMAIN, 6 Am. & Eng. Encyc. of Law 613.

And where *both parties* to a proceeding instituted by a railroad company to condemn land appeal to the circuit court, each excepting to the amount awarded, the land owner has the right to open and close. Indiana etc. R. Co. v. Cook, 102 Ind. 133.

On appeal from proceedings before commissioners concerning the location of a highway, where the remonstrance, as amended in the circuit court, is based upon a claim for damages alone, and raises no question as to the utility of the way, the burden is on the remonstrant, who, therefore, may open and close. Peed v. Brenneman, 89 Ind. 252.

2. Curtis v. Wheeler, 1 Mood. & M. 493, per LORD TENTERDEN. See also 1 Thomp. on Trials, § 240.

3. Thurston v. Kennett, 22 N. H. 151. In this case the defendant avowed the taking in a certain lot, and alleged that it was his soil and freehold. The plaintiff replied that the soil and freehold was in A, and tendered an issue thereon, which the defendant joined. It was held that the plaintiff had the right to open and close. See also Belknap v. Wendell, 21 N. H. 175.

And under a plea of "no rent arrear," in replevin for cattle distrained, the affirmative is with plaintiff. Hungerford v. Burr, 4 Cranch (C. C.) 349; Greer v. Nourse, 4 Cranch (C. C.) 527; Kearney v. Gough, 5 Gill & J. (Md.) 457.

Where an action of replevin was instituted to recover goods taken under an execution and the defendant in replevin pleaded that the goods belonged

to the defendant in execution, the court considered that the defendant in replevin had the right to open and conclude, his plea being justification, etc. Colwell v. Brower, 75 Ill. 517. See also Vance v. Vance, 2 Metc. (Ky.) 581. See these last two decisions criticised in 1 Thomp. on Trials, § 240.

4. The proof of value by the plaintiff is incidental, and does not affect this. McLees v. Felt, 11 Ind. 218.

5. James v. Kiser, 65 Ga. 515, Baker v. Lyman, 53 Ga. 539; Campbell v. Roberts, 66 Ga. 733, Doyle v. Donovan, 76 Ga. 44; Yingling v. Hesson, 16 Md. 112. See also Latham v. Selkirk, 11 Tex. 314.

If on the trial of a claim for wrongful attachment, no evidence is offered by the attaching creditor as to the liability of two of several defendants, the only question is that of damages, and the burden as to that being upon the defendants, they have the right to open and close. Whitney v. Brownell, 71 Iowa 251.

Where, in an attachment suit, interpleaders claim the property, it is in the sound discretion of the court to allow plaintiff to open and close. Meredith v. Wilkinson, 31 Mo. App. 1.

Where an execution is levied on property to which a third person makes claim, in the trial of the claim case the burden is on the plaintiff in the execution to show that the property is subject thereto; and if the claimant fails to remove this burden by admissions or otherwise, plaintiff should be allowed to open and conclude the argument. Doyle v. Donovan, 76 Ga. 44. See also as to attachment suits, Parks v. Young, 75 Tex. 278; Milburn Wagon Co. v. Kennedy, 75 Tex. 212.

(e) IN CASES OF FRAUD.—A general presumption exists in law that right acting attends human conduct, and therefore fraud is never presumed, but must be affirmatively proven as a fact. The burden of the proof, therefore, and with it the right to open and close, belongs to the party alleging it.¹

(f) IN CRIMINAL CASES.—In criminal cases, upon the principle just stated, the defendant is presumed to be innocent until he is proved guilty: the burden, therefore, rests always upon the State to prove beyond a reasonable doubt every fact essential to a conviction.²

(g) IN OTHER CASES.—There are cases which cannot well be classified, but which it will suffice to mention: *e. g.*, in case of a verdict with special case stated or case agreed;³ of a trial *de novo*;⁴ of a party applying for a license where a remonstrance is filed;⁵ of an exception to an auditor's report,⁶ of an application for a *supersedeas*;⁷ of a suit in garnishment;⁸ of an action to remove

1. It does not follow from this that where fraud is set up as a defence to an action on a contract, this necessarily shifts the burden of proof and with it the right to open and close to the defendant. 1 *Thomp. on Trials*, § 224. See also *Elwell v. Chamberlain*, 31 N. Y. 611; *Brennan Security L. Ins. etc. Co., 4 Daly* (N. Y.) 296; *Robinson v. Hitchcock*, 8 Met. (Mass.) 64; *Patton v. Hamilton*, 12 Ind. 256.

Thus upon an issue of fraud against an insolvent debtor desiring to take the oath, the creditor is entitled to the opening and close. *Johnson v. Martin*, 25 Ga. 268.

In another case, however, it is held that an issue of fraud in certain mortgages, though the burden of proof being on attaching creditors who attack the mortgages, they would be entitled to open and conclude, yet, the verdict being correct, the case will not be sent back for a new trial because the right to open and conclude was given to counsel for the mortgagees. *Moore v. Brown*, 81 Ga. 10.

2. From this it necessarily follows that in all cases the right to open and close is with the prosecutor unless a different rule is declared by statute. This is true although the accused offers no evidence; nor does the fact that the accused sets up the defence of insanity, shift the right to him. 1 *Thomp. on Trials*, § 243; *Doss' Case*, 1 Gratt. (Va.) 557; *State v. Millican*, 15 La. Ann. 557. See also *State v. Waltham*, 48 Mo. 55; *Jarnagin v. State*, 10 Yerg. (Tenn.) 529; *State v. Hamilton*, 55 Mo. 520; *Heffron v. State*, 8 Fla. 73; BURDEN OF PROOF, vol. 2, p. 657.

3. Here the plaintiff holds the affirmative in the argument. *Den v. Demarest*, 21 N. J. L. 525; *Den v. Stillwell*, 10 N. J. L. 60.

4. Although it be on appeal by defendant, the plaintiff nevertheless has the opening and close. *Bennett v. Sandifer*, 15 S. Car. 418.

5. In such case, when the trial is had the applicant for the license is entitled to open and close; and a refusal to allow his right affords ground for setting aside the verdict. *Hill v. Perry*, 82 Ind. 28; *Goodwin v. Smith*, 72 Ind. 113; s. c., 37 Am. Rep. 144.

6. The burden being upon him who excepts to an auditor's report, he is entitled to open and close, unless the other party introduces no testimony, in which case the latter has the right to close. *Arthur v. Gordon Co.*, 67 Ga. 220; *Peed v. Brenneman*, 89 Ind. 252.

But in *Massachusetts*, upon the principle that where the right once attaches to a party it does not shift with the shifting of the burden of proof, it is held that in such case the plaintiff in the original proceeding retains the right to begin and end. *Snow v. Batchelder*, 8 Cush. (Mass.) 513; *Chelsey v. Chelsey*, 10 N. H. 327.

7. The defendant in a judgment who applies for a *supersedeas*, is the plaintiff in the proceedings subsequently had on his petition, and is therefore entitled to open and close the argument. *Pearsall v. McCartney*, 28 Ala. 110.

8. In a suit in garnishment, interpleading claimants having the affirmative, may, without error, be ordered to open and close to the jury. *Randolph Bank v. Armstrong*, 11 Iowa 515.

a partition fence;¹ of a protest filed to the report of processioners;² of a *caveat* filed to obtain a patent for vacant lands;³ of an attempt to impeach an executor's account;⁴ of a bill of interpleader in equity;⁵ of exceptions filed to the final settlement of an administrator.⁶

IV. OTHER GENERAL RULES—1. Rules Established in Mercer v. Whall.—The English decisions upon this whole subject being in a state of confusion, a decision was rendered, in the Queen's Bench in 1845, that settled all previous conflicts, and established a rule which furnishes an absolute test for cases occurring in ordinary actions between plaintiff and defendant. The rule then fixed is this: that where the plaintiff has anything to prove, in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and end the argument belongs to him.⁷

1. In an action for the removal of a partition fence, under an answer that it belonged to the defendant, who gave notice, etc., it was error to allow him to open and close. *Haines v. Kent*, 11 Ind. 126.

2. Where a protest is filed to the report of processioners by the party notified, the applicant for the proceeding is entitled to open and close. *Rattaree v. Morrow*, 71 Ga. 528.

3. On a *caveat* filed under an act authorizing the defendant to locate and obtain a patent for vacant land, the defendant is entitled to open and close the case. *Records v. Melson*, 1 Houst. (Del.) 139.

4. Principle would seem to demand that, since the presumption of correctness is in favor of such instruments, and the *impeachor* is the party attempting to alter the existing state of affairs, the executor should be defendant and the *impeachor* have the right to open and close. But it has been held differently in *Indiana*. See *Taylor v. Burk*, 91 Ind. 252.

5. In such case it seems that the matter is to be left entirely to the discretion of the court, since all are equally *actores* or plaintiffs. 1 *Thomp. on Trials*, § 242; *Randolph Bank v. Armstrong*, 11 Iowa 515. See also *Willis v. Stamps*, 36 Tex. 48.

6. In this case the administrator is held to have the opening and conclusion. *Taylor v. Burk*, 91 Ind. 252; *Hamlyn v. Nesbit*, 37 Ind. 284; *Brownlee v. Hare*, 64 Ind. 311. But in *West Virginia*, where there was an action against an administrator, and he pleaded payment and *plene administravit*, the right was

held to be with the plaintiff. *Clay v. Robinson*, 7 W. Va. 350.

7. *Mercer v. Whall*, 5 Ad. & El., N. S. 447.

The unvarying test furnished by this rule is to consider which party would in the state of pleadings and of the record admissions be entitled to the verdict for substantial damages, if the case was submitted to the jury without any evidence offered by either. If the plaintiff would succeed then there is nothing for him to prove at the outset, and the defendant begins and replies. 1 *Thomp. on Trials*, § 228.

As to the application of this rule in *Indiana*, see *Judah v. Vincennes University*, 23 Ind. 273.

The advantage of this rule, as stated by Mr. Thompson in his work on Trials, is that it defines the general propositions clearly, stating them thus: The party sustaining the burden of proof of the issue or issues, or the affirmative of the issue or issues, is in every case the plaintiff, where he has anything however slight to prove in order to get a verdict for other than nominal damages; and that in other cases it is the defendant. Also, that although the burden of proof may *shift* during the trial, yet the right to open and close the argument does not shift with it, but remains with the party on whom it primarily rested; further, that where there are several issues, and the plaintiff has anything to prove under any one of them in the first instance in order to a recovery, the right to open and close is with him, and that in other cases where the general issue, or a general or special denial is pleaded, the right is with the

2. Rules Established by American Cases.—This whole doctrine has been clearly stated by JUDGE SMITH, in the conclusion of his opinion in a well-known case,¹ as follows:

First. The plaintiff, in all cases where the damages are unliquidated, has the right to open the cause to the jury and to reply.

Second. Whenever the plaintiff has anything to prove on the question of damages or otherwise, he has the right to begin.

Third. In other cases where the damages are liquidated or depend on mere calculation, as in casting of interest, the party holding the affirmative of the issue has the right to begin.

Fourth. The affirmative of the issue in such case means the affirmative in substance and not in form, and upon the whole record.

Fifth. The denial of the right to begin to the party entitled to and claiming to at the proper time is error, for which a new trial will be granted, unless the court can see clearly that no injury or injustice resulted from the erroneous decision.

3. When No Evidence Is Produced.—Another general rule is that the party against whom judgment would be given, were no evidence produced in the cause, is entitled to the closing argument,

plaintiff, no matter what may be the nature of the controversy or what special defences or counterclaims may be set up. See also *Ayer v. Austin*, 6 Pick. (Mass.) 225; *Johnson v. Josephs*, 75 Me. 544; *Tappan v. Jenness*, 21 N. H. 232; *Jackson v. Pittsford*, 8 Blackf. (Ind.) 194; *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267; *Cox v. Vickers*, 35 Ind. 27; *Veile v. Germania Ins. Co.*, 26 Iowa 10; s. c., 96 Am. Dec. 83; *Perkins v. Ermel*, 2 Kan. 325; *Dorr v. Tremont Nat. Bank*, 128 Mass. 359.

1. *Huntington v. Conkey*, 33 Barb. (N. Y.) 218.

The foundation of this doctrine is the leading case of *Mercer v. Whall*, 5 Ad. & El., N. S. 447, to which nearly all the American courts are conformed in their practice. 1 *Thomp. on Trials*, § 233.

In *Massachusetts*, the practice seems to have been settled by the decision in the case of *Dorr v. Tremont Nat. Bank*, 128 Mass. 359, where it was said: "The tendency of the decisions in this commonwealth has been to simplify the practice in this respect and to allow the plaintiff to be entitled to the opening and close in all cases. Upon trials of action-at-law in this court upon the general issue only, without any other plea or specification, the plaintiff always had the right to open and close. In early times if a justification was pleaded as well as the general issue, the two

issues were tried separately and on the issue of justification the *defendant* had the opening and close. *Flagg v. Hobart*, Quincy (Mass.) 332. And under statute 1792, authorizing officers to plead the general issue and file a brief statement of any matter of defence, it was at one time a matter of doubt which party had the right to open and close. *Bangs v. Snow*, 1 Mass. 181; but afterward the practice became settled to allow the plaintiff to open and close upon the whole case whenever the general issue was pleaded, and to permit the defendant to open and close in those cases only in which by his plea he admitted the whole cause of action stated in the declaration, and undertook to remove or defeat it by a justification or discharge. *Davis v. Mason*, 4 Pick. (Mass.) 156; *Ayer v. Austin*, 6 Pick. (Mass.) 225. Under the statute of 1836, which allowed no other plea in bar than the general issue, the plaintiff was entitled to open and close whatever specification of defence was filed. *Robinson v. Hitchcock*, 8 Met. (Mass.) 64; and since the new practice act has abolished the general issue in personal actions, and required an answer stating the defence intended to be relied on, the same rule has prevailed even where the defendant admits the plaintiff's cause of action, and the only issue for the jury is upon a declaration in set-off. *Page v. Osgood*, 2 Gray (Mass.) 260.

since he has certainly the burden of proof.¹ But the defendant cannot, by failing to offer evidence, deprive the plaintiff of his right if he has it otherwise under rules already stated.² And if the defendant files an affirmative plea which would ordinarily give him the right to open and conclude, but *produces no evidence* under it, he cannot thus oust the plaintiff from his right.³

OPEN COMMISSION—(See also DEPOSITIONS, vol. 5, p. 581).—An open commission, according to the New York Code, is a commission without written interrogatories, issued out of any one of certain courts of record, an issue of fact having been joined in that court, to take the testimony of witnesses, not within the State, but within the United States and Canada.⁴

1. *Viele v. Germania Ins. Co.*, 26 Iowa 9; s. c., 96 Am. Dec. 83; *Rogers v. Diamond*, 13 Ark. 474; *Hoxie v. Greene*, 37 How. Pr. (N. Y.) 97; *Wright v. Abbott*, 85 Ind. 154.

Therefore where, by the issues joined, plaintiff is required to offer evidence to support his case, he is entitled to open and close. *Mizer v. Bristol* (Neb. 1890), 46 N. W. Rep. 293; *Rahm v. Deig*, 121 Ind. 283.

When an action, pending in the court of common pleas, is referred to an auditor, whose report is returned into court in favor of the plaintiff, this will not give the defendant the right to open and close under the 41st rule of that court. *Snow v. Batchelder*, 8 Cush. (Mass.) 513.

Where to one paragraph of plaintiff's declaration defendant pleads in avoidance merely, and to another pleads general denial, if the plaintiff fails to produce any evidence to support this latter of his paragraphs, the defendant may be allowed, in the discretion of the court, to open and close the argument. *Zehner v. Kepler*, 16 Ind. 290.

2. *Worsham v. Goar*, 4 Port. (Ala.) 441; 1 *Thomp. on Trials*, § 254.

But in *Georgia* the rule is stated that where the defendant to a bill introduces no evidence, it is his right to open and close. *Guess v. Stone Mountain Granite & R. Co.*, 72 Ga. 320; *Cade v. Hatcher*, 72 Ga. 359; *Fall v. Simmons*, 6 Ga. 265.

3. For otherwise the defendant might, by filing a sham plea, acquire a right which the law did not intend he should have. *Davies v. Arbuckle*, 1 Dana (Ky.) 525; *Sodousky v. McGerry*, 4 J. J. Marsh. (Ky.) 275; *Goldsberry v. Stuteville*, 3 Bibb (Ky.) 246; 1 *Thomp. on Trials*, § 254; *Vanzant v. Jones*, 3 Dana (Ky.) 464.

4. See *New York Code Civ. Proc.*, §§ 893, 894, 897.

Open Commission Distinguished from Other Commissions.—The ordinary method of taking the testimony of a witness without the State, is by a commission with written interrogatories and cross-interrogatories annexed. See DEPOSITIONS, vol. 5, p. 581.

The examination of a witness by virtue of an open commission, is by oral interrogatories entirely. Sometimes a commission issues to take the deposition of one or more witnesses partly upon oral questions and partly upon written interrogatories; or the deposition of one or more witnesses is taken upon oral questions and one or more designated in the order upon written interrogatories. *New York Code Civ. Proc.*, § 893.

When Granted.—*New York Code Civ. Proc.*, § 894, provides that where an issue of fact, joined in an action, is pending in certain courts of record, the court may, in its discretion, make an order that an open commission issue to take the testimony of a witness whose evidence is material and necessary in the prosecution or defense of the action.

An open commission, being troublesome and expensive, should not be ordered unless it satisfactorily appears that an ordinary commission will not accomplish the purpose sought. The application for an open commission was properly denied where there seemed no reason to doubt that a commission with interrogatories would develop all the facts bearing upon the case. *Dickinson v. Bush*, 17 Week. Dig. (N. Y.) 17.

It was not error to issue an open commission, where the witnesses, from a long business intercourse, supple-

mented by more or less of personal intercourse and friendship, would not be disposed to go beyond the strict letter of their compulsory duty in giving testimony in aid of a stranger as against their friends. *Jones v. Hoyt*, 10 Abb. N. Cas. (N. Y.) 324; 63 How. Pr. (N. Y.) 94; 48 N. Y. Super. Ct. 118.

An open commission is the more reliable way to arrive at the truth. *Jones v. Hoyt*, 10 Abb. N. Cas. (N. Y.) 324.

An open commission should not be granted unless the purposes of justice absolutely demand it. *Heney v. Wead*, 4 Law Bull. (N. Y.) 10.

Where a witness has already been examined under a commission with written interrogatories, and no good reason is assigned why an open commission is especially necessary, the application for such a commission was properly denied. Another commission with interrogatories annexed, directed to the object of supplying the defect in the evidence of the witness, should have been applied for. *Beadleston v. Beadleston*, 20 St. Rep. (N. Y.) 29; 2 N. Y. Supp. 814.

Where a will was contested, an open commission for the examination of witnesses was issued, conditioned on filing specifications showing who exercised undue influence, and confirming the examination to that point. *Matter of Kendall*, 2 Law Bull. (N. Y.) 51.

A deposition previously taken is not rendered inadmissible by an amendment of the pleadings which does not change the real issue. *Vincent v. Conklin*, 1 E. D. Smith (N. Y.) 203.

An open commission will also be granted on consent of both the parties expressed by the stipulation in writing. *New York Code Civ. Proc.*, §§ 894, 908; *Oregon Code*, § 270.

New York Code Civ. Proc., § 895, provides that testimony shall not be taken by means of an open commission elsewhere than in the *United States and Canada*.

Where the witnesses reside in *Cuba*, though the testimony is to be taken in *Florida*, an open commission will not be allowed. "Such an order should not be granted unless it is made to appear that such a commission was absolutely necessary for the protection of the applicant's rights. No reason is given here to show that it would be any more difficult for defendants to procure the attendance of the witnesses, sought to be examined, at *New York* than in *Florida*, except the difference in the ex-

pense; and, as the evidence is for the benefit of the defendant, it is not fair that the plaintiffs should be put to the expense of employing counsel in *Florida*, or sending a representative there to attend such an examination. *Purdy v. Webster*, 3 How. Pr., N. S. (N. Y.) 263; 9 Civ. Proc. R. (N. Y.) 144.

It is also provided that where the adverse party is an infant, or the committee of a person judicially declared to be incapable of managing his affairs by reason of lunacy, idiocy or habitual drunkenness, an open commission will not be granted. *New York Code Civ. Proc.*, § 895.

Thus, where the will of a person who died, domiciled in *Illinois*, was contested, and contestants asked for an open commission to examine certain witnesses residing in that State, it was held that certain infants who were parties though not next of kin to testator, yet who had the appearance of interest under the will, must be deemed adverse parties within the spirit of sections 893, 895, of the *New York Code*, and hence, the request should be denied. But it being subsequently shown that under the statutes of *Illinois*, those infants would take a greater share in the intestacy than would be possible if the will were admitted, an open commission was allowed to issue. *Bull v. Kendrick*, 4 Dem. (N. Y.) 330.

The Motion.—Either party to the action may apply for an open commission; but before such commission will issue it must be satisfactorily shown by affidavit that the witnesses are not within the State and are material to the applicant. *New York Code Civ. Proc.* 894.

Where the affidavit was made by the attorney for the plaintiff, and his statements were wholly on information and belief, and he omitted to declare that he believed that the evidence of the witness named therein was material to himself in the prosecution of the action, held to be defective. *Clark v. Sullivan*, 28 St. Rep. (N. Y.) 596; 8 N. Y. Supp. 565.

New York Code Civ. Proc., § 894, gives a very large discretion to the judge to which such an application is presented. While the exercise of such discretion may be the subject of an appeal, it ought not to be disturbed unless it is clear to the appellate court that the discretion was unwisely exercised. *Jones v. Hoyt*, 48 N. Y. Super. Ct. 118; 63 How. Pr. (N. Y.) 94.

And it is not sufficient under this section of the *New York Code*, to show that the witness "does not reside within the State," but it must be shown that he is not "within the State." *Wallace v. Blake*, 4 N. Y. Supp. 438.

The Order.—The sanction of the commission by an order of the court or judge is absolutely necessary for its validity. *New York Code Civ. Proc.*, §§ 889, 898; *Mason & Hamlin etc. Co. v. Pugsley*, 19 Hun (N. Y.) 282; *Tracy v. Suydam*, 30 Barb. (N. Y.) 110; *Whitney v. Wyncoop*, 4 Abb. Pr. (N. Y.) 370.

If issued by consent, there must be an order on stipulation. *New York Code Civ. Proc.*, § 908; *Mason & Hamlin etc. Co. v. Pugsley*, 19 Hun (N. Y.) 282. For further provisions with regard to the order granting an open commission, see *New York Code Civ. Proc.*, § 898.

A copy of §§ 901 and 902 of the *New York Code Civ. Proc.*, must be annexed to each provision or order to take depositions to be used in that State. See § 901 *New York Code Civ. Proc.* But if the execution is correct, an omission to annex a copy of the statute is unimportant. *Williams v. Eldridge*, 1 Hill (N. Y.) 249; *Hall v. Barton*, 25 Barb. (N. Y.) 274.

An order granting or refusing an open commission involves a substantial right and is appealable. *Jennison v. Citizens' Sav. Bank*, 85 N. Y. 546; reversing, 24 Hun (N. Y.) 350.

To say that the choice between the usual closed commission where the witnesses are named and the interrogatories settled in advance, and the open commission now specially authorized by the Code, in which the examination is oral, and unknown and unnamed witnesses may be produced to testify at a point far away from the place of trial, involving the expense of special counsel, and making wise and prudent a long journey of parties, is merely matter of form and not matter of substance, seems to us to be going quite too far. Practically the commission granted in the present instance changes the place of trial of the defendant's side of the case from *New York* to *Texas*. It may not be an unwise and improper thing to do—we express no opinion upon that—but we cannot fail to see that it affects a substantial right of the plaintiff. It imposes upon him new and unusual expenses, and deprives him of the right to confront the hostile witnesses, or to cause them to be cross-

examined intelligently by counsel who can have the aid of the party's personal knowledge and useful advice, except at the cost of a long journey to a distant State. *Jennison v. Citizens' Sav. Bank*, 85 N. Y. 546. See also *Anonymous*, 59 N. Y. 314.

Notice.—As to what notice must be given the adverse party, see *New York Code Civ. Proc.*, § 899. And see also § 898.

Commissioners.—As to what persons may be commissioners, see *New York Code Civ. Proc.*, § 899. As to the authority of such commissioner or commissioners, see *New York Code Civ. Proc.*, § 897.

Where a commission is directed to two or more persons, one or more of them may execute it. *New York Code Civ. Proc.*, § 901, subd. 7. And where the commission is directed to two, and the return is by but one of the two, he alone will be presumed to have been present at its execution. And the commissioner who took the testimony will be presumed to have closed and sealed the package himself, and that he did all things which, though not bound specially to certify as having done, nevertheless in the full discharge of his duty he ought to have done. *Williams v. Eldridge*, 1 Hill (N. Y.) 249.

Examination.—The statute gives either party the privilege, on the execution of an open commission, to produce before the commissioner witnesses and to examine them upon oral questions. *Clark v. Sullivan*, 28 St. Rep. (N. Y.) 596.

As to how much of the testimony the commissioner must take down, or cause to be taken down, and the oath which the witnesses shall take, see *New York Code Civ. Proc.*, §§ 900, 901, subd. 1. Where witnesses were sworn "to make true answers to the interrogatories read to them," it was held that the statutory requirement had not been complied with. *Whitney v. Wyncoop*, 4 Abb. Pr. (N. Y.) 370. Where in the return the commissioners simply certified that they administered the oath, it was held sufficient. *Halloran v. Field*, 23 Wend. (N. Y.) 38. See also *Lincoln v. Battle*, 6 Wend. (N. Y.) 475; *Williams v. Eldridge*, 1 Hill (N. Y.) 249.

A person appearing for either party may ask any question which he deems proper, unless the commission or order otherwise direct. *New York Code Civ. Proc.*, § 900. And see also *Union Bank v. Terry*, 5 Duer (N. Y.) 626; 2 Abb. Pr. (N. Y.) 269.

OPERA.—"A musical drama, consisting of airs, choruses, recitations, etc., enriched with magnificent scenery, machinery, and other decorations, and representing some passionate action."¹

If an exhibit is produced and proved, or, if the witness or other person having it in his custody does not surrender it, a copy thereof must be annexed to the deposition to which it relates, subscribed by the witness proving it and numbered or otherwise identified in writing thereupon by the commissioner, or person taking the deposition, who must subscribe his name thereto. *New York Code Civ. Proc.*, § 901, subd. 3; *Hall v. Barton*, 25 Barb. (N. Y.) 274; *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Brunskill v. James*, 11 N. Y. 294. Letters which are merely identified are not so "produced and proved" that they must be annexed. *Kelly v. Weaver*, 9 Abb. N. Cas. (N. Y.) 62. After his testimony has been read to him, or by him, the witness must subscribe his name to the same. *New York Code Civ. Proc.*, § 901, subd. 2.

The commissioner must subscribe his name to each half sheet of the deposition. *New York Code Civ. Proc.*, § 901, subd. 4. Where the signature was on the margin it was held sufficient. *Burrows v. Watertown etc. Co.*, 51 Barb. (N. Y.) 105. The court will take judicial notice of the signature of a commissioner, though his name be not written at length. *Williams v. Eldridge*, 1 Hill (N. Y.) 249.

The commissioner must annex all the depositions and exhibits to the commission, also the certificate of execution. For the statutory certificate of execution, see *New York Code Civ. Proc.*, § 902. The annexing of the papers by means of a tape and seal is unnecessary, the annexing by wafers is sufficient. *Williams v. Eldridge*, 1 Hill (N. Y.) 249.

After the acting commissioners have enclosed the commission and depositions under their seals, they should severally write their names upon the outside of the envelope. When one of the commissioners wrote the names of all on the envelope, it was held that the practice had been departed from on an immaterial point. *Brown v. Southworth*, 9 Paige (N. Y.) 351.

The court has power to order a commission which has been defectively executed, to be returned and that the defect be corrected; but a new commission need not issue for this purpose.

Sheldon v. Wood, 2 Bosw. (N. Y.) 267; *Keeler v. Vanderpool*, 1 Code R., N. S. (N. Y.) 289.

Return.—For provisions as to the return of the commission, see *New York Code Civ. Proc.*, § 901, subd. 5 and 6, and § 905. The code provides in § 904 that if the packet is delivered to an agent of a party, at whose instance the commission or order was issued, the packet so addressed must be delivered to the agent, and the agent must deliver it to the clerk to whom it is addressed, or judge of the court, and must make affidavit that he received it from the hands of the commissioner. *New York Code Civ. Proc.*, §§ 904, 901, subd. 6. The affidavit of the agent is absolutely indispensable unless waived by consent. *Dwinelle v. Howland*, 1 Abb. Pr. (N. Y.) 87. Although a return by express was directly authorized by the commission, a return by express unaccompanied by the affidavit of the agent, is inadmissible. *Dwinelle v. Howland*, 1 Abb. Pr. (N. Y.) 87.

Where there is nothing to show how a commission was returned, and it should have been returned by mail, it will be presumed to have been so returned. *Hall v. Barton*, 25 Barb. (N. Y.) 274; *Brunskill v. James*, 11 N. Y. 294. Irregularities in the return should be taken advantage of by motion before the trial. *Becker v. Winne*, 7 Hun (N. Y.) 458.

Where a stay has been granted in an action and sufficient time has elapsed *prima facie* to have it returned, an order will be granted to vacate the stay when the cause is called for title. The party who obtained the stay must show their good cause in order to obtain a further stay. *Voss v. Field*, 3 Code R. (N. Y.) 202; 2 Sandf. (N. Y.) 690.

For provisions as to filing returned depositions, see *New York Code Civ. Proc.*, §§ 906, 907. As to the place of keeping returned commissions and the inspection thereof, see *New York Code Civ. Proc.*, § 909.

1. Webster, followed in *Bell v. Mahn*, 121 Pa. St. 225.

An opera is a composition of a dramatic kind, but set to music and sung, accompanied with musical instruments and enriched with appropriate costumes,

OPERATE; OPERATING.—See note 1.

OPERATION.—By the “operation” of a law, is meant its practical working and effect.²

scenery, etc. *Rowland v. Kleber*, 1 Pittsb. (Pa.) 68.

A dedication to the public of the arrangement of a musical composition for the piano, does not dedicate what it does not contain and what cannot be reproduced from it, and an unauthorized person does not, therefore, possess and has no right to perform such composition as set for an orchestra, although he should have the opportunity to copy it.

An opera is more like a patented invention than a common book, as to the rule that he who obtains similar results, better or worse, by similar means, though the opportunity is furnished by an unprotected book, should be held to infringe the rights of the composer. *Thomas v. Lennon*, 14 Fed. Rep. 849. See also *Carte v. Ford*, 15 Fed. Rep. 439.

A performance on the stage is not such a publication as will destroy the exclusive common-law right of the author and his assigns to a dramatic or lyrical composition of this sort, though the composer is an alien, not entitled to the benefits of our law of statutory copyright. *Thomas v. Lennon*, 14 Fed. Rep. 849. See also *Keene v. Wheatley*, 4 Phila. (Pa.) 157; *Boucicault v. Fox*, 5 Blatchf. (U. S.) 87; *Crowe v. Aiken*, 2 Biss (U. S.) 208; *Palmer v. De Witt*, 47 N. Y. 532; *Tompkins v. Halleck*, 133 Mass. 32. See also COPYRIGHT, vol. 3, p. 155.

An opera is a “theatrical exhibition,” within the meaning of the *Pennsylvania* act, April 16th, 1845 (P. L. 533), and subsequent acts, providing for licenses for theatrical exhibitions, circus performances, and menageries. *Bell v. Mahn*, 122 Pa. St. 225.

Opera House.—The house in which operas are represented. *Rowland v. Kleber*, 1 Pittsb. (Pa.) 68.

1. **“Operate on the Lands.”**—The phrase “to operate on the lands,” in a contract regulating the rights of associates in an adventure for purchasing and dealing with a tract of land, was held to include not only offering the land for sale in parcels, at an advance, but also selling the timber to be cut and removed. *Eaton v. Smith*, 20 Pick. (Mass.) 150.

Operating Expenses.—The income of a railroad company, earned after the mortgage authorized by the statute of 1876 took effect, may, so long as the company remains in the use and management of its property, be attached by trustee process, to secure a claim accruing since that date for negligently injuring the property of the plaintiff at a highway crossing, such claim being “operating expenses,” within the meaning of those words in the statute. *Smith v. Eastern R. Co.*, 124 Mass. 154. See also *Eastern R. v. Rogers*, 124 Mass. 527, 532.

“Ceased to be Operated.”—The provision in an insurance company that a manufacturing establishment is not to “cease to be operated” is not violated, where there is also a provision that the assured “may set up and operate machinery and make such repairs and alterations as may be necessary,” by a temporary suspension, whether such suspension was for purposes of repairs and alterations or not. The court says, “What is the meaning of the words ‘cease to be operated’?” The operation of a large manufacturing establishment means doing everything necessary for its successful and profitable management. It would necessarily be the work of many hands and the operation would be multiplied many fold. But conceding that there was a suspension of all work at the mill, and that the sole cause of such stoppage was a difficulty in procuring cotton of the quality that could be worked up at a profit, still it was but a temporary suspension, and the law is that a mere temporary suspension of business at such establishment for want of a supply of materials is not ceasing to operate the factory in the sense of the words “cease to be operated,” as used in the policy in suit. *American F. Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131.

2. *Geebrick v. State*, 5 Iowa 496.

The operation of a law is nothing more than the obligation of a law. *United States v. Hammond*, 1 Cranch (C. C.) 19.

If a company is not dissolved, it is “in operation within § 7 (5), Companies act, 1880 (43 Vict., ch. 19), although it is not carrying on business (*Re Finan-*

The term "operation of law" applied to indicate the manner in which a party acquires rights without any act of his own; as the right to an estate of one who dies intestate, which is cast upon the heir at law, by operation of law; or where a lessee for life enfeoffs him in reversion, or when the lessee and lessor join in a feoffment, or when a lessee for life or years accepts a new lease or demise from the lessor, there is a surrender of the first lease by operation of law.¹

OPERATIVE—(See also **EMPLOYEE**, vol. 6, p. 637; **MASTER AND SERVANT**, vol. 14, p. 730.)—A workman, one employed to perform work for another.²

cial Corporation, 27 S. J. 199). See, however, *Re Outlay Assur.*, 34 Ch. D. 479.

Operation of a Railway.—The proviso in a charter of a railway company, that the city is hereby authorized to contract with said railway company concerning the construction, maintenance and operation of said railway, upon such terms as it may agree with said railway, any laws now existing to the contrary, notwithstanding, will not override a subsequent general law, under which another corporation justifies the use of the tracks of the first named corporation, although under the charter an exclusive right was granted by the city. In considering the proviso the court says: "The word which must be relied on is 'operation,' as 'construction' and 'maintenance' clearly do not go far enough; but in a legislative grant of this nature we should be disposed to think that authority to contract concerning the operation of a road, which may be operated none the less, that its tracks are used by another company, did not extend to a contract excluding use by another road previously or subsequently authorized by the legislature." *New Bedford etc. R. Co. v. Acushnet etc. R. Co.*, 143 Mass. 200.

Where contractors agree to lay track for a railroad corporation, and in that agreement stipulate that the railway company shall furnish all motive power and cars and operate the construction trains, a suit for damages will not lie against the railroad corporation for injury caused by the negligence of the engineer. The word "operate" in the agreement is not used in the general sense common to all acts necessary to the use of railroad by moving trains over it, but it is used in the restricted sense that the necessary force was to be furnished to

move the train over the road at such times as directed by the contractors. *Miller v. Minnesota etc. R. Co.*, 76 Iowa 655.

Under *Iowa Code*, § 1307, providing for the recovery of damages suffered by reason of negligence of the co-employee connected with use and operation of railway, a person injured in operating a ditching machine which is carried on the car and worked by the movement of the car on the railroad track, comes within the provision. *Nelson v. Chicago etc. R. Co.*, 73 Iowa 576.

1. *Bouv. L. Dict.*; *Whitehall v. Hall*, 5 B. & C. 269; *Wallis v. Wallis*, 51 L. J., Ch. 577.

2. *Bouv. L. Dict.* See also *Ex parte Steiner*, 1 Pa. L. J. 134.

Where the creditor of an insolvent debtor received materials from the shop of the insolvent, and took them to his own shop, and there manufactured such materials into boots at certain agreed prices, and delivered the manufactured articles to the debtor within sixty-five days previous to his insolvency, it was held, that such creditor was entitled to a preference as an operative, under the act of 1838, ch. 163, § 24. *Thayer v. Mann*, 2 Cush. (Mass.) 371.

Petitioners made articles of machinery for defendant, to be paid for at a fixed price for each article. Defendant furnished the material, power, tools, etc., and petitioners hired and paid the laborers who did most of the work, subject to general rules in force at defendant's factory. Petitioners themselves did but little work on the machinery. *Held*, that they were not "employees, operatives, or laborers," within the meaning of *Laws New York* 1885, ch. 376, giving a preference, in certain cases of insolvency, "for the payment of wages to employees, operatives,

OPINIONS.—See CHARACTER, vol. 3, p. 114; EXPERT AND OPINION EVIDENCE, vol. 7, p. 490; WILLS.

OPINIONS OF THE ATTORNEYS GENERAL.—See ATTORNEY GENERAL, vol. 1, p. 974.

OPINIONS OF THE JUSTICES.—The constitutions of several of the States of the Union contain provisions requiring the judges of the courts of last resort to give advisory opinions to the legislative or executive departments of the government on request. Massachusetts was the first State to adopt such a provision. The constitution of 1780 declares that “each branch of the legislature, as well as the governor and counsel, shall have authority to require the opinions of the justices of the supreme judicial court upon important questions of law, and upon solemn occasions.” Maine and New Hampshire adopted similar constitutional provisions shortly after, Rhode Island in 1843, Colorado in 1885. In Florida, Vermont, and South Dakota there are like provisions. The practice is founded upon that of England. Formerly, the crown frequently asked the opinion of the judges. It is said that this power has not been exercised since 1760; but the right of the house of lords to put abstract questions of law to the judges, the answer to which might be necessary to the house in its legislative capacity, has often been acted on in modern times.¹

In the States of the Union the justices, in giving such opinions, do not act as a court, but as the constitutional advisers of the other departments of the government.²

These opinions have been asked and given upon a great variety of subjects; as, for example, in *Massachusetts*, to the governor and council upon questions of the exercise of the power of pardon,³ the issue of death warrants,⁴ the validity of the proceedings of a court-martial,⁵ and the authority of the governor as commander-in-chief over the militia;⁶ and to the legislature on the right of a town not to elect representatives,⁷ the right of a person ex-

and laborers.” *People v. Remington* (Supreme Ct.), 6 N. Y. Supp. 796. See also *Harris v. Norvell*, 1 Abb. N. Cas. (N. Y.) 127.

Operative words, in a deed or other instrument, are those words which express (and purport to give) the effect, *i. e.*, operation, of the deed or instrument, *e. g.*, doth hereby grant and convey. The operative words are distinguished from the recitals, premises, covenants, conditions, and such like. *Brown's L. Dict.*

1. *McNaghten's Case*, 10 Cl. & Fin. 200.

For a historical summary of the

English precedents and practice, see *Opinion of the Justices*, 126 Mass. 557.

2. *Opinions of the Justices*, 5 Metc. (Mass.) 597; 126 Mass. 566.

3. *Opinions of the Justices*, 13 Gray (Mass.) 618.

4. *Opinions of the Justices*, 11 Cush. (Mass.) 604.

5. *Opinions of the Justices*, 3 Cush. (Mass.) 586.

6. *Opinions of the Justices*, 5 Allen (Mass.) 197, 11.

7. *Opinions of the Justices*, 15 Mass.

536.

empted from taxation to vote,¹ the constitutionality of insolvency laws,² the right of the senate to originate a money bill,³ the right of colored persons to vote,⁴ the constitutionality of a pending bill relative to the prohibition of sales of liquor,⁵ and in many other instances.⁶

In at least one instance the judges, in the absence of a special constitutional requirement, have, at the request of the executive, expounded a constitutional provision relative to the power of appointment.⁷

Until recently it has been the practice of the judges to answer all questions propounded, though in one or two instances the court has expressed a doubt as to its power and duty in reference to certain questions.⁸ It has been asserted invariably, however, that the constitutional provisions did not contemplate the asking of opinions in reference to matters pending in the course of a judicial proceeding. Of late years there has been a tendency to limit this power and duty; in *Colorado*, in a recent opinion, the court based its refusal to answer on the ground aforesaid,⁹ but in *Massachusetts* the court has gone further and declined to give its opinion as to the construction of an existing statute, concerning which a change was contemplated by the legislature.¹⁰

In *New Hampshire*, the judges refused to answer a question, propounded by the house, whether the governor was authorized to summon two senators who had qualified already, the ground of refusal being that the opinion could have no greater weight or authority than a criticism by one branch of the government upon the conduct of another branch.¹¹

The *Missouri* constitution formerly contained a similar provision, which, however, was left out of the constitution of 1875. The judges refused on one occasion to answer a question relative to the legislative power to enact a law affecting the internal management of a corporation then in existence, on the ground, apparently, that the question was not of such magnitude and concern as to call for their opinion.¹²

1. Opinions of the Justices, 11 Pick. (Mass.) 537; 5 Metc. (Mass.) 591.

2. Opinions of the Justices, 8 Gray (Mass.) 20.

3. Opinions of the Justices, 126 Mass. 557.

4. Opinions of the Justices, 44 Me. 505.

5. Opinions of the Justices, 25 N. H. 538.

6. In 24 Am. L. Rev. 369, the instances are collected in an article on "The Duties of Judges as Consti-

tutional Advisers," by H. A. Du-
buque.

7. Opinions of the Judges, 79 Ky. 621.

8. Opinions of the Justices, 7 Pick. (Mass.) 129.

9. *Re Irrigation*, 9 Colo. 620.

10. Opinions of the Justices, 148 Mass. 623.

11. Opinions of the Justices, 56 N. H. 570.

12. Opinions of the Justices, 37 Mo. 135.

OPPORTUNITY—OPPOSITE.

Doubts have been expressed sometimes as to the wisdom of such a provision. Twice in *Massachusetts*, first in 1820 and again in 1853, it was proposed in amending the constitution to do away with it. The ground of the objection, as stated in the report of the legislative committees, of the first of which Judge Story was chairman, and Chief Justice Shaw a member, while ex-Governor Morton was chairman of the second, was that, while the questions propounded might deeply affect private rights and interests, they must almost inevitably be decided without the important benefit of an argument;¹ and that in other cases of a more public character, involving questions of general interest, of political power, and perhaps even of party principles, the proper responsibility of the public functionaries might be shifted upon the judges, who are called upon only to decide and not to act.²

OPPORTUNITY.—See note 3.

OPPOSITE.—Over against, standing in front of, facing.⁴

1. In *New Hampshire*, on one occasion the judges called upon parties interested to furnish briefs. Opinions of the Justices, 53 N. H. 640. In *Massachusetts*, in one case, briefs were furnished by counsel and one also by the attorney general. Opinions of the Justices, 7 Pick. (Mass.) 125. And in a later case the legislative houses, at the request of the judges, furnished precedents. Opinions of the Justices, 126 Mass. 558. In *England*, contending counsel have argued before the judges. *Re London etc. Bank*, 1 Bing. N. C. 197.

2. *Massachusetts* Convention 1820, p. 137; Debates *Massachusetts* Convention 1853, p. 4. For examples of questions of the latter class, see Opinions of the Justices, 70 Me. 560-612.

3. A *Minnesota* statute provides that where a party has not appeared in the probate court, he can only appeal when he "had not due notice or opportunity to be heard." Opportunity here means such opportunity as a party is entitled to by law. Want of opportunity is some act or omission in the proceedings which denies or bridges the party's legal rights. *In re Hause*, 32 Minn. 155. See also *In re Brown*, 32 Minn. 443.

A prisoner present, when a statement is taken down against him under § 6, 30 & 31 Vict., ch. 35, and who is not in any way hindered from cross examining the witness, has "full opportunity" to do so within the meaning of the section, even

though he be not told he may do so. *Rex v. Shurmer*, 55 L. J., M. C. 153; 17 Q. B. D. 323; 55 L. T. 126; 34 W. R. 656; 50 J. P. 743.

4. *Bradley v. Wilson*, 58 Me. 357.

See *Patching v. Dubbins*, 23 L. J., Ch. 45, Kay 1, where Wood, V. C., in his affirmed judgment, said: "The word 'opposite' is not, *ex vi termini*, necessarily confined to land precisely opposite, between parallel lines drawn from the sides of the plot conveyed. If the words had been 'the land opposite' only, it would have been merely a word of description, showing the particular position of the land in question."

The phrase "opposite the borough of Sunbury," as used in *Pennsylvania* act 1870, incorporating the plaintiff ferry and tow-boat company, and prohibiting all others from pushing, rowing or towing any boat, raft, etc., for hire or reward, over the Susquehanna river, "to or from any point opposite or within the limits of the borough of Sunbury," means that portion of the river and its banks which the town would come in contact with if it were moved straight across the river. *Sunbury Steam Ferry etc. Co. v. Grant* (Pa. 1888), 15 Atl. Rep. 706.

If a deed of real estate describes one of the lines as ending at a point on one side of a street "opposite" a point on the other side, a straight line between the two points must cross the street at a right angle; and parol evidence is not

OPPRESSION.—An act of cruelty, severity, unlawful exaction, domination, or use of excessive authority.¹

OPTIONS.—See CONTRACT, vol. 3, p. 823; GAMBLING CONTRACTS, vol. 8, p. 992; VENDOR AND VENDEE.

OR.—(See also ATTACHMENT, vol. 1, p. 904, n.; BOTH, vol. 2, p. 482, n.; GARNISHMENT, vol. 8, p. 1115).—"Or," in its ordinary signification, corresponds to either; meaning one or the other of two, but not both.² "And" is *prima facie* either an alternative or substitutionary word.³

admissible to show that a line ending at a different point was intended. *Bradley v. Wilson*, 58 Me. 357. As to opposite political parties, see *People v. Sullivan Co.*, 56 N. Y. 249.

1. *United States v. Deaver*, 14 Fed. Rep. 595.

"If the illegal act consists in inflicting upon any person any bodily harm, imprisonment or other injury not being extortion, the offense is called 'oppression.'" *Steph. Cr.* 83.

To make an act oppressive on the part of an officer under the statute, it must be done wilfully, "under color of law," and "without legal authority." *United States v. Deaver*, 14 Fed. Rep. 595.

2. *Douglas v. Eyre*, Gilp. 147.

3. *Elliott v. Turner*, 2 C. B. 446. See also *Re Simpson & Wall*, 25 Ch. D. 482; *Reiff v. Strite*, 54 Md. 304.

A bequest to be applied "to any charitable or benevolent purpose," or to be expended "in acts of hospitality or charity," is void, for the vice of uncertainty taints so much of the bequest as is not charitable, whilst the alternative "or" contra-distinguishes that part from so much of the bequest as is charitable. *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 522; *Ellis v. Selby*, 4 L. J., Ch. 69; 7 Sim. 352; *Re Jarman*, 8 Ch. D. 584; *Re Hewitt*, 53 L. J., Ch. 132; *Re Sutton*, 28 Ch. D. 464; 1 Jarman on Wills 215-217.

So, "if a man give lands to one, to have and to hold to him or his heirs, he hath but an estate for life, for the uncertainty." *Co. Litt.* 8 b. See also *Touch.* 106.

In a testamentary gift to a class "or" their heirs, issue, children or descendants, the word "or" is substitutionary. So, where a will provides for the distribution of the testator's property, after the death of his wife and the arrival of

his youngest child at majority, equally "among the children I may then have or those who may be legally entitled thereto," it was held the word "or" in the sentence implies a substitution in case of the pre-decease of sons or daughters, of their surviving children. *In re Paton*, 111 N. Y. 480. See also *Brasher v. Marsh*, 15 Ohio St. 112; *Stook's Appeal*, 20 Pa. St. 352; *Re Sibley*, 5 Ch. D. 594; *Re Webster*, 23 Ch. D. 737.

An alternative bequest is good, *e. g.*, a gift to A B "of £50 or £100," the option being with the legatee. 1 Jarman on Wills 359, citing *Seale v. Seale*, 1 P. Wms. 290; *Haggar v. Neatby*, 23 L. J., Ch. 455; *Kay* 379; *Phillipps v. Chamberlaine*, 4 Ves. 50. But *quære*, where the person to take is in the alternative. See 1 Jarman on Wills 372, 375, 376.

"It appears to be now established that where there is a bequest 'to A or his personal representatives,' or 'to A or his heirs,' the word 'or,' generally speaking, implies a substitution, so as to prevent a lapse." *Wms. Exrs.* 1215, 1216. *Secus*, where the gift is "to A and his executors, administrators and assigns." *Wms. Exrs.* 1212. But when "to A and his heirs," there is no lapse. *Wms.* 1213.

A plea in abatement has been held defective by reason of presenting several issuable facts by the use of the disjunctive "or." *State v. Ward*, 60 Vt. 142.

Where it was required by statute that an affidavit should state "that the defendant has no property subject to execution in the county of his residence, or that in which the judgment was rendered," it was held that or was used in an alternative sense and that the affidavit need not show the non-existence of property as to both of the counties. *Vance v. Gray*, 9 Bush (Ky.) 658.

Where there are alternative times or modes for the performance of an act, and nothing is said as to the person who is to exercise the option, that option is with the person by whom the act is to be performed. Thus, on a sale at six "or" nine months' credit, the purchaser, by not paying at the end of the six months, elects not to pay till the expiration of nine months, and the price cannot be recovered till then. *Price v. Nicholson*, 5 Taunt. 333. So of a loan. *Reed v. Kilburn Soc., L. R., 10 Q. B. 264*. See, further, *Alexander v. Vanderzee, L. R., 7 C. P. 530*; *Ashforth v. Redford, L. R., 9 C. P. 20*.

So, a lease for seven, fourteen, "or" twenty-one years is not void, but gives the lessee an option to determine the lease at the end of the seventh or fourteenth year. *Dann v. Spurrier*, 3 B. & P. 399; *Doe d. Webb v. Dixon*, 9 East 15; *Price v. Dyer*, 17 Ves. 356; *Goodright d. Hall v. Richardson*, 3 T. R. 462; *Powell v. Smith, L. R., 14 Eq. 85*.

A power to appoint to certain persons "or" their children, gives a discretion. *Longmore v. Broom*, 7 Ves. 124.

The power given to justices by § 3. Licensing act, 1872 (35 & 36 Vict., ch. 94), to inflict a fine "or" to imprison, is in the alternative; and "or" is not to be read "or in default of paying the fine"; therefore, a conviction imposing a fine, or, in default of payment, imprisonment, is bad. *Re Brown*, 3 Q. B. D. 545; *Re Clew*, 8 Q. B. D. 511.

But, where a statute forbids any minister of the gospel to marry any minor without a certificate that the intention of such marriage has been published agreeably to law, "or" before such minister is certified of the consent of the parents, guardian, etc., of such minor, "or" is to be taken in its disjunctive sense, and both the certificate of publication and the consent of the minor's parents are necessary to satisfy the statute. *Ellis v. Huli*, 2 Aik. (Vt.) 43. See also *Fairfield v. Morgan*, 2 Bos. & Pul. 53.

In an Indictment.—The use of the disjunctive "or" is fatal in charging a criminal offense, but is proper in enumerating the negative averments required to exclude the exceptions of a statute. *State v. Carver*, 12 R. I. 285.

Under a statute against permitting gaming in a "dramshop," an indictment for gaming in a "dramshop or

grocery" is not bad for the surplusage. *Ballentine v. State*, 48 Ark. 48 (1886).

Where a criminal statute forbids several things in the alternative, it is to be construed as creating but one offense, and the indictment may charge the defendant with the commission of all the forbidden acts in a conjunctive form, when the statute uses the disjunctive "or" between them, the several acts being only different modes of committing the same offense. *State v. Freeze*, 30 Mo. App. 347. See also *INDICTMENT*, vol. 10, p. 599 d.

"Or Damaged."—The words "or damaged," in that provision of the *Nebraska* code which enacts that "the property of no person shall be taken or damaged" for public use without just compensation therefor, include all actual damages resulting from the exercise of eminent domain which diminishes the market value of private property. *Omaha v. Cramer*, 25 Neb. 489; 13 Am. Rep. 504; 27 Am. & Eng. Corp. Cas. 73. See also *Omaha etc. R. Co. v. Standen*, 22 Neb. 343; 34 Am. & Eng. R. Cas. 183.

"Or Elsewhere"—Where a mariner shipped on a voyage "from Boston to the Pacific, Indian and Chinese Oceans or elsewhere," it was held that the words "or elsewhere" in the shipping articles were either void for uncertainty, under the act of congress regulating mariners in the merchants' service, or were to be construed as subordinate to the principal voyage stated in the articles. *Brown v. Jones*, 2 Gall. (U. S.) 477.

Or Order; Or Bearer; Bearer.—These words in notes or bills are words of negotiability, without which, or other equivalent words, the instrument will not possess that quality. *Mechanics' Bank v. Straiton*, 3 Keyes (N. Y.) 365; 5 Abb. Pr. (N. Y.) 11, and 36 How. Pr. (N. Y.) 190.

Or Other.—An indictment for selling spirituous liquors without license, in charging the kinds of liquors sold, used the words, "or other spirituous liquors." Held, that the use of the disjunctive was not a defect. *Morgan v. Commonwealth*, 7 Gratt. (Va.) 592.

In a statute which provides that the county treasurer shall be liable in an action on his bond if he receives any further money out of the treasury for fees, clerk's hire or otherwise, the words "or otherwise" comprehend every case for getting money out of the treasury other than that which a preceding sec-

But it is not always disjunctive; it is sometimes interpretative or expository of the former word, as "*balivam vel jurisdictionem*"—in the statute of Marlbridge. As used in the tariff statutes it may be taken to indicate an intention of congress to refer to the one phrase in explanation of the other.¹

"Or" Read as "And," and Vice Versa.—It is sometimes construed to mean "and," when such construction appears clearly necessary to give effect to a clause in a will, or to some legislative provision; but never to change a contract at pleasure. Indeed, to say that "or," can ever mean "and" seems to be an inaccurate expression. It should rather be said that, for strong reasons and in conformity with a clear intention, "or" has been changed or removed, and "and" substituted in its place.²

tion has provided should be a legitimate one. *State v. Kelly*, 32 Ohio St. 429.

Where a widow makes a power of attorney authorizing the grantee of the power to demand the assignment or her dower "in any and all of the above mentioned premises or any other," no premises whatever being mentioned in the instrument, it was held that the term "or any other" added nothing to the meaning of the word "premises" in the paper, no premises being mentioned. *Sloan v. Whitman*, 5 Cush. (Mass.) 532.

The general words "or other thing," must be construed to mean or other thing of like kind. The maxim *noscitur a sociis* applies. *Commonwealth v. Dejardin*, 126 Mass. 46.

Or Otherwise.—The power to justices to order a person to comply with specified health requisitions, "or otherwise to abate the nuisance," gives the justices the alternative, and does not compel them to make an alternative order. *Whitaker v. Derby*, 55 L. J., M. C. 8; 50 J. P. 357; 2 Times Rep. 68; dissenting from *Ex parte Whitchurch*, 6 Q. B. D. 545. See also *Ex parte Saunders*, 11 Q. B. D. 191; *Rex v. Llewellyn*, 13 Q. B. D. 681.

1. *Hill v. London Gas Co.*, 5 H. & N. 312; *Arthur v. Cummings*, 91 U. S. 362; *Weilbacher v. Merritt*, 37 Fed. Rep. 87. See, however, *Hills v. Evans*, 31 L. J., Ch. 466.

In the power in the Infants' Settlement act 1855 (18 & 19 Vict., ch. 43, § 1), to make a settlement "upon or in contemplation of" marriage, the words "in contemplation of" are not expository of "upon"; for the "or" has its natural disjunctive effect of

presenting to the view two distinct things. Per SELBORNE, L. C. *In re Sampson & Wall*, 25 Ch. D. 482. See thereon *Seaton v. Seaton*, 13 App. Cas. 68.

"Agent or Surveyor."—In an appointment of a person to act as "agent or surveyor" of a fire insurance company, the term "surveyor" cannot be taken as limiting the word "agent." *Lycoming F. Ins. Co. v. Woodworth*, 83 Pa. St. 223.

When the word "or" in a statute is used in the sense of to wit, that is in explanation of what precedes, and making it signify the same thing, a complaint or indictment which adopts the words of the statute is well framed. Thus, it was held that an indictment was sufficient which alleged that the defendant had in his custody and possession ten counterfeit bank bills or promissory notes, payable to the bearer thereof, and purporting to be signed in behalf of the president and directors of the Union Bank, knowing them to be counterfeit, and with intent to utter and pass them, and thereby to injure and defraud the said president and directors; it being manifest from the statute on which the indictment was framed, that "promissory note" was used merely as explanatory of "bank bill," and meant the same thing. *Bouv. L. Dict.*; *Brown v. Commonwealth*, 8 Mass. 59; *Clifford v. State*, 29 Wis. 327; *Commonwealth v. Grey*, 2 Gray (Mass.) 502; *Blemer v. People*, 76 Ill. 265. See also *State v. Gilbert*, 13 Vt. 647; *Morgan v. Commonwealth*, 7 Gratt. (Va.) 592.

2. *Douglass v. Eyre*, Gilp. (U. S.) 147. Compare *United States v. Haun*, 8 Am. Law Reg. 663.

Still, it is an ancient rule of construction (the principle of which, however, would not be extended at the present day) to avoid disinheritance issue, that if real estate be devised to A in fee simple with a limitation over in the event of A dying under twenty-one or without issue, the word "or" will be read "and," and the gift over will be construed to take effect only in the event of A dying under twenty-one and without issue. *Soulle v. Gerrard*, Cro. Eliz. 525; *Fairfield v. Morgan*, 2 B. & P. N. R. 38; *Right v. Day*, 16 East 69; *Eastman v. Baker*, 1 Taunt. 174; *Hawk*, 203. See also 1 *Jarman on Wills* 505-507; *Johnson v. Sincox*, 31 L. J. Ex. 38; 7 H. & N. 344; *Den v. English*, 17 N. J. L. 280; *Fairfield v. Morgan*, 2 N. R. 38. And see *Right d. Day v. Day*, 16 East 67; *Monroe v. Holmes*, 1 Brev. (S. Car.) 319; *Beltzhoover v. Costen*, 7 Pa. St. 13; *S. P. Shands v. Rogers*, 7 Rich. Eq. (S. Car.) 422. But if the first estate is less than the fee simple, the rule just stated will not apply. *Mortimer v. Hartley*, 6 Ex. 47; *Cooke v. Mirehouse*, 34 Bea. 27.

Besides that rule there is probably no other general rule which could with practical utility be relied on for sanctioning the change of "or" to "and," or the converse. See, however, 1 *Jarman on Wills* 505-524, where this change of words is elaborately treated. See also *Watson Eq.* 1316-1318. Whenever such a construction is adopted there must be some violence done to the language which only a context can justify.

Courts sometimes, in attempting to give effect to a testator's intention, displace "or" and substitute "and," and also put "or" where the testator has written "and;" but such departures from the words of the will are never made, except it is clear they are necessary to give effect to a clear purpose of the testator. *Courter v. Stagg*, 27 N. J. Eq. 305.

The rule is well settled that, in order to carry out an evident and clearly shown intent of a testator, "and" may be construed as "or," and "or" may be construed as "and." *Roome v. Phillips*, 24 N. Y. 463; *Cornish v. Willson*, 6 Gil (Md.) 299. See also *Woerner on Adm.* 881; *BONDS*, vol. 2, p. 461 n, 462 n.; *AND*, vol. 1, p. 569; *INTENT*, vol. 11, p. 366.

"Or" Read as "And."—"The word 'or' in a will has been rejected, and the word 'and' construed 'or,' and the word 'or' construed 'and' to comply with the

intent of the testator . . . So the word 'and' has been construed 'or' in a lease . . . And the word 'or' has been construed 'and' in an act of parliament, 1 Vent. 62." *Englefried v. Woelpart*, 1 Yeates (Pa.) 41, 46.

"Courts of justice will transpose the clauses of a will and construe 'or' to be 'and' and 'and' to be 'or,' only in such cases when it is absolutely necessary so to do, to support the evident meaning of the testator. But they cannot arbitrarily expunge or alter words without such apparent necessity." *Griffith v. Woodward*, 1 Yeates (Pa.) 316.

The by-laws of an incorporated company provided that the directors "should serve for the term of one year or until such time as their successors shall be elected." *Held*, that the word "or" should be read as "and" and that one who had been duly elected must be considered liable as a director until it should be shown by him that a successor was elected. *National Bank v. Colwell*, 14 Daly (N. Y.) 361.

The expression "claim growing out of or dependent upon any treaty stipulation" in U. S. Rev. Stat. held to mean "growing out of and dependent upon," etc. *Weld v. United States*, 16 Wash. L. Rep. 171.

Where by a rule of court the plaintiff is permitted to amend his bill "upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material," etc., it was held that the last "or" was to be read "and." *Toomey v. Hughes*, 25 W. N. C. (Pa.) 66. See *Stretton v. Fitzgerald*, 23 L. R., I. 310, 466, for a discussion as to whether "or" was to be read "and" in a particular case.

"Or," in a statute imposing punishment if any person shall place obstructions in a water course, whereby the flow of water is lessened, or navigation impeded, read "and." *State v. Pool*, 74 N. Car. 402.

"Break or enter," in the *Pennsylvania* act of 1860, § 135, defining burglary, means "break and enter." *Rolland v. Commonwealth*, 82 Pa. St. 306, 326.

"Or" in a statute was read "and," because it was evidently a misprint. in *Sparrow v. Davidson College*, 77 N. Car. 35.

In a devise of lands to two, in equal shares, and to their heirs and assigns, with the condition that if either shall "die under age or intestate," his share should go to the survivor, the word

"or" should be construed "and;" and, that the survivor may take, the other must have died both under age and in testate. *Den v. Mugway*, 15 N. J. L. 330.

"Or" means "and" in the clause "unlawful or forcible entry." in the re-enacted forcible entry law of *Wisconsin*, notwithstanding the substitution. *Winterfield v. Stauss*, 24 Wis. 394.

In the following cases "or" was read as "and": *United States v. Fisk*, 3 Wall. (N. Y.) 447; *Dumont v. United States*, 98 U. S. 143; *Robinson v. Brinson*, 20 Tex. 438; *Parker v. Carson*, 64 N. Car. 563; *Kindig v. Smith*, 39 Ill. 301; *Neveson v. Taylor*, 8 N. J. L. 43; *People v. Van Rensselaer*, 8 Barb. (N. Y.) 189; *Van Vechten v. Pearson*, 5 Paige (N. Y.) 512; *Miller v. Philip*, 5 Paige (N. Y.) 573. *Compare* *Phyfe v. Phyfe*, 3 Bradf. (N. Y.) 45, 52; *Jackson v. Blanshan*, 6 Johns. (N. Y.) 54; *Roome v. Phillips*, 24 N. Y. 463; *Murray v. Keyes*, 35 Pa. St. 384; *Parke v. Kleeber*, 37 Pa. St. 251; *State v. Brandt*, 41 Iowa 615; *Neal v. Cosden*, 34 Md. 421; *Rigoney v. Neiman*, 73 Pa. St. 330; *Ward v. Barrows*, 2 Ohio St. 241; *State v. Conner*, 30 Ohio St. 407; *Sargent v. Simpson*, 8 Me. 148; *White v. Crawford*, 10 Mass. 183; *Holcomb v. Lake*, 25 N. J. L. 605; 24 N. J. L. 688; *Den v. Allaire*, 20 N. J. L. 19; *Den v. English*, 17 N. J. L. 280; *Hunt v. Hunt*, 11 Met. (Mass.) 98; *Loyd v. Lynchburg Nat. Bank* (Va. 1890), 11 S. E. Rep. 105; *Tennell v. Ford*, 30 Ga. 707; *Raborg v. Hammond*, 2 Har. & G. (Md.) 42; *Wood v. Georgia R. & Banking Co.* (Ga. 1890), 10 S. E. Rep. 967; *Janney v. Sprigg*, 7 Gill (Md.) 197; 48 Am. Dec. 557; *Phelps v. Bates*, 54 Conn. 11; *Kanne v. Minneapolis etc. R. Co.*, 33 Minn. 419; *Scott v. Methodist Church*, 50 Mich. 531; *Doebler's Appeal*, 64 Pa. St. 14; *Denn d. Wilkins v. Kemeys*, 9 East 366; *Ray v. Enslin*, 2 Mass. 554; *Carpenter v. Heard*, 14 Pick. (Mass.) 449; *Dallam v. Dallam*, 7 Har. & J. (Md.) 220; *Robertson v. Johnston*, 24 Ga. 102; *Turner v. Whitted*, 2 Hawks (N. Car.) 613; *Harrison v. Bowe*, 3 Jones Eq. (N. Car.) 478; *Duncan v. Harper*, 4 S. Car. 76; *Atty. Gen. v. West Wisconsin R. Co.*, 36 Wis. 466; *Witsell v. Mitchell*, 3 Rich. 289; *China v. White*, 5 Rich. Eq. (S. Car.) 426; *Shands v. Roger*, 7 Rich. Eq. (S. Car.) 422; *Hammond v. Denton*, 1 Harr. & McH. (Md.) 202; *Read v. Snell*, 2 Atk. 645; *Fowler v. Paget*, 7 T. R. 509; *Harris v. Davis*, 1 Coll. 416; *Morris v. Morris*,

17 Bea. 198; *Shand v. Kidd*, 19 Bea. 310; *Maude v. Maude*, 22 Bea. 290; *Bentley v. Meech*, 25 Bea. 197; *Maynard v. Wright*, 26 Bea. 285; *Greated v. Greated*, 26 Bea. 621; *Hawksworth v. Hawksworth*, 27 Bea. 1; *Cooke v. Mirehouse*, 34 Bea. 27; *Greenway v. Greenway*, 29 L. J. Ch. 601; 2 D. G. F. & J. 128; 1 Giff. 131; *Parkin v. Knight*, 15 L. J. Ch. 209; 15 Sim. 83; *G. W. R. v. Bishop*, L. R., 7 Q. B. 550. But see thereon *Malton Local Board v. Malton Manure Co.*, 4 Exch. D. 302, and *Bishop Auckland Loc. Bd. v. Bishop Auckland Iron Co.*, 52 L. J., Mc. 38; *Metropolitan Bd. of Works v. Steed*, 8 Q. B. Div. 445; *Re Philips*, L. R., 7 Eq. 151; *Holland v. Wood*, L. R., 11 Eq. 91.

"Or" Not Read as "And." — A testator devised land to his "two sisters, or their children, that is to say, one-third to Mary or her said children, and two-thirds to Bridget or her children." *Held*, that in this case the word "or" could not be changed into "and," and that the children were entitled, if at all, only after the death of their respective parents. *O'Brien v. Heeney*, 2 Edw. Ch. (N. Y.) 242.

In the construction of a devise, the word "and" will never be substituted for "or," unless it is necessary in order to carry out the clear intention of the testator. *Holcomb v. Lake*, 24 N. J. L. 686.

In the following cases "or" was not read as "and": *Dumont v. United States*, 8 Cent. L. J. 196; *Cody v. Bunn*, 46 N. J. Eq. 131.

It cannot be construed "and" in a penal statute when the effect is to aggravate the offense. *State v. Walters*, 97 N. Car. 490; 2 Am. Rep. 310. See also *United States v. Tenshaws*, 2 Paine (U. S.) 162; *State v. Mitchell*, 5 Ired. L. (N. Car.) 350. But see *State v. Brandt*, 41 Iowa 615; *State v. Myers*, 10 Iowa 448.

There is a world of difference between the little words "and" and "or." *State v. Braucleigh*, 92 Mo. 490; *Crow v. Beardsley*, 68 Mo. 435; *Mersey Docks v. Henderson*, 4 Times Rep. 703; *Prim v. Smith*, 20 Q. B. D. 643; 36 W. R. 530; *Re Huggins*, 58 L. J., Q. B. 207; 22 Q. B. D. 277; *Re Clew*, 8 Q. B. D. 511; *Re Sanders*, L. R., 1 Eq. 675; *Simpson v. Holliday*, L. R., 1 H. L. 315; *Wingfield v. Wingfield*, 9 Ch. D. 658; *Re Stroud*, W. N. (75) 148; *Wright v. Frant*, 4 B. & S. 118; *R. v. Phillips*, 7 B. & S. 593; L. R., 1 Q. B. 648

ORDAIN—(See also RELIGIOUS SOCIETIES).—I. To make, enact, establish; as to ordain a constitution or a system of courts.¹

2. To ordain, applied to a clergyman, means that he has been invested with ministerial functions or sacerdotal power.²

ORDER.—Any command or direction emanating from authority.³

ORDERS—(See also BILLS AND NOTES, vol. 2, p. 313).

- I. Definition, 224.
- II. The Consideration, 224.
- III. When Revocable, 224.
- IV. The Effect, 225.
 - 1. *In General*, 225.
 - 2. *As an Assignment of the Fund Upon Which Drawn*, 226.
- V. Duties of the Payee, 226.
- VI. Acceptance, 227.
 - 1. *What Amounts to an Acceptance*, 227.
 - 2. *Consideration for Acceptance*, 228.
 - 3. *Acceptor's Liability*, 228.
- VII. Assignment of Order, 232.
 - 1. *Endorsee's Rights; Defenses Which May be Made Against Him*, 232.
- VIII. Presumptions Arising from Possession of the Order by Drawee, 233.
- IX. Construction, Admission of Parol Evidence, 233.
- X. Order for Merchandise; Presumption of Credit, 234.

(overruling *R. v. Shiles*, 1 Q. B. 919; *Harrington v. Ramsay*, 8 Exch. 879; *R. v. Pocock*, 8 Q. B. 729; *Green v. Wood*, 7 Q. B. 178).

"And" Read as "Or."—Where land was devised to a person for life, with remainder to his issue, and if he should die "under age, and without leaving lawful issue living at his death," then over, the word "and" was construed to mean "or," so as to give the remainder over, upon the death of the first taker without issue, after he became of age. *Seabrook v. Mikell*, 1 Cheves (S. Car.), pt. II, 80.

"And" construed to mean "or," for which it had been substituted in codifying former statutes, of which its conjunctive sense would operate a repeal. *Hughes v. Smith*, 64 N. Car. 493.

In the following cases "and" was read as "or": *Sayward v. Sayward*, 7 Me. 210, *Litchfield v. Cudworth*, 15 Pick. (Mass.) 27; *Commonwealth v. Heywood*, 105 Mass. 187; *East v. Garrett*, 84 Va. 523, *Janney v. Sprigg*, 7 Gill (Md.) 197; 48 Am. Dec. 557; *Brownson v. Edwards*, 2 Ves. Sen. 243; *Waterhouse v. Keen*, 6 D. & R. 257; *Townsend v. Read*, 10 C. B., N. S. 317, *E. C. L.; Stapleton v. Stapleton*, 21 L. J., Ch. 434; 2 Sim., N. S. 212; *Townsend v. Kingston*, 6 Ir. Eq. Rep. 118. See also *Wms. Exrs.* 1089. See also **AND**, vol. 1, p. 569.

"And" Not Read as "Or."—"And" is never construed to mean "or" except when the context of the will favors it. *Armstrong v. Moran*, 1 Bradf. (N. Y.) 314.

"And" was not read as "or" in the following cases: *Ely v. Ely*, 20 N. J. Eq. 48, *Butterfield v. Haskins*, 33 Me. 393, *Hale v. Sweet*, 40 N. Y. 97; *Commonwealth v. Hadcraft*, 6 Bush (Ky.) 91; *Twyne's Case*, 3 Rep. 80a; *Doe d. Usher v. Jessop*, 12 East 288, *Gray v. Pearson*, 6 H. L. Ca. 61; *Seccombe v. Edwards*, 28 Bea. 440; *Reed v. Braithwaite*, L. R., 11 Eq. 514, *Re Kirkbride*, L. R., 2 Eq. 400, *Barker v. Young*, 33 Bea. 353, *Oldfield v. Dodd*, 8 Exch. 578; *Re Sanders*, L. R., 1 Eq. 675; *Coates v. Hart*, 3 DeG. J. & S. 504.

1. *And*. L. Dict. See also *United States v. Smith*, 4 N. J. L. 38.

2. *Kibbe v. Autram*, 4 Conn. 134, *Baker v. Fales*, 16 Mass. 512.

3. *Abb. L. Dict.*

Where B, an executor, placed the amount of some legacies which he held in trust for the nieces of his testator, in the hands of C, who thereupon gave to B a writing acknowledging the receipt thereby and agreeing to retain the same in his hands until the said beneficiaries became of full age, and to pay the same toward the said beneficiaries by an order from B when they should become of full age, it was held that the "or"

I. DEFINITION.—An order is a brief note, resembling a single bill of exchange, requesting the payment of money or the delivery of personalty to a person named or to the bearer of the note.¹

But though an order may be said to resemble a bill of exchange, and what are technically bills of exchange are often called orders for the payment of money, yet an order may lack one or more of the essential attributes of a bill; and it is of such orders that it is proposed to treat in this article.²

II. THE CONSIDERATION FOR DRAWING THE ORDER.—There is a *prima facie* presumption that there was a valuable consideration for drawing an order.³

III. WHEN REVOCABLE.—An order drawn upon sufficient consideration cannot be revoked, no matter whether accepted or not⁴ but if there is no consideration for the order, it may be

der" mentioned in the writing given by C did not import exclusively a written instrument, but any express direction by B, though merely verbal, was a sufficient compliance with the agreement. *Treat v. Stanton*, 14 Conn. 446.

1. And. L. Dict.; Bouv. L. Dict.; Abb. L. Dict.

A will, signed by three witnesses, bequeathing a relief fund of a mutual relief association, though inoperative as a bequest, may be such an order, signed by two witnesses, for payment of the fund, as is required by the rules of the association. *Dennett v. Kirk*, 59 N. H. 10.

An order written thus, "Value received, pay to A B \$40 and charge same against whatever amount may be due me for my share of fish caught on board schooner Star," is an order for the payment of that sum absolutely, and is not limited to the proceeds of the drawer's share. An action can be maintained thereon in the name of an endorsee. *Redman v. Adams*, 51 Me. 429.

A Check.—A check upon a bank, until accepted, is merely an order upon the bank. The bank is not liable upon it; and it may be revoked. *Schneider v. Irving Bank*, 1 Daly (N. Y.) 500; 30 How. Pr. (N. Y.) 190. See also CHECKS, vol. 3, p. 211.

2. Order does not ordinarily mean a cash draft. *Hinneman v. Rosenback*, 39 N. Y. 98, which case see for a discussion of the distinction commonly made between an "order" and a bill of exchange. As used in *New Hampshire Rev. Stat.*, ch. 14, § 3, making the protest of any bill of exchange, note or order, duly certified, etc., evidence of the facts stated in such protest, embraces a draft not

negotiable and payable only on a certain contingency. *Dakin v. Graves*, 48 N. H. 45.

An order drawn by the public printer upon the treasurer of the State for a specified sum, payable out of any scrip in the hands of the treasurer that might be due the drawer, is not, by the law-merchant, a bill of exchange or draft. *Wilamouicz v. Adams*, 13 Ark. 12.

An order by a client on his attorney to pay from moneys collected, is not such a bill as requires mercantile notice of non-acceptance, etc. *Crawford v. Cully*, *Wright* (Ohio) 453.

Plaintiff sued defendant on the following instrument: "The commissioners of highways of the township of Rowland will pay the bearer \$22 when funds in road district number three and four. February 22nd, 1841. (Signed) A P and H C, commissioners of highways in the township." *Held*, it was not an order or warrant upon the township treasurer, under the act of 1841, but a draft, drawn by the commissioners on themselves, and that an action could not be sustained thereon against the township. *Monroe v. Rowland*, 1 Mich. 318.

3. *Smith v. Poor*, 37 Me., 462; *Kincaid v. Kincaid*, 8 Humph. (Tenn.) 17.

An order drawn upon one for money, for value received, is *prima facie* evidence that the drawer has received the amount in money, or in money's worth. *Child v. Moore*, 6 N. H. 33.

An order for a specific sum of money, to be paid out of a particular fund, is *prima facie*, but not conclusive, evidence of debt. *Curle v. Beers*, 3 J. J. Marsh. (Ky.) 170.

4. An order to deliver oil, drawn upon

revoked at any time.¹

IV. THE EFFECT—1. In General.—An order for the payment of a certain sum in chattels does not legally import an undertaking, by the drawer, that the payee shall obtain the chattels; nor that the drawer will be answerable to him for the value of them on the drawee's refusal to accept or pay the order.² In such a case the payee's remedy would be an action for or upon the original consideration for which the order was given. So an order to an attorney to pay the proceeds of a certain claim, by the owner of such claim to a designated person, does not create an undertaking, on the part of the drawer in favor of the payee, to pay in case the claim cannot be or is not collected.³

But when one delivers to another an order on a third person to pay a specified sum of money to the person to whom the order is given, the natural import of the transaction is that the drawee is indebted to the drawer in the sum mentioned in the order, and that it was given to the payee as means of paying or securing the payment of the payee's debt; in other words, it implies the relation of debtor and creditor between the parties to the extent of the sum specified in the order, and the willingness on the part of the debtor to pay the debt.⁴

And this inference is so strong that it has been held that an order drawn by a debtor, in favor of his creditor upon a third party, is such an acknowledgment of debt as will bar the statute of limitations from running in favor of the drawer.⁵

Where the order is drawn on a particular fund, it has been held that it will not support an action by the payee against the

the owner's bailee upon a sufficient consideration, cannot be revoked without the holder's consent; nor does it matter whether the bailee accepted the order or not. *Barse v. Morton*, 43 Hun (N. Y.) 479.

One who, in absence of fraud or misrepresentation, has given an order on another for money equitably due, cannot recall the order, and, upon the refusal of him on whom it is drawn, to pay it. *Foster v. Dayton*, 10 Daly (N. Y.) 225.

1. *Schneider v. Irving Bank*, 1 Daly (N. Y.) 500.

2. *Sears v. Lawrence*, 15 Gray (Mass.) 269.

A's order to B to pay C a certain sum in lumber, *held*, not to be an undertaking on A's part to pay the same in case of B's refusal. *Hyland v. Blodgett*, 9 Oregon 166; 42 Am. Rep. 799.

3. *Curry v. Shelby* (Ala. 1890), 7 So. Rep. 922.

4. *Manchester v. Braedner*, 107 N. Y.

346. See also *Bogert v. Moss*, 1 N. Y. 317; *Winchell v. Hicks*, 18 N. Y. 558; *Smith v. Ryan*, 66 N. Y. 352, 23 Am. Rep. 60.

A executed a written order directed to B, requesting him to pay C a sum specified, when B should collect that amount for A. *Held*, that the order was *prima facie* in acknowledgment that the sum specified was due from A. to C. *Spangler v. McDaniel*, 3 Ind. 275. See also *Gallagher v. Raleigh*, 7 Ind. 1.

5. *Manchester v. Braedner*, 107 N. Y. 346; *Spangler v. McDaniel*, 3 Ind. 275; *Bogert v. Moss*, 1 N. Y. 317. See also *Winchell v. Hicks*, 18 N. Y. 558; *Smith v. Ryan*, 66 N. Y. 352; 23 Am. Rep. 60; *Mershon v. Withers*, 1 Bibb (Ky.) 503; *Nichols v. Davis*, 1 Bibb (Ky.) 490. And in *Manchester v. Braedner*, 107 N. Y. 346, it was held that the new promise so inferred was not conditional, in the sense that the debt was to be paid only out of the funds in the hands of the drawee.

drawer without reference to the original consideration for which it was given without its evidence of debt.¹

2. As an Assignment of the Fund or Personalty Upon Which It Is Drawn.—An order, when given by a principal upon his agent or a creditor upon his debtor, acts as an equitable assignment of the fund or of the personal property upon which it is drawn; but a bill of exchange does not act as the assignment of any particular debt.²

V. DUTIES OF PAYEE.—Notice of the failure of the drawee to pay upon the presentation of a non-negotiable order is due to the drawer, although regular protest and notice, in the strict manner required in reference to bills of exchange, is not necessary.³ But where an order was drawn by a client upon his attorney directing him to pay money out of any collected by

1. *Mershon v. Withers*, 1 Bibb (Ky.) 503; *Nichols v. Davis*, 1 Bibb (Ky.) 490. Compare *Joliffe v. Higgins*, 6 Munf. (Va.) 3.

2. *Foster v. Dayton*, 10 Daly (N.Y.) 225; *Curry v. Shelby* (Ala. 1890), 7 So. Rep. 922. See also *Dunn v. Stokern*, 43 N. J. E. 401; *Koch v. Quick*, 29 Ill. App. 635; *Harvin v. Galluchat*, 28 S. Car. 211.

An order drawn by a sub-contractor on the contractor, requesting him to pay to a third person the contract price for doing a specified part of the work included in the sub-contract, is sufficiently definite as to amount, which is ascertainable by measurement and calculation. And is a good assignment by the sub-contractor of the money due him on his contract. *McBride v. Collins*, 4 Utah 181.

In an action on a written order which reads: "Mr. C.—Dear Sir: Please allow Mr. B. to see a statement of our account in full, and give him any money due us, and let him receipt you for the same"—it is not necessary to show an acceptance by the drawee, as the order amounts to an equitable assignment of the fund. *Brem v. Covington*, 104 N. Car. 589.

While the custodian of a particular fund may not be bound to accept an order drawn on him for a part of the fund, yet such an order will be upheld as constituting an assignment in equity, especially where the custodian consents thereto. *Des Moines Co. v. Hinckley*, 62 Iowa 637.

See also ASSIGNMENT, vol. 1, p. 835.

While at law an order drawn by a creditor on his debtor, in favor of a third person, will not give the third

person a right of action against the debtor unless he accepts the order, equity will treat an unaccepted order as a valid assignment of the debt, if the order has the support of a valuable consideration, but not if it is without such support. *Brokaw v. Brokaw*, 41 N. J. Eq. 215.

But see *Aguader v. Quish*, 21 La. Ann. 322, where it was held that an order given by a principal upon his agent holding property for disposal, to deliver "the property or its proceeds," to the payee, does not operate to vest the title to the specific chattels in the payee.

An unaccepted order for part of a fund alleged to be due the drawer, does not operate as a legal or equitable transfer of the amount therein called for, nor does it constitute a lien on such fund; and hence it is unavailing against a subsequent garnishment of the fund by a creditor of the drawer. *Missouri Pac. R. Co. v. Wright*, 38 Mo. App. 141.

Where a building contractor draws an order on the owner of the building for a sum of money, requesting him therein to charge such sum to the balance due him on the contract, the contractor knowing that the sum was not yet due, and the order being by its terms negotiable, such order is a mere draft, and not an order on a particular fund so as to operate as an assignment. *Gunther v. Darmstadt*, 14 Daly (N. Y.) 368.

See also ASSIGNMENT, vol. 1, p. 835; BILLS AND NOTES, vol. 2, p. 313.

3. *Sinclair v. Johnson*, 85 Ind. 527.

In an action for the price of work and labor, where the defendant sets up

him, and the drawer receives money in advance upon such order from the payee, he (the drawer) is not entitled to notice of the refusal to pay by his own attorney.¹ And if the drawee had no effects of the drawer in his hands at the date of the order, the drawer is not entitled to notice of non-payment.² The payee owes it to the drawer to use due diligence in presenting the order for payment.³

VI. ACCEPTANCE—1. What Amounts to an Acceptance of an Order.—If the drawee has funds of the drawer in his hands, his acceptance is good whether verbal or written; but it seems, if he has no funds of the drawer in his hands, a verbal acceptance will amount to a promise to pay the debt of another, and would therefore be void.⁴

that he drew and delivered to the plaintiffs an order on a railroad company which they negligently failed to collect, it is not error to instruct that if, after payment of the order had been refused, defendant told plaintiff to hold on, as he would pay the amount of the order, then no protest or notice was necessary, and that plaintiffs were not bound to accept the money from the drawee coupled with conditions prejudicing their rights, there being substantial evidence warranting the hypothesis. *Griggs v. Deal*, 30 Mo. App. 152.

1. *Crawford v. Cully*, *Wright* (Ohio) 453.

2. *Blankenship v. Rogers*, 10 Ind. 333; *Spangler v. McDaniels*, 3 Ind. 275.

3. *Gallagher v. Raleigh*, 7 Ind. 1.

Drawer Released Through Negligence of Payee.—Gray, being indebted to Garcia, gave him an order on V for the delivery of 500 goats. V refused to deliver the goats, alleging that he did not know whether or not he was indebted to Gray to that extent. Garcia notified Gray of V's refusal, and entered into a written agreement with V to extend the time for receiving the goats for two months, upon V's agreeing to deliver them at the end of that time. V removed the goats from the State. It was held that Garcia, by his agreement with V released Gray from all his obligations upon the order and the debt for which the order was given. *Garcia v. Gray*, 67 Tex. 282.

4. *Walton v. Mandaville*, 56 Iowa 597; 41 Am. Rep. 125. See also *Quinn v. Hanford*, 1 Hill (N. Y.) 84; *Pike v. Irwin*, 1 Sandf. (N. Y.) 14; *Manly v. Geagan*, 105 Mass. 445; *Plummer v. Lyman*, 49 Me. 229; *Wakefield v. Greenwood*, 29 Cal. 600.

Held to be an Acceptance.—In an ac-

tion by the owner of a building against the creditors' and mechanics' lien claimants of the contractor, to settle to whom the balance due under the contract was to be paid, defendant claimed under an order given on the owner by the contractor, which was general in its terms. Upon presentment the owner made no formal acceptance, but said there was now no money due the contractor, but would pay the order out of the first money due him, and retained the order. *Held*, a sufficient acceptance, and defendant is entitled to be paid out of the balance on hand. *McPherson v. Walton*, 42 N. J. Eq. 282.

Where, in an action to recover on an order drawn upon defendant in favor of plaintiff, the party giving such order has placed in defendant's hands a fund or means of obtaining money belonging to him, and at his request and with plaintiff's consent, the defendant has promised plaintiff to pay him the debt out of the moneys which should be received by him belonging to the drawer of the order, such promise will be held an original promise, and not within the statute of frauds. *Mitz v. McMorran*, 64 Mich. 664.

The drawee of an order, on presentment and demand, after taking time to consider, told the payee, "I think there will be money enough to pay you, and it will be all right, and I will pay it." On another occasion, the payee's agent asked the drawee about the order, and he said he would not pay it that afternoon; "but tell S [the payee]" it is all right, and I will pay it;" and the agent so informed the payee. *Held*, that these words, though not in writing, in absence of a statute requiring written acceptances, were a valid acceptance. *Short v. Blount*, 99 N. Car. 49.

2. Consideration for Acceptance.—It has always been held that an agreement to forbear on the part of a payee to push a claim, in satisfaction of, or as security for which an order has been given, against the drawer, is a sufficient consideration for the acceptance of the order by the drawee.¹

3. Acceptor's Liability.—Where there is no consideration passing between the acceptor of an order for the delivery of a sum of money in merchandise and the payee thereof, the acceptance does not render the acceptor liable to the payee, when such acceptance is made while the order is still in the hands of the drawer, and is not a promise on the part of the drawee to the payee.²

This proposition is only one form of a well-known common-law rule, "that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter."³ (See also NOVATION).

So it was held, where A drew an order on the defendants for the delivery of certain books, in favor of the plaintiff, who accepted it, the acceptance being made while the order was in the hands of the drawers without any communication with the plaintiff, and without any knowledge on the part of the defend-

Defendants were sureties for a contractor, and to protect them, all money due him was paid to them and they disbursed it on his order. Plaintiffs were the holders of an order on defendants payable at a future time; it was presented to defendants and by them verbally accepted. *Held*, that this acceptance was not a promise to pay the debt of another, but a promise to disburse the funds of another in a certain way, and does not fall within the statute of frauds. *Hughes v. Fisher*, 10 Colo. 383.

Held Not to be An Acceptance.—Where an order has been drawn on a fund and not accepted, and the drawer afterwards recovers judgment for such fund from the drawee, the institution by the latter of a proceeding of interpleader between the payee and subsequent garnishing creditors of the drawer, does not of itself operate as an acceptance of the order. *Missouri Pac. R. Co. v. Wright*, 38 Mo. App. 141.

1. *Hughes v. Fisher*, 10 Colo. 383; *Walker v. Sherman*, 11 Met. (Mass.) 170; *Johnson v. Wilmarth*, 13 Met. (Mass.) 416, 421; *Boyd v. Freize*, 5 Gray (Mass.) 553; *McCorney v. Stanley*, 8 Cush. (Mass.) 85, 88.

Where plaintiff testifies that he took an order in payment for plastering, in

reliance on defendants' promise to accept it, and forbore to file a lien against the party giving the order for the amount due him, it is immaterial whether or not defendants received any consideration for their acceptance, as plaintiff's forbearance is sufficient to bind them. *Flanagan v. Mitchell*, 10 N. Y. Supp. 234.

The shipment of goods by a debtor to a third person, on whom he has given his creditor an order for the proceeds, is a sufficient consideration for the acceptance of the order, and the acceptor becomes the debtor to the amount of the goods shipped and received. *H. G. Olds Wagon Works v. Combs*, 124 Ind. 62.

Where an order was given by one party, received and presented by another and accepted by the third, the agreement of each party is sufficient consideration for the agreement of every other party. *Bacon v. Bates*, 53 Vt. 30. But see VI, (c) and notes.

2. *Rogers v. Union Stone Co.*, 130 Mass. 581; 39 Am. Rep. 478.

3. *Exchange Bank v. Rice*, 107 Mass. 137; 9 Am. Rep. 1. See also *Millard v. Baldwin*, 3 Gray (Mass.) 484; *Field v. Crawford*, 6 Gray (Mass.) 116; *Dow v. Clark*, 7 Gray (Mass.) 198; *Pattee v. Peppard*,

ants of the transaction between the drawers and the plaintiff, that this was a promise to A, and that plaintiff could not recover upon it.¹

120 Mass. 522; *Gamwell v. Pomeroy*, 121 Mass. 207; *Cottage Street Church v. Kendall*, 121 Mass. 428; 23 Am. Rep. 286; *Prentice v. Brimhall*, 123 Mass. 291; PARTIES TO ACTIONS.

1. *Morse v. Adams*, 130 Mass. 585.

In *Willamouciz v. Adams*, 13 Ark. 12, it was held, that an order drawn by the public printer upon the treasurer of the State for a specified sum, payable out of any scrip in the hands of the treasurer which might be due the drawer, and accepted by the treasurer, created no liability on the part of the treasurer. See also *Coyle v. Satterwhite*, 4 Mon. (Ky.) 124, 125; *Hawkins v. Watkins*, 6 Ark. 291. Such an order as that in *Willamouciz v. Williams*, would amount to nothing more than an authority from the drawer to the payee to receive the scrip legally issued; and, if not delivered to him, he would have to resort to an action for the consideration paid by him for the order.

A, being indebted to C, gave him a written order on B for goods which B had contracted to deliver to A. B accepted the order upon the same day that it was drawn, and a few days later it was delivered to C. *Held*, that C could not maintain an action on the contract against B. *Rogers v. Union Stone Co.*, 130 Mass. 581; 39 Am. Rep. 478.

In *Walker v. Sherman*, 11 Met. (Mass.) 170, it was held that a suit could be maintained by the payee against the acceptor of an order for merchandise, upon proof that the drawer was in debt to the payee when the order was drawn, and that it was given in payment of the debt, and was accepted at the request of the drawer when it was drawn, all parties being present at the acceptance. *ENDICOTT, J.*, in speaking of this case, says, in *Rogers v. Union Stone Co.*, 130 Mass. 581: "And even if it were not given in payment of the debt, yet the other facts would authorize the inference that the plaintiff agreed to forbear suing the drawer on receiving the order. It was upon this last ground that the case is cited as authority by Justice Wild, in *Johnson v. Wilmarth*, 13 Met. (Mass.) 416, 421. By Chief Justice Shaw, in *Boyd v. Freize*, 5 Gray (Mass.) 553, and by

Justice Bigelow, in *McCorney v. Stanley*, 8 Cush. (Mass.) 85, 88.

ENDICOTT, J., thus distinguishes *Eastern R. Co. v. Benedict*, 15 Gray (Mass.) 289; 10 Gray (Mass.) 212, from *Rogers v. Union Stone Co.*, 130 Mass. 581; 39 Am. Rep. 478. In the case of *Eastern R. Co. v. Benedict*, he says: "One Fuller agreed with the defendant to deliver him a quantity of goods to be paid for in the stock of the corporation, and afterwards drew his order on the defendant to give a certain number of shares to the plaintiff, and the defendant promised the plaintiff to deliver the stock accordingly, and the action was maintained. In the case at bar" (*Rogers v. Union Stone Co.*), "there was no promise to the plaintiffs by the defendant, at the time the order was drawn or afterwards, to pay the order or deliver the merchandise."

W gave a written order to the plaintiff, for all that was due him, on the defendants, and it was accepted by them by writing their names across the same. *Held*, that the payee could maintain an action in his own name and recover of defendant's whatever was due of them to W. *Bacon v. Bates*, 53 Vt. 30.

Measure of Liability for Refusal to Deliver Stock.—Where one gave an order for the delivery of \$20,000 in stock as collateral security for a debt, which order was accepted by the drawee, it was held, upon the acceptor's refusal to turn over such stock, that the acceptor was liable for the value of the stock at the date that it should have been delivered, and not for the debt for which it was security. *Appeal of Hite Natural Gas Co.*, 118 Pa. St. 436; *Appeal of American Tube & Iron Co.* (Pa. 1888), 12 Atl. Rep. 270. See also *Eastern R. Co. v. Benedict*, 10 Gray (Mass.) 212.

Acceptance of an Order to Deliver Property Is Not a Warranty of the Title of the Drawer to the Property.—An attorney who has received a promissory note from the agent of the owner for collection, and subsequently receives an order from such agent directing him to deliver the note or the proceeds thereof to one B, by his acceptance thereof binds himself to deliver as directed, but does not warrant the title of

As has been seen, an order for the payment of money out of a certain fund, acts as an assignment of such fund, or part thereof, and of course creates a liability on the part of the acceptor to the payee.¹

But the acceptor of a non-negotiable order is not bound unless there is a consideration for the acceptance.² Where the order is conditional, or it is accepted conditionally, the acceptor is in no case liable until the happening of the contingency upon which the order or his acceptance is based.³

the drawer of the order to the note, or that he had a right to appropriate the proceeds. *Keys v. Follett*, 41 Ohio St. 535.

1. See VI, (b). See also ASSIGNMENTS, vol. I, p. 826.

Parties to Action.—*Brem v. Covington* (N. Car.), 10 S. E. Rep. 706.

An order in this form: "Pay J or order \$300, if the same may be due him from me on his and my settlement, out of the last payment due from you to me, on houses which I am now building for you," and accepted by the drawee, cannot be declared on as a bill of exchange; but the payee, in order to maintain an action thereon against the acceptor, must aver and prove that, before action brought, there was due to the drawee, upon a settlement with the drawer, \$300 or some other sum, and also that a sum of money was due from the acceptor out of the last payment to be made by him to the drawer on the houses mentioned in the order. *Jackman v. Bowker*, 4 Met. (Mass.) 235.

2. *Hunt v. Williams*, 15 R. I. 595.

3. *Ellison v. McCahill*, 10 Daly (N. Y.) 367; *Wakeman v. Noble* (N. J.), 20 Atl. Rep. 388; *Proctor v. Hartigan*, 143 Mass. 462; *Hughes v. Fisher*, 10 Colo. 383; *Gerow v. Riffe*, 29 W. Va. 462; *Sinnehan v. Matthews*, 149 Mass. 29; *Suffield v. Johnston*, 96 N. Y. 369; *Bailey v. Joy*, 132 Mass. 356.

The acceptance of an order for the payment of money out of the amount to be advanced to the drawer, when the houses he was then erecting on the drawee's land should be so far completed as to have the plastering done according to the contract between the parties, is not absolute, but conditional; and the acceptor's liability thereon is dependent on the contingency of the work being completed to a certain stage, according to the contract; nor will such acceptance become absolute, and the acceptor liable thereon, as such,

by a subsequent cancellation of the contract by the drawee and the assignee of the drawer. *Newhall v. Clark*, 3 Cush. (Mass.) 376; 50 Am. Dec. 741.

An order read as follows: "A B.—Sir: Please pay to C D or order \$635, out of amount due me on contract for the erection of your store building, when due," which was accepted. *Held*, a conditional order, and that no recovery could be had thereon unless the acceptor was then or thereafter indebted to the maker, he having failed to complete the building. *Hoagland v. Erck*, 11 Neb. 580.

T J C gave plaintiff a written order on defendants in these words: "Please pay to the bearer, J R E, ninety-five dollars, on delivery of Dakota maps, per agreement," which they accepted by endorsing on it: "We hereby agree to pay the within when due T J C on the delivery of the Dakota maps." *Held*, that no other claims except what pertained to the matter of the maps mentioned can be taken into account to determine defendant's liability. *Everard v. Warner*, 36 Minn. 383.

H, while building a machine for defendant, made and delivered to plaintiff an order upon defendant for a specified sum of money to be paid by defendant to plaintiff upon completion of the machine. Defendant accepted the order and afterwards paid to H's workman, on orders from H, more than the amount of his order in favor of plaintiff, and more than the balance payable on the machine. *Held*, that defendant was liable to plaintiff upon the acceptance, though these payments were made to insure the completion of the machine, as H was without means and would otherwise have been compelled to abandon the contract. *Fox v. New York Wood Turning Co.*, 13 Daly (N. Y.) 153.

In an action upon an order which had been accepted in the following

terms: "Accepted, to pay out of of the profits from drilling by Seiple Bros." The court charged that "plaintiff testifies that he had an interview with defendant, and that defendant promised to pay the order . . . Now, if defendant told plaintiff, at that time, that he would pay this order, while that would not be a new contract between the parties upon this subject, yet it would be very persuasive evidence that defendant, when he made that promise, if he understood it was a conditional acceptance, understood that that condition had been fulfilled." *Held*, no error. *Schermerhorn v. Latchaw* (Pa. 1888), 14 Atl. Rep. 429.

"The defendants accepted an order 'subject to a final settlement,' between themselves and the drawer," *held*, that they were entitled to deduct from the amount otherwise due, a sum which they were legally holden to pay upon execution of a third party against the drawer as principal and themselves as trustees, the service upon them as trustees having been made when the order was accepted. *Goodwin v. Bethel Steam Mill Co.*, 76 Me. 468.

A clerk of court accepted an order drawn by the party to whom a fund to be received by the clerk was payable, but attached to his acceptance the proviso that it should be presented on the day when due. It was not then presented, and the clerk paid it to the assignor. *Held*, that he could not be held liable by the assignee. *Fayetteville Bank v. Clark*, 9 Baxt. (Tenn.) 589.

Defendants had a chattel mortgage upon some cattle, which were sold and the proceeds placed in a bank to the credit of the mortgagor; and the mortgagor gave to the plaintiff an order on the defendants, to be paid out of this fund. The defendants accepted the order provided that they should have money in their hands after their claims were satisfied in full out of the proceeds of the sale of the cattle. The fund was garnished by another creditor of the mortgagor, who dismissed his attachment upon defendants' promise to satisfy him next after their claim had been satisfied. The court held that the defendants were not liable to the plaintiff upon their acceptance for any larger sum than that which might remain in their hands after satisfying their claim and that of the garnisheeing creditor that the acceptance was a conditional one, and that the plaintiffs were not prejudiced by the defendants' agree-

ment with the garnisheeing creditor, as he would have been entitled to priority in any case. *Nordby v. Clough*, 79 Iowa 428.

A builder engaged in constructing a house for defendant gave the plaintiff the following order: "Please pay to G. Fuller & Son \$1,000, being amount of second payment due on contract for building house on Foster St., said payment being due when house is plastered," which order defendant accepted. The house was never plastered by the builder. The court said: "Our construction is that the money was payable when the amount of the second payment on the contract should become due. It is agreed that the second payment was never earned and never became due; the order, therefore, never became payable. *Fuller v. Wild*, 151 Mass. 412.

D was indebted to C; to secure him against loss D deposited \$2,500 in a bank giving C an order for it on the bankers, which they accepted. The order was conditional, specifying that C should make out his account, verified by his affidavit, and file it with the bankers, and thereupon to be paid by the latter, the whole or such part of the \$2,500 as might be due him. C filed a trial balance which showed the total debits and total credits and the balance due from D. *Held*, that this account was sufficient, and that the condition did not require for its fulfilment, a fully itemized account—a total transcript from the books. *Howard v. Munford*, 80 Ga. 166.

Where parties, by an order absolute in its terms, assigned to a bank, as security for advances, the money due and to become due them from the county upon a contract, and afterwards drew checks upon the bank to various parties "to be paid as soon as we settle with the county," which checks the bank accepted, to be paid in the order of presentation, out of and to the extent of the fund, *held*, that these facts constituted an equitable assignment, irrevocable, to the bank, of so much of the fund as was necessary to reimburse it for advances made, and to the payees of the checks, in their order, of so much of the fund as was necessary to pay them, so long as the fund should hold out. *Des Moines Co. v. Hinckley*, 62 Iowa 637.

An order to "pay four hundred dollars out of funds that may be due me as per our contract" is not absolute, but

VII. ASSIGNMENT OF THE ORDER.—An order for the payment of money out of a particular fund being an equitable assignment of the fund, or so much thereof as it calls for, is itself assignable in equity; and in some of the States it is provided by statute that non-negotiable instruments may be assigned, and that the assignor may sue upon them in his own name.¹ But the endorsement of an order by the payee will not render it negotiable.²

1. Endorsee's Rights—Defenses Which May be Made Against Him.—The endorsee at common law could not sue the drawer of a non-negotiable bill in his own name, nor did the endorsement render the drawer liable to the endorsee.³ The endorsee might always, however, sue in equity in his own name, and might sue at common law in the name of the payee.⁴

An order or non-negotiable bill is subject, in the hands of an endorsee for value, to all equities between the payee and the drawer of such order or bill; that is to say, that the order in his hands is subject to all defenses originally existing against the payee, or arising before notice of transfer.⁵ But an endorsee

conditional; and the acceptor's liability thereon is dependent on the contingency that, according to the terms of the contract, anything would be due the drawer thereon. *Gerow v. Riffe*, 29 W. Va. 462.

1. *Halsey v. Dehart*, 1 N. J. L. 93; *Maxwell v. Goodrum*, 10 B. Mon. (Ky.) 286; *Goodman v. Fleming*, 57 Ga. 350; *Cohen v. Prater*, 56 Ga. 203. See also **ASSIGNMENTS**, vol. 1, p. 826; **PARTIES TO ACTIONS**, art. 267, 268, of the Rev. Stats. of *Texas* provides that in order to hold the assignor of a non-negotiable instrument liable as surety for its payment, the assignee shall use due diligence to collect the same; and that parol testimony shall be inadmissible to prove that the assignor, drawer or endorser of such instrument has released the holder from his obligation to use due diligence to collect it.

The court in *Kampmann v. Williams*, 70 Tex. 568 says: "The diligence required under this statute is the same as that required in negotiable instruments under the law-merchant. It was held, in that case, that the holder of an order, not having brought suit until the third term of the court after the cause of action had accrued, and no excuse for the delay being alleged in the original petitions, could not maintain his action upon the order. See also *Thompson v. Payne*, 21 Tex. 625.

2. *Rand Com. Paper*, § 177; *Gregg v. Johnson*, 37 Tex. 558.

3. *Randolph on Com. Paper*, § 656; *Hill v. Lewis*, 1 Salk. 132; *Noland v. Ringgold*, 3 Harr. & J. (Md.) 216; 5 Am. Dec. 435; *Fernon v. Farmer*, 1 Harr. (Del.) 32; *Pratt v. Thomas*, 2 Hill (S. Car.) 654; *Maule v. Crawford*, 14 Hun (N. Y.) 193; *Backus v. Danforth*, 10 Conn. 297; *Warren v. Scott*, 32 Iowa 22; *Hackney v. Jones*, 3 Humph. (Tenn.) 612; *Reed v. Murphy*, 1 Ga. 236; *Hosford v. Stone*, 6 Neb. 380; *Johnston v. Speer*, 92 Pa. St. 227; 37 Am. Rep. 675; *Sanborn v. Little*, 3 N. H. 539; *Wiggin v. Darnell*, 4 N. H. 69; *Conine v. Junction etc. R. Co.*, 3 Houst. (Del.) 288; 89 Am. Dec. 230; *Pratt v. Thomas*, 2 Hill (S. Car.) 654; *Costelo v. Crowell*, 127 Mass. 293; 34 Am. Dec. 367. See also *Sutton v. Owen*, 65 N. Car. 123; *Douglass v. Wilkeson*, 6 Wend. (N. Y.) 637; *Gerard v. Le Coste*, 1 Dall. (U. S.) 194; 1 Am. Dec. 226; *Raymond v. Middleton*, 29 Pa. St. 529.

4. Story on Promissory Notes, § 128; *Randolph on Commercial Paper*, § 656; *Matlack v. Hendrickson*, 13 N. J. Eq. 263; *Truscott v. Hull*, 17 Johns. (N. Y.) 284.

5. *Randolph on Commercial Paper*, 657; *Dyer v. Homer*, 22 Pick. (Mass.) 253; *Sanborn v. Little*, 3 N. H. 539; *Summers v. Hutchison*, 48 Ind. 228; *Herod v. Snyder*, 48 Ind. 480; *Haskell v. Brown*, 65 Ill. 29; *Havens v. Potts*, 86 N. Car. 31; *Cohen v. Prater*, 56 Ga. 203; *Reddish v. Ritchie*, 17 Fla.

always has recourse to his immediate endorser upon default of the drawer.¹ The endorsee may sue the endorser in his own name.² The endorser is not liable as endorser but as assignor, unless he has made his note "with recourse," or in some other way indicated his intention to bind himself as endorser.³

The endorser's liability is absolute, and is not conditioned upon demand and protest as is the case with negotiable instruments.⁴ The endorsee must use due diligence to collect from the drawer.⁵

VIII. POSSESSION OF THE ORDER BY THE DRAWEE.—Possession of an order for the payment of money or delivery of personal property by the drawee, is *prima facie* evidence that he has paid the money or delivered the goods.⁶

IX. CONSTRUCTION—ADMISSION OF PAROL EVIDENCE.—It is the duty of the court to interpret an order, and to instruct the jury as to its legal effect.⁷ Parol evidence is admissible to explain any ambiguity in the order, often to explain those orders which are frequently given by a contractor upon the person for whom he has contracted to build.⁸

867; *Miller v. Bomberger*, 76 Pa. St. 78; *White v. Heylman*, 34 Pa. St. 142.

Especially where the holder is merely in possession of the paper and offers no evidence showing himself the holder for value. *Bircleback v. Wilkins*, 22 Pa. St. 26; *Guerry v. Perryman*, 6 Ga. 119; *Willis v. Twambly*, 13 Mass. 204.

1. *Randolph on Commercial Paper*, 658; *Byles* 149; *Chiddy* 226; 1 *Daniel*, 591; 1 *Edw.* 350; *Story on Promissory Notes*, § 128; *Hill v. Lewis*, 1 *Salk.* 132; *Smallwood v. Vernon*, 1 *Stra.* 478; *Smith v. Kendall*, 6 *T. R.* 123; *Jones v. Fales*, 4 *Mass.* 245; *Sweetser v. French*, 13 *Met. (Mass.)* 262; *Aldis v. Johnson*, 1 *Vt.* 136; *Parker v. Riddle*, 11 *Ohio* 102; *Snyder v. Oatman*, 16 *Ind.* 265; *Smurr v. Forman*, 1 *Ohio* 272; *White v. Low*, 7 *Barb. (N. Y.)* 204; *Long v. Smyser*, 3 *Iowa* 266.

2. *Jones v. Fales*, 4 *Mass.* 245; *Leidy v. Tammany*, 9 *Watts (Pa.)* 353.

3. *Trevall v. Fitch*, 5 *Whart. (Pa.)* 325; 34 *Am. Dec.* 558; *Gray v. Donahue*, 4 *Watts (Pa.)* 400; *Kline v. Keiser*, 87 *Pa. St.* 485; *Campbell v. Farmers' Bank*, 10 *Bush (Ky.)* 152; *Story v. Lamb*, 52 *Mich.* 525.

4. *Plimley v. Westley*, 2 *Bing. N. C.* 249; *Peddlicord v. Whittam*, 9 *Iowa* 47; *Seymour v. Van Slyck*, 8 *Wend. (N. Y.)* 403; *Cromwell v. Hewitt*, 40 *Ind.* 491; *Gilbert v. Seymour*, 44 *Ga.* 63; *Castle v. Candee*, 16 *Conn.* 223. See, however, *Aldis v. Johnson*, 1 *Vt.* 136.

5. *Plimley v. Westley*, 2 *Bing. N. C.* 249.

6. *Greenleaf on Ev.*, vol. 2, §§ 5-18 and 114.

Possession of an order by the maker of a note, drawn upon him by the payee of the note, is *prima facie* evidence that he has paid the order according to its tenor. *Lane v. Farmer*, 13 *Ark.* 63.

The possession of an order by him on whom it was drawn, is *prima facie* evidence that the articles therein specified were delivered according to request. *Kincaid v. Kincaid*, 8 *Humph. (Tenn.)* 17.

A gave to B an order on C for certain hides, and B endorsed on the order a receipt for the hides. *Held*, in an action by C against A, that B's receipt, so endorsed, was *prima facie* evidence of the delivery of the hides pursuant to order. *Rawson v. Adams*, 17 *Johns. (N. Y.)* 130. Compare *Price v. Justiobe*, *Harp. (S. Car.)* 111. See also *EVIDENCE*, vol. 7, p. 42; *SECONDARY EVIDENCE*.

7. *H. G. Olds Wagon Works v. Combs*, 124 *Ind.* 62.

8. Where an order was drawn upon defendant in the following terms: "Pay to the order of A \$500, charge the same to the account of B," and was accepted "to be paid out of the last payment" it was held, the words "to be paid out of the last payment" are ambiguous without some extrinsic explanation and that parol evidence was ad-

X. ORDER FOR MERCHANDISE—PRESUMPTION OF CREDIT.—If a party on whom an order for merchandise is drawn accepts the same, and thereupon proceeds to pay the amount of the order to the person in whose favor it is drawn, the presumption is that the credit was given to the drawer of the order, unless the holder, by some act of his own, rendered himself liable.¹

But where the drawee of an order for merchandise refused to deliver the merchandise to the payee as the order directed, but credited the payee with the amount of the order, on an old account for which he was in the drawee's debt, it was held that the drawer was not liable upon the order.²

missible to show their meaning. *Proctor v. Hardigan*, 143 Mass. 462.

Plaintiffs furnished brick to a sub-contractor to be used in building a house. Defendants, principal contractors, had agreed to pay the sub-contractor when the building was completed and the work accepted. Defendants after a portion of the brick had been furnished, accepted an order on them by the sub-contractor requesting payment to plaintiff of \$100 on the estimate of that month; also for "the balance due" [plaintiffs] "for brick, said amount, when ascertained, to be taken out of the estimate or estimates" to the sub-contractor. Afterwards plaintiff furnished the balance of the brick. There was evidence that the order was intended to cover all the brick which should be purchased of plaintiffs for the building. *Held*, that a judgment for the plaintiffs for the price of all the brick furnished by them would not be disturbed. *Brown v. Doren*, 76 Mich. 482.

A building contract provided for alterations, deviations or additions, and for the payment thereof. *Held*, that the holder of an order drawn by the builder on the owner for extra work, "and to charge the same to account of contract," was entitled to priority over another claimant who held a subsequent order drawn expressly for extra work. *Dunn v. Stokern*, 43 N. J. Eq. 401.

The plaintiff gave an order to W upon the defendants to pay her all "moneys due him after labor pay rolls were paid." W gave her a receipt in full for the above account and all demands except \$350 held subject to garnishee proceedings. *Held*, that the description of the subject matter referred

to in the order and receipt standing by itself was incomplete, uncertain and ambiguous, hence extrinsic evidence was admissible to aid in their construction and rightful application. *Lynch v. Henry*, 75 Wis. 63.

Where checks were drawn "to be paid as soon as we settle with the county," it was competent, for the interpretation of these words, to show by parol that it was understood by the drawers, drawee and payees that the checks were to be paid out of a particular fund due the drawers from the county, and which the drawers had previously assigned to the drawee of the checks as security for advances. *Des Moines Co. v. Hinckley*, 62 Iowa 637. See also *PAROL EVIDENCE*.

Where there is an agreement to pay \$500 in an order on B and T, parol evidence was held admissible to show that the order was to be paid in sash and blinds and not in money. *Hinne-man v. Rosenback*, 39 N. Y. 98.

A contractor drew an order upon his employer in favor of material men to be paid upon completion of houses numbers 424 and 426 Sumner ave. The contractors had an agreement with the drawee to build houses on lots numbered 416, 418, 420, 422, 428 and 430 on the same street, and afterwards gave an order to the same parties to be paid on completion of houses numbered 416, 418, 428 and 430 "north and south pair houses on Sumner ave." In absence of evidence that the parties had any other dealings, the first order will be held to have referred to houses numbered 420 and 422. *Wakeman v. Noble* (N. J.), 20 Atl. Rep. 388.

1. *Camp v. Sadler*, 21 Neb. 732.

2. *Shields v. McEyer*, 1 N. Y. Supp. 585.

ORDINANCES—(See IMPROVEMENTS, vol. 10, p. 281; INTOXICATING LIQUORS, vol. 11, p. 614; LICENSE, vol. 13, p. 529; MUNICIPAL CORPORATIONS; SUMMARY PROCEEDINGS).

- I. Definition, 235.
- II. Ordinances and Resolutions, 235.
- III. Authority to Make, 236.
- IV. Enactment, 237.
 1. *Generally*, 237.
 2. *Meetings of Council*, 239.
 3. *Number Necessary to Enact*, 239.
 4. *Notice*, 239.
 5. *Readings*, 240.
 6. *Signings*, 240.
 7. *Publication*, 241.
 8. *Recording*, 243.
 9. *Amendments*, 244.
 10. *Ratification*, 244.
- V. Form of Ordinance, 244.
 1. *Title*, 245.
 2. *Enacting Clause*, 245.
- VI. Repeal or Modification, 245.
 1. *By the Legislature*, 246.
 2. *By Subsequent Ordinance*, 247.
 3. *By Implication*, 247.
- VII. Reasonableness, 247.
- VIII. Must be Consistent with General Laws, 248.
- IX. Must be Impartial and General, 253.
- X. Must be Certain and Definite, 253.
- XI. Must Not Contravene Common Right, 253.
- XII. May Regulate but Not Restrain Trade, 254.
- XIII. Cannot Authorize the Creation of Private Nuisance, 254.
- XIV. On Whom Binding, 254.
- XV. Penalties, 255.
 1. *Generally*, 255.
 2. *Fines*, 256.
 3. *Payment of Fines*, 257.
 4. *Imprisonment in Default of Payment*, 257.
 5. *When Fines Refunded*, 258.
- XVI. Forfeiture, 258.
- XVII. Repetition of Offenses, 259.
- XVIII. Mode of Enforcing, 260.
 1. *Pleadings*, 262.
 - (a) *Jurisdiction*, 263.
 - (b) *Variance*, 263.
 - (c) *Action Must be Brought in Corporate Name*, 264.
 2. *Construction*, 264.
 - (a) *Generally*, 264.
 - (b) *Void in Part*, 265.
 3. *Evidence*, 266.
 - (a) *Generally*, 266.
 - (b) *Record of Council Proceedings*, 267.
 - (c) *Publication*, 268.
 - (d) *Corporate Existence*, 268.
 4. *Judgments*, 268.
- XIX. Review of Proceedings, 269.
 1. *Certiorari*, 269.
 2. *Habeas Corpus*, 269.
 3. *Injunction*, 269.
 4. *Appeal*, 270.
 5. *Record*, 270.
- XX. Costs, 271.

I. DEFINITION.—Municipal ordinances are laws passed by the governing body of a municipal corporation for the regulation of the affairs of the corporation.¹ The term ordinance is said to be analogous to if not entirely identical with by-law.²

II. ORDINANCES AND RESOLUTIONS.—An ordinance prescribes a permanent rule of conduct or government. A resolution is of a temporary character and prescribes no permanent rule of govern-

1. *Bills v. Goshen*, 117 Ind. 221; *Robinson v. Mayor etc. of Franklin*, 1 Humph. (Tenn.) 156; s. c., 34 Am. Dec. 625; *Blanchard v. Bissell*, 11 Ohio St. 96; *Kepner v. Com.* 40 Pa. St. 130.

In *Citizens' Gas & Min. Co. v. Elwood*, 114 Ind. 336, ELLIOT, J., said: "The word 'ordinance' is a term of settled meaning. It means a local law

prescribing a general and permanent rule."

2. See *Kepner v. Com.*, 40 Pa. St. 124; *Taylor v. Lambertville*, 43 N. J. Eq. 112.

In *State v. Lambertville*, 45 N. J. L. 282, DIXON, J., said: "The language, ordinances, rules, regulations, and by-laws is certainly to some extent tauto-

ment.¹ Where a common council is authorized to do an act but the mode of doing it is not prescribed, it may be done by resolution as well as by ordinance.² So matters upon which the council wishes to legislate must be put in the form of an ordinance and all acts that are done in its ministerial capacity may be in the form of resolutions.³

III. AUTHORITY TO MAKE.—Ordinances passed by a municipal corporation under the powers conferred by its charter derive their authority from the legislative power of the State, and not merely from the municipal authority passing them. The legislature of a State may delegate to municipal corporations the power to make by-laws and ordinances, and when so passed they have the force and effect of the legislative act within the limits prescribed for it.⁴

The extent of the power of a city to pass ordinances depends upon the provisions of its charter. The power to make ordinances, when not expressly given, is implied as incident to the very existence of a corporation, but in the case of an express grant of the power to enact by-laws limited to certain specified cases and for certain purposes, the corporate power of legislation is confined to the objects specified.⁵ The enumeration of special

logical, for ordinances and by-laws are not distinguishable, and it is doubtful whether rules and regulations on the subjects embraced in this section are not merely equivalent words."

"The term 'ordinance' is now the usual denomination of such acts, although in *England* and in some of the States the technically more correct term 'by-law' or 'bye-law' is in common and approved use. The main feature of such enactments is their local as distinguished from their general applicability of the State laws; hence the word 'law' with the prefix 'by' or 'bye' should in strictness be preferred to the word 'ordinance.'" Per OLDS, J., in *Bills v. Goshen*, 117 Ind. 221.

1. *Blanchard v. Bissell*, 11 Ohio St. 96.

2. *Butler v. Passaic*, 44 N. J. L. 171. Power to purchase apparatus may be exercised by the common council either by resolution or by ordinance, when by the charter that body is not restricted to a particular method. *Green v. Cape May*, 41 N. J. L. 45. So it is not necessary that the common council should decide by ordinance that a sewer should be built—it may be done by resolution. *State v. Jersey City*, 27 N. J. L. 493.

3. *Horr & Bemis*, § 210; *Quincy v. Chicago* etc. R. Co., 92 Ill. 21; *Butler v. Passaic*, 44 N. J. L. 171; *Grimmell v.*

Des Moines, 57 Iowa 144; *Green v. Cape May*, 41 N. J. L. 46; *Burlington v. Dennison*, 42 N. J. L. 165.

4. *State v. Williams*, 11 S. Car. 288; *Taylor v. Carondelet*, 22 Mo. 105; *Heland v. Lowell*, 3 Allen (Mass.) 407; *McDermott v. Board of Police*, 5 Abb. Pr. (N. Y.) 422; *Jones v. Firemens' Fund Ins. Co.*, 2 Daly (N. Y.) 307; *St. Louis v. Mfrs. Bank*, 49 Mo. 574; *St. Louis v. Boffinger*, 19 Mo. 13, 15; *Presbyterian Church v. Mayor* etc. of New York, 5 Cow. (N. Y.) 538; *Mason v. Shawneetown*, 77 Ill. 533; *Starr v. Burlington*, 45 Iowa 87; *Indianapolis v. Indianapolis Gas Light & Coke Co.*, 66 Ind. 396; *State v. Tryon*, 39 Conn. 183; *Des Moines Gas Co. v. Des Moines*, 44 Iowa 508; s. c., 24 Am. Rep. 756; *Milne v. Davidson*, 5 Mart., N. S. 409; *Gabel v. Houston*, 29 Tex. 336; *Bearden v. Madison*, 73 Ga. 184; *Hopkins v. Swansea*, 4 M. & W. 621; *Burmeister v. Howard*, 1 Wash. Ter. 207; *Wright v. Chicago* etc. R. Co., 7 Ill. App. 438; *St. Louis v. Foster*, 52 Mo. 513; *Bott v. Pratt*, 33 Minn. 323; s. c., 53 Am. Rep. 47; *Jones v. Firemens' Fund Ins. Co.*, 2 Daly (N. Y.) 307; *Wheeler v. Cincinnati*, 19 Ohio St. 19; s. c., 2 Am. Rep. 368; *Smith v. Marston*, 5 Tex. 426.

5. *State v. Ferguson*, 33 N. H. 424. See *Child v. Hudson Bay Co.*, 2 P. Wms. 207.

cases, however, does not, unless the intent be apparent, exclude the implied power any further than necessarily results from the nature of the special provisions.¹

The power vested by legislation in a city corporation to make ordinances for its own government, cannot be construed as imparting to it the power to enlarge, diminish, or vary its powers by any of its ordinances.² It cannot be transferred to a mere executive officer.³ Nor can the presumption be indulged that the legislature intended that ordinances passed by the city should be superior to and take the place of the general law of the State upon the same subject.⁴

IV. ENACTMENT—1. Generally.—Ordinances to be valid must be passed by the common council when organized and acting as a board;⁵ and it is only through the medium of an ordinance that

A municipal corporation must act within the limits of its delegated powers, but may pass all laws necessary or proper to carry into effect a given power. *Ex parte Burnett*, 30 Ala. 461.

1. *Dill on Mun. Corp.*, § 316; *Heisembrittle v. City Council of Charleston*, 2 McMull. (S. Car.) 233; *Wadleigh v. Gilman*, 12 Me. 408; s. c., 28 Am. Dec. 188; *State v. Freeman*, 38 N. H. 426; *State v. Clark*, 28 N. H. 176; s. c., 61 Am. Dec. 611; *Collins v. Hatch*, 18 Ohio 523; s. c., 51 Am. Dec. 465; *Com. v. Turner*, 1 Cush. (Mass.) 493; *New Orleans v. Phillippi*, 9 La. Ann. 44; *Laundry Licence Case*, 22 Fed. Rep. 701; *Indianapolis v. Indianapolis Gas, Light & Coke Co.*, 66 Ind. 396.

In *State v. Morristown*, 33 N. J. L. 57, *DEPUE, J.*, said that, "A special grant of power to a municipal corporation is a delegation of authority to legislate by ordinance on the enumerated subjects, and does add to the powers incident to the creation of the corporation."

2. *Andrews v. Union Mut. F. Ins. Co.*, 37 Me. 256; *March v. Com.*, 12 B. Mon. (Ky.) 25; *Thompson v. Carroll*, 22 How. (U. S.) 422; *Thomas v. Richmond*, 12 Wall. (U. S.) 349; *State v. Municipal Court of St. Paul*, 32 Minn. 329; *Com. v. Roy*, 140 Mass. 432; *State v. Mayor etc. of Nashville*, 15 Lea (Tenn.) 697; *Mays v. Cincinnati*, 1 Ohio St. 268; *Breniger v. Belvidere*, 44 N. J. L. 350; *Vestry etc. of St. Luke's Church v. Mathews*, 4 De-saus. (S. Car.) 585; *Lake View v. Letz*, 44 Ill. 81; *Amboy v. Sleeper*, 31 Ill. 499; *Municipality No. Three v. Ursuline Nuns*, 2 La. Ann. 611; *Bregguglia v. Lord* (N. J.), 20 Atl. Rep. 1082.

Where, by statute, power is granted to the common council of a municipal corporation, without authority to delegate the same, and the common council attempt to delegate the power to a subordinate by ordinance, the ordinance is void. *Thompson v. Schermerhorn*, 6 N. Y. 92; s. c., 55 Am. Dec. 385.

Power was given to a municipal corporation to sell and alienate all public lots or parcels of land within their jurisdiction; and they afterwards passed an ordinance alleged to be a dedication of certain timbered lands to the common use of the citizens. *Held*, that the corporation had no authority to dedicate these lands to the common use of the citizens; and that an injunction ought not to be granted restraining the alienation of them. *Wright v. Victoria*, 4 Tex. 375.

3. *Chicago v. Trotter* (Ill.), 26 N. E. Rep. 359.

4. *March v. Com.*, 12 B. Mon. (Ky.) 25; *Rothschild v. Darien*, 69 Ga. 503; *Jefferson City v. Courtmire*, 9 Mo. 692; *In re Sic*, 73 Cal. 142; *State v. Oleson*, 26 Minn. 507.

City authorities cannot, by ordinance, declare those acts offenses against the city which, by the general law, are defined and made punishable as offenses against the State. *Jenkins v. Thomasville*, 35 Ga. 145; *New Orleans v. Miller*, 7 La. Ann. 651. But see *Brooklyn v. Toynbee* 31 Barb. (N. Y.) 282.

5. *Day v. Mayor etc. of Jersey City*, 19 N. J. Eq. 412.

Where a city charter required that no ordinance should be passed except at a stated meeting of the council, and a certain ordinance appeared by the record to have been passed at an "ad-

the council can act; but the ordinance may, however, be in the form of a resolution.¹ So the members of the council must be duly elected and qualified in order to pass a valid ordinance.²

The mode of procedure to be followed in the enactment of ordinances is prescribed by statute and must be strictly observed.³ These statutory provisions constitute conditions precedent;⁴ and unless the ordinance is adopted in compliance with the conditions and directions thus prescribed, it will have no force.⁵

It is not essential to the validity of an ordinance, executing powers conferred by the legislature, that it should state or indicate the power in execution of which the ordinance was passed.⁶ So, if an ordinance is found necessary the necessity for its enactment need not be recited in the ordinance or averred in proceedings to enforce it. The passage of the ordinance is equivalent to an averment that the necessity had arisen, had been declared, and

journe'd meeting" of the council, but it did not appear, by the record or otherwise, whether such meeting was an adjournment of a special or stated meeting—*held*, that such ordinance was never legally before the council. *State v. Jersey City*, 25 N. J. L. 309.

1. *Creighton v. Manson*, 27 Cal. 613; *Central v. Sears*, 2 Colo. 588. See *State v. Lambertville*, 45 N. J. L. 279.

In *Terre Haute v. Lake*, 43 Ind. 482, it is held that the common council can only contract by an order, resolution, or ordinance passed in the manner required by statute; and where a contract has thus been made, it must be repealed or annulled by a vote of the common council.

2. *Dinwiddie v. Rushville*, 37 Ind. 66; *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 78.

3. *State v. Mayor etc. of Newark*, 25 N. J. L. 399; *Blanchard v. Bissell*, 11 Ohio St. 101; *Elizabethtown v. Lefler*, 23 Ill. 90; *Town of Danville v. Shelton*, 76 Va. 325; *Barnett v. Newark*, 28 Ill. 62; *Ewbanks v. Ashley*, 36 Ill. 177; *Herzo v. San Francisco*, 33 Cal. 134; *Welker v. Potter*, 18 Ohio St. 85; *Bloom v. Xenia*, 32 Ohio St. 461, 466; *State v. Bell*, 34 Ohio St. 194; *Fuller v. Heath*, 89 Ill. 296; *Tracey v. People*, 6 Colo. 151; *Lewis v. St. Louis*, 4 Mo. App. 563; *Williams v. Willard*, 23 Vt. 369; *Missouri Pac. R. Co. v. Wyandotte (Kan.)*, 23 Pac. Rep. 950.

If the charter of a city require that the resolutions and ordinances passed by common council shall, before taking effect, be presented to the mayor for his approval and be approved by him, or if vetoed, have a second passage,

notwithstanding his objections; or on his failure to return them in five days, they shall become operative; literal compliance with the charter is essential to the validity of the proceedings, and the resolutions and ordinances should be formally presented to the mayor, or in case of his disability, to the person performing the duties of the office, or the proper officer, at the time and in the manner prescribed by the charter. *State v. Mayor etc. of Newark*, 25 N. J. L. 400.

4. *Herzo v. San Francisco*, 33 Cal. 149; *Elizabethtown v. Lefler*, 23 Ill. 90.

5. *McCoy v. Briant*, 53 Cal. 250; *Smith v. Buffalo*, 1 Sheld. (N. Y.) 493; *Sank v. Philadelphia*, 4 Brewst. (Pa.) 133; *Beikman's Case*, 11 Abb. Pr. (N. Y.) 164; *Leland v. Long Branch Comms.*, 42 N. J. L. 375; *Van Alstine v. People*, 37 Mich. 523. Compare *Pennsylvania Globe Gas Light Co. v. Scranton*, 97 Pa. St. 538.

Where the statute provided as a condition precedent to the exercise of the authority to pass an ordinance that the council should declare by resolution the necessity of the improvement and publish the resolution, briefly describing the character of the improvement and referring to the plans, etc., it was held, that a noncompliance with the precedent condition by the council in passing the ordinance was an irregularity or defect in the proceedings provided for in the curative part of the act. *Welker v. Potter*, 18 Ohio St. 85.

6. *Methodist P. Church v. Baltimore*, 6 Gill (Md.) 391; 18 C., 48 Am. Dec. 540. See *Com. v. Fahey*, 5 Cush. (Mass.) 408.

acted upon.¹ The charter, however, may be imperative in requiring the necessity to be expressed by ordinance.²

The motive of the members of a city council, or the influences under which they acted, cannot be brought to nullify an ordinance within their corporate powers regularly passed in legal form at a meeting regularly convened.³

2. Meetings of Council.—See MUNICIPAL CORPORATIONS, vol. 15, p. 1028.

3. Number Necessary to Enact.—The charter of cities usually provides that no ordinance or resolution shall be passed except by a majority of all the members elected,⁴ and the mayor, like the presiding officer of any other legislative body, is allowed to vote in case of a tie.⁵ See MUNICIPAL CORPORATIONS, vol. 15, p. 1034.

4. Notice.—The statutes usually require notice to be given before passing ordinances relating to public improvements,⁶ the abatement of nuisances and the like.⁷ Where notice is required

1. *Young v. St. Louis*, 47 Mo. 492; *Stuyvesant v. Mayor etc. of N. Y.*, 7 Cow. (N. Y.) 588; *Kiley v. Forsee*, 57 Mo. 390; *Platter v. Elkhart Co.*, 103 Ind. 360. See *Fisher v. Vaughan*, 10 U. C., Q. B. 492; *Grierson v. Ontario*, 9 U. C., Q. B. 623.

2. *Hoyt v. East Saginaw*, 19 Mich. 39; s. c., 2 Am. Rep. 76.

3. *Freeport v. Marks*, 59 Pa. St. 253.

4. *San Francisco v. Hazen*, 5 Cal. 169; *McCracken v. San Francisco*, 16 Cal. 591; *Van Zandt v. New York*, 8 Bosw. (N. Y.) 375.

Where it appears by the pleadings that a city ordinance was made "by the mayor and council," and unanimity was necessary to the legal authority to make the order, it will be presumed that the vote was unanimous until the contrary is shown. *Louisville v. Hyatt*, 2 B. Mon. (Ky.) 177.

A two-thirds' vote is not necessary for each resolution passed in the prosecution of a city improvement—in this case the resolve awarding the contract to the successful bidder—although, by law, a two-thirds' vote to commence the improvement, is necessary. *Cincinnati v. Bickett*, 26 Ohio St. 49.

5. *Launtz v. People*, 113 Ill. 137; *Carroll v. Wall*, 35 Kan. 36. If four of the eight councilmen vote in the affirmative, and the other four, though present, refuse to vote either way, the mayor may treat those not voting as opposed to those voting, and decide the question by voting also in the

affirmative. *Launtz v. People*, 113 Ill. 137.

6. The object of such notice required by law is to give to property holders whose interests are affected, by assessments of damages and benefits, notice of what is proposed to be done, and thus secure to them the opportunity to promote or resist the contemplated improvement by the appropriate expression of their views for or against it, before the city council. *Baltimore v. Little Sisters of the Poor*, 56 Md. 400.

An ordinance passed without notice to the prosecutor, directing a committee to remove certain objects upon lands occupied by him for twenty-five years, because they were encroachments upon a street, *held*, void. *State v. Mayor etc. of Hightstown*, 45 N. J. L. 127.

Where a city ordinance is annulled for want of jurisdiction, by competent notice to the persons affected, the error is fundamental, and cannot be remedied by subsequent legislation. *State v. City of Plainfield*, 38 N. J. L. 95.

7. *Baumgartner v. Hasty*, 100 Ind. 575; s. c., 50 Am. Rep. 830; *People v. Board of Health*, 33 Barb. (N. Y.) 344; *Weil v. Ricard*, 24 N. J. Eq. 169. In *Georgia*, a municipal corporation may punish for continuing a nuisance before notice is given to abate it but not after, when such continuance becomes a penal offence. *Horr & Bem. on Mun. Ord.*, § 253; *Vason v. Augusta*, 38 Ga. 542.

to be given before passing such ordinances, technical precision in compliance with the terms of the statute is not required.¹

5. Readings.—Ordinances are usually required to be read at three separate meetings before final enactment.² As an adjourned meeting is a continuation of the same meeting, readings at adjourned meetings will not invalidate the passage of the ordinance;³ but where amendments are made between the readings, the effect of the first or previous reading is destroyed, and it cannot be lawfully read again without the notice required by the charter.⁴

6. Signing.—The signature of the mayor of a city incorporated under the general laws of a State is not usually essential to the validity of an ordinance of such city, when it is regularly passed by the proper body and has been duly recorded by the proper officer.⁵ Although the statute may direct him to authenticate all ordinances by his signature, it does not follow that his signature is essential to their validity.⁶ Unless his signature is made essential by the express terms of the statute or charter, the requirement is only directory and the absence of his signature not fatal to the ordinance.⁷ So under acts providing that every reso-

1. Mayor etc. of Baltimore v. Little Sisters of the Poor, 56 Md. 400.

2. Weill v. Kenfield, 54 Cal. 111. Compare Barton v. Pittsburgh, 4 Brewst. (Pa.) 373.

3. Cutcomp v. Utt, 60 Iowa 156.

4. State v. Mayor etc. of Newark, 30 N. J. L. 303; Staates v. Borough of Washington, 44 N. J. L. 605; s. c., 47 Am. Rep. 402; State v. Mayor etc. of Jersey City, 34 N. J. L. 429.

5. Martindale v. Palmer, 52 Ind. 411; Fisher v. Graham, 1 Cin. (Ohio) 113; State v. Henderson, 38 Ohio St. 644. See Chaffee v. Granger, 6 Mich. 51.

Under act Pa., May 23rd, 1874, requiring the mayor to sign an ordinance or return it to the branch of the council where it originated, the mayor and clerks will not be compelled by *mandamus* to certify an ordinance on the technical ground that it was returned with the mayor's veto to the wrong branch. Com. v. Fitler (Pa.), 20 Atl. Rep. 424.

6. Blanchard v. Bissell, 11 Ohio St. 103; Fisher v. Graham, 1 Cin. (Ohio) 113; Woodruff v. Stewart, 63 Ala. 206.

In the case of Becker v. City of Washington (Mo.), 7 S. W. Rep. 291, under Mo. Rev. St. 1879, § 4948, providing that "no bill shall become an ordinance until the same is signed by the president of the board of aldermen and the mayor," and section 4965 provides that "the mayor shall preside

at all meetings of the board of aldermen," etc., held, that an ordinance which has been signed by the mayor as such, and not by him as *ex officio* president of the board of aldermen, will not be invalidated thereby. See Worth v. Springfield, 78 Mo. 108; Stevenson v. Bay City, 26 Mich. 44.

So where a charter required the signature of the mayor to all resolutions affecting the interests of the city, it was held, that a resolution of the common council, referring a petition for a sewer to the committee on sewerage, does not require the signature of the mayor. Howeth v. Jersey City, 30 N. J. L. 93.

An ordinance signed by the president of a council presiding in the mayor's absence is effective. O'Mally v. McGinn, 53 Wis. 353.

Under Mo. Rev. St. § 4918, providing that no bill shall become a city ordinance until signed by the mayor and by the president of the board of aldermen, if the mayor is *ex officio* president of the board of aldermen his signature as mayor is sufficient. Becker v. Washington, 94 Mo. 375.

7. Horr. & Bem. on Mun. Ord., § 49; Striker v. Kelly, 7 Hill (N. Y.) 9; Blanchard v. Bissell, 11 Ohio St. 96; Elmendorf v. Mayor etc. of N. Y., 25 Wend. (N. Y.) 693. See Conboy v. Iowa City, 2 Iowa 90; State v. Hudson, 29 N. J. L. 475; State v. Mayor

lution of the common council of the city shall be presented to the mayor for his approval or veto, a formal and literal presentation must be shown.¹

7. Publication.—Where the charter provides that ordinances shall not take effect and be of force until after publication, it is essential that the publication be made in the designated mode, and they will not be valid, or go into operation, and no penalty can be enforced under them, until after such publication be made.²

etc. of Newark, 25 N. J. L. 399; State v. Jersey City, 30 N. J. L. 93; Kepner v. Com., 40 Pa. St. 124; Taylor v. Palmer, 31 Cal. 241; Creighton v. Manson, 27 Cal. 613; Dey v. Mayor etc. of Jersey City, 19 N. J. Eq. 412; New York etc. R. Co. v. Waterbury, 55 Conn. 19; State v. Henderson, 38 Ohio St. 644; San Francisco Gas Co. v. San Francisco, 6 Cal. 190; State v. Mayor etc. of Newark, 27 N. J. L. 185; Waln v. Philadelphia, 99 Pa. St. 330; Opelousas v. Andrus, 37 La. Ann. 699; People v. Schroeder, 76 N. Y. 160.

In Breau's Bridge v. Dupuis, 30 La. Ann. 1105, it was held that no municipal ordinance is binding unless signed by the mayor.

So where the charter required the mayor to sign ordinances or return them within five days, with his reasons for not doing so, an ordinance passed by the council but which was not signed or returned by the mayor, held, invalid. *In re Standiford*, 5 Mackey (D. C.) 549. See Pennsylvania Globe Gas Light Co. v. Trenton, 97 Pa. St. 538. See also People v. Schroeder, 76 N. Y. 160.

But in Martindale v. Palmer, 52 Ind. 411, the signature of the mayor was held not essential under the general incorporation laws of Indiana.

So in Burlington v. Dennison, 42 N. J. L. 165, it was held, that the approval by the mayor of the proceedings of the city council is essential to their validity, only by special requirement of the charter.

In State v. Miller, 45 N. J. L. 251, under section 34 of the charter of Hoboken (Pamphlet L. 855, p. 460), it is held, that every ordinance and resolution affecting the interests of the city, before it takes effect, be presented, duly certified, to the mayor for his approval, does not apply to the appointment of officers by the common council.

The location or alteration of a street,

and awarding damages to parties injured thereby, is not an act for the appropriation of money; and such act need not be approved by the mayor. Preble v. Portland, 45 Me. 241.

1. State v. Mayor etc. of Newark, 25 N. J. L. 399.

The fact that the mayor is informally cognizant of the passage of such a resolution, and makes no objection to it, does not constitute a waiver of such literal presentation; no waiver being admissible. State v. Mayor of Newark, 25 N. J. L. 399.

Under the provision of a charter of a city, that "if any bill shall not be returned by the mayor within ten days after it shall have been presented to him for signature, the same shall become a law in the same manner as if he had approved and signed it," if before the ten days expire, and before he has signed it, the council adjourns *sine die*, the bill does not become a law; otherwise the council might nullify the charter. State v. Carr, 67 Mo. 38. See State v. Carr, 1 Mo. App. 490.

2. Napa v. Easterby, 61 Cal. 517; Baltimore v. Johnson, 62 Md. 225; Loughridge v. Huntington, 56 Ind. 253; Re Douglass, 46 N. Y. 42; 12 Abb. Pr., N. S. 161; Matter of Smith, 52 N. Y. 527; Schwartz v. Oshkosh, 55 Wis. 490; Waln v. Philadelphia, 99 Pa. St., 330; Higley v. Bunce, 10 Conn. 435; Barnett v. Newark, 28 Ill. 62; Conboy v. Iowa City, 2 Iowa 90; Kneib v. People, 6 Hun (N. Y.) 238; Mayor etc. of Hoboken v. Gear, 38 N. J. L. 265; Clark v. Janesville, 10 Wis. 136; Matter of Bassford, 50 N. Y. 509; Marshall v. Com., 59 Pa. St. 455; Van Alstine v. People, 37 Mich. 523. Compare Matter of New York etc. School, 47 N. Y. 556.

In Barnett v. Newark, 28 Ill. 62, it was held that ordinances prohibiting the sale of ardent spirits passed in towns incorporated under the charter of Springfield and Quincy, must be

The newspaper in which publication may be made¹ and the question of the sufficiency of the publication depend upon the provisions of the statute.² Since the object of publishing ordinances is to give notice to all who must obey them, it seems that the publication must be made in a newspaper of general

published before a penalty can be enforced.

Where the legislature directs the manner of publishing the proceedings of a city council, they can be published in no other way. *State v. Mayor etc. of Hoboken*, 38 N. J. L. 110.

The rule laid down in the text does not always apply to property ordinances. Thus in *Com. v. Davis*, 140 Mass. 485, it was held, that where provision was made that ordinances "shall be published two weeks successively in three daily newspapers published in the city," was directory and a compliance with it was not a condition precedent to the validity of an ordinance, especially if the ordinance is a re-enactment or continuation of a similar ordinance which was duly published. *Elmendorf v. Mayor etc. of N. Y.*, 25 Wend. (N. Y.) 693. See *In re Smith*, 65 Barb. 283; *Stuhr v. Hoboken*, 47 N. J. L. 148.

So in a number of cases it is held that a failure to publish ordinances do not affect the validity of bonds issued under a subsequent act authorizing the corporation to incur a debt. *People v. San Francisco*, 27 Cal. 655; *Clark v. Janesville*, 10 Wis. 136; *Amey v. Allegheny City*, 24 How. (U. S.) 364; *State v. Mayor of Newark*, 30 N. J. L. 303.

If the statute expressly provides that a failure to publish shall not affect the validity of the ordinance, the ordinance is in force from the date of its passage. *Horr & Bem. on Ordinances*, § 52; *Schweitzer v. Liberty*, 82 Mo. 309.

Publication is not necessary if not required by the charter. *In re Guerrero*, 69 Cal. 88.

1. *Moss v. Oakland*, 88 Ill. 109.

Publication in a newspaper published only on Sunday was held valid under the Ohio statute. *Hastings v. Columbus*, 42 Ohio St. 585.

In *Truchelut v. City Council*, 1 Nott & M. (S. Car.) 227, it was held that the publication of an ordinance in a newspaper from which the by-laws of the city council are usually published, was a sufficient promulga-

tion. So a newspaper properly appointed by a municipal corporation to be its official paper may be relied upon to contain the ordinances of the corporation, and an ordinance which is not published in such newspaper is void. *Matter of Astor*, 50 N. Y. 363; *Wright v. Forrestal*, 65 Wis. 342.

In *State v. Mayor etc. of Hoboken*, 38 N. J. L. 110, it was held under the laws of 1872, p. 602, that newspapers designated for publication must have been at the time of the passage of the act authorized to publish the laws of the State. They must have been published regularly for the term of one year or nine months prior to the act.

2. *Mayor of Hoboken v. Gear*, 27 N. J. L. 265; *Higley v. Buncé*, 10 Conn. 435; *Matter of Bassford*, 50 N. Y. 509; *Warsop v. Hastings*, 22 Minn. 437; *Law v. People*, 87 Ill. 339.

In *People v. Russell*, 74 Cal. 578, it was held under a statute relating to county and township government providing that all ordinances passed by the board of supervisors should have an enacting clause in a certain form and that no ordinance should take effect within less than 15 days after its passage, and before the expiration of the 15 days, the ordinance should be published for one week; that the publication of the ordinance without the clause was not a publication of the whole ordinance, and it was not therefore sufficient to put the ordinance into operation.

Under N. Y. laws of 1870, ch. 137, requiring the publication of certain ordinances and resolutions passed by the board of aldermen and assistant aldermen of New York city, it was held that the publication must be made of the resolution introduced or passed in the respective boards, and cannot be made before that time. *Matter of Levy*, 4 Hun (N. Y.) 501.

It is not necessary that the provisions of law referred to in it should be published with it. *People v. San Francisco*, 27 Cal. 655. A requirement—as under the Ohio municipal code, § 100—of publication of ordinances in a

circulation within the municipality;¹ but in the absence of any special provision for the mode of publication it is enough to show that it has been posted in public places.²

8. Recording.—The provisions of the statutes relating to the recording of by-laws, resolutions, and ordinances are merely directory, and noncompliance therewith does not affect the validity of such ordinances.³ But where the provisions of the law are mandatory, the record or journal must show compliance with all the formalities which are considered mandatory.⁴ So where an ordinance must be passed by a certain vote of the council the record must enumerate the yeas and nays upon its passage.⁵ And if the statute or charter expressly directs that

newspaper of general circulation, does not preclude also their publication by other means, in the discretion of the city council. *Wasem v. Cincinnati*, 2 Cin. (Ohio.) 84.

1. *Bayer v. Mayor etc. of Hoboken*, 44 N. J. L. 131; *In re Durkin*, 10 Hun (N. Y.) 269.

A paper in which the ordinances of a town are published, printed in another town, will be a proper newspaper for publication if it is shown that they were published the prescribed number of weeks required by law, and that such paper was one of general circulation in the town enacting them. *Tisdale v. Minouk*, 46 Ill. 10.

But in *Haskell v. Bartlett*, 34 Cal. 281, it was held that to constitute a publication in the city paper, it must appear that the paper is both published and circulated in the city—the former alone being insufficient.

2. *Queen v. Justices*, 4 Q. B. Div. 522; s. c., 29 Moak, Eng. R. 61.

When no provision for the publication of ordinances is contained in a special charter, the promulgation should be reasonably sufficient to notify all parties interested, and the presumption is in favor of the reasonableness and the time adopted by the corporation which must prevail unless countervailing the facts of the proof. *Schweitzer v. Liberty*, 82 Mo. 309.

3. *Central Irrigation District v. De Lappe*, 79 Cal. 351; *Erie Academy v. Erie*, 31 Pa. St.; *Waln v. Macomb*, 76 Ill. 49; *Upington v. Oviatt*, 24 Ohio St. 241; *Barton v. Pittsburgh*, 4 Brewst. (Pa.) 373; *Amey v. Allegheny City*, 24 How. (U. S.) 364; *Town of Tipton v. Norman*, 72 Mo. 380; *Stevenson v. Bay City*, 26 Mich. 44; *Wiggin v. Mayor of N. Y.*, 9 Paige (N. Y.) 16;

Striker v. Kelly, 7 Hill (N. Y.) 9. Compare *Klais v. Pulford*, 36 Wis. 587.

An act of incorporation declared that ordinances, etc., not incorporated within 30 days from their passage, should be void. Under an unrecorded ordinance a contract was made which was decided not to be binding; afterwards an act passed declared that the omission to record the ordinance should not affect the contract, etc., but that the contract might be enforced, and claims under it collected as if the ordinance had been recorded. Held, that the act was constitutional and ratified in the recorded ordinance, the failure to record was a technical defect which the legislature might remedy. *Com. v. Marshall*, 69 Pa. St. 328. Compare *Kepner v. Com.*, 40 Pa. St. 124.

4. *Schwartz v. Oshkosh*, 55 Wis. 490; *State v. Town of Union*, 32 N. J. L. 343; *Marshall v. Com.*, 59 Pa. St. 455. Compare *People v. Starne*, 35 Ill. 121; *Supervisors v. People*, 25 Ill. 121.

If the record was made by pasting a printed copy in the record book, it is sufficiently recorded, and it is not necessary that it be recorded in the manuscript to be admissible in evidence. *Houston etc. R. Co. v. Odum*, 53 Tex. 343.

5. *In re Buffalo*, 78 N. Y. 363; *In re Carlton Street*, 16 Hun (N. Y.) 497; *Delphi v. Evans*, 36 Ind. 90; *Steckert v. East Saginaw*, 22 Mich. 104; *Olin v. Meyers*, 55 Iowa 209; *Rich v. Chicago*, 59 Ill. 286; *Spangler v. Jacobi*, 14 Ill. 297; *McCormick v. Bay City*, 23 Mich. 457. Compare *St. Louis v. Foster*, 52 Mo. 513; *Elmendorf v. Mayor etc. of N. Y.*, 25 Wend. (N. Y.) 693; *Striker v. Kelly*, 7 Hill (N. Y.) 9. Sec. 26, ch. 6, General Laws of 1877,

the yeas and nays shall be recorded as well as taken, the statute is mandatory and the ordinance void if the record is defective.¹ But whenever the record shows that a measure was adopted unanimously, there seems to be no necessity of spreading the yea and nay vote on the record.² So where a charter provides that "a vote on the passage of every such resolution shall be taken of the yeas and nays and duly entered in the journal," etc., a separate vote on each of such resolutions is not necessary.³

9. Amendments.—An amendment to a previous ordinance which never took effect is not valid and will not be sustained as an independent ordinance, where it is manifest that it would not have been adopted except on the assumption that the ordinance which it attempted to amend was in force.⁴ But the subsequent amendment of an unconstitutional portion of an ordinance is a valid amendment.⁵

10. Ratification.—Ordinances originally void may be ratified by an act of the assembly and rendered valid,⁶ and offenders against them must be prosecuted under the ordinances and not under the act.⁷

V. FORM OF ORDINANCE.—No ordinance can have a binding effect unless composed and promulgated in the English language.⁸ It matters not whether it be called a resolution or an ordinance, if passed with all the formalities of a regular ordinance it will be

requires the yeas and nays to be called and recorded in the passage of all ordinances and by-laws by municipal corporations. In respect to resolutions and orders the rule is restricted by the section to such as relate to contracts. In the passage of an ordinance concerning misdemeanors, by a council or board of trustees of a municipal corporation, acting under the general law, if the records of the corporation fail to show that the yeas and nays were called and recorded, the ordinance is invalid and will not support a conviction. *Tracey v. People*, 6 Colo. 151.

In *Iowa* where the records of a city council show the adoption of an ordinance, it will be presumed to have been adopted by the requisite majority. *Brewster v. Davenport*, 51 Iowa 427; *Eldora v. Town of Burlingame*, 62 Iowa 32; *State v. Vail*, 53 Iowa 550.

1. *Steckert v. East Saginaw*, 22 Mich. 104; *Los Angeles Gas Co. v. Toberman*, 61 Cal. 199; *Logansport v. Crockett*, 64 Ind. 319; *Cutler v. Russellville*, 40 Ark. 105; *Olin v. Meyers*, 55 Iowa 209; *McCormick v. Bay City*, 23 Mich. 457.

2. *Barr v. Auburn*, 89 Ill. 361; *El-*

mendorf v. Ewen, 2 N. Y. Leg. Obs. 85; *Solomon v. Hughes*, 24 Kan. 211.

A municipal ordinance which appears by the records of the corporation to have been passed, may be presumed to have been passed by the full number of votes required by the charter, although the record does not affirmatively show that they were given. *Lexington v. Headley*, 5 Bush (Ky.) 508.

3. *Wright v. Forrestal*, 65 Wis. 341.

4. *Schwartz v. Oshkosh*, 55 Wis. 490.

5. *State v. Kantler*, 33 Minn. 69.

6. *Truchelut v. City Council*, 1 Nott & M. (S. Car.) 227; *Lennon v. Mayor etc. of N. Y.*, 55 N. Y. 361; *Logansport v. Crockett*, 64 Ind. 319. Compare *State v. Plainfield*, 38 N. J. L. 95; *Gillespie v. Concordia Police Jury*, 5 La. Ann. 403; *Schenley v. Com.*, 35 Pa. St. 29; s. c., 78 Am. Dec. 359.

7. *Truchelut v. City Council*, 1 Nott & McCord 227.

8. *Breaux's Bridge v. Dupuis*, 30 La. Ann. 1105. But in *Lose v. Mayor etc.*, 2 La. 427, it was held that an ordinance of the city council is binding, although it be promulgated in the French language only.

in effect an ordinance;¹ but a mere temporary or informal motion can never amount to an ordinance.²

1. **The title** of an ordinance being inessential cannot control the tenor of the enactment.³ Any matter germane to the main object of the ordinance may be included.⁴ If the title fairly gives notice of the subject of the act so as reasonably to lead to an enquiry into the body of the ordinance, it is all that is necessary;⁵ but when the title tends to mislead and draw off attention from a covert purpose contained in the body of the ordinance, it will be invalid.⁶ And a statute providing "that no ordinance shall contain more than one subject which shall be clearly expressed in its title," is mandatory upon the city council.⁷

2. **Enacting Clause.**—The omission of the enacting clause from a municipal ordinance does not necessarily nullify the ordinance, particularly if the charter does not so provide.⁸

VI. REPEAL OR MODIFICATION.—The power to pass ordinances or regulations affecting the government of a municipal corpora-

1. *Sower v. Philadelphia*, 35 Pa. St. 236; *State v. Kantler*, 33 Minn. 69; *Town of Tipton v. Norman*, 72 Mo. 780; *State v. Barnet*, 46 N. J. L. 62; *Manufacturing Co. v. Shell City*, 21 Mo. App. 175.

2. *Horr & Bemis*, § 70; *Manufacturing Co. v. Shell City*, 21 Mo. App. 175.

3. *State v. Beverly*, 45 N. J. L. 289. An ordinance will not be held void because in its title are used the words "common council" instead of the words "city council," the words are so nearly the same in meaning, as to render it immaterial which are used. *Law v. People*, 87 Ill. 389.

4. *St. Louis v. Green*, 70 Mo. 562; *St. Louis v. Tiefel*, 42 Mo. 578.

5. *Mauch Chunk v. McGee*, 81 Pa. St. 433; *Esling's Appeal*, 89 Pa. St. 205; *State v. Catienny*, 34 Minn. 1; *Bergman v. St. Louis etc. R. Co.*, 88 Mo. 678; *Barton v. Pittsburgh*, 4 Brewst. (Pa.) 373.

An ordinance of a city entitled "An ordinance to regulate and prohibit the running at large of animals," and containing therein provisions for taking up and impounding cattle running at large within the corporate limits of the city, contains a title sufficiently extended to embrace also a section prohibiting any person from breaking open the enclosure used by the city as a pound, and forbidding the unlawful taking and driving therefrom of animals impounded therein. *Smith v. Emporia*, 27 Kan. 528.

6. *Mauch Chunk v. McGee*, 81 Pa. St. 438.

In *Town of Cantril v. Sainer*, 59 Iowa 26, an ordinance entitled, "Regulating the use and sale of intoxicating liquors," the substance of which being entirely prohibitory with no pretense of regulation, was held invalid for want of compliance with the law requiring the subject of the ordinance to be clearly expressed in its title. An act entitled, "An act for the relief of the village of Clinton," was held not violative of the constitutional provision declaring that no private or local bill shall embrace more than one subject, and that "shall be expressed in the title." *Water Commissioners of Clinton v. Dwight*, 101 N.Y. 9. *In re Knaust*, 101 N.Y. 188.

7. *Missouri Pacific R. Co. v. Wyandotte (Kan.)*, 23 Pac. Rep. 950.

The fact that a city ordinance entitled "An ordinance making appropriations," for a specified year, contains also provisions for levy and collection of taxes to raise the money required, is not so clear a violation of a general law that no ordinance shall contain more than one subject which shall be clearly expressed in the title, as will warrant an injunction to prevent the execution of the provisions of the ordinance. The rule does not require that the title shall specify all the provisions, but only calls for the general subject. *Barton v. Pittsburgh*, 4 Brewst. (Pa.) 373.

8. *People v. Murray*, 57 Mich. 396;

tion carries with it by implication the power to modify or repeal such ordinances or regulations, unless the power is restricted in the law conferring the right.¹ The limitation to which this power is subject is that a repeal or change cannot be made so as to affect any vested right lawfully required under an ordinance, or regulation lawfully adopted.² Where an ordinance is repealed while prosecutions are pending for violations of it, the defendants are thereby discharged, and no subsequent statute can make them liable for the same offences.³

1. Repeal by the Legislature.—A change made in the organic law in which cities are organized does not repeal existing ordinances, while the power to pass the same continues to exist.⁴ So if the new statute confers upon the municipality the same rights and powers in a different form or under a new name together with additional powers, the ordinances enacted before the change are not interfered with.⁵

Where a municipal corporation has been empowered to make ordinances in regard to certain subjects and the legislature subsequently enacts a law regulating the same matter, which had been before permitted to be regulated by such ordinance, it shows most satisfactorily that the legislature intended to take the regulation of the matter out of the hands of the corporation to the extent to which such general law regulated it.⁶ But the right

People v. Lee, 112 Ill. 121; *Cape Girardeau v. Riley*, 52 Mo. 424. See *Hawkins v. Huron Mun. Council*, 2 U. C. C. P. 72.

1. *Welch v. Bowen*, 103 Ind. 256. *In re Mollie Hall*, 10 Neb. 537; *Rex v. Ashwell*, 12 East 22; *Kansas City v. White*, 69 Mo. 26; *Bloomer v. Stolley*, 5 McLean (U. S.) 158; *Rex v. Baird*, 13 East 367; *Santo v. State*, 2 Iowa 165; s. c., 63 Am. Dec. 487; *Rice v. Foster*, 4 Harr. (Del.) 479; *Bank of Chenango v. Brown*, 26 N. Y. 467; *Greely v. Jacksonville*, 17 Fla. 174; *Great Western Railway Co. and North Cayuga, In re*, 23 U. C. C. P. 28.

2. *Rex v. Bird*, 13 East 379; *State v. Clerk of Chillicothe*, 7 Ohio St. 355; *Rex v. Ashwell*, 12 East 22 (3 Term R. 198); *Terre Haute v. Lake*, 43 Ind. 480; *Stoddard v. Gilman*, 22 Vt. 568; *Bigelow v. Hillman*, 37 Me. 52; *Pond v. Negus*, 3 Mass. 230; s. c., 3 Am. Dec. 131; *State v. Graves*, 19 Md. 351; *Reiff v. Conner*, 10 Ark. 241; *Louisiana v. Pilsbury*, 105 U. S. 278; *Road in Augusta Township*, 17 Pa. St. 71, 75; *Cape May etc. R. Co. v. Cape May*, 35 N. J. Eq. 419; *Nelson v. St. Martin's Parish*, 111 U. S. 716; *People v. O'Brien*, 111 N. Y. 1; *Great Western R. Co., In re*, 23 U. C. C. P. 28;

Cunningham v. Almonte, 21 U. C. C. P. 459; *Baldwin v. Smith*, 82 Ill. 162; *Gormley v. Day*, 114 Ill. 185; *People v. Chicago W. D. R. Co.*, 18 Ill. App. 125; *Quincy v. Bull*, 106 Ill. 337; *Chicago etc. R. Co. v. Minnesota Cent. R. Co.*, 14 Fed. Rep. 525; *Des Moines v. Chicago etc. R. Co.*, 41 Iowa 569; *Burlington v. Burlington St. R. Co.*, 49 Iowa 144; s. c., 31 Am. Rep. 145; *Mayor etc. of Rome v. Lumpkin*, 5 Ga. 447; *City Council of Charleston v. Baptist Church*, 4 Strobb. L. (S. Car.) 306.

3. *Day v. Clinton*, 6 Ill. App. 476; *Kansas City v. Clark*, 68 Mo. 588; *Naylor v. Galesburg*, 56 Ill. 285.

4. *In re Mollie Hall*, 10 Neb. 537; *Academy v. Erie*, 31 Pa. St. 515.

5. *Horr & Bemis*, § 62; *Waring v. Mayor etc. of Mobile*, 24 Ala. 701.

6. *Southport v. Ogden*, 23 Conn. 133; *Duryee v. Mayor etc. of N. Y.*, 96 N. Y. 477.

Where a town was, by its charter of incorporation, authorized to make all such ordinances as should be consistent with the constitution and laws of the State, and passed an ordinance of that character, *held*, that a subsequent general statute passed by the legislature might constitutionally an-

to pass ordinances given to a municipal corporation by its charter will not be adjudged to be taken away by subsequent legislation, unless it is wholly impossible to reconcile the State right with that conferred by the charter.¹

2. Repeal by Subsequent Ordinance.—The enactment of an ordinance without negative words will not repeal the particular provisions of a former ordinance unless the two are clearly inconsistent.²

3. Repeals by implication are never favored in law. Before an ordinance can be held to be repealed by implication, it must clearly appear to be so repealed. Whenever the former law and the subsequent law can both be given force and effect, the former law will never be declared to be repealed by implication.³ But when the legislative authority of an incorporated town amends an ordinance by enacting an entire section which embraces and reviews the whole subject matter of the section in an existing ordinance, there arises a clear implication of the legislative intent that the former shall take the place of the latter.⁴

VII. REASONABLENESS.—Ordinances other than those passed by

nul such ordinance. *Marietta v. Fearing*, 4 Ohio 427. See also *Coates v. Mayor etc. of N. Y.*, 7 Cow. (N. Y.) 585.

A city charter providing that election judges should receive no pay, and repealing all ordinances inconsistent with this provision, *held* to repeal an ordinance giving pay to judges and clerks, only as to the judges. *Quinette v. St. Louis*, 76 Mo. 402.

1. *Mayor etc. of N. Y. v. Hyatt*, 3 E. D. Smith (N. Y.) 156; *March v. Com.* 12 B. Mon. (Ky.) 25.

Where a special charter of a town, granted before the adoption of the present constitution, confers power upon the corporate authorities to impose fines or penalties for the unauthorized sale of intoxicating liquors, they are not limited or restricted to the same penalties imposed by the general law. *Baldwin v. Murphy*, 82 Ill. 485.

A city ordinance to punish the adulteration of milk, *held* not abrogated by a general statute defining and punishing the adulteration of drugs, food and drinks. *State v. Labatut*, 39 La. An. 516.

2. *Providence v. Union R. Co.*, 12 R. I. 473; *Ex parte Wolf*, 14 Neb. 24.

A city ordinance prohibiting animals from running at large anywhere within the city limits, will be repealed by the passage of a mandatory ordi-

nance prohibiting them from going at large within such city limits "as may from time to time be designated by the common council by resolution," and providing for the repeal of "all ordinances or parts of ordinances not consistent therewith." *Lenz v. Sherrott*, 26 Mich. 139; *Barker v. Smith*, 10 S. Car. 226; *Croll v. Village of Franklin*, 40 Ohio St. 340.

A subsequent ordinance revising the whole subject of selling or dealing in spirituous liquors, *held* to be a substitute for all prior ordinances on the same subject, although the last contained no words of repeal. *Booth v. Carthage*, 67 Ill. 102.

3. *Franklin v. Westfall*, 27 Kan. 619; *Mayor etc. of N. Y. v. Hyatt*, 3 E. D. Smith (N. Y.) 156; *State v. Crumme*, 17 Minn. 72.

An ordinance which occupies the entire field of a former one will, as a general rule, repeal such former one by implication. *Burlington v. Estlow*, 43 N. J. L. 13.

4. *Decorah v. Dunstan*, 38 Iowa 96; *Burlington v. Estlow*, N. J. L. 13.

In *Booth v. Town of Carthage*, 617 Ill. 103, it was held, that where the authorities of a town adopted a subsequent ordinance, revising the whole subject of selling or dealing in spirituous liquors, the ordinance must be taken as a substitute for all prior ordinances on the same subject, although the last contained no words of repeal.

virtue of an express grant or power must be reasonable¹ and not oppressive.² Whenever an ordinance appears to be unreasonable or oppressive it may be declared void.³ The question of reasonableness is to be decided by the court and on the facts of each special case.⁴ And the presumption is in favor of its reasonableness unless the contrary appears on the face of the ordinance, or is established by proper evidence.⁵

VIII. MUST BE CONSISTENT WITH GENERAL LAWS.—The power to make ordinances must not only be exercised strictly within the limits of the charter but in perfect subordination to the constitution and general law of the land, and the rights dependent

1. *Boston v. Shaw*, 1 Met. (Mass.) 130; *Com. v. Worcester*, 3 Pick. (Mass.) 462; *Delaware etc. R. Co. v. East Orange*, 41 N. J. L. 127; *Kipp v. Mayor etc. of Paterson*, 2 Dutch. (N. J.) 298; *Dayton v. Quigley*, 29 N. J. Eq. 77; *People v. Troop*, 12 Wend. (N. Y.) 183; *Com. v. Steffee*, 7 Bush (Ky.) 161; *Ex parte Frank*, 52 Cal. 606; s. c., 28 Am. Rep. 642; *Mayor etc. of Memphis v. Winfield*, 8 Humph. (Tenn.) 767; *Waters v. Leech*, 3 Ark. 110; *Com. v. Robertson*, 5 Cush. (Mass.) 438; *Fisher v. Harrisburg*, 2 Grant's Cas. (Pa.) 291; *Comms. of Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318; *Mayor etc. of Columbia v. Beasley*, 1 Humph. (Tenn.) 232; s. c., 34 Am. Dec. 646; *Pedrick v. Bailey*, 12 Gray (Mass.) 161; *White v. Mayor etc. of Nashville*, 2 Swan (Tenn.) 364; *State v. Freeman*, 38 N. H. 426; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Tugman v. Chicago*, 78 Ill. 405; *Clason v. Milwaukee*, 30 Wis. 316; *Baltimore v. Radecke*, 49 Md. 217; *Kirkham v. Russell*, 76 Va. 956; *State v. Mayor etc. of Jersey City*, 37 N. J. L. 348; *Corrigan v. Gage*, 68 Mo. 541.

"An ordinance cannot be held to be unreasonable which is expressly authorized by the legislature. The power of a court to declare an ordinance unreasonable, and therefore void, is practically restricted to cases in which the legislature has enacted nothing on the subject matter of the ordinance, and consequently, to cases of which the ordinance was passed under the supposed incidental power of the corporation merely." *NIBLACK, J.*, in *Coal Float v. Jeffersonville*, 112 Ind. 19. See *Chamberlain v. Evansville*, 79 Ind. 542; *State v. Clarke*, 54 Mo. 17; s. c., 14 Am. Rep. 471.

2. *Comms. of Northern Liberties v.*

Northern Liberties Gas Co., 12 Pa. St. 318; *Mayor etc. of Memphis v. Winfield*, 8 Humph. (Tenn.) 707.

3. *Cooley's Const. Lim.* (4th ed.) 243; *Chicago v. Trotter* (Ill.), 26 N. E. Rep. 359.

4. *Mayor etc. of Hudson v. Thorne*, 7 Paige Ch. (N. Y.) 261; *Austin v. Murray*, 16 Pick. (Mass.) 121; *Boston v. Shaw*, 1 Met. (Mass.) 130; *Com. v. Worcester*, 3 Pick. (Mass.) 462; *In re Vandine*, 6 Pick. (Mass.) 187; *Paxson v. Sweet*, 13 N. J. L. 196; *Com. v. Stodder*, 2 Cush. (Mass.) 562; s. c., 48 Am. Dec. 679; *Comms. of Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318; *Brooklyn v. Breslin*, 57 N. Y. 591; *Ex parte Frank*, 52 Cal. 606; s. c., 28 Am. Rep. 642; *Buffalo v. Webster*, 10 Wend. (N. Y.) 100; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Delaware etc. R. Co. v. East Orange*, 41 N. J. L. 127; *Kneedler v. Norristown*, 100 Pa. St. 368; s. c., 45 Am. Rep. 384; *State v. Mayor etc. of Jersey City*, 37 N. J. L. 348; *Clason v. Milwaukee*, 30 Wis. 316.

5. *Van Hook v. Selma*, 70 Ala. 361; s. c., 45 Am. Rep. 85; s. c., 2 Am. & Eng. Corp. Cas. 23; *State v. Trenton* (N. J.), 20 Atl. Rep. 1076.

Ordinances That Are Reasonable.—The following ordinances have been held reasonable and valid:

Those Relating to Public Health—Safety.—Forbidding new burial ground within the city. *City Council of Charleston v. Baptist Church*, 4 Strobb. L. (S. Car.) 416.

Compelling boats with damaged corn or putrid substances on board, or coming from any place, infected with malignant or contagious diseases, to anchor in the middle of the river and not to land until examined by the city physicians. *Dubois v. Augusta*, Dud. (Ga.) 30.

Prohibiting unlicensed persons from

removing offal and garbage through any of the streets. *In re Vandine*, 6 Pick. (Mass.) 187; s. c., 17 Am. Dec. 351.

Forbidding the keeping of more than fifty-six pounds of gunpowder, and requiring it to be kept in tin or copper, under penalty of \$50 to \$500. *Williams v. City Council of Augusta*, 4 Ga. 509.

Subjecting every dog owner to a fine of \$100 for the biting of any person by his dog outside the owner's enclosure. *Com. v. Steffee*, 7 Bush (Ky.) 161.

Intoxicating Liquors.—Making it a penal offense to sell spirituous liquors in quantities of a quart or more to be drank on the premises, when sold inconsistent with the State law. *Adams v. Mayor etc. of Albany*, 29 Ga. 56.

Imposing penalty on retail grocers for having spirituous liquors on their premises without license. *City Council v. Ahrens*, 4 Strobb. L. (S. Car.) 241.

Requiring license fee of \$150 or \$500 from retailer of ardent spirits. *Perdue v. Ellis*, 18 Ga. 586; *Mayor etc. of Columbia v. Beasley*, 1 Humph. (Tenn.) 232.

Restricting the hours during which saloons might be kept open. *Ex parte Wolf*, 14 Neb. 24; s. c., 6 Am. & Eng. Corp. Cas. 24.

Requiring saloons to close at nine o'clock P. M. *Smith v. Mayor etc. of Knoxville*, 3 Head (Tenn.) 245; to close dram shops from 10:30 P. M. to 5 A. M. *State v. Welch*, 36 Conn. 215.

Requiring that there shall be no avenue of direct communication between billiard rooms and places where liquors are sold. *Neill v. Owensound*, 36 U. C., Q. B. 289.

Laundries.—Restricting the hours during which laundries might be kept open. *Barbier v. Connolly*, 113 U. S. 27; s. c., 7 Am. Rep. 64; *Soon Hing v. Crowley*, 113 U. S. 713; 7 Am. & Eng. Corp. Cas. 646.

Markets.—Fixing market hours from dawn to 9 o'clock A. M. Prohibiting the sale of fresh beef at other times less than a quarter. *Bowling Green v. Carson*, 10 Bush (Ky.) 64.

Authorizing commissioners to vacate license of market stalls. *City Council v. Goldsmith*, 2 Spear (S. Car.) 359.

Railroads.—Declaring the use of steam as a motor in street railways a nuisance. *North Chicago City R. Co.*

v. Lakeview, 105 Ill. 207; s. c., 44 Am. Rep. 78; 2 Am. & Eng. Corp. Cas. 6.

Prohibiting a railroad train from standing across a public street for longer than two minutes at a time. *State v. Jersey City*, 27 N. J. L. 493.

Compelling a railroad company to station flagmen at grade crossings in a district being thickly populated and trains numerous. *Delaware etc. R. Co. v. East Orange*, 41 N. J. L. 127.

Enacting that it shall not be lawful for any horse railroad company to run any car without having an agent, in addition to the driver, to assist in the control of the car and passengers, and to prevent accidents and disturbances of the good order and security of the streets. *State v. Trenton* (N. J.), 20 Atl. Rep. 1076.

Sidewalks.—Requiring property owners to lay brick sidewalks and fix curbstones in front of their lands. *Paxson v. Sweet*, 13 N. J. L. 196. But sidewalks so ordered must be required of all property owners on the street, without discrimination, unless there be good cause for a distinction. *Whyte v. Mayor etc. of Nashville*, 2 Swan (Tenn.) 364.

Stock.—Impounding cattle running at large. *Kelly v. Meeks*, 87 Mo. 396; 13 Am. & Eng. Corp. Cas. 223.

Prohibiting swine from running at large. *Com. v. Patch*, 97 Mass. 221; *Com. v. Bean*, 14 Gray (Mass.) 52.

Sale of Commodities.—Requiring license in order to sell certain commodities in certain streets. *In re Nightingale*, 11 Pick. (Mass.) 168.

Authorizing mayor to grant license to sell and deliver milk, and declaring act of selling milk without such licence a misdemeanor. *People v. Mulholland*, 82 N. Y. 324; s. c., 37 Am. Rep. 568.

Forbidding the sale of merchandise after 9 o'clock A. M. on Sunday. *St. Louis v. Cafferata*, 24 Mo. 94.

Providing that no person shall sell articles in the streets unless duly licensed. *Com. v. Elliot*, 121 Mass. 367.

Licensing bakers and regulating the weight and price of bread. *Mayor etc. of Mobile v. Yuille*, 3 Ala. 137.

Swearing.—Imposing a fine of \$25 for the use of "any abusive or indecent language, cursing, swearing, or any loud or boisterous talking hallooing, or any other disorderly conduct." *State v. Earnhardt* (N. Car.) 12 S. E. Rep. 426.

Vehicles.—Authorizing a mayor to grant cart licenses. *Brooklyn v. Breslin*, 57 N. Y. 591.

Forbidding wagons loaded with perishable produce to stand in market place for longer time than twenty minutes between certain hours. *Com. v. Brooks*, 109 Mass. 355.

Prohibiting persons from driving wagons and carts on a gallop through the streets. *Com. v. Worcester*, 3 Pick. (Mass.) 461.

Providing that the owner of a hackney carriage should not receive more than specified fare for a given distance. *Com. v. Gage*, 114 Mass. 328.

Prohibiting any person from allowing his vehicle to stop in the public streets for more than twenty minutes. *Com. v. Fenton*, 139 Mass. 195.

Prescribing streets as routes of travel for omnibuses, and providing for their exclusion from other streets. *Com. v. Stodder*, 2 Cush. (Mass.) 562; s. c., 48 Am. Dec. 679.

Forbidding the obstruction of street cars by other vehicles. *State v. Foley*, 31 Iowa 527; s. c., 7 Am. Rep. 166.

Requiring draw bridges crossing river to be closed every ten minutes for the passage of persons and vehicles, making it unlawful for navigators to pass after signal had been displayed and bridge was being closed. *Chicago v. McGinn*, 51 Ill. 266; s. c., 2 Am. Rep. 295.

Removing garbage in an open wagon. *People v. Gordon*, 81 Mich. 306.

Prohibiting carriages from standing in a street more than fifteen minutes, in connection with the police regulation that a space of thirty-five feet about the door of a public place or public entertainment must be kept clear. *Com. v. Robertson*, 5 Cush. (Mass.) 438.

Other Occupations.—Requiring butchers to be licensed and to pay \$200 therefor. *St. Paul v. Colter*, 12 Minn. 41; s. c., 90 Am. Dec. 278.

Imposing annual license of \$500 on express company, whose business extended beyond the limits of the State, and \$100 on company whose business did not. *Southern Express Co. v. Mayor etc. of Mobile*, 49 Ala. 404.

Prohibiting restaurants from being kept open after 10 o'clock at night. *State v. Freeman*, 38 N. H. 426.

Requiring that every horse and cattle dealer shall take out a license and furnish a certificate of moral character. *St. Louis v. Knox*, 74 Mo. 79.

Miscellaneous Instances.—Fixing a price for the privilege of tapping public sewers. *Fisher v. Harrisburg*, 2 Grant's Cas. (Pa.) 291.

Prohibiting awnings before doors unless authorized by the mayor or aldermen. *Pedrick v. Bailey*, 12 Gray (Mass.) 161.

Prohibiting any person from occupying exclusive possession, without special permission, of the public streets, squares, wharves, etc. *Shinkle v. Covington*, 83 Ky. 420; 11 Am. & Eng. Corp. Cas. 313.

Prohibiting the delivery of a discourse on a public common without leave of the committee of the council in charge of the public grounds. *Com. v. Davis*, 140 Mass. 485.

Prohibiting the removal of sandstone or earth from the lake shore within 100 feet of high-water mark. *Clason v. Milwaukee*, 30 Wis. 316.

Prescribing fire limits and preventing the erection of wooden buildings therein. *King v. Davenport*, 98 Ill. 305; s. c., 38 Am. Rep. 39; *Baumgartner v. Hasty*, 100 Ind. 575; s. c., 50 Am. Rep. 830.

Requiring a license for building. *Welch v. Hotchkiss*, 39 Conn. 140; s. c., 12 Am. Rep. 383.

Ordinances That Are Unreasonable.—The following ordinances have been held unreasonable and invalid:

Prohibiting one citizen from engaging in a particular kind of business in a certain locality under a penalty, while another is permitted to engage in the same business in the same locality. *Tugman v. Chicago*, 78 Ill. 405.

Those Relating to Public Health—Safety—Morals.—Prohibiting any person from putting up a steam engine without the consent of the mayor and common council, and allowing the revocation of such permits and compelling the removal of such engines on notice. *Baltimore v. Radecke*, 49 Md. 217; s. c., 33 Am. Rep. 239.

Prohibiting the running of any steamboat unless provided with a spark catcher or screen, so as to prevent the escape of sparks or burning cinders therefrom. *Atkinson v. Goodrich Transportation Co.*, 60 Wis. 141; s. c., 50 Am. Rep. 352.

Abolishing the use of a certain kind of fire extinguisher within the limits of the city. *Teutonia Ins. Co. v. O'Connor*, 27 La. An. 371.

Punishing those who associate with

thereon.¹ An ordinance which is repugnant either to the constitution or general laws is *ipso facto* void.²

those of bad character. *St. Louis v. Fitz*, 53 Mo. 582.

Intoxicating Liquors.—Prohibiting the sale of beer and ale or other intoxicating liquors in a less quantity than twenty-eight gallons at one time, unless specially authorized by statute. *Com. v. Turner*, 1 Cush. (Mass.) 493.

Requiring a druggist to furnish quarterly statement, showing kinds and qualities of alcoholic liquors sold, and to whom. *Clinton v. Phillips*, 58 Ill. 102; s. c., 11 Am. Rep. 52.

Peddlers.—Requiring a peddler to pay a license of not less than \$1 nor more than \$25 each time, in the discretion of the mayor. *Town of State Center v. Barenstein*, 66 Iowa 249.

Markets.—Prescribing a penalty of not less than \$1 nor more than \$5 for every hour that a person shall keep his wagon within the limits of the market. *Commonwealth v. Wilkins*, 121 Mass. 356.

Railroads.—Requiring a railroad company to keep a flag by day and a red lantern by night at an ordinary street crossing.

Sale of Commodities.—Prohibiting farmers, gardeners etc., from selling vegetables drawn by them in the street, without license. *St. Paul v. Traeger*, 25 Minn. 248; s. c., 33 Am. Rep. 462.

Requiring milk dealers to pay a license fee for each cart run by them. *Chicago v. Bartree*, 100 Ill. 57.

Forbidding the sale of goods on Sunday, but allowing it by Jews. *Shreveport v. Levy*, 26 La. Ann. 671; s. c., 21 Am. Rep. 553.

Inflicting a penalty for selling pressed hay without inspection, such hay being tolerated by statute. Mayor etc. of N. Y. *v. Nichols*, 4 Hill (N. Y.) 209.

Exactng a license for selling goods which are within corporate limits or *in transitu* to the city, and another and much larger licence for selling goods which are not in the city or *in transitu* to it. *Ex parte Frank*, 52 Cal. 606; s. c., 28 Am. Rep. 642.

Forbidding the sale, without a license, at temporary stands, of lemonade, ice cream, cakes, pies, cheese, nuts or fruits. *Barling v. West*, 29 Wis. 307; s. c., 9 Am. Rep. 567.

Requiring all persons who sell hay and other produce and deliver the

same within the limits of the city to pay a fee of five cents. *Kip v. Mayor etc. of Paterson*, 26 N. J. L. 298.

Providing that hucksters shall take and pay for a license. *Dunham v. Rochester*, 5 Cow. (N. Y.) 462.

Prohibiting any licensed auctioneer from selling at auction after sundown. *Hayes v. Appleton*, 24 Wis. 543.

Prohibiting a gas company from opening a paved street for the purpose of connecting houses with their main. *Commrs. of Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318.

Other Occupations.—Forbidding porters, runners, hackmen, draymen, expressmen, omnibus agents, and drivers from approaching within twenty feet of any wharf or depot on the arrival of any steamboat or train, unless requested by a passenger, it being shown that such approach was arranged for by agreement between the railroad and the omnibus company. *Nappman v. People*, 19 Mich. 352.

Miscellaneous Instances.—Granting a franchise to build and maintain a toll bridge across a river flowing through a city. *Williams v. Davidson*, 43 Tex. 1.

Forbidding any inhabitant of a city from taking fish from a navigable river within the city limits. *Hayden v. Noyes*, 5 Conn. 391.

Punishing the wanton injury of private shade trees. *Goshen v. Crary*, 58 Ind. 268.

Requiring owners of theaters to pay the city constable \$2 per night for his attendance at public performances therein. *Waters v. Leach*, 3 Ark. 110.

Exactng that all slaughtering shall be done for a certain period at a certain building, and that the owners shall be paid a fixed price for the privilege by those slaughtering. *Chicago v. Rumpff*, 45 Ill. 9; s. c., 92 Am. Dec. 196.

1. *Burlington v. Kellar*, 18 Iowa 65; *Watters v. Leech*, 3 Ark. 115; *State v. Langston*, 88 N. Car. 692; *Town of Washington v. Hammond*, 76 N. Car. 33; *Philadelphia etc. R. Co. v. Ervin*, 89 Pa. St. 71; s. c., 33 Am. Rep. 787; *Mayor etc. v. Hussey*, 21 Ga. 80; *Haywood v. Savannah*, 12 Ga. 404; *State v. Caldwell*, 3 La. Ann. 435.

2. *Ex parte Kuback*, 85 Cal. 274; *Burlington v. Kellar*, 18 Iowa 65; Illi-

nois Cent. R. Co. v. Bloomington, 76 Ill. 447; Cullinan v. New Orleans, 28 La. Ann. 102; State v. Hardy, 7 Neb. 377; Wood v. Brooklyn, 14 Barb. (N. Y.) 425; Livingston v. Albany, 41 Ga. 22; Wilkesbarre City Hospital v. Luzerne, 84 Pa. St. 59; Indianapolis v. Indianapolis Gas Light & Coke Co., 66 Ind. 396; Pesterfield v. Vickers, 3 Coldw. (Tenn.) 205; State v. Caldwell, 3 La. Ann. 435; Haywood v. Savannah, 12 Ga. 404; Mayor etc. v. Hussey, 21 Ga. 80; Vance v. Little Rock, 30 Ark. 435; Walker v. New Orleans, 31 La. Ann. 828; New Orleans v. Louisiana Sav. Bank, 31 La. An. 637; Judson v. Reardon, 16 Minn. 431; Shreveport v. Levy, 26 La. An. 671; s. c., 21 Am. Rep. 553; New Orleans v. Phillips, 9 La. Ann. 44; Perdu v. Ellis, 18 Ga. 586; Paris v. Graham, 33 Mo. 94; St. Louis v. Cafferata, 24 Mo. 94; St. Louis v. Bentz, 11 Mo. 61; Carr v. St. Louis, 9 Mo. 191; Collins v. Hatch, 18 Ohio 523; s. c., 51 Am. Dec. 465; Marietta v. Fearing, 4 Ohio 427; Heisembrittle v. City Council, 2 McMull. (S. Car.) 233; Smith v. Mayor etc. of Knoxville, 3 Head (Tenn.) 245; Mayor etc. of N. Y. v. Nichols, 4 Hill (N. Y.) 209 (1843); Phillips v. Wickham, 1 Paige (N. Y.) 590; Com. v. Turner, 1 Cush. (Mass.) 493; Howard v. Savannah, T. U. P. Charlt. (Ga.) 173; Cowen v. West Troy, 43 Barb. (N. Y.) 48; Schenley v. Com. 36 Pa. St. 29; s. c., 78 Am. Dec. 359; State v. Lindsay, 34 Ark. 372; State v. Clarke, 54 Mo. 17; s. c., 14 Am. Rep. 471; State v. Fisher, 33 Wis. 155; Dubois v. Augusta, Dudley (Ga.) 30; Williams v. City Council of Augusta, 4 Ga. 509; Adams v. Mayor etc. of Albany, 29 Ga. 56; Taylor v. Griswold, 14 N. J. L. 222; s. c., 29 Am. Dec. 33; Rothschild v. Darien, 69 Ga. 503; Metcalf v. St. Louis, 11 Mo. 102; State v. Noyes, 30 N. H. 279; Clarke v. Rochester, 28 N. Y. 605; City Council v. Ahrens, 4 Strobh. L. (S. Car.) 241; Pesterfield v. Vickers, 3 Coldw. (Tenn.) 205; City Council v. Benjamin, 2 Strobh. (S. Car.) 508; s. c., 49 Am. Dec. 608; City Council v. Goldsmith, 2 Speers (S. Car.) 435; State v. Welch, 36 Conn. 215; White v. Bayonne, 49 N. J. L. 311; Newton v. Beiger, 143 Mass. 598; Lozier v. Newark Board of Health, 48 N. J. L. 452; *Ex parte* Kearney, 55 Cal. 212; Volk v. Newark, 47 N. J. L. 117; State v. Brittain, 89 N. Car. 574; Cape Girardeau v. Riley, 72 Mo. 220; State v. Mayor of Charles-

ton, 12 Rich. L. (S. Car.) 480; Barling v. West, 29 Wis. 307; s. c., 9 Am. Rep. 576; Com. v. Goodnow, 117 Mass. 114.

The charter of a city, giving power to "regulate the police" of the city, authorizes an ordinance to punish vagrants; and such ordinance does not conflict with the general law concerning vagrants. *St. Louis v. Bentz*, 11 Mo. 61.

An ordinance of the city council, requiring the mayor to enforce the collection of a special tax by suit in the nature of an action of debt, does not violate the city charter or the general law of the land. *Cincinnati v. Gwynne*, 10 Ohio 192.

A charter authority to make ordinances to "secure the health, peace, and improvement" of a city does not warrant an ordinance enjoining the closing of stores on Sunday, that act being forbidden by the general law. *Corvallis v. Carlile*, 10 Oreg. 139; s. c., 45 Am. Rep. 134.

In some States municipal ordinances may cover the same ground as the State law, and both the general law and the ordinances are enforceable. *Mobile v. Rouse*, 8 Ala. 515; Mayor etc. of Mobile v. Allaire, 14 Ala. 400; Elk Point v. Vaughn, 1 Dak. Ter. 108; Polinsky v. People, 2 Hun (N. Y.) 390; State v. Crummey, 17 Minn. 72; Town of Van Buren v. Wells, 53 Ark. 368; State v. Oleson, 26 Minn. 507; State v. Cowan, 29 Mo. 330. *Compare* Jefferson Police Jury v. Arleens, 34 La. Ann. 446; State v. Welch, 36 Conn. 215.

It is also held that the fact that there is a general statute in force on the subject does not make further regulation unnecessary and unreasonable. *Brownsville v. Cook*, 4 Neb. 101; *Ex parte* Douglas, 1 Utah 108; State v. Ludwig, 21 Minn. 202; Hughes v. People, 8 Colo. 536; Deitz v. Central, 1 Colo. 123; Huffsmith v. People, 8 Colo. 175; s. c., 54 Am. Rep. 550. While in others additional local legislation is not permissible. *Southport v. Ogden*, 23 Conn. 128; *Murphy v. Jacksonville*, 18 Fla. 318; s. c., 43 Am. Rep. 323.

A city ordinance authorizing any person refusing, at a fire, to obey any order given by a person empowered to give directions, to be arrested and detained until the fire is extinguished, is unconstitutional and void, for depriving the person arrested of his liberty without due process of law, and of

IX. MUST BE IMPARTIAL AND GENERAL.—Ordinances must be impartial and of general application. Special and unwarranted discriminations in particular cases are not to be allowed.¹ But the mere fact that an ordinance, general in its application injures in a peculiar way a particular individual, will not authorize the courts to presume that it was enacted for the purpose of annoying him and depriving him of his rights, and for that reason to declare it void.²

X. MUST BE CERTAIN AND DEFINITE.—An ordinance must be certain and definite.³ It must be certain in its definition of the offence and certain in the penalty inflicted.⁴ Where an ordinance undertaking to fix water rates leaves them indefinite and uncertain it is invalid.⁵ So penalties prescribed by ordinances must be for a definite sum of money and not left to an officer's discretion.⁶

XI. MUST NOT CONTRAVENTE COMMON RIGHT.—An ordinance in contravention of a common right is void.⁷ Thus an ordinance

the right to trial by jury. *Judson v. Reardon*, 16 Minn. 431.

1. *Dillon on Mun. Corp.*, § 322; *Soon Hing v. Crowley*, 113 U. S. 703; *Russ v. Mayor etc. of N. Y.*, 12 N. Y. Leg. Obs. 38; *Ex parte Chin Yan*, 60 Cal. 78; *Baton Rouge v. Cremonini*, 36 La. Ann. 247; *Mayor etc. of Hudson v. Thorne*, 7 Paige (N. Y.) 261; *Chicago v. Rumpff*, 45 Ill. 90; s. c., 92 Am. Dec. 196; *De Ben v. Gerard*, 4 La. Ann. 30; *Whyte v. Mayor etc. of Nashville*, 2 Swan (Tenn.) 364; *Zanone v. Mound City*, 103 Ill. 552; *Citizens' Gas & Min. Co. v. Elwood*, 114 Ind. 332.

An ordinance of a city council, which gives to one sect a privilege which it denies to another, violates both the constitution and the law, and is therefore null and void. *Shreveport v. Levy*, 26 La. Ann. 671; s. c., 21 Am. Rep. 553.

2. *Shinkle v. Covington*, 83 Ky. 420.

3. *Becker v. Washington*, 94 Mo. 380; *Tappan v. Young*, 9 Daly (N. Y.) 357; *Shreveport v. Roos*, 35 La. Ann. 1010; *San Francisco Pioneer Woolen Factory v. Brickwedel*, 60 Cal. 166.

Proceedings of a city council merely colorable and designed, under the pretence of removing a nuisance, to compel the lot owners to improve their property, cannot be sustained. *Bliss v. Kraus*, 16 Ohio St. 55. An ordinance, providing for the construction of a sewer named, in its description of the course of the sewer, three several curves between two given points, without giving the radii of the curves,—held, that the ordinance was not void for uncertainty, as the curves

were only for very short distances, and could be located without difficulty. *Hyde Park v. Borden*, 94 Ill. 26.

Appropriation Ordinance.—An annual appropriation ordinance need not specify each particular office and the exact sum to be paid the incumbent. *Leadville v. Matthews*, 10 Colo. 125. But see *Sank v. Philadelphia*, 4 Brewst. (Pa.) 133.

4. *McConrill v. Mayor etc. of Jersey City*, 49 N. J. L. 42.

5. *San Francisco Pioneer Woolen Factory v. Brickwedel*, 60 Cal. 166.

6. *State v. Zeigler*, 32 N. J. L. 269; *Commissioners v. Harris*, 7 Jones L. (N. Car.) 281; *State v. Crenshaw*, 94 N. Car. 877; *State v. Cainan*, 94 N. Car. 883; *State v. Clinton* (N. J.), 21 Atl. Rep. 304. Compare *Huntsville v. Phelps*, 27 Ala. 55.

7. *Hayden v. Noyes*, 5 Conn. 391; *Willard v. Killingworth*, 8 Conn. 247; *Taylor v. Griswold*, 14 N. J. L. 222; s. c., 27 Am. Dec. 33; *Clason v. Milwaukee*, 30 Wis. 316; *State v. Mott*, 61 Md. 297; s. c., 48 Am. Rep. 103.

An ordinance of a city which prohibits the renting of private property to lewd women or to any person for their use, without regard to the use to be made by the lessee of the premises, is a proscriptive denial of shelter to an unfortunate class null and void, because in contravention of common right. *Milliken v. City Council*, 54 Tex. 388; s. c., 38 Am. Rep. 629.

Where a city granted to a street railway company the right to lay a double track in its streets, and thereupon the company expended a large

imposing a fine is a penal enactment and must be general. If it designates one individual or establishment and subjects the owners to punishment, it is contrary to common right.¹

XII. THEY MAY REGULATE BUT NOT RESTRAIN TRADE.—Power to pass ordinances in restraint of trade will not be presumed under a general grant of power to a municipal corporation to pass ordinances.² So ordinances that create a monopoly or vest in particular persons the sole and exclusive right to carry on a business are void.³ But it seems that the power to grant or refuse licences will enable the corporation to grant an exclusive license.⁴

XIII. CANNOT AUTHORIZE THE CREATION OF A PRIVATE NUISANCE.—No ordinance of a municipal corporation can lawfully authorize the creation of a private nuisance, and it follows that no such ordinance will justify him who creates one.⁵

XIV. ON WHOM BINDING.—Ordinances which a corporation is authorized to make, not only bind its members, but also strangers, or non-residents coming within its limits.⁶ Ordinances, like

amount of money in the enjoyment of the franchise thus conferred, it is held that the city could not afterward by amendment of the ordinances conferring the franchises limit the company to a single track in the streets to which it proposed to extend its lines, *Burlington v. Burlington St. R. Co.*, 49 Iowa 144; s. c., 31 Am. Rep. 145.

An ordinance authorizing an arrest without a warrant is in contravention to the general law of the land, and is therefore void. *Pesterfield v. Vickers*, 3 Cold v. (Tenn.) 205.

1. *De Ben v. Gerard*, 4 La. Ann. 30.

2. *Ex parte Frank*, 52 Cal. 606; s. c., 28 Am. Rep. 642; *St. Louis v. Grone*, 46 Mo. 574; *State v. Fisher*, 52 Mo. 174; *St. Paul v. Traeger*, 25 Minn. 248; s. c., 36 Am. Rep. 462; *Hayes v. Appleton*, 24 Wis. 543.

Where the common council of a city, under the pretext of regulating the market, passed an ordinance prohibiting, during market hours, the sale of vegetables, outside the limits of the market, it was held that as to the defendant who was a regular dealer in family groceries, outside the market, limits the sale of vegetables, being a part of his calling, such a regulation was in restraint of trade and void. *Caldwell v. Alton*, 33 Ill. 416; s. c., 75 Am. Dec. 282.

But where a city charter authorizes the council to direct, licence and control all wagons and other vehicles carrying loads within the city, an ordinance adopted under the charter re-

quiring persons transporting coal in such vehicles from places within to places outside the city, to obtain a licence before such transportation can be made is not in restraint of trade. *Gartside v. East St. Louis*, 43 Ill. 47.

So a by-law providing that no inhabitant of the city or vicinity, in offering for sale the produce of his own farm, should be allowed to occupy or stand in certain streets designated as a market, for the purpose of vending commodities, was held not in restraint of trade. *In re Nightingale*, 11 Pick. (Mass.) 168.

3. *Ex parte Frank*, 52 Cal. 606; s. c., 28 Am. Rep. 642. See also *Gale v. Kalamazoo*, 23 Mich. 344; s. c., 9 Am. Rep. 80; *Chicago v. Rumpff*, 45 Ill. 90; s. c., 92 Am. Dec. 196; *Tugman v. Chicago*, 78 Ill. 405; *Logan v. Pyne*, 43 Iowa 526; s. c., 22 Am. Rep. 261.

4. *Burlington etc. Ferry Co. v. Davis*, 48 Iowa 133; s. c., 30 Am. Rep. 390. See *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19.

5. *Masterson v. Short*, 7 Robt. (N. Y.) 290.

6. *Heland v. Lowell*, 3 Allen (Mass.) 408; *Com. v. Worcester*, 3 Pick. (Mass.) 462; *Whitfield v. Longest*, 6 Ired. L. (N. Car.) 268; *Pierce v. Bartram*, Comp. 269; *Buffalo v. Webster*, 10 Wend. (N. Y.) 99; *Dodge v. Gridley*, 10 Ohio 173; *Marietta v. Fearing*, 4 Ohio 427; *City Council v. King*, 4 McCord (S. Car.) 487; *City Council v. Pepper*, 1 Rich. L. (S. Car.) 364; *Strauss v. Pontiac*, 40 Ill. 301;

State laws, can have no extra-territorial force. But as in the case of any other law, when persons or property come within its territory, they are under its authority.¹ Whether a corporation has power, unless expressly conferred, to provide for collecting a penalty from a non-resident who suffers his property to violate an ordinance, but he himself was at the time without the corporate limits, is not well settled. It seems, however, that ordinances will not be construed to extend to persons living without the corporation and not being within it, unless such an intention plainly appears.²

Strangers or non-residents as well as inhabitants of a city are chargeable with notice of its ordinances.³ And where an accident occurs by violating an ordinance of which the plaintiff was bound to take notice he cannot recover damages.⁴

XV. PENALTIES—1. Generally.—Power conferred by the legislature upon municipal corporations to enact ordinances authorizes or implies of necessity the power to impose penalties for the breach of such ordinances.⁵

Commissioners of Plymouth v. Pettijohn, 4 Dev. L. (N. Car.) 591; *Commissioners of Wilmington v. Roby*, 8 Ired. L. (N. Car.) 250; *Knoxville v. King*, 7 Lea (Tenn.) 441; *Bott v. Pratt*, 33 Minn. 323; s. c., 53 Am. Rep. 47; *Kennedy v. Sowden*, 1 McMull. (S. Car.) 323; *Horney v. Sloan*, 1 Ind. 266.

1. *Gosselink v. Campbell*, 4 Iowa 296, 300; *Reed v. People*, 1 Park. Cr. (N. Y.) 481; *Whitfield v. Longest*, 6 Ired. L. (N. Car.) 268; *Rose v. Hardie*, 98 N. Car. 44; *Spitler v. Young*, 63 Mo. 42; *Horney v. Sloan*, 1 Ind. 266; *Kennedy v. Sowden*, 1 McMull. (S. Car.) 323; *Williams v. Willard*, 23 Vt. 369.

2. *Dillon on Mun. Corp.*, § 355; *Plymouth v. Pettijohn*, 4 Dev. L. (N. Car.) 391.

One who lived half a mile from Knoxville let his hogs run at large. He knew of the existence of a city ordinance under which the hogs were taken up and impounded. *Held*, that the ordinance was valid, and was applicable to the case. *Knoxville v. King*, 7 Lea (Tenn.) 441. See *Whitfield v. Longest*, 6 Ired. L. (N. Car.) 268.

Incorporated towns in Ohio cannot subject stray animals, owned by persons not residents in the town, to their corporation ordinances. *Marietta v. Fearing*, 4 Ohio 429.

3. *Buffalo v. Webster*, 10 Wend. (N. Y.) 99; *Palmyra v. Morton*, 25

Mo. 593. See *Reed v. People*, 1 Park. Cr. (N. Y.) 481; *Glover on Corp.* 207, 290; *London v. Vanacre*, 12 Mod. 270, 272.

4. *Heland v. Lowell*, 3 Allen (Mass.) 408.

5. *Korah v. Ottawa*, 32 Ill. 129; s. c., 83 Am. Dec. 255; *Fisher v. Harrisburg*, 2 Grant's Cas. Pa. 291; *Barter v. Com.*, 3 Pa. 260; *Trigally v. Memphis*, 6 Coldw. (Tenn.) 382; *Eyerman v. Blaksley*, 78 Mo. 145; *Grover v. Huckins*, 26 Mich. 476; *Town of Tipton v. Norman*, 72 Mo. 380; *Winooski v. Gokey*, 49 Vt. 282; *Mayor etc. of Mobile v. Yuille*, 3 Ala. 137; s. c., 36 Am. Dec. 441; *Mason v. Shawneetown*, 77 Ill. 533; *Hooksett v. Amoskeag etc. Co.*, 44 N. H. 105; *London v. Manacre*, 12 Mod. 270; *Shreveport v. Roos*, 35 La. Ann. 1010; *Independence v. Moore*, 32 Mo. 392; *Mount Pleasant v. Breeze*, 11 Iowa 399; *Reinhard v. Mayor etc. of N. Y.*, 2 Daly (N. Y.) 243; *State v. Boneil (La.)*, 8 So. Rep. 298.

Compare Farnsworth v. Pawtucket, 13 R. I. 83.

Where the power to suppress bawdy houses is conferred upon the municipal corporation, the power to adopt means for that suppression follows by necessary implication. *Shreveport v. Roos*, 35 La. Ann. 1010.

Where the charter of a city confers power to open, widen, establish grade, or otherwise improve and keep in repair, streets, avenues, lanes, alleys,

2. Fines.—Fines accruing from a breach of an ordinance of a municipal corporation is not a debt in the sense of a constitutional provision which forbids imprisonment for debt.¹ They are penalties in the nature of liquidated damages and established as such in lieu of the damages which a court would be authorized to assess in place thereof.²

The amount of the fine must be reasonable,³ and to be reasonable it must be certain.⁴ An ordinance passed by a municipal corporation, which imposes a greater penalty for its violation than is authorized by the charter is void.⁵ But an ordinance which extends the maximum fine beyond the limits prescribed by the charter does not render the whole ordinance void, and a fine will be lawful so long as it is within the minimum amount prescribed by such charter.⁶ The fine must also be imposed on the

and to pass all ordinances necessary to carry into effect the power conferred by the charter, the city has power to adopt an ordinance, punishing by fine any person who might obstruct the public streets within its limits. *Toledo etc. R. Co. v. Town of Chenoa*, 43 Ill. 209.

So a corporation vested with the power of assessing taxes and licenses, has a right to enforce their payment by judicial proceedings. *Amite City v. Clements*, 24 La. Ann. 27.

But where a city charter specifically enumerates various powers which the common council may render effectual by penal prosecutions, such enumeration is an implied exclusion of the right to impose penalties in other cases. *Grand Rapids v. Hughes*, 15 Mich. 54.

1. *Hardengbrook v. Ligonier*, 95 Ind. 70; *Charleston v. Oliver*, 16 S. Car. 47; *Ex parte Hollwedell*, 74 Mo. 395.

In a number of cases it is held that a fine or penalty, incurred by the breach of a by-law is a debt, and recoverable as such before a justice of the peace. *Ex parte Reed*, 4 Cranch (C. C.) 582; *Hall v. Corporation of Washington*, 4 Cranch (C. C.) 582; *Philadelphia v. Duncan*, 4 Phila. (Pa.) 145.

2. *First Municipality v. Cutting*, 4 La. Ann. 335.

The power of the city of New Orleans to inflict fine or imprisonment is confined and restricted to transgressions of ordinances under its police power, and cannot be extended to transgressors of ordinances looking to revenue. *State v. Patamia*, 34 La. Ann. 750.

3. *Zylstra v. Charleston*, 1 Bay (S. Car.) 382; *Mayor etc. of Mobile v. Yuille*, 3 Ala. 137; s. c., 36 Am. Dec. 441.

A penalty, although small, fixed on every stroke of the hammer which an unauthorized person uses in his trade of a goldsmith, is unreasonable. *Willc.* 154, pl. 368. See *Mayor etc. of N. Y. v. Ordrenan*, 12 Johns. (N. Y.) 122.

4. *Mayor etc. of Mobile v. Yuille*, 3 Ala. 137; s. c., 36 Am. Dec. 441; *State v. Cainan*, 94 N. Car. 883; *State v. Crenshaw*, 94 N. Car. 877.

CHIEF JUSTICE COOLEY, in speaking of municipal by-laws says: "A by-law to be reasonable should be certain. If it affixes a penalty for its violation, it would seem that such penalty should be fixed in a certain amount, not left to the officer or court which is to impose it upon conviction; though a by-law imposing a penalty not exceeding a certain sum has been held not to be void for uncertainty. *Cooley on Const. Lim.* 202; *McConvill v. Mayor etc. of Jersey City*, 39 N. J. L. 38. See *State v. Zeigler*, 32 N. J. L. 262.

5. *Leland v. Long Branch Commrs.*, 42 N. J. L. 375; *Petersburg v. Metzker*, 21 Ill. 205; *State v. Bringier*, 8 So. Rep. 298.

Where a charter of a city limits its power to impose fines to \$100, an ordinance imposing a fine beyond this sum is inoperable. *Chicago v. Quinby*, 38 Ill. 274.

6. *Greenfield v. Mook*, 12 Ill. App. 281. See *Bailey v. State* (Neb.), 47 N. W. Rep. 208.

A city ordinance prescribing a term of imprisonment which may, but does not, necessarily, exceed that authorized by the constitution, may be enforced

person who violates the ordinance.¹ And where a statute confers upon the local body power to prescribe within certain limits the penalty which might seem to it commensurate with the offence, the justice's jurisdiction to punish is circumscribed, and he has no power to go beyond it.² When imposed, it does not legalize the acts subjected to punishment, but amounts to an authoritative prohibition.³

3. Payment of Fines.—Fines imposed by any officer of a municipal corporation having the authority to impose them, must as a general rule be paid into the treasury of the city, town, or other municipal corporation unless the law specifically directs otherwise.⁴

4. Imprisonment in Default of Payment.—Cities, towns, and villages, whether incorporated under general or special acts of the legislatures are commonly authorized by their charters to provide for the imprisonment of offenders against their ordinances, until the fines and costs adjudged against them by judicial authority are paid.⁵ The imprisonment which the court is authorized to inflict is for a failure or refusal to pay the fine, and is not by way of punishment to the offender for the offence committed.⁶ Imprisonment as a punishment can be inflicted by a municipal cor-

within the constitutional limit. *Keokuk v. Dressell*, 47 Iowa 597.

1. *Cuddon v. Eastwick*, 1 Salk. 143; *Willc. on Corp.* 154. See *Fazakerly v. Wiltshire*, 1 Stra. 469.

2. *State v. Asbury Park*, 44 N. J. L. 162.

3. *Johnson v. Simonton*, 43 Cal. 242; *Faribault v. Wilson*, 34 Minn. 254; *Pedrick v. Bailey*, 12 Gray (Mass.) 161.

4. *People v. Sacramento*, 6 Cal. 422. A city ordinance giving police-officers a fixed salary, and requiring them to pay over to the city the fees received by them as witnesses, or as penalties in criminal cases, or for service of any criminal process, or for any services in behalf of the city, is not contrary to public policy. *Worcester v. Walker*, 9 Gray (Mass.) 78.

The Indiana act approved Feb. 26, 1873 (Laws 1873, 141), concerning the application of certain fines, etc., collected in the enforcement of certain city ordinances in cities having incorporated homes for friendless women, applying such fines, etc., to the support of such institutions, is not unconstitutional. *Indianapolis v. Indianapolis Home for Friendless Women*, 50 Ind. 215.

In *Michigan* fines collected by the city authorities, on prosecutions before

the recorder for violations of city by-laws, do not belong in the county treasury. *Fennell v. Bay City*, 36 Mich. 186.

The provisions of Nev. Const., art. 11, § 3, providing that all fines collected under the penal laws of the State shall be pledged to educational purposes, have no application to fines recoverable for violation of city ordinances, but apply to fines recoverable under the general laws of the State. *State v. Swift*, 11 Nev. 128.

5. *Sheffield v. O'Day*, 7 Ill. App. 339; *Mayor of Bayonne v. Herdt*, 40 N. J. L. 264. See *State v. Ruff*, 30 La. Ann. 497.

A municipal ordinance which inflicts the punishment of hard labor for the city within the limits fixed by the charter on a citizen who refuses to pay a licence tax and yet engages in an occupation for which a licence is required, is not objectionable. *Ex parte City Council of Montgomery*, 64 Ala. 463.

6. *Sheffield v. O'Day*, 7 Ill. App. 344; *Inwood v. State*, 42 Ohio St. 186; *Mayor of Bayonne v. Herdt*, 40 N. J. L. 264.

One who has served out in prison a fine imposed for the violation of an unconstitutional municipal ordinance has no right of action against the city

poration only when the power is given by the charter.¹ The power to imprison never arises by implication.²

The terms of the power to impose penalties must be closely followed. Thus the power to imprison in a county jail does not authorize imprisonment in the penitentiary.³ So where the statute provides that no imprisonment shall exceed six months and a judgment is rendered requiring the offender to be imprisoned until the fine and costs should be paid, it will be erroneous.⁴

5. When Fines Refunded.—Voluntary payment of a fine will bar proceedings in error.⁵ But a payment made under protest to the officers of a town to avoid prosecution of a fine under an invalid ordinance is an involuntary payment and an action will lie against the town for the sum paid and interest.⁶ (See also **MISTAKE; PAYMENT.**)

XVI. FORFEITURE.—A city incorporated under the general law of a State has no power to pass an ordinance ordaining a forfeiture of property. The exercise of such power requires the authority of legislative enactment.⁷ And where this authority is

for false imprisonment. *Trescott v. Waterloo*, 26 Fed. Rep. 592.

In *Georgia* the power conferred upon a municipal corporation to punish offenders against its ordinances, by fine or imprisonment, does not include authority to coerce the payment of a fine by imprisonment. *Brieswick v. Mayor etc. of Brunswick*, 51 Ga. 639.

Support of Prisoner.—Towns and cities are chargeable for the support of prisoners committed to jail for violations of the police law, and of city ordinances passed by virtue of the powers ordinarily vested in police offices. *Stafford County v. Somersworth*, 38 N. H. 21.

1. *Burlington v. Kellar*, 18 Iowa 59.

2. *Horr & Bemis*, § 158; *Burlington v. Kellar*, 18 Iowa 59; *City of London's Cas.*, 8 Coke 187; *Clark's Cas.*, 5 Coke 64.

3. *Merkee v. Rochester*, 13 Hun (N. Y.) 157.

4. *Canouse v. Town of Lexington*, 12 Ill. App. 318.

A city ordinance that provides for a term of imprisonment which may exceed that authorized by the constitution, but does not necessarily do so, is not void but may be enforced within the constitutional limit. *Keokuk v. Dressell*, 47 Iowa 598.

5. *Powell v. People*, 47 Mich. 108. Where a fine had been paid for violating an ordinance of the town of Anderson, in South Carolina, against

public shows, *held*, that it could not be recovered by suit against the magistrate, the remedy being by prohibition. *McKee v. Town Council etc.*, 1 Rice (S. Car.) 24.

6. *Harvey v. Olena*, 42 Ill. 336.

7. *Henke v. McCord*, 55 Iowa 378; *Kneedler v. Norristown*, 100 Pa. St. 368; s. c., 45 Am. Rep. 384; *Cotter v. Doty*, 5 Ohio 394; *Clerk v. Tucket*, 3 Lev. 281; *Kirk v. Nowill*, 1 Term R. 118, 124; *White v. Tallman*, 26 N. J. L. 67; *Hart v. Mayor etc. of Albany*, 9 Wend. (N. Y.) 571; s. c., 24 Am. Dec. 165; *Adley v. Reeves*, 2 Maule & S. 60; *Lee v. Wallis*, 1 Ken. 282; *Phillips v. Allen*, 41 Pa. St. 481; s. c., 82 Am. Dec. 486; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Mayor etc. of N. Y. v. Ordrenan*, 12 Johns. (N. Y.) 122; *Barter v. Com.*, 3 Pa. 260; *Mayor etc. of Mobile v. Yuille*, 3 Ala. 137; s. c., 36 Am. Dec. 441; *Bergen v. Clarkson*, 6 N. J. L. 352; *Miles v. Chamberlain*, 17 Wis. 446; *Taylor v. Carondelet*, 22 Mo. 105, 112; *Donovan v. Mayor etc. of Vicksburg*, 29 Miss. 247; s. c., 64 Am. Dec. 143; *Cincinnati v. Buckingham*, 10 Ohio 257; *Wilcox v. Hemming*, 58 Wis. 144; s. c. 46 Am. Rep. 625.

An ordinance authorizing the arrest and punishment of any person keeping or visiting an establishment for the purpose of gaming, does not authorize the seizure or destruction of instruments used for the purpose of gaming. *Ridgeway v. West*, 60 Ind. 371.

given it must be strictly pursued.¹ And an ordinance depriving an individual of his property by forfeiture without notice or without legal adjudication, is void.²

XVII. REPETITION OF OFFENSES.—Municipal corporations empowered to impose penalties for the violation of their ordinances, may distinguish between the first and second offence, and may provide for a heavier fine for the violations subsequent to the first, providing the penalty in no case exceeds the limit fixed by

A city ordinance required that baskets used for the sale of fruits and vegetables should have the fractional parts of a bushel contained in each, marked and stamped thereon, or else to be forfeited with contents. The clerk of the city market seized several baskets of apples for sale in unmarked baskets. It was held in an action for replevin that as no act of the legislature expressly authorized the forfeiture, the city council had no power to inflict that penalty for the violation of the ordinance, *Phillips v. Allen*, 41 Pa. St. 481; s. c., 82 Am. Dec. 486.

When an ordinance prescribes the penalty of a fine and forfeiture of a licence, instead of the fine or imprisonment which it was authorized to impose for a breach of the ordinance, the punishment imposing the forfeiture is without legislative authority. *Staates v. Borough of Washington*, 44 N. J. L. 610; s. c., 43 Am. Rep. 402.

So in *Leland v. Long Branch Comms.*, 42 N. J. L. 375, in which the charter authorized the infliction of a penalty for the breach of an ordinance by fine or imprisonment, and the ordinance imposed a penalty by fine or imprisonment, or both, at the discretion of the justice, it was held that the ordinance was void because of the excess.

Animals Running at Large.—An ordinance which authorizes the sale of animals running at large without a judicial ascertainment that some law has been violated, is a violation of the constitutional provision that no person can be deprived of his property but by due course of law and securing right to a jury trial. *Miles v. Chamberlain*, 17 Wis. 446; *Poppen v. Holmes*, 44 Ill. 362; *Donovan v. Mayor etc. of Vicksburg*, 29 Miss. 247; s. c., 64 Am. Dec. 143; *Darst v. People*, 51 Ill. 286; s. c., 2 Am. Rep. 301; *Whitfield v. Longest*, 6 Ired. L. (N. Car.) 268; *State v. Columbia*, 6 Rich. (S. Car.) 404; *Varden v. Mount*, 78 Ky.

86; s. c., 39 Am. Rep. 208; *Jarman v. Patterson*, 7 Mon. (Ky.) 647; *McKee v. McKee*, 8 B. Mon. (Ky.) 433.

The animals may be held and sold to defray cost of abating the nuisance, but not to pay the penalty. The corporation is put to trouble and expense in taking up the strays and in providing a suitable pound for their retention until claimed by the owner. The animals must be fed and cared for. To meet this expense they may be sold although the owner thereby forfeits his property. *Horr & Bemis*, § 161; *Fort Smith v. Dodson*, 46 Ark. 301; s. c., 55 Am. Dec. 589; *Willis v. Legris*, 45 Ill. 289.

In *Gosselink v. Campbell*, 4 Iowa 296, it was held that ordinances do not, strictly speaking, create a forfeiture, for after paying the expenses and fine, the remainder of the proceeds are paid to the owner.

1. *Clark v. Lewis*, 35 Ill. 417; *Bullock v. Geomble*, 45 Ill. 218; *Friday v. Floyd*, 63 Ill. 50.

The act of declaring a forfeiture of a lease of land which had been granted by a city is a legislative act, and must conform to all the requirements of the charter to give it any force or validity. *Carondelet v. Wolfert*, 39 Mo. 305.

2. *Rosebaugh v. Saffin*, 10 Ohio 32; *Slessman v. Crozier*, 80 Ind. 487; *Cotter v. Doty*, 5 Ohio 393, 398; *McKee v. McKee*, 8 B. Mon. (Ky.) 433; *Wilcox v. Hemming*, 58 Wis. 144; s. c., 46 Am. Dec. 625. The right to forfeit without citation and without hearing can only exist from necessity. *Varden v. Mount*, 78 Ky. 86; 39 Am. Rep. 208.

The notice may be personal or by advertisement. *McKee v. McKee*, 8 B. Mon. (Ky.) 433; *Davies v. Morgan*, 1 C. & J. 587; *Shaw v. Kennedy*, Term (N. Car.) 158; *Hellen v. Noe*, 3 Ired. L. (N. Car.) 493; *Rosebaugh v. Saffin*, 10 Ohio 31; *Gilchrist v. Schmidling*, 12 Kan. 263.

the act of incorporation.¹

XVIII. MODE OF ENFORCING.—It is the established law of corporations that their ordinances can be enforced only in the manner prescribed by the charter.² Special tribunals are usually created for enforcing ordinances. The rules of practice in these tribunals are based partly upon direct statutory provisions, partly on custom, partly on the by-laws of the corporation itself, but more often on an attempt to imitate the rules laid down for analogous proceedings in the State courts. The rules observed in higher courts are often wholly impracticable or inapplicable to practice before the municipal courts, but remedies under ordinances are never allowed to fail for want of a tribunal, and if no special tribunal is provided, actions to enforce penalties may be brought in the established courts of the State.³

If the mode or form of action is not prescribed then the recovery of the penalty or fine for the violation of a valid municipal ordinance may be as at common law, by action of debt or assumpsit, or where these forms are abrogated, by a civil action, in substance the same.⁴ Actions for the recovery of penalties for the violation of ordinances of municipal corporations are generally civil actions.⁵ The strict and rigid rules by which the validity of penal statutes are tested are not to be applied to the by-laws of a municipal corporation,⁶ and the rules of procedure in civil cases, unless otherwise provided, are applicable to it.⁷

1. *Staates v. Borough of Washington*, 45 N. J. L. 318; s. c., 43 Am. Dec. 402.

2. *State v. Zeigler*, 32 N. J. L. 268; *Ewbanks v. Ashley*, 36 Ill. 177; *Weeks v. Foreman*, 16 N. J. L. 237; *Israel v. Jacksonville*, 2 Ill. 290; *Williamson v. Com.*, 4 B. Mon. (Ky.) 146; *Hart v. Mayor etc. of Albany*, 9 Wend. (N. Y.) 571; s. c., 24 Am. Dec. 165; *Mayor etc. of Newark v. Murphy*, 40 N. J. L. 145.

3. *Horr & Bemis on Mun. Ord.*, §§ 165, 166; *Columbia v. Harris*, 2 Treadw. Const. (S. Car.) 215. See *Mobile v. Barton*, 47 Ala. 84; *People v. Vinton* (Mich.), 46 N. W. Rep. 31; *McNeil v. State* (Tex.), 14 S. W. Rep. 393; *State v. Johnson*, 17 Ark. 407.

4. *Dill. on Mun. Corp.*, § 411; *Israel v. Jacksonville*, 2 Ill. 290; *Ewbanks v. Ashley*, 36 Ill. 178; *Coates v. Mayor etc. of N. Y.*, 7 Cow. (N. Y.) 585; *State v. Passaic*, 42 N. J. L. 429; *Columbia v. Harrison*, 2 Treadw. Const. (S. Car.) 215; *State v. Clinton*, (N. J.), 21 Atl. Rep. 304; *Heeney v. Sprague*, 11 R. I. 456.

5. *Town of Brookville v. Gagle*, 73 Ind. 118; *Greensburg v. Corwin*, 58

Ind. 518; *Goshen v. Croxton*, 34 Ind. 239.

6. *First Municipality v. Cutting*, 4 La. An. 335; *State v. Boneil* (La.), 8 So. Rep. 298.

7. *Williamson v. Com.*, 4 B. Mon. (Ky.) 146; *Jenkins v. Cheyenne*, 1 Wyo. Ter. 287; *Brophy v. Perth Amboy*, 44 N. J. L. 217; *Miller v. O'Reilly*, 84 Ind. 168; *St. Louis v. Vert*, 84 Mo. 204; *Davenport v. Bird*, 34 Iowa 524; *Quincy v. Ballance*, 30 Ill. 185; *Lewiston v. Proctor*, 27 Ill. 414; *First Municipality v. Cutting*, 4 La. Ann. 335.

A prosecution for the violation of an ordinance of a municipal corporation is a civil action, and an appeal bond given in such a prosecution is governed by the law applicable to bonds given in ordinary civil actions. *Miller v. O'Reilly*, 84 Ind. 168.

A number of cases hold that a city ordinance which punishes, by fine and imprisonment, the commission of acts which are breaches of law wherever committed, is a penal law and proceedings under it are considered to be a criminal or *quasi* criminal, and not a civil proceeding. *Wayne Co. v. De-*

troit, 17 Mich. 390; *People v. Detroit*, 18 Mich. 445; *Davenport v. Bird*, 34 Iowa 524. But see *contra*, *Williams v. City Council of Augusta*, 4 Ga. 509; *Kip v. Mayor etc. of Paterson*, 26 N. J. L. 298; *Keeler v. Milledge*, 24 N. J. L. 142; *Shafer v. Mumma*, 17 Md. 331; s. c., 79 Am. Dec. 656; *Low v. Commrs. of Pilotage, R. M. Charl.* (Ga.) 316; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194; s. c., 48 Am. Dec. 248; *Floyd v. Eatonton etc.*, 14 Ga. 354.

In *Alabama*, proceedings for the recovery of fines for penalties for the violation of city ordinances are *quasi* criminal in their character and should be conducted according to the rules applicable to indictment for misdemeanor. *Brown v. Mayor of Mobile*, 23 Ala. 722. See *Mobile v. Jones*, 42 Ala. 630; *Furhman v. Huntsville*, 54 Ala. 263.

In *California*, a prosecution for the violation of a city ordinance made punishable by fine or imprisonment is a criminal proceeding and should be prosecuted in the name of the people. *Santa Barbara v. Sherman*, 61 Cal. 57; *People v. Johnson*, 30 Cal. 98.

In *Georgia*, the violation of ordinances are not criminal cases within the meaning of the State constitution. *Williams v. City Council of Augusta*, 4 Ga. 509; *Floyd v. Eatonton*, 14 Ga. 354.

In *Illinois*, city ordinances imposing penalties for certain acts are not penal statutes within the meaning of the law which requires security for costs to be given in prosecution of any penal statute. *Quincy v. Ballance*, 30 Ill. 185; *Lewiston v. Proctor*, 23 Ill. 533; *Town of Jacksonville v. Holland*, 19 Ill. 271.

In *Indiana*, a prosecution for the violation of city ordinances is a civil action. *Miller v. O'Reilly*, 84 Ind. 168. See *Goshen v. Croxton*, 34 Ind. 239; *Commrs. v. Chissom*, 7 Ind. 688.

In *Iowa* and *Nebraska*, where a city ordinance is enacted to promote the public peace, safety and convenience, and provides the sanction of fines, the violation of the ordinance is a public offence and the guilty party is liable to a criminal prosecution. *Jaquith v. Royce*, 42 Iowa 406; *Brownville v. Cook*, 4 Neb. 101.

In *Kansas*, a prosecution in a municipal court under the city ordinance for a matter which is penal because of its supposed evil consequences to society is a criminal action. *Neitzel v.*

Concordia, 14 Kan. 446. Compare *Emporia v. Volmer*, 12 Kan. 622.

In *Massachusetts*, such actions are governed by the Penal Code of Procedure, although unlike actions under the state laws in that no costs are allowed the accused in case of acquittal. *Horr & Bemis on Mun. Ord.*, § 170; *Dill on Mun. Corp.*, § 412; *Com. v. Worcester*, 3 Pick. (Mass.) 462; *In re Goddard*, 16 Pick. (Mass.) 504.

In *Michigan*, such suits are not criminal prosecutions, but penal actions on the part of the city, and cannot be maintained in the name of the people or State. *Cooper v. People*, 41 Mich. 403; *People v. Detroit*, 18 Mich. 445.

In *Missouri*, such actions are not strictly criminal in character. *Louis v. Knox*, 74 Mo. 79; *Town of Kirkwood v. Autenreith*, 11 Mo. App. 515. St. Louis may in its own name recover a fine for breach of its ordinances, and imprisonment for the nonpayment of such fines is constitutional. *Ex parte Hollwedell*, 74 Mo. 395. See also *Ex parte Kiburg*, 10 Mo. App. 442.

In *Minnesota* and *Ohio*, such actions are called *quasi* criminal. *State v. Lee*, 22 Minn. 407; s. c., 21 Am. Rep. 769; *Cincinnati v. Gwynne*, 10 Ohio 192; *Markel v. Akron*, 14 Ohio 586; *Larney v. Cleveland*, 34 Ohio St. 599.

In *New York*, proceedings instituted under the Code of Procedure, by a city to recover a penalty imposed for the violation of an ordinance, is a civil action. *Buffalo v. Schliefer*, 25 Hun (N. Y.) 275; *Wood v. Brooklyn*, 14 Barb. (N. Y.) 431.

In *Wisconsin*, proceedings for the violation of city ordinances are civil actions for the penalty and not a criminal prosecution, and the jury may be waived by stipulation therein. *Sutton v. McConnell*, 46 Wis. 270. See *Oshkosh v. Schwartz*, 55 Wis. 483; *Fink v. Milwaukee*, 17 Wis. 26; *Platteville v. Bell*, 43 Wis. 488.

But where a city or village ordinance prohibits that which is a crime and misdemeanor, and punishable at common law, or by statute, and prescribes a penalty for its violation by fine, with imprisonment on default of payment, the action to recover such penalty is *quasi* criminal, and cannot be brought to the supreme court on plaintiff's appeal. *Platteville v. McKernan*, 54 Wis. 487.

In *Wyoming*, a prosecution by a city to recover a penalty under its ordi-

1. **Pleadings.**—The substantial principle must be complied with that a party, in order to recover, must make known to the court, in his pleading and by his proof, every law and fact essential to support his action, of which the court does not take judicial notice, and his pleading should state the facts and not the conclusions the pleader deduces from them.¹ The courts cannot legally or in the nature of things take judicial notice of corporate regulations,² unless otherwise directed by statute.³ Ordinances stand on the same footing as private and special statutes, the laws of other States and of foreign countries, and must be averred and proved like other facts.⁴ In pleading, the ordinance need not be set forth in *totidem verbis*. It is sufficient if it sets out with clearness the offence charged, and the substance of that part of the ordinance which has been violated with reference to the title, date, and section.⁵

nances is a civil action. *Jenkins v. Cheyenne*, 1 Wyo. 287.

1. *Austin v. Walton*, 68 Tex. 507.

2. *Elizabethtown v. Lefler*, 23 Ill. 90; *Case v. Mobile*, 30 Ala. 538; *Harker v. Mayor etc. of N. Y.*, 17 Wend. (N. Y.) 199; *Mooney v. Kennett*, 19 Mo. 551; s. c., 61 Am. Dec. 576; *New Orleans v. Boudro*, 14 La. Ann. 301; *People v. Mayor etc. of N. Y.*, 7 How. Pr. (N. Y.) 81; *People v. Buchanan*, 1 Idaho 681; *Wheeling v. Black*, 25 W. Va. 266; *Austin v. Walton*, 68 Tex. 507; *Goodrich v. Brown*, 30 Iowa 291; *Garvin v. Wells*, 8 Iowa 286; *Cox v. St. Louis*, 11 Mo. 431; *Central Sav. Bank of Baltimore v. Baltimore (Md.)*, 20 Atl. Rep. 285. *Compare Downing v. Miltonvale*, 36 Kan. 740.

City ordinances are not public laws of which the court can take judicial notice. They are facts, and in an indictment must be pleaded as such. *State v. Soragan*, 40 Vt. 450.

3. *Downing v. Miltonvale*, 36 Kan. 740; *Garvin v. Wells*, 8 Iowa 286; *Case v. Mobile*, 30 Ala. 538. See *Pettit v. May*, 34 Wis. 666.

4. *Austin v. Walton*, 68 Tex. 507; *Feltmaker's Co. v. Davis*, 1 Bos. & Pul. 98; *Coates v. Mayor etc. of N. Y.*, 7 Cow. (N. Y.) 585; *Case v. Mobile*, 30 Ala. 538; *Piper v. Chappell*, 14 M. & W. 624. It must allege the acts of defendant relied upon as constituting the violation of it. *Huntington v. Pease*, 56 Ind. 305.

An information upon a by-law, alleging that the penalty accrued to the commonwealth, when, by the charter, it accrued to the town, is bad. *Virginia v. Hooft*, 1 Cranch (C. C.) 21.

5. *Keeler v. Milledge*, 24 N. J. L. 142; *City Council v. Seeba*, 4 Strobb. L. (S. Car.) 319; *Kip v. Mayor etc. of Paterson*, 2 Dutch. (N. J.) 298; *Com. v. Bean*, 14 Gray (Mass.) 52; *People v. Justices*, 12 Hun (N. Y.) 65; *City Council of Charleston v. Chur.*, 2 Baily (S. Car.) 164; *Clevenger v. Rushville*, 90 Ind. 258; *Janesville v. Milwaukee etc. R. Co.*, 7 Wis. 484; *Case v. Mobile*, 30 Ala. 538; *City Council v. Seeba*, 4 Strobb. (S. Car.) 319; *Goldwaite v. City Council of Montgomery*, 50 Ala. 486; *O'Malia v. Wentworth*, 65 Me. 129; *Wood v. Town of Prineville (Oreg.)*, 23 Pac. Rep. 880. *Compare Goshen v. Croxton*, 34 Ind. 239; *Deitz v. Central*, 1 Colo. 323; *Whitson v. Franklin*, 34 Ind. 392; *Napman v. People*, 19 Mich. 352; *Fink v. Milwaukee*, 17 Wis. 26; *People v. Mayor etc. of N. Y.*, 7 How. Pr. (N. Y.) 81; *St. Louis v. Stoddard*, 15 Mo. App. 173.

Many cases hold that the ordinance, or at least that portion which is directly violated, should be embodied in the complaint. *Hendersonville v. McMinn*, 82 N. Car. 532; *Harker v. Mayor etc. of N. Y.*, 17 Wend. (N. Y.) 199; *Chicago W. D. R. Co. v. Klauber*, 9 Ill. App. 613; *Illinois Cent. R. v. Godfrey*, 71 Ill. 500; s. c., 22 Am. Rep. 112; *Pomeroy v. Lappeus*, 9 Oreg. 363; *Greensborough v. Shields*, 78 N. Car. 417; *Vandyke v. Cincinnati*, 1 Dis. (Ohio) 533; *Green v. Indianapolis*, 25 Ind. 490; *People v. Mayor etc. of N. Y.*, 7 How. Pr. (N. Y.) 81; *State v. Edens*, 85 N. Car. 522.

On appeal in the absence of proof to the contrary, city ordinances will not

It must state what ordinance the defendants have violated, and the time when, and the manner in which the same has been violated.¹ It is not necessary to set out what section is violated by its number in the ordinance.² But a complaint will be quashed if it does not allege such an illegal act as the ordinance was intended to prohibit, although it pursues the very language of the ordinance.³

(a) JURISDICTION.—A city may prescribe by ordinance the manner in which jurisdiction may be acquired over particular subjects, and if the requirements of the ordinance are mandatory, the proceeding taken without acquiring jurisdiction in the manner prescribed is void.⁴ In some States the mayor of a city has jurisdiction of cases for the violation of city ordinances.⁵

(b) VARIANCE.—Where an ordinance authorizes an action and a summary conviction before a magistrate for violation of an ordinance, a slight variance between an allegation in the complaint and the proof as to the time of the offence is immaterial.⁶ The

be presumed to require a written complaint under oath for a violation of one of them, and the circuit court will try the case on its merits notwithstanding a defect in the complaint. *Alton v. Kirsch*, 68 Ill. 261.

In *Hardenbrook v. Town of Ligonier*, 95 Ind. 70, it is held that it is not necessary to aver that the members of the board of trustees which passed the ordinance were duly elected, nor that they had authority to pass the ordinance, nor that it had been published.

Setting Out Title.—It is not necessary to set out the whole ordinance with its title. *Green v. Indianapolis*, 25 Ind. 490; *Information v. Oliver*, 21 S. Car. 318; *Alton v. Kirsch*, 78 Ill. 261.

The title of an ordinance being inessential, it cannot control the tenor of the enactment. *State v. Beverly*, 45 N. J. L. 288.

Exceptions.—A complaint which charges that the complainant has just cause to suspect and does suspect that the defendant is guilty of violating the city ordinance, without averring that he is guilty, is not made with such reasonable certainty as to be the ground of a judicial determination, conviction and sentence. It differs from a proceeding to obtain a warrant to arrest an offender to answer to a more former complaint by indictment in another court. *Roberson v. Lambertville*, 38 N. J. L. 69.

In declaring on a statute, where there is an exception in the enacting

clause, the pleader must negative the exception, but where there is no exception in the enacting clause, but an exception in the proviso of the enacting clause, or in a subsequent section of the act, it is a matter of defense and must be shown by the defendant. *Lynch v. People*, 16 Mich. 477. See *Atty. Gen. v. Oakland Co. Bank*, Walk. Ch. (Mich.) 90; *McGear v. Woodruff*, 33 N. J. L. 213; *Roberson v. Lambertville*, 38 N. J. L. 69; *Farwell v. Smith*, 16 N. J. L. 133.

1. *State v. Street Commrs. of Trenton*, 36 N. J. L. 203.

A complaint, in no manner alluding to the by-laws of a town, cannot be sustained by virtue of those by-laws. *Lewiston v. Fairfield*, 47 Me. 481.

Under a city ordinance which prohibits permitting any cattle to go at large or "stop to feed" on any highway, a complaint which avers that the defendant suffered two cows "to stop and feed" on certain highways, is bad, even after verdict, the object of the ordinance being to prevent grazing. *Com. v. Bean*, 14 Gray (Mass.) 52.

2. *Myer v. Treasurer of Bridgeton*, 37 N. J. L. 160; *Emporia v. Volmer*, 12 Kan. 622; *Huntington v. Pease*, 56 Ind. 305.

3. *State v. Goulding*, 44 N. H. 284.

4. *Starr v. Burlington*, 45 Iowa 87.

5. *McNulty v. Connew*, 50 Ind. 569; *Thomas v. Mount Vernon*, 9 Ohio 290.

6. *State v. Beverly*, 45 N. J. L. 288; *Harbaugh v. Monmouth*, 74 Ill. 367.

place of the offense, if necessary to be alleged, must be proven to a reasonable certainty, and under all circumstances the act must be proven to have been done within the territorial limits of the corporation.¹ If a complaint is not limited to a single offense, but charges a violation generally, proof may be admitted of any number of offenses, provided the aggregate of the fines assessed do not exceed the magistrate's jurisdiction.²

(c) ACTION MUST BE BROUGHT IN THE CORPORATE NAME.—Actions or prosecutions for violation of ordinances must be by and in the name of the corporation where the penalty is understood to be to the use of the corporation.³ And where a statute directs a proceeding to be had in the name of a city corporation for a breach of its laws, it is error to proceed in the name of the commonwealth.⁴ The prescribed modes of enforcing obedience to ordinances must be strictly pursued. So where the statute provides that all fines and forfeitures incurred under the general laws or the special laws applicable to any town or city, or the ordinances of any town or city, shall enure to the use of such town or city, and may be recovered in the name of the treasurer, such fines are recoverable only by complaint in the name of the treasurer of the city or town, and in no other manner.⁵

2. Construction—(a) GENERALLY.—The rules for the construction of ordinances are the same as for the construction of statutes.⁶ Those relating to the comfort, safety, health, convenience, good order, general welfare, and the like, are given a reasonable construction.⁷ Those ordinances that are in their nature penal

1. *Horr & Bemis*, § 190; *citing*, *Mayor etc. v. Nell*, 3 Yeates (Pa.) 475; *Taylor v. Americus*, 39 Ga. 59.

2. *Byars v. City of Mt. Vernon*, 77 Ill. 467.

3. *Graves v. Colby*, 9 Ad. & El. 356; *Vintner's Co. v. Passey*, 1 Burr. 235; *Glover* 313; 2 Kyd. 157; *Bodwic v. Fennell*, 1 Wils. 233; *Williamson v. Com.*, 4 B. Mon. (Ky.) 146, 151; *Webster v. Lansing*, 47 Mich. 192; *Smith v. Marston*, 5 Tex. 426. *Compare Com. v. Worcester*, 3 Pick. (Mass.) 462.

In *Nebraska*, a proceeding for violation of a city ordinance must, by the constitution, run in the name of the State; and not in that of the city concerned. *Brownville v. Cook*, 4 Neb. 101.

4. *Williamson v. Com.*, 4 B. Mon. (Ky.) 146.

The provision in the charter of Hudson, that certain prosecutions for assaults and affrays be commenced in the name of the city, held to contravene Wis. Const., art. 7, § 7, requiring all criminal prosecutions to be

carried on in the name of the State. *State v. Bartlett*, 35 Wis. 287.

5. *Com. v. Fahey*, 5 Cush. (Mass.) 408; *Harris v. Wakeman*, Say. 254; *Exeter v. Starre*, 2 Show. 158.

6. *Re Yick Wo*, 68 Cal. 294; s. c., 58 Am. Rep. 12.

7. *Municipality No. 1 v. Cutting*, 4 La. Ann. 335; *Moir v. Munday*, Say. 181, 185; *Norris v. Staps*, Hob. 211; *Com. v. Robertson*, 5 Cush. (Mass.) 438, 442; *Poulters' Co. v. Phillips*, 6 Bing. N. C. 314, 323; *Vintners' Co. v. Passey*, 1 Burr. 235; *Tobacco etc. Co. v. Woodroffe*, 7 B. & C. 838; *Rounds v. Mumford*, 2 R. I. 154.

Town by-laws are specially entitled to a reasonable construction. *Whitlock v. West*, 26 Conn. 406.

In a conflict between a city and a private corporation carrying on business therein, the city ordinances are to be construed as favorably as possible for the city in furtherance of the rights of the public, and in restraint of encroachments thereon by such corporation. *Philadelphia v. Western Union Tel. Co.*, 2 W. N. C. (Pa.) 455.

are construed strictly and must clearly embrace the offense charged.¹ The courts also consider the corporate powers under which ordinances are enacted. If municipal corporations have delegated to them a limited jurisdiction, and are entrusted with the power of dealing with the property and rights of the citizens, they will be restrained within the strict limits of their authority, and when they transgress those limits the courts will declare their acts void, in so far as they exceed their powers.² So, if exclusive jurisdiction and power to legislate upon a given subject have been conferred by law upon such a corporation, every intendment and presumption will be made in support of their acts, and courts of justice never pronounce them void unless their nullity and invalidity are placed beyond reasonable doubt.³ Effect must be given, if possible, to all ordinances regularly passed and within the powers conferred by the charter.⁴ And in order to give it the necessary certainty to sustain it, the title and the body of the ordinance may be taken together.⁵ So a contemporaneous construction adopted by all the parties interested in its enforcement, although not controlling, is, in doubtful cases, entitled to great weight.⁶ Whenever a city ordinance can be so construed and applied as to give it force and validity this will be done by the courts, although the construction so put upon it may not be the most obvious and natural one, or the literal one.⁷

(b) VOID IN PART.—When an ordinance is entire, each part being essential and connected with the rest, the invalidity of one part renders the whole invalid;⁸ but when it consists of several distinct and independent parts, as when it prohibits disjunctively two or more acts, the invalidity of one part does not affect the

1. *St. Louis v. Goebel*, 32 Mo. 295; *Krickel v. Com.*, 1 B. Mon. (Ky.) 361; *Pacific R. Co. v. Seifert*, 79 Mo. 210.

2. *Mayor of Baltimore v. Clunet*, 23 Md. 467.

The charter of a city, in express terms, gave the city power to prohibit the sale of beer, without defining its quality or character. The ordinance followed the language of the charter, and did not confine the prohibition to beer of an intoxicating quality. *Held*, that the court could not interpolate such a qualification, or adjudge that the legislature intended to confine its grant of power to the prohibition of beer of an intoxicating character. 1869, *Kettering v. Jacksonville*, 50 Ill. 39.

3. *Mayor of Baltimore v. Clunet*, 23 Md. 467.

4. *State v. Plainfield*, 38 N. J. L. 95; *Strohm v. Iowa City*, 47 Iowa 42. See *Staates v. Borough of Washington*, 45 N. J. L. 318; s. c., 43 Am. Dec. 402.

5. *Martindale v. Palmer*, 52 Ind. 141.

6. *State v. Severance*, 49 Mo. 401; *Wright v. Chicago etc. R. Co.*, 7 Ill. App. 438.

7. *Swift v. Topeka*, 43 Kan. 671.

8. *State v. Mayor etc. of Hoboken*, 38 N. J. L. 110. See *Com. v. Dow*, 10 Mass. (Mass.) 382; *Eldora v. Burlingame*, 62 Iowa 32; *Cantril v. Sainer*, 59 Iowa 26; *Quincy v. Bull*, 106 Ill. 337; *Harbaugh v. Monmouth* 74 Ill. 367; *Baker v. Normal*, 81 Ill. 108; *Trowbridge v. Newark*, 46 N. J. 140; *St. Louis v. St. Louis R. Co.*, 89 Mo. 44; s. c., 58 Am. Rep. 82; *Rau v. Little Rock*, 34 Ark. 303; *Piqua v. Zimmerlin*, 35 Ohio St. 507; *Rogers v. Jones*, 1 Wend. (N. Y.) 237; s. c., 19 Am. Dec. 493; *State v. Clarke*, 54 Mo. 17; *St. Louis v. St. Louis R. Co.*, 14 Mo. App. 221; *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray (Mass.) 596; *Warren v. Mayor etc. of Charleston*, 2 Gray (Mass.) 84.

validity of the others.¹ So an ordinance can be partly good and partly bad only where the parts are in themselves entire and distinct from each other.² And an ordinance that covers cases which the city has no power to control may be enforced in cases over which the city has power.³

3. Evidence—(a) **GENERALLY**.—Proof must be made of the existence of the ordinance,⁴ the authority to enact the ordinance,⁵ that the ordinance was in force at the time of the alleged violation,⁶ and that the act was committed within the city limits.⁷

In the absence of any provision in the act of incorporation providing for the proof of ordinances, the common-law rules of evidence apply.⁸ When provision is made for proving ordinances by the printed volume in which they are collected, it places them, as to all suits for their violation, on the same footing with statutes so far as relates to the method of proving their contents.⁹ Even in towns incorporated under the general law, the book of ordinances containing an ordinance alleged to have been violated is *prima facie* evidence of its passage.¹⁰ Where no record of the

1. *Pennsylvania R. Co. v. Jersey City*, 47 N. J. L. 286; *Shelton v. Mobile*, 30 Ala. 540; *Wilcox v. Hemming*, 58 Wis. 144; s. c., 46 Am. Rep. 625.

The fact that certain provisions of a city ordinance are void does not authorize the court to declare void those provisions which relate to the proper subject matter of the ordinance when they are distinct and separate from those which are void and useless. In such case, those provisions which are valid must stand as the law, while the others must be treated as inoperative and of no effect. Ordinance of Lincoln, Neb., regulating sale of liquor, sustained in part on this ground. *State v. Hardy*, 7 Neb. 377.

The fact that a city ordinance prohibiting sales of intoxicating liquors embraces a class of sales which the city has no power to prohibit does not prevent its being enforced as to such sales, as the city does possess the power to prohibit. *Harbaugh v. Monmouth*, 74 Ill. 367.

So a municipal ordinance providing for a fine and imprisonment is not to be deemed wholly void because that part providing for imprisonment is unlawful. *Cooper v. District of Columbia*, 4 McArthur (D. C.) 250.

2. *Second Municipality v. Morgan*, 1 La. An. 111.

It is well settled that a municipal ordinance may be partially valid and yet contain provisions which must be held void. In such cases the valid

provisions are sustained and the void provisions are not enforced. It is evident, however, that this will only be possible where the ordinance is separable; should an integral part prove invalid the whole must fall. *Warren v. Mayor*, 2 Gray 84; *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray (Mass.) 596; *Com. v. Dow*, 10 Met. (Mass.) 382; *Rogers v. Jones*, 1 Wend. (N. Y.) 237; *Thomas v. Mt. Vernon*, 9 Ohio 290; *Shelton v. Mobile*, 30 Ala. 540.

In *State v. Clark*, 54 Mo. 17, it is held that the void part of a by-law will not make null, complete and independent parts of the same by-law which would otherwise be good. See also *Town of Eldora v. Burlingame*, 62 Iowa 32; s. c., 2 Am. & Eng. Corp. Cas. 37.

3. *Kettering v. Jacksonville*, 50 Ill. 39.

4. *Stevens v. Chicago*, 48 Ill. 498; *Ewbanks v. Ashley*, 36 Ill. 177.

5. *Elizabethtown v. Lefler*, 23 Ill. 90.

6. *Chicago etc. R. Co. v. Engle*, 76 Ill. 317.

7. *Taylor v. Americus*, 39 Ga. 59; See *Mayor etc. v. Mason*, 4 Dall. (U. S.) 266; *May etc. v. Nell*, 3 Yeates (Pa.) 475.

8. *Chicago etc. R. Co. v. Engle*, 76 Ill. 317; *City Council v. Dunn*, 1 McCord (S. Car.) 333; *Fitch v. Pinckard*, 5 Ill. 78.

9. *Napman v. People*, 19 Mich. 352.

10. *Barr v. Auburn*, 89 Ill. 361; *Lind-*

ordinances is kept, the ordinance or resolution itself or a certified copy of it may be produced.¹

Where it is necessary to show the validity of an ordinance by proving that all the formalities in its enactment required by statute have been complied with, none must be omitted which are essential to its validity.² But if the ordinance is admitted in evidence without objection, it will be presumed that it was competent testimony, and that all its essential prerequisites to make it so have been complied with.³

(b) RECORD OF COUNCIL PROCEEDINGS.—A book in which all the ordinances of the town are recorded, kept in its custody, is sufficient proof of the existence of an ordinance therein.⁴ Where there is a record kept of the acts and proceedings of city councils, parol evidence is not admissible to show the existence of an ordinance. The journal of proceedings of the council should be produced,⁵ unless express provision is made for some other method of proof.⁶

A city cannot prove by extrinsic testimony that the ordinance referred to was passed by the board in compliance with certain requirements when the journal is silent upon the subject.⁷

say *v.* Chicago, 115 Ill. 120; *Prell v. McDonald*, 7 Kan. 446; s. c., 12 Am. Rep. 423; *Independence v. Trouville*, 15 Kan. 70; *State v. King*, 37 Iowa 462.

Books which purport to contain the charter and ordinances of the town and are shown to be in the custody of the town clerk, will be received in evidence without further attestation. *Town of Tipton v. Norman*, 72 Mo. 380.

So the identification of the ordinance record of the city, by a policeman familiar with the book was held sufficient to render it admissible in evidence. *Ottumwa v. Schaub*, 52 Iowa 515.

1. *Pugh v. Little Rock*, 35 Ark. 75; *Louisville etc. R. Co. v. Shires*, 108 Ill. 617; *Block v. Jacksonville*, 36 Ill. 301; *Kinghorn v. Kingston*, 25 U. C. Q. D. 130; *Bailey v. State (Neb.)*, 47 N. W. Rep. 208.

2. *Elizabethtown v. Lefler*, 23 Ill. 90; *Willard v. Killingworth*, 8 Conn. 247. If the charter requires its adoption by a vote of the voters of the town, and its publication in a certain paper before it takes effect, these must be proved before it can be received. *Schott v. People*, 89 Ill. 195.

3. *Town of Flora v. Lee*, 5 Ill. App. 629.

4. *Barnes v. Alexander City*, 89 Ala. 602. See *Kennedy v. Newman*, 1 Sandf. (N. Y.) 187.

5. *Stewart v. Clinton*, 79 Mo. 604.

When the city has offered its books of records, in which no such ordinance, proceedings or resolutions appear, for the purpose of avoiding any liability occasioned thereby, the other party may offer not only the copies certified by the register, but also the original ordinance and the slips of paper on which appear the proceedings and resolutions then on file in the register's office, and may also introduce parol testimony to show that the ordinance and resolutions did as a matter of fact pass the council. When such facts are thus proven the city is concluded thereby as fully as though the same had been recorded at length in the records of the city. *Troy v. Atchinson etc. R. Co.*, 11 Kan. 519.

6. *Baker v. Scofield*, 58 Ga. 182; *Parsons v. Trustees of Atlanta University*, 44 Ga. 529.

The omission of the jury's clerk, who proves that an ordinance was duly enacted and promulgated, to enter in the proper minute book the proceedings of the meeting at which it was passed, cannot affect its validity. The omission may be supplied at any time *nunc pro tunc*. *Bathurst v. Course*, 3 La. Ann. 260.

7. *Covington v. Ludlow*, 1 Metc. (Ky.) 295; *Lexington v. Headley*, 5 Bush (Ky.) 508; *Soloman v. Hughes*,

(c) PUBLICATION.—A prosecution under a municipal ordinance cannot be sustained unless the publication of the ordinance is proved.¹ In the absence of a statute to the contrary, oral evidence is competent to establish the fact of publication.² So publication may be proved by parol testimony, showing that copies of the ordinances had been posted in the most public places in the town.³ But where the publication of an ordinance is shown by posting, in order to give such posting effect, it must also be shown that there was no newspaper published in the village in which such ordinance could have been published.⁴

So publication of an ordinance may be sufficiently proven by the certificate under oath of one of the publishers of the newspaper in the city in which the publication was made.⁵ And when printed in book or pamphlet form, and purporting to be published by authority of the board of trustees of the city council, it is admissible in evidence without further proof.⁶ If, however, the publication of the ordinance is not denied under oath, proof of the publication is not necessary.⁷

(d) CORPORATE EXISTENCE.—The existence of a municipal corporation cannot be collaterally attacked in a proceeding to enforce an ordinance by it. Evidence that the corporation has acted as such is sufficient.⁸

4. Judgments.—No precise form of verdicts are given in the books. The rules require that they shall be responsive to the issue.⁹

24 Kan. 211; *Ball v. Fagg*, 67 Mo. 481; *People v. Murray*, 57 Mich. 396; *St. Louis v. Foster*, 52 Mo. 513.

The validity of an ordinance admitted to have been passed by the council, being denied on the ground that the mayor had never approved it, and no copy with his signature attached being found among the city records, it was shown by the testimony of the mayor that he had desired to pass the ordinance, that his impression was he had signed it, and that his omission to do so was a mistake. *Held*, it might be shown extrinsically that he did in fact sign it. *Knight v. Kansas City R. Co.*, 70 Mo. 231.

On demurrer to a replication which alleges that an ordinance of a municipal corporation was made in pursuance of an act amending the charter—it was held that the court was to assume that the act was passed by a two-thirds' vote, there being no allegation on the record to the contrary. *Buffalo etc. R. Co. v. Buffalo*, 5 Hill (N. Y.) 209.

1. *Elizabethtown v. Lefler*, 23 Ill. 90; *Raker v. Maquon*, 9 Ill. App. 155.

2. *Eldora v. Burlingame*, 62 Iowa 32.

3. *Newhan v. Aurora*, 14 Ill. 364, *Teft v. Size*, 10 Ill. 432.

4. *Raker v. Maquon*, 9 Ill. App. 155.

5. *Kettering v. Jacksonville*, 50 Ill. 39; *Schwartz v. Oshkosh*, 55 Wis. 490.

Publication of an ordinance may be shown by a proper affidavit of publication if it sufficiently identifies the ordinance, though it is attached to the manuscript record in the ordinance copy and not to the printed copy. *Albia v. O'Hara*, 64 Iowa 297. See *Bailey v. State (Neb.)*, 47 N. W. Rep. 208.

6. *Village of Bethalto v. Conely*, 9 Ill. App. 339.

It is not necessary, in an action to recover a penalty imposed by a city ordinance, to prove the promulgation of the ordinance. *City Council of Charleston v. Chur*, 2 Bailey (S. Car.) 164.

7. *Green v. Indianapolis*, 25 Ind. 490.

8. *Hamilton v. Carthage*, 24 Ill. 22; *Kettering v. Jacksonville*, 50 Ill. 39; *Decorah v. Gillis*, 10 Iowa 234; *Coles Co. v. Allison*, 23 Ill. 437; *Mendota v. Thompson*, 20 Ill. 197; *Tisdale v. Minonk*, 46 Ill. 9.

9. *Wiggins v. Chicago*, 68 Ill. 376.

In proceedings for the recovery of fines imposed by ordinances, every essential ingredient to the offence must be set out by the magistrate, otherwise his judgment will be reversed.¹ The judgment cannot be reversed for an error in overruling a demurrer to a warrant in a prosecution for a violation of a city ordinance.²

XIX. REVIEW OF PROCEEDINGS—1. Certiorari.—Where there is no appeal provided by statute from the decision of the corporate authorities, *certiorari* may be awarded to correct all errors of law apparent on the face of the record.³ But if a remedy is provided by statute, the statutory mode alone can be used,⁴ and in cases where he has permitted the time for appeal to expire, *certiorari* will not issue for relief unless upon special showing unmixed with any blame or negligence on his part.⁵ The application of the writ of *certiorari* is limited to those proceedings of corporations that do acts affecting the rights and property of individuals which are judicial or quasi judicial.⁶ It must also appear that the plaintiff has some substantial interest and will suffer some injury if the court does not interfere.⁷

2. Habeas Corpus.—It is not the province of the writ of habeas corpus to retry any questions of fact upon which the findings of the court of original jurisdiction must be presumed to have been predicated. So questions as to the validity of proceedings pending for violation of municipal ordinances will not be reviewed through the medium of the writ of *habeas corpus*, unless it appears as a matter of law that the ordinance is void, and it is the duty of the magistrate to remand the petitioner, leaving him to his remedy of review by error, appeal or *certiorari*.⁸

3. Injunction.—Though generally equity will not interfere with proceedings brought to punish a violation of municipal ordinances,⁹ yet there are exceptions to this rule.¹⁰ It will not re-

1. Philadelphia v. Hughes, 4 Phila. (Pa.) 148.

2. McGowan v. Com., 2 Metc. (Ky.) 3.

3. Corbett v. Duncan, 63 Miss. 84; Loeb v. Duncan, 63 Miss. 89.

Certiorari will not lie to bring up proceedings for the collection of a penalty under a municipal ordinance if the penalty has been paid. Powell v. People, 47 Mich. 108.

4. Taylor v. Americus, 39 Ga. 59; Intendant v. Chandler, 6 Ala. 297; Montgomery v. Belser, 53 Ala. 379; Jackson v. People, 9 Mich. 111; State v. Bill, 13 Ired. L. (N. Car.) 373.

5. Poe v. Machine Works, 24 W. Va. 517; Beasley v. Beckley, 28 W. Va. 81.

6. Camden v. Bloch, 65 Ala. 236; *In re Wilson*, 32 Minn. 144.

In *re Jersey*, the acts of a municipal corporation may be reviewed by *certiorari* at the instance of the party

aggrieved, whether such acts are judicial or legislative. Camden v. Mulford, 26 N. J. L. 49; State v. Jersey City, 29 N. J. L. 170.

7. People v. Leavitt, 41 Mich. 470; State v. Plauvelt, 34 N. J. 261.

Where a man has been tried and convicted for the violation of a city ordinance and has voluntarily paid the fine that was imposed, without cost, a reversal on *certiorari* cannot benefit, and a writ, therefore, will not lie to review the proceedings. People v. Leavitt, 41 Mich. 470.

8. *In re Wright*, 29 Hun (N. Y.) 357.

9. Morris Canal etc. Co. v. Mayor etc. of Jersey City, 12 N. J. Eq. 252. See Safe Co. v. Mayor, 38 Hun (N. Y.) 146; Schwab v. Madison, 49 Ind. 329; Dodge v. Council Bluffs, 57 Iowa 560.

10. Morris Canal etc. Co. v. Mayor etc. of Jersey City, 12 N. J. Eq. 252.

strain legislation by the council of a municipal corporation, but may enjoin the officers or members from carrying out illegal legislation.¹ Thus, where an ordinance on appeal or error has been declared void by a court of competent jurisdiction, subsequent actions begun under the same ordinance may be enjoined on the ground that they are vexatious and oppressive.² So equity has jurisdiction to enjoin a municipal corporation from enforcing a void ordinance at the suit of any person injuriously affected thereby.³ But in all cases before an injunction can be decreed to restrain a corporation from the abuse of its franchises by the adoption of ordinances or acts which will produce injury to individuals, it must appear that the acts complained of are unauthorized and injurious, and of such a character that full and adequate relief cannot be had at law.⁴ Equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation restraining an act, unless the act is shown to be a nuisance *per se*.⁵

4. Appeal.—By the practice in some of the States, appeal lies from a judgment in a proceeding for the violation of a municipal ordinance.⁶ Where this is allowed, the city as well as the offender against the ordinance has the right of appeal.⁷ And where appeal is taken to a higher court, the court should, with reference to such case, take judicial notice of the incorporation of the city and of the existence and substance of its ordinances.⁸

Where a city's charter authorizes it to prosecute civil suits in its own name, for the violation of city ordinances, a criminal prosecution before a justice for such violation cannot, on appeal, be transformed into a civil suit, nor can the original criminal sentence be affirmed on the civil side of the appellate court.⁹

5. Record.—Where an ordinance is not made part of the record, if the charge is not admitted to be in accordance with the ordinance, it may be presumed, in the absence of any showing to the contrary in the record.¹⁰ But it is better to formally put the

1. *Poyer v. Desplaines*, 20 Ill. App. 30; *Moore v. Hoffman*, 2 Cin. (Ohio) 453. See *Whitney v. Mayor of N. Y.*, 28 Barb. (N. Y.) 232.

2. *Taylor v. Pine Bluff*, 34 Ark. 603; *Safe Co. v. Mayor*, 38 Hun (N. Y.) 146.

3. *Baltimore v. Radecke*, 49 Md. 217. 4. *Geartside v. St. Louis*, 43 Ill. 47; *West v. Mayor*, 10 Paige (N. Y.) 539; *Banking Co. v. Jersey City*, 12 N. J. L. 258.

An injunction does not lie to prevent a mayor from signing an ordinance when the intended ordinance is a repeal of one under which a valid contract has been entered into. *New Orleans Elevated R. Co. v. New Orleans*, 39 La. Ann. 127.

5. *Weapum v. Moore*, 34 Wis. 450;

Hudson v. Thorne, 7 Paige (N. Y.) 261.

6. *Camden v. Blotch*, 65 Ala. 236.

In *Oregon*, an appeal from a judgment of conviction in a city tribunal for violation of a city ordinance does not lie unless expressly given by the city charter or by some statute. The proper proceeding is by writ of review. *Cunningham v. Berry*, 17 Oreg. 622.

7. *Greenfield v. Mook*, 12 Ill. App. 285.

8. *Solomon v. Hughes*, 24 Kan. 211; *March v. Com.*, 12 B. Mon. (Ky.) 25.

9. *Webster v. Lansing*, 47 Mich. 192.

10. *Morgan v. Nolte*, 37 Ohio St. 24; *New Orleans v. Boudro*, 14 La. Ann. 303; *Baton Rouge v. Crimonini*, 35 La. Ann. 367.

order in evidence and to let it appear in the record, because the superior courts will not *ex officio* take notice of the customs, laws, or proceedings of inferior courts of limited jurisdiction, unless when reviewing their judgments upon a writ of error, when, for the purpose of justice, they must necessarily notice them.¹ Where a special power is given by statute to convict a defendant in a summary manner without a trial by jury, the record should show upon its face everything necessary upon general principles to constitute a legal conviction.² It should set out the offence charged and show what ordinance or section of the ordinance was alleged to have been violated. It should show not only legal notice given, but also whether the defendant was present or absent, and if present, that the complaint was read to him and his answer to it. It should set out not only the name of the witness examined but at least the substance of the testimony that the court above may judge of its sufficiency to convict.³ And it should appear with precision by the record of what offence the defendant is convicted.⁴ The failure of the record to show the affidavit and warrant by which the prosecution was commenced is a defect for which the proceedings should be quashed and the defect cannot be cured by extrinsic parol evidence made in the record.⁵

XX. COSTS.—The costs are no part of the penalty; otherwise, where an ordinance or a statute fixes a penalty, no costs can be allowed, because if costs are part of the penalty the statutory limit will be exceeded and the judgment therefore erroneous.⁶ In prosecutions instituted by municipal corporations for the punishment of offenders against city ordinances, such municipalities are not liable for costs in any event.⁷ The community should not only be made good for its outlay in punishing the commission of offences against it, but whatever fines are imposed should be paid into the municipal treasury and enure to the benefit of the city.⁸

ORDINARY—(See also NEGLIGENCE).—Common, usual, reasonable; as ordinary care, skill, etc.; opposed to extraordinary.⁹

1. Marsh v. Com., 12 B. Mon. (Ky.) 28.

2. Hadlon v. State, 1 Harr. 97. See Ewing's Justice, 226; 1 Burr's Justice, 410.

3. Reg. v. Vipont, 2 Burrows 1163; Rex. v. Killett, 4 Burr. 3063.

4. Keeler v. Milledge, 24 N. J. L. 146.

5. Camden v. Blotch, 65 Ala. 230.

6. Mayor of Bayone v. Herdt, 40 N. J. L. 264.

7. Selma v. Stewart, 67 Ala. 338; City Council of Montgomery v. Foster, 54 Ala. 62.

8. People v. Sacramento, 6 Cal. 422.

9. And. L. Dict.

The use of the terms "ordinary man" and "ordinary business man" in standards of comparison to illustrate "ordinary care," has been condemned in *Texas*. Houston etc. R. Co. v. Smith, 77 Tex. 179.

"Ordinary Agricultural Crop."—Lands adapted to the growth of fruits are agricultural lands, and may be entered as such, fruits being an "ordinary agricultural crop," as that phrase is used in California Pol. Code, § 3495, prescribing the tests of lands which may be entered as agricultural. Reeves v. Hyde, 77 Cal. 397.

Ordinary Course of the Post.—Notices of objection addressed to voters residing in barracks were posted on a certain day in time to be delivered, in the ordinary course of post, at places in the borough other than the barracks, on the same evening. There was no postal delivery at the barracks, but the letters were called for by orderlies. The letters were called for on that evening and were distributed, some the same evening and others on the following day. *Held*, that the notices were not delivered in the ordinary course of post, within the meaning of 6 Vict., ch. 18, § 100. *Childs v. Cox*, 36 W. R. 505.

Ordinary Business.—An assignment of securities belonging to a corporation, made under the corporate seal, to secure to the assignee an admitted debt, arising in the business of the company, was held to be "ordinary business of the company," which a quorum of directors might authorize under a by-law authorizing such a quorum to transact all ordinary business, notwithstanding the value of the securities involved was very large. Whether a transaction is small or large cannot affect the question whether it is "ordinary business." *Hoyt v. Thompson*, 19 N. Y. 207.

An exemption from turnpike tolls, of any person traveling upon the "ordinary domestic business of family concerns," does not extend to the case of physicians going to visit their patients. *Center Turnpike Co. v. Smith*, 12 Vt. 212.

Such an exemption does not include an individual passing to another town from that in which he resided in order to purchase lumber for his own use, it not appearing that he went to a mill. *Second Turnpike v. Taylor*, 6 N. H. 499.

Ordinary Calling.—Enlisting is not part of the "ordinary calling" of a soldier within § 1 of the Sunday act 29 Car. II, ch. 7; for the ordinary duty of a soldier is to attend, drill, and fight the battles of his country. *Wolton v. Gavin*, 16 Q. B. 48. Nor is the giving by a tradesman of a guarantee for the fidelity of an intended employee. *Norton v. Powell*, 4 M. & G. 42. Nor is it within a farmer's "ordinary calling" to hire out a stallion to cover a mare. *Scarfe v. Morgan*, 4 M. & W. 270. Or to employ labourers. *Rex v. Whitnash*, 7 B. & C. 596; 1 M. & R. 452. Selling horses is not within the "ordinary

calling" of any one except he be a horse dealer. *Drury v. Defontaine*, 1 Taunt. 131; *Fennell v. Riddler*, 5 B. & C. 406; 8 D. & R. 204; *Ames v. Kyle*, 2 Yerg. (Tenn.) 35. See also SUNDAY LAW. As to these cases, See, per PARK, J., *Smith v. Sparrow*, 4 Bing. 88.

"With respect to what is the 'ordinary calling' of a person in *Rhode Island* a release executed by a creditor does not come within the meaning of the term. *Allen v. Gardiner*, 7 R. I. 22. But in *Georgia*, a justice of the peace trying a case was held to be engaged in his 'ordinary calling.' *Weldon v. Colquit*, 62 Ga. 440. And in *England* it was said that the ordinary calling of one includes those things that are repeated daily or weekly in the course of his trade or business. *Regina v. Whitcomb*, 7 B. C. 596. . . . But where S. sent a mare on Sunday to M., a farmer, to be covered by a stallion belonging to him, and the mare was covered by the horse, and retained by the owner of the stallion, and by reason of the lien he was entitled for the value of the stallion's services, it was held that the lien was valid, on the ground that it was not his 'ordinary calling,' being a farmer, to stand a stallion. . . . *Scarfe v. Morgan*, 4 M. & W. 270. . . . In *Massachusetts* it was held that a real estate broker in *Rhode Island*, who delivered on a Sunday a contract of his principal and received from the defendant a duplicate contract and check signed by him, was acting in his ordinary calling, and was within the Sunday law of *Rhode Island*. *Hazard v. Day*, 14 Allen (Mass.) 487, cited in *Allen v. Gardiner*, 7 R. I. 22." 11 Crim. L. Mag. 189, n.

See also BUSINESS, vol. 2, p. 699; PROFESSION; OCCUPATION; TRADE; SUNDAY LAW.

Ordinary Course—Ordinary Course of Business.—An act done according to the rules or methods which prevail in business generally, or in a particular line or branch of business, is said to be done in the "due," "ordinary," "regular," or "usual" course of business. *And. L. Dict.*

As to the phrase, "transfers of goods in the ordinary course of business," in § 4 (*English*) Bills of Sale act, 1878, see *Re Hall*, 14 Q. B. Div. 386; *Ex parte Attenborough*, 28 Ch. D. 682.

When a notice is to be considered as served when "in the ordinary course

of post" it would be delivered, the onus is on the sender to show that there is an ordinary course of post at the place and to the person addressed. *Lewis v. Evans*, L. R., 10 C. P. 297; *Hudson v. Louth*, 6 L. R., 1r. 69; *Doogan v. Colquhoun*, 20 L. R., 1r. 361; *Child v. Cox*, L. R., 20 Q. B. Div. 290.

"Ordinary way of his trade," § 11, subs. 14, 15 (Eng.), Debtors' act, 1869. See *Ex parte Brett*, 1 Ch. D. 151. See also COURSE, vol. 4, p. 445; BILLS AND NOTES, vol. 2, p. 313.

Ordinary Course of Things.—Damage is the natural and reasonable result of a person's act if it is such a consequence as "in the ordinary course of things" would flow from the act. Reasonable human conduct is part of the "ordinary course of things," that expression including at least "the reasonable conduct of those who have sustained the damage in the endeavor to save themselves from further loss." *City of Lincoln*, Adm. 59 L. J. R., P. D. 1, 4.

Ordinary fences (as used in *Connecticut* Gen. Stat., tit. 21, § 12, which speaks of "unruly cattle that will not be restrained by ordinary fences") does not mean lawful fences, but such fences as are common and sufficient to restrain orderly cattle. *Hine v. Wooding*, 37 Conn. 123.

See also FENCES, vol. 7, p. 900.

Ordinary Expenses.—Ordinary expenses (of a corporation) are the expenditures which are necessary to carry into effect the ordinary powers of the corporation. *Livingston v. Pip-pin*, 31 Ala. 542.

The "ordinary expenses" of a township can never include less than the necessary expenses incurred in administering the government of the township, under the statutes creating it and relating thereto, in such manner as will best promote the convenience, peace, health, prosperity, and happiness of the people residing therein. *Mills v. Richland Township*, 72 Mich. 100.

Ordinary Outgoings.—The cost of drainage works under § 73, 18 & 19 Vict., ch. 120, is within a direction to deduct "ordinary outgoings" from the income of a tenant for life; and is certainly so if such outgoings be expressed to be for "taxes or otherwise." *Acton v. Crawley*, 28 Ch. D. 431.

"Ordinary language" (as used in section 149 of the *New York* Code of Pro., subd. 2, regulating pleadings)

means such language as is established and customary. It has reference to the established and customary use of legal terms, at the time when the code was enacted. *Bell v. Yates*, 33 Barb. (N. Y.) 629.

Ordinary Low Water Mark.—This term is only predicable of those parts of rivers within the ebb and flow of the tides, to distinguish the water line at spring or neap tides. *Howard v. Ingersoll*, 13 How. (U. S.) 417.

Ordinary process of law (as used in the *Missouri* tax laws) does not mean ordinary personal judgment and execution, but such process as is adopted to enforce a lien or specific charge upon the property specially assessed. *Nee-nan v. Smith*, 50 Mo. 525.

Ordinarily Resided.—Where a debtor who was not domiciled in *England* and had not a dwelling house or place of business there, had, for eighteen months previous to the presentation of a bankruptcy petition against him, a room at a hotel in London which he paid for continuously during that time, and was treated as an ordinary resident there, *held*, that he "ordinarily resided" in *England*, within the meaning of the Bankruptcy act, 1883. *In re Norris*, 5 Morr. Bankr. Rep. 111.

Ordinary Repair.—Rev. Stat. *Indiana* 1881, § 5069, provides that road superintendents shall, in certain months, first put all the roads in their respective townships in "good ordinary repair," and then, with such other means as may be in their hands, proceed to do work denominated "extraordinary," and by judicious ditching, draining, and making embankments, and grading, etc., construct smooth roads, etc. *Held*, that in an action against a township by a road superintendent to recover certain sums advanced for constructing roads, a complaint alleging in substance that the money in his hands was expended in repairing and improving the highways by ditching, grading, gravelling, and constructing culverts, and that such repairs and improvements were necessary, is not sufficiently defective to require a reversal of judgment; the difference between the classes of work spoken of as "ordinary" and "extraordinary" being more in degree than in character. *Clark Township v. Brookshire*, 114 Ind. 437.

Ordinary Stock.—Where a contract provided that a hedge should be cultivated and completed so that it would

ORE—LEAVE—ORGANIZE—ORIGINAL—ORIGINALLY.

ORE—LEAVE.—The right to dig and take ore.¹

ORGANIZE—(See also CORPORATIONS, vol. 4, p. 184; RELIGIOUS SOCIETIES).—In the sense of, to constitute, to qualify for the exercise of appropriate functions, may refer to a government, a court, a legislative body, a board of deputies or other officers.²

ORIGINAL—ORIGINALLY.—An authentic instrument of something, and which is to serve as a model or example to be copied or imitated.³ It also means first, or not deriving any authority from any other source; as original jurisdiction, original writ, original bill, and the like.⁴

turn "ordinary stock," it was held that "ordinary stock," within the meaning of the contract, were such stock as are permitted to run at large by *Kansas* law. *Usher v. Hiatt*, 21 Kan. 397.

Ordinary Train.—A train having a special object other than the ordinary traffic and purposes of the particular railway, going faster and stopping much less frequently than the usual trains thereon, is not an "ordinary train" within a special act. *Turner v. London R. Co. etc.*, L. R., 17 Eq. 561.

Ordinary Work.—In *Alabama*, Sunday is equivalent to common or usual work or employment, and embraces the sale of a horse, or other chattel. *O'Donnell v. Sweeney*, 5 Ala. 467; s. c., 39 Am. Dec. 338.

1. *Ege v. Kille*, 84 Pa. St. 340.

2. *And. L. Dict.* To organize a corporation signifies the choice and qualification of all necessary officers for the transaction of the business of the corporation. *New Haven etc. R. Co. v. Chapman*, 38 Conn. 66.

Organized and Established Counties Distinguished.—The establishing of a county is the setting apart of certain territory to be in the future organized as a political community, or *quasi* corporation for political purposes, and the organization of a county is the vesting in the people of such territory such corporate rights and powers. *State v. McFadden*, 23 Min. 40; *State v. Parker*, 25 Minn. 219. See also **COUNTIES**, vol. 4, p. 343.

3. *Bouv. L. Dict.*

Originals are single or duplicate: single when there is but one; duplicate when there are two. In the case of printed documents, all the impressions are originals, or in the nature of duplicate originals, and any copy will be primary evidence. *Bouv. L. Dict.*

citing 2 Stark. 130. But see 14 S. & R. 200; 2 *Bouv. Inst.* n. 2001. See also 1 *Greene Ev.*, § 538; 1 *Whart.*, § 74. See also **SECONDARY EVIDENCE**.

4. *Bouv. L. Dict.*

An original bill is defined to be one which relates to some matter not before litigated in the court, by the same persons, and standing in the same interests. *Butler v. Cunningham*, 1 Barb. (N. Y.) 87. See **EQUITY PLEADINGS**, vol. 6, p. 724.

Original Contractor (as used in the *Missouri* mechanic's lien law).—Includes a party furnishing material to a railroad company under a contract with its president. *Hearn v. Chilli-cothe etc. R. Co.*, 53 Mo. 324. See also **MECHANICS' LIEN**.

Original Cause, etc.—An action asking relief as in detinue was brought against a sole defendant who had seized goods which B had assigned to the plaintiff under a bill of sale. The sole defendant filed a statement of defence and a counter-claim, impeaching the *bona fides* of the plaintiff's bill of sale and alleging a bill of sale of B to himself, and by such counter-claim claimed first, relief against the plaintiff, and second as against B, the money due under the bill of sale from B to himself, the counter-claim against the plaintiff was abandoned at the hearing. The counter-claim against B was based on the *English* Judicature act, 1873, § 24, subsec. 3, which provides that the court shall have power to grant to any defendant, in respect to any matter of equity and also in respect of any legal right claimed by him, certain relief against any plaintiff claimed by defendant's pleading, and all such relief relating to or connected with the *original subject of the cause or matter*. The court

held, that the counter claim against B was totally distinct from the *original cause or matter* which was the right of plaintiff to the goods which the defendant had seized. *Barbour v. Blaidurge*, 19 Ch. Div. 476.

"Original Cost."—Where A agreed to deliver stock in a mining claim to B at its original cost, the amount of the stock to be of the value of a certain sum, the term "original cost" means its cost to A; and where A made advances or loans to the corporation, which have been repaid out of its property as such, the advances or loans will not be regarded as part of such cost. *Eagan v. Clasbey*, 5 Utah 154.

Original Holder.—See *In re Oriental Bank*, 54 L. J., Ch. 481; 1 T. R. 273, in which it was held, on the construction of a clause in the charter of that bank, that "original holder" of shares did not mean the first allottee, but meant the immediate transferor to the person holding the shares at the time when the phrase became operative—*i. e.*, in that case, the winding-up of the company.

Original Jurisdiction.—Jurisdiction is original when it is conferred on the court in the first instance, which is called original jurisdiction. *Kundolf v. Thalheimer*, 17 Barb. (N. Y.) 511 (quoting Bouv. L. Dict.).

"The words 'original jurisdiction' are used in the *Minnesota Rev. Stat.* as distinguished from 'appellate jurisdiction,' and must be interpreted to mean, 'may entertain in the first instance.' *Castner v. Chandler*, 2 Minn. 86." See also JURISDICTION, vol. 12, p. 244.

When the legislature or people confer "original jurisdiction" upon a court, the word original will not operate to exclude the jurisdiction of other courts. *Crowell v. Lambert*, 10 Minn. 208; *Cooley's Prin. of Con. L.*, p. 113; *Cohens v. Virginia*, 6 Wheat. (U. S.) 396.

Original Owners.—The words "original owners," in the prospectus of an oil company, are not terms of art, science or trade, which require the aid of experts to explain. *Simons v. Vulcan Oil etc. Co.*, 61 Pa. St. 202.

The "original process" by which adverse proceedings before a court of probate are commenced, is the petition of the court and the citation issued by the court for the appearance of the respondent; and under an act of con-

gress which required a revenue stamp to be affixed to every "writ or other original process by which a suit is commenced," such stamp may be affixed to either the petition or citation. *Hotchkiss' Appeal from Probate*, 32 Conn. 353. See also PROCESS.

An "Original Package."—Within the sense of the interstate commerce regulations, is the unbroken package, imported into a State from another State or from a foreign country, before, by sale or otherwise, it becomes a part of the general mass of property in the State. *Leisy v. Hardin* (original package decision), 135 U. S. 100.

See also POLICE POWER.

A box containing whisky in bottles was shipped from *Illinois* to *Iowa*, and while in the latter State the box was opened by a resident of *Iowa*, who sold one of the bottles of whisky, contrary to the *Iowa* statute. For this he was convicted by a justice, and he applied to be released on *habeas corpus*, because his sale was protected under the interstate commerce clause of the national constitution. *Held*, that he should not be released, since the question whether the bottle or the box was the original package was sufficiently doubtful to make the proper remedy an appeal rather than an application for *habeas corpus*. *Allen v. Black*, 43 Fed. Rep. 228.

In Patent Laws—Original Inventor.—A person, to be entitled to the character of an inventor, must himself have conceived the idea embodied in his improvement. If, however, he is aided by the suggestions of others in arriving at the useful result, and if, after all the suggestions, there was something left for him to devise and work out by his own skill and ingenuity, he may still be regarded as the first and original discoverer. But if the suggestions and communications of others go to make up a complete and perfect machine, embodying all that is embraced in the patent subsequently issued to the party to whom the suggestions were made, the patent is invalid. *Pitts v. Hall*, 2 Blatchf. (U. S.) 229.

Originality, in the law of patents, is the finding out, the contriving, the creating of something which did not exist, and was not known before, and which can be made useful and advantageous in the pursuits of life or which can add to the enjoyment of mankind.

And. L. Dict.; *Conover v. Roach*, 4

Fish. Pat. Cas. 16. See also INVENTION, vol. 11, p. 780; NEW; PATENT LAW.

Originally.—By the Blackheath Court of Requests act (7 & 7 W. IV, ch. 120, § 22), that court had no jurisdiction over debts “for any sum being the balance of an account *originally exceeded*” £5. “The meaning of the term ‘originally’ in this clause is somewhat obscure, and has not been judicially decided; but we think it is to be understood to apply to a case where credit was given at one time for an amount exceeding £5, either in one of different sums, although afterwards the credit might have been reduced under that sum by part payments before the commencement of the suit in the superior court” (per PARKE, B., *Pope v. Banyard*, 3 M. & W. 424). And under another statute (2 W. IV, ch. 65, § 10), it was settled that a claim which at its inception exceeded the stated amount, “originally” exceeded it, though reduced by payment below such amount before action brought. *Green v. Bolton*, 4 Bing. N. C. 308; *Elsley v. Kirby*, 9 M. & W. 536.

When passengers, traveling upon branch lines to the termini of the main line, have to await the arrival of a train upon the main line to reach their destination, the terminus of the main line from which the train started is “the place from which the train originally started.” *Barry v. Midland G. W. R.*, 1 C. L., Ir. Rep. 130.

The words “stockholders originally liable,” under public statutes of *Rhode Island*, ch. 155, § 23, which authorizes suit for contribution “against any one or more of the stockholders who were originally liable” with the stockholders suing for the payment of the corporate debt, include all stockholders who were liable for the debt before it was paid by the stockholder suing for contributions, and therefore that all persons who were stockholders when the debt was contracted and all who were stockholders when proceedings were begun to enforce the liability, are proper contributors.

The court, by DUFFEE, C. J., said: “Our statute imposing the liability was first enacted in 1847. It was copied, with some immaterial verbal changes, from the *Massachusetts* statute of 1829. See Rev. Stat. Mass., ch. 38, §§ 16, 30, 32. The Supreme Judicial Court of *Massachusetts*, construing the *Massachusetts* statute, have decided that the liability extends to all persons who were stockholders when the debt was contracted,

and also to all persons who were stockholders when the liability is sought to be enforced, though they may have become such since the debt was contracted; but does not extend to persons who have become stockholders after the debt was contracted, and had ceased to be such before the debt became payable and action was brought. *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183; *Curtis v. Harlow*, 12 Met. (Mass.) 3. See also *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Johnson v. Somerville Dyeing and Bleaching Company*, 15 Gray (Mass.) 216. These decisions are entitled to great weight, not only because of the liability of the court, but also because our statute was borrowed from the *Massachusetts* statute, and should be construed in the same way, unless there is some strong reason for construing it differently. We do not find any such reason, and adopt the *Massachusetts* construction.

We think that, under the statute (Pub. Stat. *Rhode Island*, ch. 155, § 23) the liability to contribution is co-extensive with the liability for the debt. The section authorizes suit for contribution ‘against any one or more of the stockholders who were originally liable’ with the stockholders suing for the payment of the corporate debt. We understand the words ‘stockholders originally liable’ to include all stockholders who were liable for the debt before it was paid by the stockholder suing for contribution, and therefore that all persons who were stockholders when proceedings were begun to enforce the liability, are proper contributors.

When two persons are subject to the same liability—namely, the stockholder when the debt was contracted, and the stockholder when the liability is sought to be enforced—the question may arise how, as between the two, the liability shall be discharged? This question has not been argued, and is left undetermined.” *Sayles v. Bates*, 15 R. I. 342.

An *Iowa* statute which enacts that administration shall not be originally granted after the lapse of five years from the death of a decedent, does not prohibit the appointment of an administrator who has already qualified in another State, although his appointment is sought more than five years after the death of the decedent, the foreign appointment being held to be the original one within the meaning of the statute. *Dolton v. Nelson*, 3 Dill. (U. S.) 470.

ORNAMENT.—See also JEWELRY, vol. II, p. 984; BAGGAGE, vol. I, p. 1043; ALTERING, vol. I, p. 523, n.; TRINKETS.¹

ORNERY.—See note 2.

ORPHAN.—A fatherless child; a minor who has lost either or

1. A will contained the following provisions: "To my niece, Louise E. Matthews . . . I give . . . my finger-rings . . . and so many of my books, pictures and ornaments (not otherwise bequeathed specifically) as she shall choose to take." Held, that the word "ornaments" as used in the will was intended to include articles of jewelry, such as breastpins, bracelets, ear-rings, brooches, locket, chains, etc., and also many articles not classified under the head of jewelry. "We have no doubt that the word 'ornaments,' in its general signification, and freed from any modification that might come from association in particular instances with other language, includes 'jewelry' worn by women for the purpose of adding grace or beauty to their persons, or for the purpose of complying with the usages of society. Such is its meaning both in classic English and in common language. In Webster's Dictionary an illustration is given from Sir Thomas Browne, as follows: "Some think it is most ornamental to wear their bracelets on their wrists; others about their ankles." And the Jenkins of the present day in his descriptions of the costumes of ladies at evening parties writes, "ornaments, diamonds." *In re Taylor's Estate*, 75 Cal. 189.

Ornamental Structure.—Where a Baltimore ordinance permitted steps, porotics, or any other "ornamental structure" to extend nine feet into Mount Vernon place it was held that an inclosed porch or vestibule was an ornamental structure. *Garrett v. Janes*, 65 Md. 260.

Personal Ornaments.—A question arose on this phrase as used in the will of Dr. John Willis (physician to George III). He possessed an ivory tooth-pick case with a portrait of his father in the center, a gold pencil-case, a silver lip-salve box, a gold eye-glass, a pocket-book and a case of instruments, which he usually carried about his person. *LANGDALE, M. R.*, decided

that the pocket-book and case of instruments were not "personal ornaments." But as to the other things he said: "The question seems to be whether a thing that is ornamental and capable of being applied to useful purposes, is, or is not, to be considered as an ornament. There are some things of no personal use, a common ring, for instance, which may be set round with diamonds and be of extreme value, and yet of no use, except as an ornament; but it may be said, if you convert that into a signet ring and seal letters with it, in consequence of that useful purpose to which it is applied, it becomes an article of utility as well as of ornament. A shirt-pin is equally useful. A pencil-case certainly is useful as containing the pencil. The inclination of my opinion is, that though those things were capable of being connected with personal use, yet they were considered as personal ornaments in the sense in which the testator intended them. If you come to a minute definition, they may not be so; but at the same time they may be put in such a form and appearance that the ornamental part is paramount to the useful part, and consequently they might pass as 'ornaments.'" *Willis v. Curtois*, 1 Bea. 196. In the report of this case in 8 L. J., Ch. 106, the learned Master of Rolls is reported to have said: "I do not think that the tooth-pick case or the silver lip-salve box passed under the will." As the matter was settled between the parties, no decision was given except as to the pocket-book and case of instruments.

2. This word has not such a place in English language that any lexicographer has ventured to define it. Its use is generally to express the opposite of good qualities, and it does not in some of its uses differ from the words "common" or "mean." The court by GRANGER, J., in *Wymer v. Allbaugh*, 78 Iowa 79, says: "Substitute either of these words in the expression charged, and the legal

both parents.¹

OTHER—(See also OTHERS; OTHERWISE; OR; SURVIVOR.) Where general words follow particular ones, the rule is to construe the former as applicable to persons *ejusdem generis*.² This rule, which is sometimes called Lord Tenterden's rule, has been stated, as to the word "other," thus: Where a statute, or other document, enumerates several classes of persons or things, and immediately following and classed with such enumeration, the clause embraces "other" persons or things, the word "other" will generally be read as "other such like," so that persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior to or different from those specifically enumerated.³ Though this is generally the interpretation given to the word "other" when following an enumeration, it is not an inflexible rule, and in many cases the word has been held to be

status would not be materially different, and in such a case there would be no question as to the right of the party to prove what the understanding of the hearers was."

1. An orphan is a fatherless child. *Soohan v. Philadelphia*, 33 Pa. St. 9. Is one bereft of parents. *Downing v. Schoenberger*, 9 Watts (Pa.) 299. See also *Jackman v. Nelson*, 147 Mass. 300.

Orphan may be construed in remedial statute by contract and manifest intent to mean infant with living parents. *Ragland v. Justices*, 10 Ga. 65, 71.

Though Johnson defines an orphan as "a child who has lost father, or mother, or both," yet where there was a bequest to A until 21, "provided she be left an orphan, unprovided for, and lives with part of my family," it was held, by Woon, V. C., that though A's mother was dead, yet as her father was alive and as on him lay the obligation of providing for A, she was not an "orphan" as contemplated by the bequest. *Guilmette v. Mossop*, 7 L. T. 190.

A charitable gift for the "orphans" of a place is good. *A. G. v. Comber*, 2 Sim. & St. 93; *Russell v. Kellett*, 3 Sm. & G. 264; 2 Jur., N. S. 132.

Orphan may mean either a minor who has lost both parents, or one who has lost only one. A devise for the benefit of the Roman Catholic orphans of a specified region is void for uncertainty, for the reason, among others, that it is impossible to determine whether whole or half orphans are

meant. *Heiss v. Murphey*, 40 Wis. 276, 290.

Orphans' Business.—Constitutional provisions regulating the creation, powers, and procedure of courts for "orphans' business," are not necessarily confined in construction to affairs of orphans in the limited or popular sense importing death of parent. The phrase may be construed as meaning minor's business, to sustain a statute which authorizes such courts to appoint a guardian of a minor whose father is yet living. (Overruling 38 Miss. 417) *Hall v. Wells*, 54 Miss. 289.

Orphans Court.—In *Delaware, New Jersey, Pennsylvania*, and perhaps in other States, the title of the court having jurisdiction to settle the estates of decedents. And. L. Dict.

The orphans court is not a court of common law, but a court partaking of the powers of a chancery and prerogative jurisdiction, instituted by law to remedy and supply the defects in the powers of the prerogative court, with regard to the accountability of executors, administrators and guardians. *Wood v. Tallman*, 1 N. J. L. 155.

2. *Sandiman v. Breach*, 7 B. & C. (Eng.) 99.

3. *Stroud's Jud. Dict.*

The principle of this rule, as regards statutes, was explained by KENYON, C. J., in *Rex v. Wallace*, 5 T. R. (Eng.) 379, wherein he said that if the legislature had meant the general words to apply without restriction, it "would have used only one compendious word."

unrestrictedly comprehensive, embracing every other sort or kind, whether *ejusdem generis* with the classes enumerated or not. In the notes will be found a collection of cases divided into two classes: first, where the *ejusdem generis* interpretation was followed;¹ and second, where the word was held to have been used

1. **Examples from English Cases of the *Ejusdem Generis* Interpretation of the Word "Other."**—The leading case upon the *ejusdem generis* interpretation of "other" is *Sandiman v. Breach*, 7 B. & C. (Eng.) 99, in which Lord Tenterden laid down that rule of interpretation that has since been known by his name. The case was decided upon the English Sunday act, 29 Car. II, ch. 7, which enacts that "no tradesman, artificer, workman, laborer or other person whatsoever" shall exercise his ordinary calling on the Lord's day. And it was held that the prohibitor did not apply to a stage coachman. This construction of the statute is all the more remarkable because the words in the act are "or other person whatsoever;" and also because the court which decided *Sandiman v. Beach*, 7 B. & C. (Eng.) 99, had only three years previously declared that the Sunday act "ought to receive a liberal construction, being for the better observance of the Lord's day." *Ex parte Middleton*, 3 B. & C. (Eng.) 164.

Following this line of interpretation it has been held that the same act did not apply to a farmer. *Rex v. Sylvester*, 33 L. J., M. C. 79. Nor to a solicitor nor an attorney. *Peate v. Dickinson*, 4 L. J. Ex. 28.

In *Thames etc. Ins. Co. v. Hamilton*, 12 App. Cas. (Eng.) 484, it was held in construing the words "perils of the sea" and "all other perils, losses, misfortunes, etc.," that "other perils" must be *ejusdem generis* with "perils of the sea."

An English act (11 Geo. II, ch. 19, §§ 8, 9), extending the common-law right of distress, enables a landlord to distrain upon all sorts of growing "corn and grass, hops, roots, fruits, pulse, or other product whatsoever." It was held that the general words "other product" do not include trees, shrubs and plants growing in a nursery garden. *Clark v. Gaskarth*, 8 Taunt. (Eng.) 481; *Clark v. Calvert*, 3 Moo. 114. And see also *Rex v. Hodges*, Moo. & M. (Eng.) 341.

It has been stated that when words descriptive of the rank of persons or things are used in a descending order

according to rank, and general words (such as "other" persons and things) are superadded, the general words will not include persons or things of higher rank or importance than the highest named, if there be any lower species to which they can apply. Maxwell, 417. 418; Wilberforce, 183, 184. The case usually stated as illustrative of this principle is *Ex parte Hill*, 3 C. & P. (Eng.) 225, which decided that an English statute (3 Geo. IV, ch. 71), which punished cruelty to "any horse, mare, gelding, mule, ass, ox, cow, heifer, sheep, or other cattle," did not include a bull. But it may be doubted whether the rule, or the case which illustrates it, is of much practical value to-day.

For other English cases illustrating the application of the *ejusdem generis* interpretation of the word "other," see *Irwell v. Eden*, 18 Q. B. D. (Eng.) 588; *R. v. De Portugal*, 55 L. J., Q. B. 567; 34 W. R. (Eng.) 42; *Re Parker*, 29 Ch. Div. 199; 33 W. R. 541; *Ex parte O'Hagan*, 19 L. R. (Irish) 99; *Re Robertson*, 19 Q. B. D. 1; *Crompton v. Jarrott*, 30 Ch. Div. (Eng.) 298; *Early v. Rathbone*, 57 L. J., Ch. 652; *Bailes v. Sunderland etc. Soc.*, 55 L. T. (Eng.) 808; 51 J. P. 310; *Harrison v. Blackburn*, 17 C. B., N. S. 678; *Manchester etc. Co. v. Carr*, 5 C. P. D. 507; *Chasteauneuf v. Capeyron*, 7 App. Cas. (Eng.) 127; *Webb v. Bird*, 10 C. B., N. S. 268; 13 C. B., N. S. 841; *Powell v. Boreston*, 18 C. B., N. S. 175; *Morris v. Harris*, L. R., 1 C. P. 155; *Powell v. Farmer*, 34 L. J., C. P. 71; *Harris v. DePinna*, 33 Ch. Div. 238; *R. v. Neville*, 8 Q. B. 452; *R. v. Mosley*, 2 B. & C. 226; *Holebrook v. Tickell*, 4 A. & E. 916; *R. v. Manchester etc. Co.*, 1 B. & C. 630; *East London etc. Co. v. Mile End*, 17 Q. B. 512; *Chelsea Water Works Co. v. Bowley*, 17 Q. B. 358; *Casher v. Holmes*, 2 B. & Ad. 592; *Radnorshire v. Ibbins*, 3 B. & S. 400; *Reed v. Ingham*, 3 E. & B. 889; *Tisdell v. Combe*, 7 A. & E. 788; *Wanstead v. Hill*, 13 C. B., N. S. 479; *Willis v. Thorp*, L. R., 10 Q. B. 383; *Merricks v. Cadwallader*, 51 L. J., M. C. 20; *Williams v. Golding*, L. R., 1 C. P. 69; *R. v. Doubleday*, 3 E. & E. 501; *Lowther*

v. Radnor, 8 East 113; *Kitchen v. Shaw*, 6 A. & E. 729; *Bramwell v. Penneck*, 7 B. & C. 536; *Midgley v. Richardson*, 14 M. & W. 595; *Hedley v. Fenwick*, 3 H. & C. 349; *R. v. Hall*, 1 B. & C. 237; *R. v. Spratley*, 6 E. & B. 363; *R. v. Dickenson*, 7 E. & B. 831; *Ward v. Folkstone Waterworks Co.*, 24 Q. B. D. 334.

Examples from American Cases of the Ejusdem Generis Interpretation of the Word "Other."—A statute gave a lien to "mechanics, tradesmen, or others" for labor or material. *Held*, that "others" following the enumeration of particular classes was applicable only to persons in the same category. *Carlo v. Tufts*, 4 Cush. (Mass.) 453.

The words "other persons," following in a statute the words "warehousemen" and "wharfinger," must be understood to refer to other persons *ejusdem generis*, viz: those who are engaged in a like business or who connect the business of warehousemen, etc., with some other pursuit. *Bucher v. Commonwealth*, 103 Pa. St. 528.

"Any works, mines, manufactory or other business where clerks, miners, or mechanics, are employed" does not include a hotel; for the general words "or other business" refer to some business *ejusdem generis* as works, mines, manufactory. *Sullivan's App.*, 77 Pa. St. 107; *Evans' App.*, 81* Pa. St. 302.

The expression "other actions," following an enumeration of some well-known common-law actions, does not include militia cases, bastardy cases, the assessment of damages under the Mill acts, nor the assessment of damages for laying out highways in the country. If all the actions enumerated are common-law actions, the maxim of *noscitur a sociis* is applicable, and raises a fair inference that the "other actions" were intended to be of the same description. *Valentine v. Boston*, 20 Pick. (Mass.) 201.

In a United States Statute.—In § 5388, Rev. Stat. U. S., which provides that every person who unlawfully cuts any timber standing upon the land of the *United States*, which "in pursuance of law may be reserved or purchased" "for military or other purposes," shall pay a fine, the words "or other purposes" must be construed as extending only to purposes *ejusdem generis* with military purposes. *Wilcox v. Jackson*, 13 Pet. (U. S.) 496; *Leavenworth R. Co. v. United States*, 92 U. S. 742; *United States v. Garrettson*, 42 Fed. Rep. 23.

In Exemption Statutes.—The term "other person," in Rev. Stat. of *Wisconsin*, ch. 134, § 31, subdiv. 9, which exempts from execution the tools, etc. of "any mechanic, miner, or other person," does not include a judgment debtor who is a farmer. *Bevitt v. Crandall*, 19 Wis. 581. See also *Grimes v. Bryne*, 2 Minn. 89.

A statute exempted from taxation "every building erected for the use of a college, incorporated academy, or other seminary of learning." As all those enumerated were corporations, it was held that the general words "or other seminary" required that such institution should also be incorporated in order to have the benefit of the exemption. *Chegaray v. Mayor etc. of New York*, 13 N. Y. 220.

Clerical or Other Defects.—An act declaring that certain affidavits shall not be invalidated by "clerical or other defects," refers to "clerical or formal defects of like description." *Duanesburg v. Jenkins*, 40 Barb. (N. Y.) 574.

In the matter of *Hermanse*, 71 N. Y. 481, in a statute authorizing boards of supervisors to correct any "manifest clerical, or other errors," it was held, that the term "other errors" must be treated as referring to matters *ejusdem generis* with the classes specified.

In Penal Statutes.—The expression "or other instrument in writing" in the *Illinois* Crim. Code is held to include only instruments of the same kind as those previously specified; *i. e.*, bills, notes, checks, etc., for the payment of money, and not to apply to the case of a contract under which it was wholly uncertain whether the money would ever become payable. *Shirk v. People*, 121 Ill. 61.

Where a statute provides a punishment for obtaining money, goods, wares, merchandise, "or other property" under false pretences, it was held, that obtaining board and lodgings was not within the meaning of the words "other property." *State v. Black*, 75 Wis. 462.

Where a statute against gambling makes it a felony to carry on or conduct "a keno bank, faro bank, or other machine or contrivance, used in betting," it was held, that "other machine or contrivance" must be *ejusdem generis* with the keno bank or faro bank. *Commonwealth v. Kammerer*, 13 S. W. Rep. (Ky.) 108.

Statutes of *New York*, relating to offences of the nature of burglary, enact

in its comprehensive sense.¹

that the term "building" includes "a railway car, vessel, booth, tent, shop, or other erection or enclosure." *Held*, that the general words must be limited to the same class with "erections or enclosures" already specified, and that they do not include a vault intended and used exclusively for the interment of the dead. *People v. Richards*, 108 N. Y. 137.

For other American cases illustrative of the application of the *ejusdem generis* interpretation of the word "other," see *White v. Ivey*, 34 Ga. 186; *Hall v. Byrne*, 2 Ill. 140; *Shirk v. People*, 121 Ill. 61; *State v. Stoller*, 38 Iowa 321; *Anderson v. Winfree*, 85 Ky. 597; *Opinion of the Justices*, 52 Me. 597, 598; *Levant v. Varney*, 32 Me. 180; *Grimes v. Bryne*, 2 Minn. 89; *Brailey v. Inhabitants of Southborough*, 6 Cush. (Mass.) 142; *Weld v. May*, 9 Cush. (Mass.) 191; *Commonwealth v. Dejardin*, 126 Mass. 46; *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.) 440; *McDade v. People*, 29 Mich. 50; *American Transp. Co. v. Moore*, 5 Mich. 368; *Brooks v. Cook*, 44 Mich. 617; *McIntyre v. Ingraham*, 35 Miss. 25; *St. Louis v. Laughten*, 49 Mo. 559; *Gumley v. Webb*, 44 Mo. 444; *King v. Thompson*, 87 Pa. St. 365; *Pardee's Appeal*, 100 Pa. St. 412; *Monongahela Bridge Company's App.*, 17 Pittsb. Leg. Journ., N. S. 322; *Renick v. Boyd*, 99 Pa. St. 555; 44 Am. Rep. 126; *Livermore v. Camden Co.*, 29 N. J. L. 248; *State v. Gedicke*, 43 N. J. L. 89; *Cox v. Houston etc. R. Co.*, 68 Tex. 226; *State v. Marshall*, 13 Tex. 55; *Stone v. Stone*, 1 R. I. 425; *Lynchburg v. Norfolk etc. R. Co.*, 80 Va. 247; *Edison v. Hayden*, 20 Wis. 682; *State v. McGarry*, 21 Wis. 496; *Pennock v. Coe*, 23 How. (U. S.) 117; *Alabama v. Montague*, 117 U. S. 602.

1. **Examples of the Use of the Word "Other" in Its Comprehensive Sense, Embracing Persons and Things Not Ejusdem Generis with Previously Enumerated Classes.**—If the particular words exhaust a whole genus, the general words must refer to some larger genus. *Fenwick v. Schmalz*, L. R., 3 C. P. 316; *Ellis v. Murray*, 28 Miss. 129.

In Wills.—It would seem from the modern authorities that the *ejusdem generis* principle of construing the word "other" has little or no application in the construction of wills.

In *Williams on Exrs.*, p. 1188, the *ejusdem generis* rule is stated as being applicable even to wills, but it is added that the rule is by no means of universal application. While *Jarman*, in commenting upon Lord Eldon's remark in *Hotham v. Sutton*, 15 Ves. (Eng.) 319, that "The doctrine appears now to be settled that the words 'or other effects,' in general, means effects *ejusdem generis*," declares that such a position seems scarcely to accord with the subsequent decisions. 1 *Jarm.* 757. See also *Stroud's Jud. Dict.*, tit. Other; *Theobald*, 176, 177.

In *Hodgson v. Jex*, 3 Ch. Div. 122, it was held, that a bequest "of all my furniture, plate, linen, and other effects" comprised all the residuary estate of the testator.

And in *Arnold v. Arnold*, 4 L. J., Ch. 123; 2 Myl. & K. (Eng.) 365, the like effect was given to a bequest "of all my wines, and other property." See also *Bunard v. Winchell*, 28 L. J., Ch. 649; 1 *Jarm.* 751, 754, note; *Johns*, 276.

English Examples.—Within the meaning of the English Prison act, 28 & 29 Vict., ch. 126, which makes it a felony to facilitate the escape of a prisoner, by conveying to the prison "any mask, dress, or other disguise, or any letter or any other article or thing," the words "any other article or thing" mean of any kind, sort, or description whatsoever; *e. g.*, a crowbar. *R. v. Payne*, L. R., 1 C. Cr. (Eng.) 27.

A statute enacted that it should be lawful for any two justices, upon complaint made upon oath that there was cause to suspect that purloined or embezzled materials used in certain manufactures, were concealed "in any dwelling house, outhouse, yard, garden, or other place or places," to issue a search warrant ordering a search of such places. It was held, that a warehouse occupied for business purposes only, and not within the curtilage, or connected with any dwelling house was a place within the meaning of the statute. *Regina v. Edmondson*, 2 El. & El. 77. See also *Doggett v. Catterns*, 17 Q. B., N. S. 669; 19 C. B., N. S. 765; *Haugh v. Corporation of Sheffield*, L. R., 10 Q. B. 102; *Clark v. Hague*, 2 E. & E. 281; *Morley v. Greenhaugh*, 3 B. & S. (Eng.) 374; *Eastwood v. Miller*, L. R., 9 Q. B. (Eng.) 440; *Galloway v. Mor-*

ies, L. R., 8 Q. B. D. (Eng.) 275; Shaw v. Morley, 3 Ex. (Eng.) 137; Bows v. Fenwick, L. R., 9 C. R. 339; Shillito v. Thompson, L. R., 1 Q. B. D. (Eng.) 12; Clapham v. Oliver, 30 L. T. (Eng.) 365; 22 W. R. (Eng.) 655; Williams v. Goldring, L. R., 1 C. P. (Eng.) 69; Sun Ins. Co. v. Hart, 58 L. J., P. C. 69; Young v. Gettridge, L. R., 4 Q. B. 166; R. v. Shewsbury Gas Co., 2 B. & Ad. (Eng.) 216; Cork etc. R. Co. v. Goode, 13 C. B. (Eng.) 826.

American Examples.—The rule that where particular words in a statute are followed by general words, such as "and all others," the latter will be restricted in meaning to objects of like kind, will not be put into effect where it will defeat the legislative intent. State v. Williams, 35 Mo. App. 541, where it was held, that baseball was included in a prohibition against "horse racing, cock fighting, or playing at games of cards of any kind" on Sunday.

A statute authorized a county to pay a subscription "in money, lands, or other property." *Held*, that tax certificates were included in the words "other property." Hall v. Baker, 74 Wis. 127.

An act prescribed the fees of county judges and clerks of county courts, and made it an offence for either to receive any other or greater fees from "any guardian, executor, or administrator or other person." In a prosecution against a clerk for excessive fees in a suit, and in answer to the contention that "other person" is only some one who has paid more or greater fees than are allowed by law in some matter relating to the administration of estates, the court, while recognizing the rule for limiting general words to persons and things *ejusdem generis*, said: "This is but a rule of construction by which courts are to ascertain the intention of the legislature, and when that is apparent we are bound by it, and can no more disregard the intention in the exposition of a penal statute than any other." The court held that the true meaning of the act was to punish as an offence the taking of greater than the prescribed fees from any person. Foster v. Blount, 18 Ala. 687.

"Other estate," in a statute giving a remedy against any one suspected of having "fraudulently received, concealed, embezzled, or conveyed away any of the money, goods, effects, or other estate" of an insolvent, is not

confined to personal property, but extends to real estate. Although generally, "other" following an enumeration of particulars is construed as embracing unenumerated particulars of like nature only, yet here, the history and objects of the statute indicate that a broader use was intended. Carlo v. Tufts, 4 Cush. (Mass.) 448.

A *Connecticut* statute provides that where any injury is done to "a building or other property" by fire communicated by a locomotive engine, etc., the railroad company shall be held responsible. It was held, that the words "or other property" should not be confined to subjects *ejusdem generis*. Grissell v. Housenontic R. Co., 54 Conn. 447; 32 Am. & Eng. R. Cas. 358.

Where the constitution of a relief fund association provided for the relief of a member when disabled from following his "usual or other occupation" it was held that "other occupation" did not mean "or other of the same kind." Albert v. Order of Chosen Friends, 34 Fed. Rep. 721.

The *Pennsylvania* act of April 27th, 1855, § 8 (Pl. 369), declares it "to be lawful for every lessee for a term of years of any colliery, or mining land, manufactory, or other premises," to mortgage his lease or term. *Held*, that the words "or other premises," in view of the remedial purpose of the act, are equivalent to "other lands and tenements," and are not restricted to leases of the same or like nature as colliery, mining, or manufactory leases. Hilton's App., 116 Pa. St. 351.

In a Contract.—A contract with a reservoir company permitted the owner of a cotton mill to draw water to run his mill, or "such other mill or mills as may be erected upon his said privilege." *Held*, that "other mill or mills" was not restricted to objects *ejusdem generis* with the cotton mill, but that it applies as well to a paper mill. Phoenix etc. Co. v. Hazen, 118 Mass. 350.

Exemption Laws.—The horse, wagon, and harness, of an unmarried man, engaged in the business of assaying and sampling ores, are exempt from execution under the proviso of Gen. Sts. of *Colorado*, § 32, p. 602, that the tools, etc. "of a mechanic, miner, or other person," not exceeding \$300 in value shall be exempt from levy and sale. Watson v. Lederer, 11 Colo. 577.

For various phrases involving an interpretation of "other," apart from the *ejusdem generis* principle, see note 1.

It was held, that a merchant's stock in trade was exempt from execution under a statute which exempts the tools, implements, working animals, books, and stock in trade, of any "mechanic, miner, or other person." *Martin v. Bond*, 24 Pac. Rep. 326.

In the By-laws of a Corporation.—Under a by-law of a corporation providing that "the directors shall elect from their number a president, vice-president, and such other assistants as are necessary," there is no room for the application of the principle of *ejusdem generis* to the words, "other assistants." *Archer v. Whiting*, 88 Ala. 249.

For other examples, see *Collins v. Drew*, 67 N. Y. 149; *Ellis v. Beale*, 18 Me. 337; 36 Am. Dec. 726; *Brown's Case*, 112 Mass. 409; *Carr v. Wilson*, 32 W. Va. 419; *Brown v. Corbin*, 40 Minn. 508; *Flower v. Witkosty*, 69 Mich. 371; *Higler v. People*, 44 Mich. 299; *Paterson v. State*, 48 N. J. L. 386; *Borough of Warren v. Geer*, 117 Pa. St. 207; *Petner v. State*, 23 Tex. App. 366; *State v. Solomon*, 33 Ind. 450; *State v. Broderick*, 7 Mo. App. 19. See also 27 Am. & Eng. Corp. Cas. 372, n.

1. **Other Articles.**—Under a policy which mentioned dried fish among articles free from average, unless general, adding also "all other articles perishable in their own nature," it was held that pickled fish were not included. *Baker v. Ludlow*, 2 Johns. Cas. (N. Y.) 289.

Other Banking Game.—The words "or any other banking game," in the statute against gaming, must be construed according to the intent of the legislature; and they include any banking game, though not named in the act. *Randolph v. State*, 9 Tex. 521.

Other Business.—See BUSINESS, vol. 2, p. 702.

Other Cases.—The statute (Rev. St. Wis., § 3323) relating to lien suits provides that "any issue of fact in such action shall, on demand of either party, be tried by a jury, whose verdict thereon shall be conclusive as in other cases." The "other cases" here mentioned evidently mean actions at law. *Moritz v. Larsen*, 70 Wis. 569.

Other Four-wheeled Carriages.—A clause in a turnpike charter, imposing

tolls upon "coaches, chariots, and other four-wheeled pleasure carriages," includes stage-coaches used for the conveyance of the mail and of passengers. *Cincinnati etc. Turnpike Co. v. Neil*, 9 Ohio 11. See also CARRIAGE, vol. 2, p. 737.

Other Cause.—See CAUSE, vol. 3, p. 45.

Other Device.—The words "or other device" in a statute against gaming are not so loose and vague as to be rejected. *United States v. Speeden*, 1 Cranch (C. C.) 535.

Other Felony.—Section 1, p. 445, *Wagner's Missouri Statutes*, provides that "every murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony shall be deemed murder in the first degree." *Held*, that the words "other felony" here refer to some felony collateral to the homicide, and not to those acts of personal violence to the deceased, which are necessary and constituent elements of the homicide itself. They are merged in it, and do not, when consummated, constitute an offence distinct from the homicide. *State v. Shock*, 68 Mo. 552.

Other Hereditary Diseases.—In an **Insurance Policy.**—Where the question was, "Have the person's parents, uncles, aunts, brothers, or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or any other hereditary disease?" it was held that the word, "other" indicated that the question was intended to be an enquiry whether any of the diseases mentioned had appeared among the relatives of the applicant in the form of an *hereditary disease*. *Gridley v. North Western L. Ins. Co.*, 14 Blatchf. (U. S.) 107.

Other Insurance.—See FIRE INSURANCE, vol. 7, p. 1012; LIFE INSURANCE, vol. 13, p. 631.

Other Lands and Real Estate.—In a **Statute.**—A New Jersey statute enacts that if a husband devised to his wife any land or real estate for life, or otherwise, without expressing whether such devise to her is intended to be in lieu of dower or not, the said wife shall not be entitled to dower in any lands devised by her said husband unless she shall, in writing, express

her dissent to receive the lands so devised to her in lieu of her right of dower in the "other lands and real estate devised in and by the said will." Where testator devised lands to his wife for life on condition that she remain a widow, it was held, upon her not dissenting to the said devise, and afterwards marrying that she forfeited her right to dower in any of the lands devised by the testator, notwithstanding, the words, "other lands and real estate devised in and by the said will," from which it was contended that it was not intended to bar the right of dower in the lands devised to the widow herself. *Stark v. Hunton*, 1 N. J. Eq. 229.

Other Lawful Merchandise.—See *CHARTER-PARTY*, vol. 2, p. 147.

Other Memoranda.—Where a statute provides that in an action by or against an executor or the legal representative of a deceased person, in which his account books or other memoranda are used as evidence on either side, the other party may testify in relation thereto, it was held that it should be read "his account books or his other memoranda." *Cary v. Herrin*, 59 Me. 361.

Other Usual Projections.—Where, in a deed conveying land, there was an allowance of "steps, windows, porticos, and other usual projections appurtenant to said front wall," in a reserved space of 22 feet, it was held, that the word "other" imports that porticos are usual within the meaning of the deed, and therefore a porch falls within the exception. *Atty. Gen. v. Ayer*, 148 Mass. 586.

Other Valuable Articles.—See *ARTICLES*, vol. 1, p. 776, n.

Other Writs Necessary, etc.—A California statute provides that the supreme court "shall have power to issue writs of *mandamus*, *certiorari*, prohibition, *habeas corpus*, and all other writs, necessary or proper to the complete exercise of the appellate jurisdiction," the court following Webster's definition of "other," which is "different from that which has been specified," *held*, that this clause should be construed thus: "The court shall have power to issue writs of *mandamus*, *certiorari*, prohibition, *habeas corpus*, and all writs different from those which have been specified, necessary or proper for the complete exercise of its appellate jurisdiction." *Hyatt v. Allen*, 54 Cal. 357.

Other Real Estate.—In *Gen. St. Minnesota*, 1878, ch. 46, § 3, the expression "other real estate" clearly means real estate belonging to the deceased husband or wife, and the word "other" implies that the real estate which is to share with it the burden of paying debts is also the property of the deceased, which would not include property conveyed by him or her during life. *Goodwin v. Kumm*, 43 Minn. 403.

Other Sons.—In a gift to second, third, fourth, and all and every "other sons" of A the first son, though not mentioned, is not excluded, but rather the word "other," "*ex vi termini*," includes the first" (per *LORD BROUGHAM*, *Langston v. Langston*, 8 Bligh, N. S. 167; s. c., 2 Cl. & F. 194, cited 2 Jarm. 215, 216). In *Locke v. Dunlop* (39 Ch. Div. 387), *STIRLING, J.*, *held*, on the context, that "other son," had reference to futurity, and included only those sons who should be born after his sons who were in existence at the date of his will.

Other Terms.—Under a statute which provides that a plaintiff may discontinue as against any of the defendants upon payment of costs to them, as in case of a nonsuit, and on such other terms as the court shall direct, it was held, that the other terms spoken of in the statute have reference to the time of going to trial, the continuance of the cause, amendments of the pleading, etc., over which the court has full discretion, and does not give the court any direction upon the question of costs. *Ganet v. Mears*, 4 Wis. 308.

Other than.—"Other than" creates an exception. *Wrotesley v. Adams*, 1 Plow. 195.

Other the Issue.—In *Allgood v. Blake* (L. R., 7 Ex. 339; 8 Ib. 160), the words (at the end of a series of limitations in tail-special) "to the use of all and every other the issue," were read, not as excluding those before mentioned, but rather as completing a provision for all the issue, and as thus creating a vested remainder in tail-general.

Other then Surviving Children.—Where a testator directs that the interest of a sum of money shall be paid to his son A for life, and on A's death that the principal shall be divided among his (the testator's) other then surviving children, and issue of any deceased child, A's issue are entitled to a share of the principal. *Bell v. Smally*, 45 N. J. Eq. 478.

OTHERS.—See also **OTHER**.¹

OTHERWISE.—Speaking generally, “otherwise” when following an enumeration, should receive an *ejusdem generis* interpretation much in the same way as other. As to this general rule “no authority is necessary,”² and POLLOCK, B., says: “The principle upon which this rule is founded is thoroughly established.”³ But it is a general rule, which, in the case of “otherwise,” is not unfrequently found inapplicable.

It was decided in the case which is the leading authority on this word that the proviso contained in § 9, 27 Hen. VIII, ch. 10, enabling a wife to take or reject hereditaments given to her “for term of her life, or otherwise in jointure,” extended to an estate in fee simple; but the judgment says, “for *nota*, this word ‘otherwise’ is not indefinite, but ‘otherwise in jointure.’”⁴

Other Trustee.—“Where four trustees were appointed originally, and the power was to the surviving or continuing or *other* trustee to appoint new trustees, it was held that the survivor of the four trustees who desired himself to be discharged, could, by force of the words ‘other trustee,’ appoint four new trustees in the place of himself and three others.” Lewin 665, citing *Camoys v. Best*, 19 Bea. 414.

1. **Others.**—In *Welch v. Seymour*, 28 Conn. 387, the words of the statute were: “The said officers shall continue in office until the next annual election, and until others are elected in their stead;” and it was adjudged that the word “others” did not necessarily mean different persons.

A *New Jersey* statute provides that the commissioners appointed to assess damages for opening streets shall meet “on ten days’ notice given by or to any of the said persons so applying to each of the others, or to his, her or their attorney or agent,” the word “others” extends to all who are interested in the application for a new assessment. *State v. Passaic*, 36 N. J. L. 387.

Others in the expression “tenants and others” refers to persons who are not tenants. *Kenney v. Sweeney*, 14 R. I. 581.

Others or Other.—Not read as “survivors or survivor.” *Re Hagen*, 46 L. J. Ch. 665. See also **SURVIVOR**.

2. *Stroud’s Law Dict.*; per *CLEASBY, B.*, *Monck v. Hilton*, 46 L. J., M. C. 167.

3. *Monck v. Hilton*, 46 L. J., M. C.

167. See also per *DOWSE, B.*, *Haren v. Archdale*, 12 L. R., Ir. 318.

4. *Vernon’s Case*, 4 Rep. 1 a.; *Stroud’s L. Dict.* And so there are many other cases where the *ejusdem generis* rule has been held inapplicable. For example:

By § 1, *Jervis’s act* (11 & 12 Vict., ch. 43), justices may issue a summons in cases where they have authority to make “any order for the payment of any money or otherwise:” an order for the demolition of a building under a local improvement act is within these words, and must therefore (by § 11) be made within six months after the completion of the building. *Morant v. Taylor*, 1 Ex. D. 188.

§ 4 of the *Vagrant act* (5 Geo. IV, ch. 83) makes it an offense “pretending or professing to tell fortunes, or using any subtle craft, means or device by palmistry or otherwise to deceive.” “Reading this as a whole, I should take the word ‘otherwise,’ not as limiting ‘the earlier words, but as enlarging the word ‘palmistry,’ and providing against the professing to tell fortunes or using craft, means or device to deceive, whether by palmistry or by contrivance to deceive other than palmistry, provided, they are of the same general character as is indicated by the earlier words of the section.” Per *POLLOCK, B.*, *Monck v. Hilton*, 46 L. J., M. C. 169. Accordingly, pretended spiritualism is within the offense. *Monck v. Hilton*, 2 Ex. D. 268. But a trick of legerdemain is not *Johnson v. Fenner*, 33 J. P. 740; for, “in such a case no peculiar power is pretended, like telling fortunes or

palmistry, to impose upon the credulous." Per CLEASBY, B., in *Monck v. Hilton*, 46 L. J., M. C. 167. See further *Ex parte A.-G.*, 41 J. P. 118; *Rex v. Middlesex Jus.*, 41 J. P. 629; *Re Slade*, 36 L. T. 402.

Though under the county courts act, 1867 (30 & 31 Vict., ch. 142, § 7), an action in the high court for an amount exceeding £50, but reduced by payment after action brought, could not be remitted to the county court under the words of the section "reduced by payment, an admitted set-off, or otherwise." *Osborne v. Homburg*, 1 Ex. D. 48; 24 W. R. 161; *Walesby v. Goulston*, L. R., 1 C. P. 567; *Foster v. Usherwood*, 3 Ex. D. 1; 26 W. R. 91. See also Co. Co. act, 1888, § 65, and thereon *Hodgson v. Bell*, 24 Q. B. D. 302; yet, after issue joined, such an action, however subsequently reduced below £50, could be remitted under § 26, Co. Co. act, 1856 (19 & 20 Vict., ch. 108), because in that section the words are "reduced by payment into court, payment, an admitted set-off or otherwise," and as "payment into court" must refer to something after action brought, the words "or otherwise" received their natural meaning. *Gray v. Hopper*, 21 Q. B. D. 246.

A provision in a private (borough) improvement act, that nothing therein contained should affect any right which the corporation might have "under the municipal corporation acts, or otherwise," is not confined to acts similar in kind to the municipal corporation acts, but extends to all acts. *Taylor v. Oldham*, 4 Ch. D. 395.

"A power to appoint 'by will or otherwise,' of course authorizes an appointment by deed." Sug. Pow. 211, citing *Irwin v. Farrer*, 19 Ves. 86; *Van v. Barnett*, 19 Ves. 110.

A condition of sale empowered a vendor to vacate the sale if any objection were made "as to the abstract of title, or the evidence thereof, or the conveyance, or as to compensation or indemnity or otherwise;" and *WESTBURY, L. C.*, held that the word "otherwise" would comprehend all other subjects as to which there might be an objection or a claim made by the purchaser. *Cordingly v. Cheesebrough*, 31 L. J., Ch. 621; 3 Giff. 496; 4 De G. F. & J. 379. See further judgment of *ESHER, M. R.*, *Terry v. White*, 32 Ch. D. 14. So in the ordinary power

to trustees to apply capital in or towards "the advancement or preferment or otherwise for the benefit" of a person, the words italicised are not restricted by "advancement" or "preferment." *Lowther v. Bentinck*, 44 L. R., 19 Eq. 167. In this case *JESSEL, M. R.*, said: "When I find the words 'or otherwise,' I am bound to say I don't know what is *ejusdem generis*". So a direction to make deductions from the income of a tenant for life, for all ordinary outgoings for "taxes or otherwise," was held to include cost of drainage works under § 73, 18 & 19 Vict., ch. 120. *Re Crawley*, 28 Ch. D. 431.

A gift of real estate, to hold "for ever or otherwise," according to the respective natures and tenures thereof, held to include leaseholds for years. *Swift v. Swift*, 29 L. J., Ch. 121; 1 De G. F. & J. 160.

Where a party to an action has to satisfy the court of any matter, "by affidavit or otherwise," that means by affidavit or any other sufficient means. *Shelford v. Louth R.*, 4 Ex. D. 317.

An admission, "either on the pleadings or otherwise" (Ord. 32, R. 6, R. S. C.), may be in an affidavit. *Freeman v. Cox*, 8 Ch. D. 148; *Porrett v. White*, 31 Ch. D. 52; *Laudergan v. Feast*, 54 L. T. 369). Or even in a letter before action. *Hamden v. Wallis*, 27 Ch. D. 251. "*JESSEL, M. R.*, used to say that one admission is as good as another." Per *CHITTY, J.*, *Hampden v. Wallis*, 27 Ch. D. 251.

"Though an indictment will not lie for an offense newly created by statute where another method of prosecution is appointed, yet if the statute gives a recovery by action of debt, bill, plaint, information, 'or otherwise,' it authorizes a proceeding by way of indictment." *Dwar*, 673.

As to "dividends, profits or otherwise," subsec. 7, § 38, Companies act 1862, see *Re Leicester Race-course Co.*, 30 Ch. D. 629; 53 L. T. 340; 34 W. R. 14.

Where a statute provides that "a debt due to a member of a company in his character of a member by way of dividends, profits or otherwise," shall be postponed to debts of their creditors, it was held that a director's unpaid fees fell within the proviso. *In re Leicester Club*, 30 Ch. D. 629.

Threats, "by circulars, advertisements or otherwise" (Eng. Patents, Designs, and Trade-Marks act, 1883,

But upon these are numerous instances of the application of the rule; as, for example, in the provision in the English Wills act (1 Vict., ch. 26, § 20), for revoking a will by "burning, tearing or *otherwise destroying*" it, the words italicized have to be read as *ejusdem generis* with "burning, tearing."¹ For other examples, see note 2.

§ 32), include threats by private letter to the person charged with infringement; the words "or otherwise" not being restricted on the *ejusdem generis* principle to "or other means such as circulars or advertisements." *Driffield etc. Co. v. Waterloo etc. Co.*, 31 Ch. D. 638.

Take by "purchase or otherwise" is authority to take by devise. *Downing v. Marshall*, 23 N. Y. 388.

In a provision that a county treasurer who receives any further money out of the treasury, "for fees, clerk hire or otherwise," shall be liable in an action on his bond, the words "or otherwise" comprehend every case of getting money out of the treasury other than that which the preceding section had provided should be legitimate. *State v. Kelly*, 32 Ohio St. 429.

It was held in *Carpenter v. Mitchell*, 54 Ill. 126, that the power given to married women to acquire property by descent, devise "or otherwise," was sufficiently broad to embrace an acquisition by purchase. See also *Haight v. McVeagh*, 69 Ill. 624.

People v. Greenwall, 115 N. Y. 520; *Re St. Philips Church v. Glasgow & London Ins. Co.*, 17 Ont. Rep. 95.

1. *Jarm. on Wills* 142.

See, however, *Cheese v. Lovejoy*, 2 P. D. 251; *Margary v. Robinson*, 56 L. J. P. D. & A. 44.

2. So the phrase in § 53, Towns Improvement Clauses act (10 & 11 Vict., ch. 34), relating to streets not theretofore paved and flagged, "or otherwise made good," refers to a process *ejusdem generis* with paving and flagging; *i. e.* otherwise made into an artificial road in a manner similar to that in which a road is made by paving and flagging. Per *BRETT, M. R.*, *Portsmouth v. Smith*, 13 Q. B. D. 184.

So the phrase "otherwise engaged in Manual Labor" (§ 10, Employers and Workmen act, 1875, 38 & 39 Vict., ch. 90), following, as it immediately does, an enumeration of employments exclusively manual, embraces only "people who are ordinarily known in the English language as working people

who exercise manual labor" (per *BRETT, L. J.*), and does not include an omnibus conductor. *Morgan v. London Gen. Omnibus Co.*, 53 L. J., Q. B. 352; Q. B. D. 832. See also, per *SMITH J.*, *Cook v. N. Metrop. Tramways*, 18 Q. B. D. 684.

The direction in the act, which is the foundation of the modern poor law (43 Eliz., ch. 2), that the poor rate is to be raised "weekly or otherwise," means "that it is to be raised at the outside annually." Per *ESHER, M. R.*, *Rex v. Christopherson*, 16 Q. B. D. 7.

And perhaps one of the most instructive decisions as to the meanings of "otherwise" is that of *CAVE, J.*, in *Ex parte Tidswell*, 56 L. J., Q. B. 548; 57 L. T. 416; 35 W. R. 669, wherein he analyzed the use of the word in several of the sections of the M. W. P. act, 1882, and as a result held that in § 3, a loan from a wife to her husband for the purpose "of any trade or business carried on by him—or otherwise," means trade or business carried on by him or otherwise in partnership with others or as agent, etc., and that therefore a wife is entitled to prove in competition with the general creditors of her husband for a loan advanced for private purposes wholly connected with trade or business.

Where a married woman cannot claim a dividend in bankruptcy in respect of money lent by her to her husband for the purpose of any trade or business carried on by him "or otherwise," this does not apply to a loan for private purposes unconnected with business. *Re Tidswell*, 18 Co. Ct. Rep. (Pa.) 195.

The by-laws of the city of Boston provided that no inhabitant of the city, or any inhabitant of any town or city, whose dwelling house is less than twenty miles distant from said market, shall, at any time, without the permission of the clerk of said market, occupy any stand therein," with cart, wagon, sleigh, or otherwise, it was held that a stand may be occupied within

the meaning of the section by a person having a box within the limits of the market, containing articles for sale. In *Commonwealth v. Rice*, 9 Met. (Mass.) 253, the court by SHAW, C. J., said: "The words are, 'with cart, wagon, sleigh or otherwise, for the purpose of vending,' etc.; and it is urged that, under a well-known maxim of construction, the word 'otherwise' can only include things *ejusdem generis*, and that, as all the articles in the enumeration are vehicles, capable of being moved by horses or cattle, it cannot include a box. The maxim is no doubt a sound one, but it is to be applied, with discrimination, to the subject-matter, with a view to accomplish the purposes of the act. The purpose of the by-law was to prohibit the use of a part of the market as a stand for the sale of provisions, with a receptacle capable of holding and displaying such provisions. Cart, wagon and sleigh, are specified; but it is cart, wagon or sleigh, with the horse removed, and used only for the time being as such receptacle. We believe that the species of sleigh commonly used for carrying provisions to market is usually called a lumber-box. Now the point of likeness to be regarded is, not the capacity of being moved by a horse, but the capacity of being used to hold and display provisions for sale. A box, therefore, of suitable dimensions to hold and display provisions for sale is an article *ejusdem generis*, within the clause of the by-law. The same rule, we think, would apply to a bench, stall or table used for the like purpose."

The foreclosure and sale of premises under a mortgage does not bar the widow's right of dower therein, though she was made a party to the foreclosure suit and suffered the bill—alleging her to have or to claim "some interest in the mortgaged premises as a subsequent purchaser, or encumbrancer, or otherwise" but not alluding to her as doweress—to be taken against her as confessed." The word "otherwise," according to the rule of construction adopted in all analogous cases, "means on some other like capacity." *Lewis v. Smith*, 9 N. Y. 502, 520.

In a provision that real estate "actually purchased, or otherwise acquired," by any intestate is to descend to the father if living, or if dead then to the mother of such intestate, the words "otherwise acquired" do not in-

clude lands descended from either parent. *Roberts v. Jackson*, 4 Yerg. (Tenn.) 322; *Hoover v. Gregory*, 10 Yerg. (Tenn.) 451; *Towls v. Rains*, 2 Heisk. (Tenn.) 357.

A provision in a policy avoiding it in the case of "alienation" by sale or otherwise, does not apply to a conveyance by way of mortgage, while the mortgagor remains in possession, and there has been no entry for foreclosure. *Jackson v. Massachusetts Mut. F. Ins. Co.*, 23 Pick. (Mass.) 418; 34 Am. Dec. 69.

A contract for the carriage of live stock which exempts the railroad company from loss and damages "in loading, unloading, conveyance and otherwise" does not exempt them from a loss occasioned by reason of the bottom of the carriage giving way. In *Hawkins v. Great Western R. Co.*, 17 Mich. 62, the court by CAMPBELL, J. says: "The rule is usually applicable that, where no intention to the contrary appears, general words used after specific terms are to be confined to things *ejusdem generis* with the things previously specified. See also *American Transp. Co. v. Moore*, 5 Mich. 385.

In considering a provision that a county board may levy a county road tax on taxable property "which shall be expended under their direction in making culverts, grading, gravelling, ditching or otherwise improving such highways," the court by CASSIDAY, J. says, "by a familiar rule of construction the words 'or otherwise' must be held to mean the improving such highways by the making of culverts, grading, gravelling, ditching or other improvements of a similar character, and not by the rebuilding of a bridge." *State v. Wood Co.*, 72 Wis. 629.

So where a *United States* statute provided that if any person shall, by the exhibition of any false sample or by means of any false representation or device, or by collusion with any officer of the revenue, or otherwise, knowingly effect an entry of goods, wares, etc., at less than the true weight, measure, etc., such person shall be fined, etc., it was held that the words "or otherwise" must be interpreted to mean by any other fraudulent means." *United States v. Bettillini*, 1 Woods (U. S.) 654. See also *State v. Fuller*, 40 N. J. L. 330; *Ham v. Missouri*, 18 How. (U. S.) 126; *Penfold v. Universal L. Ins. Co.*, 85 N. Y. 317; 39 Am. Rep. 660.

OUNCE.—See note 1.

OUSTER.—(See also ABATEMENT, vol. 1, p. 6; ADVERSE POSSESSION, vol. 1, p. 225; CORPORATIONS, vol. 4, p. 184; DEFORCEMENT, vol. 5, p. 519; DISCONTINUANCE, vol. 5, p. 674; DISPOSSESSION, vol. 5, p. 704; DISSEISIN, vol. 5, p. 704; EJECTMENT, vol. 6, p. 245; FRANCHISES, vol. 8, p. 584; INTRUSION, vol. 11, p. 779; JOINT TENANTS, vol. 11, p. 1112; PUBLIC OFFICERS; QUO WARRANTO).—Ouster, called also dispossession, is the general name for all wrongs to corporeal real property, depriving the rightful owner of the possession or enjoyment thereof. Its five principal varieties are the following: abatement, intrusion, forfeiture, discontinuance, disseisin. For the like torts in cases of incorporeal real property there are also various technical names, such as disturbance, obstruction, subtraction, and the like.

An entry upon the land of another is an ouster of the legal possession arising from the title, if made under claim and color of right; otherwise, it is a mere trespass. The "intention" guides the entry and fixes its character.²

OUT.—See note 3.

"Otherwise" held to extend to things of an analogous nature to what precedes. *In re Jamieson*, 6 Mon. Bankr. Cas. 24, 28.

In a Covenant by an Executor.—A covenant by an executor on a conveyance of land of his testator in his capacity as executor and "not otherwise," is not binding on him in his individual capacity, although it may not be binding on the estate of the testator. *Thayer v. Wendell*, 1 Gall. (U. S.) 37.

1. An Ounce of Gold.—It was held, in *Roberts v. Smith*, 58 Vt. 492; 56 Am. Rep. 567, that "an ounce of gold" was not money, that it has no fixed or unvarying value, and that a promise to pay to bearer one ounce of gold was not a negotiable promissory note.

2. And. L. Dict.; *Ewing v. Burnet*, 11 Pet. (U. S.) 52; *Bath v. Valdez*, 70 Cal. 357.

3. Out and Out.—A power to sell the trust property for a price or consideration "to be paid out and out in money" is not well executed by a sale on credit. In *Philadelphia etc. R. Co. v. Lehigh Navigation Co.*, 36 Pa. St. 210, the court by THOMPSON, J., said: "Lexicographers define this expression as meaning, 'completely,' 'entirely,' 'without reservation.'" Consequently, when applied to an act to be performed "out and out," it must mean ended and completed. The meaning of idiomatic expressions is

not, as is the case in defining words, to be found in origin or root; but ascertainable only from the usual and ordinary sense in which they are used—the common acceptance of them. Even unaided by the context, I would understand the words here to mean a sale for cash—not on credit; a completion of the transaction by the execution of a conveyance and payment of the consideration at the same time—ending and closing the matter by one process.

Out of.—In construing a contract, held to import a residue. See *Cochrane v. Green*, 9 C. B., N. S. 469.

Where a testator directed his legatees to contribute to A a percentage "out of their legacies," ROMILLY, M. R., said: "I doubt whether the testator intended by the words 'out of' to point to any particular description of legatees who were to contribute," *Ward v. Grey*, 26 Bea. 485.

Out of the Business.—A provision in partnership articles, that moneys that might be due to a retiring partner shall be paid "out of the business by the continuing or surviving partners" by annual installments, does not mean that the source of such payment is to be restricted to the business from time to time carried on by such continuing or surviving partners, but means that such moneys are to be paid by such partners as partners, and becomes a per-

OUTFIT, OUTFITTER.—"‘Outfit’ is, correctly speaking, that portion of the ship’s furniture or apparel which ordinarily perishes, or is consumed in the course of her voyage, as provisions for the crew, spare ropes, and the like.”¹

sonal obligation on them. *Beresford v. Browning*, 1 Ch. D. 30.

“Out of the Country;” Out of the State;”

“Out of the Jurisdiction.”—In a provision that the statute of limitation shall not run against a person “out of the country,” the words “out of the country” should be construed to mean “out of the State,” not out of the United States. “When the legislature used the expression, “the country” it is natural to suppose that they meant the country for which they were legislating. *Mensell v. Israel*, 3 Bibb (Ky.) 514. See also *Graves v. Graves*, 2 Bibb (Ky.) 207.

Where it was enacted that the statute of limitation should not run in favor of a person who is “out of the State” at the time the cause of action accrued, it was held, that a person who was within the British lines during the war of 1812, and thus out of the jurisdiction of the State, was out of the State within the meaning of the statute. *Sleght v. Kane*, 1 Johns. Cas. (N. Y.) 76. See also *Whitton v. Wass*, 109 Mass. 40.

In *Meyer v. Roth*, 51 Cal. 582, the court construed the phrase, “the witness out of the jurisdiction,” as meaning without the State, “and so beyond the reach of any process of our courts compelling his testimony.” See also *JURISDICTION*, vol. 12, p. 315.

Out of My Estate.—While the words “out of my estate,” upon which much reliance is placed, if they stood alone, would indicate that the legacies were to be paid from the general funds of the estate, they are controlled by the other parts of the will, and its whole general scheme. *Stevens v. Fisher*, 14 Mass. 114.

Out of the Profits.—An agreement to pay an annual sum “out of the profits” of a business, refers to net profits. Per *PARKE, B.*, *Bond v. Pittard*, 3 M. & W. 357.

Out of the Rents—A devise of an annuity for life to be paid “out of rents and profits” which prove insufficient to keep down the annuity, does not entitle the annuitant to a continuing charge upon the rents and profits after his death until the arrears are

satisfied, but only to the rents and profits during his life. *Wormald v. Muzeen*, 50 L. J., Ch. 776; *Stelfox v. Sugden*, Johns. 234. On the latter case, see *Bell v. Bell*, Ir. Rep., 6 Eq. 239.

Out of Term.—Under code of *North Carolina*, § 423, which, with regard to referee’s reports, enacts that “either party during a term or upon ten days’ notice to the adverse party out of term may move the judge to review such report and set aside, modify, or confirm the same.” The words “out of term may move the judge,” etc., nothing further being provided in the statutory provision cited, mean out of term within the territorial jurisdiction of the judge as to that action, not beyond and outside of it, unless by the common consent of the parties. *McNeill v. Hodges*, 99 N. Car. 247.

Out West.—Where a promissory note is not payable at any particular place and the makers have removed their place of business unknown to the holder, and on enquiry at the former place of business, the holder was referred to the agents of the makers, who informed him that they were “out west,” held that this excused presentment. The common understanding of the phrase “out west” is “in the western States;” it means out of this State. *Adams v. Leland*, 30 N. Y. 309.

1. Lowndes on Average, 11.

“Outfit” (in a fishing voyage) differs materially from what is comprehended under the term ‘goods.’” Per *ELLENBOROUGH, C. J.*, *Hill v. Patten*, 8 East 375.

The word “outfits,” in its original use as applying to ships, embraced those objects connected with a ship which were necessary for the sailing of her, and without which she would not in fact be navigable. *Macy v. Whaling Ins. Co.*, 9 Met. (Mass.) 364.

The construction of the words “outfits” and “catchings” is, in the absence of any peculiar technical meaning thereof by the usage of trade, a matter of law for the decision of the court; and these words must have the ordinary meaning belonging to them in the language of common life and common sense, in the absence of any such

OUTGOINGS.—"An 'outgoing' means something that has gone out; an expense that some one has been at."¹

OUT-HOUSE—(See also **HOUSE**, vol. 9, p. 779).—A building adjoining or belonging to a dwelling house; a building subservient to, yet distinct from, the principal mansion house located either within or without the curtilage.²

technical meaning. *STORY J., Rogers v. Mechanics' Ins. Co., 1 Story (U. S.) 603.*

See also *Hancox v. Fishing Ins. Co., 3 Sumn. (U. S.) 132.*

Outfitter.—A covenant not to carry on the business of a "ladies' outfitter" is not broken by a hosier selling, in the ordinary course of his business, certain articles also sold by a ladies' outfitter, although the articles so sold form a substantial part of the business of a ladies' outfitter. *Stuart v. Diplock, 38 W. R. 224.*

1. *BRAMBELL, B., in Crosse v. Raw, L. R., 9 Ex. 209;* and it was accordingly held in that case that the expense of sanitating a house, under § 10, Sanitary act, 1866 (29 & 30 Vict., ch. 99), was an outgoing within a lessee's covenant to pay "taxes, rates, assessments, and outgoing." So the expenses of street paving were held within a lessee's covenant to pay "outgoings of every description for the time being, payable either by the landlord or tenant" in respect of the premises. *Aldridge v. Ferne, 17 Q. B. Div. 212, in which Hill v. Edward, W. N. (85) 32 was doubted.* See also *Batchelor v. Bigger, 60 L. T. 416.*

So under an agreement for a lease at a rent "free of all outgoing," the tenant has to pay land tax and tithe rent charge, and the landlord is entitled to have a covenant to that effect inserted in the lease. *Parish v. Sleeman, 1 De G. F. & J. 326; 29 L. J., Ch. 96; 1 L. T. 506; 8 W. R. 166; 6 Jur., N. S. 385.*

The word "outgoings," in a covenant to bear burdens "is of the largest possible signification." Per *BRETT, L. J., Budd v. Marshall, 50 L. J., Q. B. 26.* But at the same page *BRAMWELL, L. J.,* speaks of the word as "an awkward one;" "but the word 'outgoings' is certainly as strong as duties." Per *GROVE, J., Aldridge v. Ferne, 55 L. J., Q. B. 588.*

A paving assessment under the Manchester General Improvement

act, 1851, is an "outgoing" within a contract for sale of a house which provides that "all rents, rates, taxes, and outgoing shall be received and discharged by the vendor up to the time of completion." *Midgley v. Coppock, 4 Ex. D. 309.* So also is a liability for works done by a local board and chargeable on an owner by virtue of a statute, although the assessment by the board may not be made until after the date fixed for completing the contract for sale. *Re Furtado v. Jeffries, 27 Sol. J. 466.* *Secus,* of expenses of paving under vendor's implied covenant. *Egg v. Blayney, 21 Q. B. Div. 107.* But where, in a deed of gift, the tenant for life was to pay all "outgoings" during his life, it was held that that word did not comprise expenses of making up a road abutting on the premises comprised in the deed, which work had been done by a local board in the lifetime of the tenant for life and on his non-compliance with their notice, but which expenses had not been assessed until after the death of the tenant for life. *Re Boor, 58 L. J., Ch. 285.* See, however, *Re Bettsworth & Richer, 57 L. J., Ch. 749; 37 Ch. D. 535.*

On a sale of leaseholds in which all "outgoings" are to be cleared by the vendor to date of completion, the vendor must pay a proportionate part of the rent reserved by the lease under which the premises are held. *Lawes v. Gibson, L. R., 1 Eq. 135.*

A bequest of leaseholds "free of all outgoing and payments except the annual and other rent" payable in respect of it, means that the testator's estate must pay the rent, taxes, and other payments in respect of the property up to his death; and after that time the legatee takes the property subject to the rents and the liability to perform the covenants. *Re Taber, Arnold v. Kayess, 51 L. J., Ch. 721.*

2. *Bouv. L. Dict.*

"I apprehend that it has been settled from ancient times, that an out-house must be that which belongs

to a dwelling house, and is in some respects parcel of such dwelling house." TAUNTON J., in *Rex v. Haughton*, 5 Car. & P. 555.

In American Statutes.—Any house necessary for the purposes of life, in which the owner does not make his constant or principal residence, is an out-house. *State v. O'Brien*, 2 Root (Conn.) 516. See also *State v. Powers*, 36 Conn. 79.

A barn not connected with the mansion house, but standing alone several rods distant therefrom, is an out-house. *State v. Brooks*, 4 Conn. 446.

An out-house is a building appurtenant to some main building or mansion house; and whether it be parcel of it or not, depends upon its particular location, or its connection with such mansion house. It is plain, that a school house is not of this description; and, therefore, is not an out-house, in legal signification. *State v. Bailey*, 10 Conn. 143.

By the phrase, out-house where people resort, in the act to suppress gaming, is meant any house standing out and apart from houses used as dwellings or business houses. *Wheelock v. State*, 15 Tex. 260.

An "out-house where people resort," to be within the purview of the statute against gaming, must be one to which people have resorted on more than one occasion, or one where more persons than those actually engaged in gaming are assembled on the particular occasion when the offence is charged to have been committed. *State v. Norton*, 19 Tex. 102.

A tobacco barn is not an "out-house, belonging to or used with any dwelling house," within *Kentucky Gen. St.*, ch. 29, art. 5, § 4; and it is error to instruct the jury that, if they believe defendant broke and entered such barn, and stole tobacco therefrom, to assess the penalty prescribed by said section. *White v. Commonwealth*, 87 Ky. 454.

In English Statutes.—Within the meaning of 7 & 8 Geo. IV., ch. 30, § 2, an open shed in a farm-yard, composed of upright posts supporting pieces of wood laid across them, and covered with a straw-roof, was held to be an out-house. *Rex v. Stallion*, 1 Mood. 398.

An open building in a field out of sight of the owner's house, though boarded and covered, is not such an

out-house. *Rex v. Ellison*, 1 Mood. 336.

So a cart hovel, consisting of a stubble roof supported by uprights, at a distance from other buildings, is not an out-house. *Rex v. Parrott*, 6 Car. & P. 402.

A building separated from the house by a passage, used as a school room, but within the curtilage, is an out-house, within 9 Geo. I., ch. 22, § 1, which provides that the owner of an out-house may maintain an action against a hundred for an injury sustained by him in consequence of maliciously setting fire to the same. *Rex v. Winter, Russ. & R.* 295.

So setting fire to paper only, in a drying loft belonging to a paper mill, no part of which was burned, is not setting fire to an out-house, within the same statute. *Rex v. Taylor*, 1 Leach 49.

Nor is a building intended for and constructed as a dwelling house, but which had not been completed or inhabited, and in which the owner had stored straw and agricultural implements, an out-house within the meaning of this statute. *Elsmore v. St. Briavells*, 8 B. & C. 461.

A building had been built for an oven to bake bricks, but afterwards was roofed and a door put to it. In this place the prosecutor kept a cow; adjoining to it, but not under the same roof, was a lean-to, in which another person kept a horse. Neither the prosecutor nor the person of whom he rented this building had any house or farm-yard near it, nor did any wall connect it with any dwelling-house; the nearest dwelling being one hundred yards off, and not belonging to either the prosecutor or his landlord. It was held that the building was neither a stable nor an out-house, and that, if a person set it on fire (the lean-to not being burned) he was not indictable for arson. *Rex v. Haughton*, 5 Car. & P. 555.

A person was indicted for setting fire to an out-house. The building set on fire was a thatched pigsty, situate in a yard in the possession of the prosecutor, into which yard the back door of his house opened, and which yard was bounded by fences and by other buildings of the prosecutor, it was held that this pigsty was an out-house, within 7 Wm. IV. & L. Vict., ch. 89, § 3. *Rex v. Jones*, 1 Car. & K. 303.

OUTLAWRY—OUTLAW.—1. An ancient proceeding, putting a man out of the protection of the law, so that he became incapable of bringing an action for redress for injuries, and forfeited all his goods and chattels to the king. Outlawry was a process which might be resorted to against an absconding defendant in a civil or criminal proceeding. An outlawry for treason or felony operated as a conviction and attainder; and, anciently, a person outlawed might be killed by anyone who should meet him: but as early as the reign of Edward III, it was held that no man was entitled to kill him except the sheriff, having lawful warrant.¹ In the *United States*, outlawry in civil cases is unknown, and if there are any cases of outlawry in criminal cases they are very rare.²

2. Referring to a claim as a debt due on a promissory note, "outlawed" means barred by the statute of limitations.³

OUTRAGE.—A grave injury; a serious wrong. This is a generic word which is applied to everything which is injurious in a great degree to the honor or rights of another.⁴

A first count charged the firing of a certain building, used by O for carrying on his trade as a builder; and other counts laid the arson as of a stable, an out-house and a stack of haulm. It was proved that some haulm had been carted from a field and stacked in a building originally intended for a stable, but afterwards divided into three parts by a wall, which reached only to the eaves. One part was used as a stable, and the part fired contained the haulm and a lot of tiles of the prosecutor, who was a builder. The fire had been kindled on the haulm. It was held that the building was improperly described as an out-house, a shed or a stable. *Reg. v. Munson*, 2 Cox Cr. Cas. 186.

1. Abb. L. Dict. See also 3 Black. Com. 284; 4 Black. Com. 319; *Respublica v. Doan*, 1 Dall. (U. S.) 86; *Respublica v. Steele*, 2 Dall. (U. S.) 92.

The word "outlaw" has a strict technical signification, and means a person who is put out of the law, that is deprived of its benefit and protection. In earlier times he was called a friendless man—one who could not by law have a friend. Outlaw was *caput genere lupinum*, by which it was meant that anyone might knock him on the head as a wolf, in case he would not surrender himself peaceably when taken. He forfeited everything he had whether it was in right or possession. *Drew v. Drew*, 37 Me. 389.

Outlaw (as used in *Alabama* act of

Dec. 28th, 1868, § 1, declaring counties liable for persons killed by an outlaw, etc.), does not mean an outlaw in the strict sense of the common law use of the term—i. e., a person who has been adjudged by a regular judicial proceeding to be out of the protection of the laws. No such proceeding is known to the laws of *Alabama*. It is used in the act in a loose sense, having reference to the disturbed condition of society at the time, and includes the lawless and disorderly persons then addicted to roving through the State in disguise, and committing habitually acts of violence and outrage. *Dale Co. v. Gunter*, 46 Ala. 118, 137.

2. Bouv. L. Dict.; And. L. Dict.

3. *Drew v. Drew*, 37 Me. 393; *Waters v. Tompkins*, 2 Compt. M. & K. 726; *Curtis v. Goodenow*, 24 Mich. 22.

4. Bouv. L. Dict.; *McKinley v. Chicago etc. R. Co.*, 44 Iowa 314.

Outrage and Indignity.—In estimating damages in cases of assault and battery, mental anguish or pain, as distinguished from physical suffering, must be included in the meaning of outrage and indignity. *McKinley v. Chicago etc. R. Co.*, 44 Iowa 314.

Outrageous.—In *Thompson on Trial*, § 1075, it is said, that what is meant by the use of the words "insupportable" and "outrageous," in a statute relating to divorces, is a question of law; but that the existence and truth of the facts which amount to such outrages

OUTSTANDING—OUTWARD MARK—OVER.

OUTSTANDING.—(a) Not gathered or harvested; as, an outstanding crop.¹

(b) Due, but not paid; overdue; uncollected; as, an outstanding draft, bond, premium, or other demand or indebtedness.²

(c) Existing as a distinct interest in lands; as an outstanding title.³

OUTWARD MARK.—See note 4.

OVER.—The words “over” and “under,” as applied to the surface, are not precisely opposites. A person passes over a road if he crosses it on the surface, as well as when he crosses above it, on a bridge; but he cannot be said to pass under it, unless on another surface at a lower level.⁵

are for the jury. *Byrne v. Byrne*, 3 Tex. 336.

1. And. Law Dict.

Outstanding Crop.—It is “outstanding” from the day it commences to grow until gathered and taken away. *Sullins v. State*, 53 Ala. 474. See also CROP, vol. 4, p. 887.

2. And. L. Dict.

A bank note “in circulation,” means a note which is passing from hand to hand as a negotiable instrument; and when returned to the bank (or any of its branches) it ceases to be “in circulation” or “outstanding.” *Bank of Africa v. Colonial Government*, 13 App. Ca. 215.

Outstanding and Bearing Interest.—See *Gardillo v. Weguelin*, 25 W. R. 623; 5 Cent. L. J. 45.

Outstanding Liabilities.—A stipulation by the vendee of a newspaper to pay “all of the outstanding liabilities” of the paper will not make the vendee liable for the damages for libel, subsequently recovered against the vendor, in a suit pending when the sale of the paper was made. *Perret v. King*, 30 La. Ann. 1368; 31 Am. Rep. 240.

3. And. L. Dict.

4. For a tradesman to place on a wire blind to a front window such letters as “H. B. & Co., late S. B. & Co.,” with similar letters on a roller-blind and on a brass plate fixed on the front railings, is to make an “outward mark or show of business” within a restrictive covenant in a lease, which stipulated that the lessee should not “affix or permit any outward mark or show of business” to be affixed to the premises. *Evans v. Davis*, 10 Ch. D. 747.

5. Abb. L. Dict. A statutory power to lower a turnpike road, so as to have

a railroad pass over it, includes power to carry the turnpike across the railroad on the same level. *Newburyport Turnpike Corp. v. Eastern R. Co.*, 23 Pick. (Mass.) 326; *Boston etc. R. Co. v. Mayor etc. of Lawrence*, 2 Allen (Mass.) 109.

In a statute which grants authority to railroads to construct their roads “over or under” the highway, the word “over” is synonymous with the word “upon,” and has the same meaning and effect. *State v. Davenport etc. R. Co.*, 47 Iowa 507; *Milburn v. Cedar Rapids etc. R. Co.*, 12 Iowa 246; *Chicago etc. R. Co. v. Mayor of Newton*, 36 Iowa 299; *Gear v. Chicago etc. R. Co.*, 43 Iowa 83.

Over, Under, Through, or Across the Streets.—The *New York* Rapid Transit act (Laws 1875, ch. 606) providing for the construction of railways “over, under, through, or across the streets,” authorizes the construction, under its provisions, of surface roads, although animal power as a motor is by the terms of the act excluded. *In re New York Cable Co. v. New York*, 104 N. Y. 1.

Where it was enacted that no projection of any kind should be made in front of any building “over or upon the pavement,” *held*, that an oriel window which projected over the pavement of a street, but did not interfere with the use of the footpath, but only with the access of light and air to the street, was not within the provision, as the section of the act had exclusive reference to footways. *Goldstraw v. Duckworth*, 49 L. J. R., M. C. 73.

“Over” does not necessarily mean vertically above. And. L. Dict.; *Patterson v. State*, 12 Tex. App. 222.

Overflowing.—The daily rising of the

OVERDRAW.—To obtain more money from one's bank or depository, by bill, check, or order, than the state of the account authorizes.

Bouvier defines "overdraw" as meaning to draw bills or checks upon an individual, bank or other corporation, for a greater amount of funds than the party who draws is entitled to. But we do not understand that to draw a bill or check, even though it is presented, constitutes overdrawing, unless money is paid out upon it in excess of the balance. Certainly, a bank account is not called overdrawn, unless too much has been paid out upon it. To draw one's check for too much, which the bank refuses to pay, may be an attempt to overdraw—nothing more.¹

OVERDUE.—(See also *BILLS AND NOTES*, vol. 2, p. 313).—A bill, note, bond or other contract for the payment of money at a particular day, when not paid upon the day, is overdue.²

tide is not an "encroachment" or "overflowing" of the sea, within Stat. 16 & 17 of Vict., ch. 34, § 37. *Hesketh v. Bray*, 58 L. T., N. S. 313, 316.

Where a railroad company charged a certain rate per mile and every part of a mile was accounted a whole mile, it was held that each mile was to be considered as a unit in determining the "portion" of the railway over which the traffic of two different coal masters passed, and that where the ridings of two collieries joined the main line at different distances from the terminus of their respective journeys, but were within the same mile from it, the traffic of both passed "over the same portion of the railway" within the meaning of a statute. *Oflats Trustees v. G. & S. W. R. Co.*, 26 Sc. L. Rep. 386.

Over that Sum.—A constitutional provision that the fees of clerks of the courts of record shall not exceed \$2,500, and a further provision that the surplus "over that sum" shall be paid into the treasury of the State, is no restriction upon the legislature, so far as fixing the salaries of clerks is concerned, save in the one particular that it shall not exceed \$2,500. *In re Burris*, 66 Mo. 448.

1. Abb. L. Dict.

The term overdraw is not recognized or adopted by the lexicographers; but it has, nevertheless, a definite and well understood meaning. Money is drawn from the bank by him who draws the check, not by him who receives the money; and it is drawn upon the account of the individual by whose check it is drawn, though it be paid to and for the benefit of another.

No one can draw money from the bank upon his own account, except by means of his own check or draft, nor can he overdraw his account with the bank in any other manner. *State v. Stimson*, 24 N. J. L. 478, 484.

As between a banking firm and a depositor not a member of the firm, an overdraft is a loan. The payment of the latter's check when no funds stand to his credit is an advance by the firm of its own money, for the repayment of which, with the lawful interest, the customer is liable. It is payable absolutely and in full, without abatement or contingency, and so constitutes a loan in all its characteristics. If more than the legal rate of interest is agreed upon and paid, the borrower loses the excess above such legal rate, and if the contract stands and is carried out, the loss is absolute and certain. But the situation changes when the person making the overdraft is a member of the firm which advances it. *Payne v. Freer*, 91 N. Y. 43.

An overdraft by an agent, of his principal's account, with the knowledge of the cashier of the bank, the credit being extended to the principal, amounts to a simple loan of money, and whether the cashier had authority to extend such accommodation or not, his authority cannot be questioned in an action by the bank to recover the money. *Union Min. Co. v. Rocky Mt. National Bank*, 2 Colo. 248.

2. Bouv. L. Dict.

The term "overdue," as applied to a demand bill of exchange, is used in different connections, in each of which it has a different meaning.

OVERPLUS—OVERRATE—OVERSEER—OVERT.

OVERPLUS.—What is left beyond a certain amount; the residue; the remainder of a thing; the same as surplus.¹

OVERRATE.—To “overrate,” “in its strictest signification, means a rating by way of excess, and not one which ought not to have been made at all.”²

OVERSEER.—See POOR LAWS; ROAD OFFICERS.

OVERT—(See also CRIMINAL CONSPIRACY, vol. 4, p. 589; TREASON).—Open, public. An overt act signifies an open or manifest act, such as can be manifestly proved.³

Sometimes it is used in reference to a right of action against a drawer or endorser. In that connection a bill is not overdue until presented to the drawee for payment, and payment refused. Sometimes the term is used in considering whether an endorser has been released by a failure of the holder to present the bill for payment, and to give the endorser notice of its dishonor within a reasonable time. Again, the term is applied to a bill which has come into the hands of an endorser so long after its issue as to charge him with notice of its dishonor, and thus subject it in his hands to the defenses which the drawer had against it in the hands of the assignor. *La-Due v. First Nat. Bank*, 31 Minn. 38.

The endorsement of a note overdue is equivalent to making a new note payable on demand. *Morgan v. United States*, 113 U. S. 499. See also **BILLS AND NOTES**, vol. 2, p. 380.

1. *Bouv. L. Dict.*

The overplus may be certain or uncertain. It is certain, for example, when an estate is worth three thousand dollars, and the owner asserts it to be so in his will, and devises of the proceeds one thousand dollars to A, one thousand dollars to B, and the overplus to C, and in consequence of the deterioration of the estate, or from some other cause, it sells for less than three thousand dollars, each of the legatees, A, B and C, shall take one-third. The overplus is uncertain where, for example, a testator does not know the value of his estate, and gives various legacies, and the overplus to another legatee; the latter will be entitled only to what may be left. *Bouv. L. Dict.*; *Poge v. Leahingwell*, 18 Ves. 466.

“Overplus,” as used in 2 W. & M. sess. 1, ch. 5, § 2, means what remains after payment of the rent and the

reasonable charges of the distress, *Lyon v. Tomkies*, 1 M. & W. 603; *Knight v. Egerton*, 7 Ex. 407.

A bequest of “overplus” usually includes whatever shall turn out to be the overplus. *Shaw v. Bull*, 12 Mod. 593; stated and commented on, 1 Jarm. 729; *Page v. Leapingwell*, 18 Ves. 463; *Beverly v. Attorney General*, 6 H. L. Cas. 310.

2. *Per PARKE, B., Allen v. Sharp*, 2 Ex. 352. But that learned judge, and the court, held that the word in § 24, 43 Geo. III, ch. 99 (giving appeal for an “over-rating”), had a far wider interpretation.

3. *Brown's L. Dict.* See also *Jones v. Van Zandt*, 5 How. (U. S.) 215, 228.

An attempt to steal, accompanied by overt act or acts towards its commission, constitutes an attempt to commit larceny under the law. The act or acts done towards the commission of an offense, in order to constitute an attempt, must be such as will apparently result, in the usual and natural course of events, if not hindered by extraneous causes, in the commission of the crime itself; and if the means are apparently adapted to the end, whether those means are or are not actually such as to be necessarily successful if employed, it is sufficient. Mere preliminary preparations are not the overt acts required. *Sipple v. State*, 46 N. J. L. 197.

A lease, under a power requiring accustomed clauses, was objected to because, in the clause of re-entry, if there were no distress on the premises, it omitted to say (as previous leases had said), no “overt” distress; but the court decided against the objection, and (per DENMAN, C. J.) said: “The law recognizes a difference between a pound overt and a pound covert; but as to distress, the law does not affix any meaning to the word ‘overt.’ Is

OVERTAKING VESSEL—OVERWHELMING PROOF.

OVERTAKING VESSEL.—See note 1.

OVERWHELMING PROOF.—In speaking of that “overwhelming proof,” which is said to be required before equity will correct a mistake of fact, it is said, “It cannot be disputed that proof sufficient to remove every doubt from the mind is in effect overwhelming, because it establishes the part sought to be proved; and no proof can usefully accomplish more than this result. In some of the States the expressions used by the courts are not so strong; and it is held that “the evidence of the mistake must be clear and satisfactory, leaving but little if any doubt of the mistake.”²

OWE—(See also DEBT, vol. 5, p. 143; DUE, vol. 6, p. 36; OWING).—The word owe implies a debt imposed by law for the satisfaction of which an action will lie.³

OWELTY.—Money paid or secured, by one co-tenant to another, to equalize the partition of their realty.⁴

OWING—(See also DEBT, vol. 5, p. 143; DUE, vol. 6, p. 36; OWNER;

‘overt’ to be confined to what may be seen walking over the lands and farmyard, without going into any enclosed buildings? Or does it extend to what may be seen by opening the outer doors of a house or other building, or what may be seen by opening inner doors, or by opening cupboards, chests, and boxes which are not concealed and have no locks, or various other shades of being less ‘overt’? Doe d. Douglas v. Lock, 4 L. J., K. B. 119; 2 A. & E. 705.

1. As to what is an “overtaking vessel” entitled to have lights exhibited by the vessel overtaken, SIR JAS. HANNEN said, in *The Essequibo*, 58 L. T., N. S. 597: “So far as the main (55 L. T., N. S. 15) has any bearing on the case, it simply amounts to this: I took what the court of appeal considered to be a mistaken view. In my definition of an overtaking vessel I thought that if the aftermost vessel was broadening, so as to indicate she was on another course from that of the overtaken vessel, she could not be considered to be an overtaking vessel. But the court of appeal, I think, perhaps fortunately for the safety of those navigating the seas, found that that was not a correct view, but that it was rather a practical question, if one vessel was behind the other, either on a parallel or a slightly divergent course, whether she was an overtaking vessel, and whether she stood in need of that assistance which this rule was intended to give.” A

ship is “being overtaken by another,” within art. 11, Regulations for Preventing Collisions at Sea, when the other vessel is going faster than, and coming nearer to her in such a position that her lights cannot be seen by the approaching ship. *The Main*, 11 P. D. 132; 2 T. R. 689, and the cases there cited.

In the navigation of a narrow river or arm of the sea, in determining whether a vessel is “overtaking” or “crossing,” within the meaning of navigation rules,” regard must be had to the general direction of the vessels, whether up or down the river, and not altogether to the courses on which they may be running at a particular moment. If the vessels are going up the river, the one down the river should be considered an overtaking vessel, regardless of their courses. *Alldridge v. Clausen*, 6 N. Y. St. Rep. 31.

2. *Yellott, J.*, in *Bond v. Dorsey*, 65 Md. 310. And see *Miner v. Hess*, 47 Ill. 170; *Heavenridge v. Mondy*, 49 Ind. 434; *Bergin v. Giberson*, 26 N. J. Eq. 72.

3. *Succession of Guidry*, 40 La. Ann. 671.

Owes and Is Indebted.—There is no difference in their legal effect between the words “is held and firmly bound,” and the words “owes and is indebted.” *Shattuck v. People*, 5 Ill. 477.

4. And. L. Dict. See also PARTITION.

OWE).—Something unpaid. A debt, for example, is owing while it is unpaid, whether it be due or not.¹

OWN; OWNED.—(See also OWNER).—To own is to hold as property; to have a legal or rightful title to; to have, to possess.²

1. Bouv. L. Dict.

Money may be owing which is not due. A man owes the money represented by his note; but it is not due until the note matures. And. L. Dict. *Coquard v. Kansas City Bank*, 12 Mo. App. 261, 265. See, however, *CHATTEL MORTGAGE*, vol. 3, p. 188.

As soon as a judge at trial orders that judgment should be entered for a certain amount, a debt arises which is capable of being attached under garnishee proceedings as a debt "owing or accruing." *Holtby v. Hodgson*, 61 L.T., N. S. 297.

A call was held "owing" immediately after it was made, though the shares were forfeited before the day appointed for its payment, in *Faure Electric etc. Co. v. Phillipart*, 58 L. T., N. S. 525.

The income arising from a trust fund and payable half-yearly to the *cestui que trust*, held not a debt "owing or accruing," which could be attached before it came into the hands of the trustees. *Webb v. Stenton*, 52 L. J. R., Q. B. 584.

Notwithstanding the Apportionment act, 1870 (33 & 34 Vict., ch. 35, § 2), a testamentary direction to forgive a tenant "all rent or arrears of rent which may be due and owing from him at the time of my decease," only extends to the rent due at the quarter-day immediately preceding the testator's death. *Re Lucas*, 55 L. J., Ch. 101; 54 L. T. 30.

Accruing or Owning.—See *ACCRUE*, vol. 1, p. 142, n.

Due and Owning.—"I think it very likely that the words, 'sums of money due and owing,' might extend beyond what were strictly debts. It might possibly, under the particular circumstances of certain wills, be held to include any sum which could be recovered either at law or in equity." Per *MELLISH, L. J.*, *Martin v. Hobson*, L. R., 8 Ch. 401. But in that case it was held that such phrase did not comprise an unascertained share in certain partnership assets to which the testatrix was entitled as one of the next kin of her son.

The salary of a medical or other offi-

cer cannot, before it is actually payable, be attached by a garnishee order under the English county court rules of 1875, for it is not "a debt due, owing or accruing to the judgment debtor." *Jones v. Thompson*, 27 L. J., Q. B. 234; *Hall v. Pritchett*, 3 Q. B. Div. 215; 28 Moakes E. R. 194.

2. Baltimore etc. R. Co. v. Walker, 45 Ohio St. 577.

Own Dwelling Place.—See *DWELLING PLACE*, vol. 5, p. 105.

Own Hand.—See *LIFE INSURANCE*, vol. 13, p. 642.

Own Name.—Where a statute provided that if any person transacts business in his "own name," all the property used or acquired in such business shall be liable for his debts, it was held that one doing business under a fictitious name, but who held himself out as the proprietor, was within the provision. *Hamblet v. Steen*, 65 Miss. 474.

Own Right.—The phrase "holder of shares in his own right" held to mean a beneficial holder, and to include one who had mortgaged his shares, but not one who was put on the register of members, as holder for some one else. *Bainbridge v. Smith*, 5 Times L. Rep. 375; 33 Solic. Journ. 414.

Own Premises.—A statute prohibiting any person from selling wine, etc., without a license as dram-shop keeper, except a wine-grower selling on his "own premises," means that he may sell at the place of production of manufacture only. *State v. Wyl*, 55 Mo. 67.

Under *Mansf. Dig. Arkansas*, § 1907, making the carrying of weapons a misdemeanor, except upon the defendant's "own premises," the common stairway of a building, on the upper floor of which defendant and other persons rented and occupied offices for business purposes, is a public place, and cannot be claimed by defendant to be his own premises. *Clark v. State*, 49 Ark. 174.

Own Use—Own Sole Use.—For the purpose of giving a married woman a separate use, "own" does not seem to give any additional force to "sole." *Re Tarsey, L. R.*, 1 Eq. 561.

OWNER—(See also PROPRIETOR ; OCCUPANCY ; OCCUPANT).—Owner is he who has dominion of a thing real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases ; even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.¹

Owner of Real Property.—The word owner includes any per-

A limitation to A, "his executors or administrators, to and for his and their own use and benefit," does not, give the executors or administrators any beneficial interest; they simply take the property as part of A's estate. *Hames v. Hames*, 2 Keen 646; *Meryon v. Collett*, 8 Beav. 386; 14 L. J., Ch. 369.

A bequest in *Pennsylvania* to a *feme covert* "for her own use" is equivalent to a bequest for her sole and separate use." *Jamison v. Brady*, 6 S. & R. (Pa.) 466, cited in *Evans v. Kenorr*, 4 Rawle (Pa.) 68.

Where lands were given by will to a wife to keep for her own use so long as she keeps my name, this was held a gift during widowhood, and therefore an estate for life determinable on a second marriage. *Long v. Paul*, 46 Leg. Int. (Pa.) 456.

In Her Own Right.—A conveyance of land to a married woman "in her own right" is not a sufficient conveyance of it "to her sole and separate use, free from the interference or control of her husband," within the *Massachusetts* statute of 1845, ch. 208, § 3; *Merrill v. Bullock*, 105 Mass. 486.

On Their Own Land.—An act authorizing a corporation to erect a dam "on their own land" does not limit or designate the place of building; its intent is to prevent any inference that the legislature intended to authorize the corporation to take the land of others for that purpose. *Parker v. Cutler Mildam Co.*, 20 Me. 353; 37 Am. Dec. 56.

Owned.—Where there is a provision that "such property as may be necessary for carrying out the design of the seminary in the best manner while used exclusively for such purposes, shall be free from all taxation," it was held that it was not necessary for the property to be owned by the seminary. *County Comrs. v. Colorado Seminary*, 12 Colo. 497.

Owning the Track.—A railroad company which has the possession and

control of a railroad in this State, and is managing and operating the same as the lessee thereof, is one "owning the track" of such railroad within the meaning of § 3333, *Ohio Rev. St.*, which provides that "when the tracks of two railroads cross each other, or in any way connect at a common grade, the crossing shall be made and kept in repair, and watchmen maintained thereat, at the joint expense of the companies owning the tracks." *Baltimore etc. R. Co. v. Walker*, 45 Ohio St. 577; 35 Am. & Eng. R. Cas. 271. The court by WILLIAMS, J., said: "The terms 'owner' and 'owning' depend somewhat for their signification upon the connection in which they are used. To own is defined 'to hold as property; to have a legal or rightful title to; to have, to possess;' and an owner is, 'one who owns—a rightful proprietor.' An owner is not necessarily one owning the fee simple, or one having in the property the highest estate it will admit of. One having a lesser estate may be an owner; and, indeed, there may be different estates in the same property vested in different persons, and each be an owner thereof. In the construction of statutes, to ascertain the proper meaning of such terms, regard must be had to their various provisions, and such effect given as these provisions clearly indicate they were intended to have, and as will render the statute operative."

1. Bouv. L. Dict., followed in *Dow v. Gould*, 31 Cal. 649.

"The word 'owner' has no technical meaning, and, being *nomen generalissimum*, should, especially when used in a remedial statute, be construed liberally in favor of the parties whom it is the duty and intention of the legislature to protect." *Hare's Am. Const. Law*, 355, citing *Railroad Co. v. Boyer*, 13 Pa. St. 497, 499; *Watson v. New York Cent. R. Co.*, 47 N. Y. 161; *Moeller v. Harvey*, 16 Phila. (Pa.) 66; *Schott v. Harvey*, 105 Pa. St. 222.

son who has the usufruct, control, or occupation of the land, whether his interest in it is an absolute fee or an estate less than a fee.¹

Under the charter of the city of Rochester conferring power upon the common council "to require the owners or occupants of any mill-race within the said city to cover the same with bridges or arches," etc., the expense must be defrayed by those who use a mill-race for propelling the machinery in their mills, and an assessment of the expense upon the owners or occupants of lots adjoining a street through which a race runs, and who were not benefited by the race, or authorized to take water therefrom, is void. *People v. Common Council of Rochester*, 54 N. Y. 507.

A Bankrupt.—Under a statute which enacts that the "owner" may, within a time named, redeem land sold for taxes, a redemption may properly be made by a person who has been decreed a bankrupt, the lands having been his. *Hampton v. Rouse*, 22 Wall. (U. S.) 263.

Owner Implies Title.—Where an agreed statement of facts stated that A owned the land in question at a certain date, it was claimed that there was a distinction between owner of the land and one who had a title to it. The court refused to sustain such a distinction, saying, "when the word 'owner' is used with reference to property, it means one who has title." *Frank v. Arnold*, 73 Iowa 370.

"Owner's Risk" (in a contract for the transportation of goods) imports that the owner assumes the risks arising from the ordinary dangers of transportation by the means employed, which the reasonable and ordinary care of the carrier might be insufficient to prevent, and that the latter is liable only for those dangers which, with ordinary care and prudence, might be avoided. *French v. Buffalo etc. R. Co.*, 4 Keyes (N. Y.) 108.

Goods carried at "owner's risk," means at the risk of the owner, minus the liability of the carrier for the misconduct of himself or servants. Per *BRAMWELL, L. J.*, *Lewis v. G. W. R.*, 47 L. J., Q. B. 134; 3 Q. B. Div. 195. And a stipulation that goods shall be carried "at owner's risk," only exempts the carrier from the ordinary

risks of the transit and does not cover the carrier's negligent delay. *Robinson v. G. W. Ry.*, 35 L. J., C. P. 123; even though less than the usual freight be charged. *D'Arc v. Lond. & N. W. R.*, L. R., 9 C. P. 325. See further, *Stewart v. Lond. & N. W. R.*, 33 L. J. Ex. 199.

In *Dixon v. Richelieu Nav. Co.*, 15 Ont. App. 647; 39 Am. & Eng. R. Cas. 426, the court by *HAGARTY, C. J. O.*, says: "It seems conceded that 'owner's risk' alone would protect the carriers against all but wilful neglect or misconduct or unreasonable delay. *Citing McCauley v. Fueness*, L. R., 8 Q. B. 57; *Gallin v. London & N. R. Co.*, L. R., 10 Q. B. 212; *Robinson v. G. W. R. Co.*, L. J., C. P. 123; *D'Arc v. Lond. & N. W. R. Co.*, 9 C. P. 325.

Part Owner.—"Part owners," a term of common use in the law to denote a class of persons distinct from partners, who own property jointly, but in a different manner and by a different tenure. *Breck v. Blair*, 129 Mass. 127.

Under a statute exempting property of a given description, owned by a debtor, his interest in property of which he is part owner is exempt. *Radcliff v. Wood*, 25 Barb. (N. Y.) 52.

The primary relationship of part owners of ships to each other is that of tenants in common of chattels. *Scull v. Raymond*, 18 Fed. Rep. 549.

Unassigned Dower.—A widow to whom dower has never been assigned is not "the owner" of any of the land in which she is entitled to dower, within the meaning of the *Kansas Mechanic's Lien act*. *Ermul v. Kullok*, 3 Kan. 499.

Wife's Separate Estate.—Owner (as used in the *Ohio* statute exempting property from execution) does not apply to the husband occupying the "separate property" of the wife as a homestead. *Davis v. Dodds*, 20 Ohio St. 473. But see *Dwenell v. Edwards*, 23 Ohio St. 603.

1. *Lozo v. Sutherland*, 38 Mich. 171, in which case it was said that "the word 'owner,' as used in the law has generally been treated as including all persons who had a claim or in-

terest in the property, although the same might be an undivided one or fall far short of an absolute ownership." See also *McKee v. Wilcox*, 11 Mich. 358; *Orr v. Shraft*, 22 Mich. 261; *Choteau v. Thompson*, 2 Ohio St. 123; *Tyler v. Jewett*, 82 Ala. 99.

The "owner" or "proprietor" of a property is the person in whom (with his or her assent) it is for the time being beneficially vested, and who has the occupation or control or usufruct of it; *e. g.*, a lessee is, during the term, the owner of the property demised. *Eglinton v. Norman*, 46 L. J., Q. B. 559. See also *Chauntler v. Robinson*, 4 Ex. 163; *Lister v. Lobley*, 7 A. & E. 124; *Cook v. Hamber*, 31 L. J., C. P. 75.

"Owner," in the *Ohio Mechanics' Lien* law, is not limited to an owner in fee, but includes also an owner of a leasehold estate. If the ownership is in fee, the lien is on the fee; if it is of a less estate, the lien is on such smaller estate. *Choteau v. Thompson*, 2 Ohio St. 114.

Lessees of land for years, with covenant for renewal, have such an interest in the land as will bring them within the jurisdiction of a court authorized to fix the compensation a railroad shall pay to "owners." *North Pennsylvania R. Co. v. Davis*, 26 Pa. St. 238.

Under the *Metropolitan Building act*, 1855, 18 & 19 Vict., ch. 122, §§ 3, 73, which provides that commissioners shall give notice to the "owner or occupier," when a building becomes dangerous, to take down, secure or repair the same, etc., the lessee for years, and not the lessor, of a chapel or house, is its "owner." *Mourilyan v. Labalmondiere*, 30 L. J., M. C. 95; 1 E. & E. 533; *Hunt v. Harris*, 34 L. J., C. P. 249; 19 C. B., N. S. 13.

And, within the same act, the owner of the land in fee simple, upon which another has built under a building agreement, is not the "owner." *Carr v. Stringer*, E. B. & E. 123.

Where it was enacted that the "owners, superintendents or managers of factories" should provide fire escapes for their employees, it was held that by "owner" was meant the lessee in possession, the person operating such factory. *Schoot v. Harvey*, 105 Pa. St. 228. See also *Moeler v. Harvey*, 40 Leg. Int. (Pa.) 78; *Kelley v. O'Conner*, 42 Leg. Int. (Pa.) 238.

A corporation leased land for the

term of ninety-nine years, renewable forever, at a fixed annual rent, covenanting that the lessee should pay all taxes levied or assessed on said land. It was held that the lessee, and not the corporation, was the "owner" of the real estate, within the meaning of the word in the established tax system of *Maryland*. *Mayor etc. of Baltimore v. Canton Co.*, 63 Md. 218.

"The word 'owner' under homestead statutes has been construed liberally, and never limited to owner in fee." *Burns v. Keas*, 21 Iowa 263.

Where a statute provides that a railroad corporation before entering upon any lands for the purpose of construction shall give notice to the owner thereof in writing that the right of way over such lands is required, and if the owner shall not, within the period of thirty days, signify his refusal or consent, it shall be presumed that such consent is given, etc., it was held that the word "owner" was not used in the sense of the holder of the legal title, but rather in the sense of the one who has the control of the land. *Tompkins v. Augusta etc. R. Co.*, 21 S. Car. 420; *Tutt v. Port Royal etc. R. Co.*, 28 S. Car. 388.

Where the purchaser of a piece of land covenanted with the vendors, and also with the "owners or owner of any other land" to which the benefit of the covenant extended, not to carry on certain trades on the purchased land, and afterwards began to carry on one of such trades there, held that a lessee of a portion of the land entitled to the benefit of the covenant was an "owner" of the land within the meaning of the covenant, and entitled to an injunction to restrain the breach. *Taite v. Gosling*, Eng. High Ct. Chy. Div. 27 W. R. 394. See also 8 Cent. Law J. 462.

The owner of a private road, entitled under 8 & 9 Vict., ch. 20, § 54, to recover penalties for its interruption, is the person who, for the time being, owns such road in possession. *Mann v. Great Southern etc. R. Co.*, 9 Ir. C. L. R. 105; *Loyd on Compensation* (5th ed.) 229. See also *Woodward v. Billencay*, L. R., 11 Ch. D. 214; 27 Moakes Eng. R. 478.

The words "owner" and "proprietor," in a petition for dower, as descriptive of the estate of the deceased husband of the petitioner, are insufficient, because not describing an estate in fee simple or fee tail, which is

Under different circumstances, and having regard to the different objects of various statutes in which the word has been used, "owner" has been held to mean the person having the legal

necessary to support the petition. *Davenport v. Farrar*, 2 Ill. 314.

But see *Tompkins v. Horton*, 25 N. J. Eq. 289, where it was held that "owner," as used in a mechanics' lien law, is applied to the person owning the land as distinguished from a tenant or from a person who may be a mere possessor. So where a railway act imposed a penalty on a company for the interruption of any road, and in case of a private road, made the penalty "payable to the owner thereof," held, that the tenant of the farm over which the road passed could not sue for the penalty. *Collinson v. Newcastle & Darlington R. Co.*, 1 C. & K. 546.

So, in a provision for the paving of streets by means of assessments made upon the adjacent "owners," it was held that the word "owners" did not include tenants for life. *Mayor etc. of Baltimore v. Boyd*, 64 Md. 12. But in *Whyte v. Mayor etc. of Nashville*, 2 Swan (Tenn.) 364, it was held that a tenant in dower was an owner in a meaning of a like statute.

And, in *Wright v. Bennett*, 4 Ill. 258, the term "owner or ownership," as applied to land, was held to mean a fee simple estate. See also *Illinois Mut. Ins. Co. v. Marseilles Mfg. Co.*, 6 Ill. 267; *Jarrott v. Vaughn*, 7 Ill. 132.

"The word owner has no precise legal signification and may be applied to any defined interest in or to real estate." *Gitchell v. Kreidler*, 84 Mo. 476.

"If a declaration alleges *seisin in fee*, that would *prima facie* imply occupation, but is an allegation of ownership equivalent to a statement of *seisin in fee*. *PATTERSON, J.*, in *Russell v. Shanton*; 3 Q. B. 456. And in the same case it was decided that an allegation that a person was the "owner and proprietor" of a certain building did not import that he was the occupant."

In *Gilligan v. Board etc.*, 11 R. I. 258, it is held that a "tenant for life or years, or from year to year, is an owner," within the provisions of the statute which gave "compensation to abutting owners, for damages caused by a change of grade in highway." See also *Baltimore etc. R. Co. v. Walker*,

45 Ohio St. 577; 35 Am. & Eng. R. Cas. 277.

In Statutes Providing that Compensation Shall be Made "Owners" for the Exercise of the Right of Domain.—Under statutes providing that compensation shall be made to the owner of real estate for the injury to his estate from the taking of his property, under the right of eminent domain, as, for example, when taken by railroad and turnpike corporations for right of way, it has been held, that a tenant for life, for years or from year to year, was an "owner" within the meaning of such a provision. 1 Redf. on Railways (5th ed.) 361, pt. 3, § 83; *Watson v. New York Cent. R. Co.*, 6 Abb. Pr., N. S. (N. Y.) 91; *Marsden v. Cambridge*, 114 Mass. 490; *Winchester v. County Commrs.*, 114 Mass. 481; *Lister v. Lobby*, 7 A. & E. 124; *Johnson v. O. S. etc.*, 11 U. C., Q. B. 247; *Bourgouin v. Montreal*, 19 Lower Canada, Jur. 57; *Matter of New Reservoir*, 1 Buffalo Supr. Rep. 408; *Ginbel v. Stolte*, 59 Ind. 450; *Parks v. Boston*, 15 Pick. (Mass.) 198; *Turnpike Road v. Brosi*, 22 Pa. St. 29; *Brown v. Powel*, 25 Pa. St. 229; *Baltimore etc. R. Co. v. Thompson*, 10 Md. 76; *Enfield Toll Bridge Co. v. Hartford etc. R. Co.*, 17 Conn. 454; *Harrisburg v. Crangle*, 3 W. & S. (Pa.) 460; *Railroad Co. v. Boyer*, 13 Pa. St. 497. But a mere squatter upon public lands without right, is not an owner within such statutes. *Rosa v. Missouri etc. R. Co.*, 18 Kan. 124.

Owner of a Mine.—Where the "owner" of a mine is required by statute to furnish a cage for raising and lowering the men, which is to be provided with a spring catch to arrest the rapid descent of the car, and "owner" is defined to mean "the immediate proprietor, lessee or occupant," it was held that the object of the act was to extend the ordinary meaning of the word "owner" so as to make it for the purpose in view apply to a party operating the mine under contract with the actual owner, but that this would not acquit of negligence the actual owner who has engaged another to open his mine, reserving to himself the burden of furnishing the operating

title¹ or the one who has the equitable estate;²

machinery. *Fell v. Rich Hill Coal Min. Co.*, 23 Mo. App. 216.

1. Held to Mean Person Having Legal Estate.—As used in 1 *New York Rev. Stat.* 514, § 64, providing that no highway shall be opened or worked without a release by the owner of the land, or an assessment of his damages, owner means the person entitled to the legal estate in the land. *Smith v. Ferris*, 6 Hun (N. Y.) 553.

By "owner" is meant the person having some legal estate which the company proposes by the condemnation to acquire. Under the more comprehensive expression of persons interested, are included also other individuals having some independent right or interest therein, not amounting to an actual legal estate; such as an easement of a right of way, inchoate rights of dower curtesy, or encumbrances, such as by judgments or mortgages which are charges or liens on the legal estate. *State v. Easton etc. R. Co.*, 36 N. J. L. 181.

The owner of property, for the purpose of taxation, is the person having the legal title or estate thereto or therein, and not one who, by contract or otherwise, has a mere equity therein, or a right to compel a conveyance of such legal title or estate to himself. *Tracy v. Reed*, 38 Fed. Rep. 69.

"Owner" does not include a person who holds merely a parol contract for a conveyance of real property to him when he shall have paid the purchase-money, and who has paid a part, but not all of it. *Ruggles v. Nantucket*, 11 Cush. (Mass.) 433.

2. Person Having Beneficial or Equitable Estate.—Where a statute provided that, if a person shall hunt on the land of another, without first gaining the permission of the "owner," he shall be guilty of a misdemeanor, it was held that, within the meaning of the statute, a person having an equitable title alone was an "owner." *Wellington v. State*, 52 Ark. 266.

Owner—Owned (as used in the *Minnesota Homestead law*) include an equitable as well as a legal ownership. *Wilder v. Haughey*, 21 Minn. 101; *Hartman v. Munch*, 21 Minn. 107.

A statute providing for an appraisal, "upon the application of the owner or owners, their heirs or assigns," designates the person equitably entitled to

receive compensation, rather than the person having a legal estate in the land. *Danforth v. Suydam*, 4 N. Y. 66.

One who has sold lots and agreed to make a building-loan, does not continue to be "owner," within the meaning of the mechanic's lien laws, merely because the title is not, by the agreement of sale, to be transferred to the vendee until the completion of the proposed building. *Loonie v. Hogan*, 9 N. Y. 435; 2 E. D. Smith (N. Y.) 681.

The equitable owner of property held the "entire and sole owner" within the meaning of a policy. *Franklin Fire Ins. Co. v. Crockett*, 77 Lea (Tenn.) 725.

The "owner of the prior estate" who, under § 22, Fines and Recoveries act (3 & 4 W. IV, ch. 74), is the protector of a settlement, is "the real substantial owner of the estate—that is to say—the person who has the beneficial interest in the land." Per JAMES, L. J., *Re Dudson*, 8 Ch. D. 628. See also *Re Ainslie*, 54 L. J., Ch. 8; 51 L. T. 780; 33 W. R. 148.

A mere naked trustee of an equitable interest in lands is not entitled to notice of proceedings to acquire title thereto for public purposes, notice to the party having the equitable interest is sufficient. He is the "owner." *McIntyre v. Easton etc. R. Co.*, 26 N. J. Eq. 425.

One who holds the equitable title to land under a contract of purchase is the owner thereof, within the meaning of the homestead law. *Blue v. Blue*, 38 Ill. 9.

In an Insurance Policy.—A policy of insurance was conditioned to be void if the assured's interest was other than the entire, unconditional and sole ownership. The assured had contracted to purchase the buildings but had made no payments. The court said, he had the equitable title only, but he was, to all intents and purposes, the "owner" of the property. He was equitable owner in fee, and in respect to the insurance we think he may be said to be the entire, unconditional and sole owner. *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460. See also *Hough v. City F. Ins. Co.*, 29 Conn. 10; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Lorillard Ins. Co. v. McCul-*

the mortgagor¹ or the mortgagee.² And in more than one instance it has been held to include every one who has an interest in the land.³

lough, 21 Ohio St., 176; *Noyes v. Hartford Ins. Co.*, 54 N. Y. 668; *Pelton v. Westchester F. Ins. Co.*, 77 N. Y. 605; *Rumsey v. Phoenix Ins. Co.*, 17 Blatchf. (U. S.) 527.

1. **The Mortgagor.**—*Tompkins v. Horton*, 25 N. J. Eq. 284; *Whiting v. New Haven*, 45 Conn. 303; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603; *Wade v. Miller*, 32 N. J. L. 296; *Shields v. Lozeau*, 34 N. J. L. 496; *Kircher v. Schalk*, 39 N. J. L. 335.

"In this country it may be considered the prevailing rule that the mortgagor is the owner of the lands mortgaged, and retains the inheritable interest." *White v. Rettenmeyer*, 30 Iowa 270.

"Owner" in *Massachusetts Rev. Sts.* 58, ch. 7, § 7—relating to taxes on real estate—means the mortgagor, until possession taken by the mortgagee, after which the latter will be deemed the owner. *Parker v. Baxter*, 2 Gray (Mass.) 185, 189.

A mortgagor of a horse in possession even after default, held an "owner," within the meaning of ch. 498 of Laws of 1872. "The word 'owner' in this statute, is used in contrast with an entire stranger, a person who has no right or authority over the horses; a thief, for instance, or a mere hirer of the animals. The mortgagor in possession, even after default, is not such a person." *Corning v. Ashley*, 51 Hun (N. Y.) 483.

2. **The Mortgagee.**—In statutes describing to whom compensation is to be made, and who are to be made parties to the proceedings, when land is taken for public uses by corporations as for railroad right of way, etc., it has been held that the word "owner" includes a mortgagee in *Severin v. Cole*, 38 Iowa 463; *Dodge v. Omaha etc. R. Co.*, 20 Neb. 276; *Wade v. Hennessey*, 55 Vt. 207; *Wilson v. European etc. R. Co.*, 67 Me. 358. But see *Parish v. Gilmanton*, 11 N. H. 283, where it was held that owner did not include mortgagee, and *Crane v. Elizabeth*, 36 N. J. Eq. 339.

3. See *Lozo v. Sutherland*, 38 Mich. 171.

There may be different estates in the same property, vested in different persons, and each be an owner thereof.

Baltimore etc. R. Co. v. Walker, 45 Ohio St. 577; 35 Am. & Eng. R. Cas. 277. And see *Lindley v. Davis*, 7 Mont. 206, where it was held that a tenant in common is an "owner" within the meaning of *Montana Homestead law*. But the contrary has been held in many *California* cases. See *Wolf v. Fleischacker*, 5 Cal. 244; *Carroll v. Ellis*, 63 Cal. 441.

Where a railroad charter provided that viewers should be appointed to fix the damages suffered by the "owner or owners" of land taken by the corporation for the purposes of their charter, it was held that the legislature meant by the terms "owner or owners" to include all owners of titles in or growing out of the land whose rights are capable of actual privation by the taxing. In this case, owner of a private right of way held to be included. *Philadelphia etc. R. Co. v. Williams*, 54 Pa. St. 109.

So "owner," in *Pennsylvania* law, authorizing the redemption of lands sold for taxes was held to include "any person who has any interest in lands sold for taxes. Any right, which in law or equity amounts to an ownership in land; any right of entry upon it, to its possession, or enjoyment, or any part of it, which can be deemed an estate in it, makes the person the owner, so far as is necessary to give him the right to redeem. *Dubois v. Hepburn*, 10 Pet. (U. S.) 22, 23.

In Statutes Giving Compensation for the Exercise of the Right of Eminent Domain.

—The word "owner" in statutes when used to describe those to whom compensation should be made, or who should be made parties to proceedings for the condemnation of land for a public use, has been held in a general way to include all persons having an interest in the land to be taken. *Lewis on Eminent Domain*, § 335, citing *Smith Co. v. Labore*, 37 Kan. 480; *Baltimore etc. R. Co. v. Thompson*, 10 Md. 76; *Gerrard v. Omaha etc. R. Co.*, 14 Neb. 270; *Calcough v. Nashville etc. R. Co.*, 2 Head (Tenn.) 172.

In the case of *Watson v. New York Cent. R. Co.*, 47 N. Y. 157, the words "owner or owners" were the only words used in the statute under con-

Personalty. —“Owner” when used in a statute with reference to personal property does not always nor even usually refer to the person in whom the absolute right of property is vested. For instance it has been held that it will include the person in possession and control of any article of personalty, as the one who hires a carriage.¹

sideration, to designate the parties entitled to compensation, and they were interpreted as follows: “The terms “owner or owners, as used in these statutes having been intended to designate the parties entitled to compensation, which is substituted for the land taken, should be held to embrace all persons having estates in the land in possession, reversion or remainder, all persons having proprietary interests are entitled to compensation, for the aggregate of those interests to constitute the ownership or fee.” See also *Ellis v. Welch*, 6 Mass. 246; *Parks v. Boston*, 15 Pick. (Mass.) 198.

But in *Watson v. New York Cent. R. Co.*, 47 N. Y. 157. it was held that a judgment creditor of an owner has no estate or proprietary interest in the land, and, therefore is not an “owner” within such statutes. See also *Danforth v. Suydam*, 4 N. Y. 66.

1. And. L. Dict., citing *Camp v. Rogers*, 44 Conn. 298.

A statute giving a right of action against the owner of any locomotive or car, by the defects in which a person is injured, means the owner at the time of the injury; owner for the purposes of operating the road; and not, necessarily, the party in whom the absolute right of property is vested. If a corporation hires cars from a car builder, and runs them on its road, the corporation, not the lessor, is the party liable to the statutory action. *Proctor v. Hannibal etc. R. Co.*, 64 Mo. 112.

“Owner” as used in the *Illinois* statute making one liable to damages as the owner of Texas or Cherokee cattle for infection to other cattle, does not mean conditional ownership growing out of a lien, unless he has the actual possession and control of the cattle. *Smith v. Race*, 76 Ill. 490.

“Owner” of goods, held to mean the importer, for the purpose of duties, under a Royal Charter, on goods brought beyond seas into the Tyne. *Newcastle Pilots v. Hammond*, 18 L. J. Ex. 417; 4 Ex. 285.

“Owner” in the Merchant Shipping

act 1854 (17 & 18 Vict., ch. 104), in § 169. at least if not all through that act, does not mean the registered owner of a ship if he has parted with all control over it; but “must be restrained to such actual owner for the time being of the ship as either himself or by his master or other authorized agent, manages and controls her.” *Meikle-reid v. West*, 45 L. J. M. C. 91; 1 Q. B. Div. 428; 40 J. P. 708.

A provision that where the logs of different parties on a river become intermixed and one of the “owners” shall refuse and neglect to furnish the necessary labor for driving them, any other owner may drive all such logs or timber and shall receive compensation from the parties so neglecting or refusing. It was held, that one having possession of logs and the special title or interest as a bailee is an owner within the meaning of the act. *Wisconsin River Log Driving Assoc. v. D. F. Comstock Lumber Co.*, 72 Wis. 464.

Under a statute which provides that a creditor shall have a lien on a vessel for any debt contracted by the master “owner,” etc., thereof, it was held, that a contractor who agrees to build and deliver a vessel, furnishing all material, was the owner of such vessel from the commencement of its construction until delivery, within the statute. *Low v. Austin*, 20 N. Y. 181.

Where the statute gave a penalty against the “owner” of a vehicle which should not seasonably turn to the right. in favor of any person who was injured from a failure to do so, held that by the word “owner” was intended the person in control of the vehicle. either mediately or immediately and not necessarily the actual owner, and that the proprietor of a livery stable was not liable for the failure of one, to whom he had hired a team, to seasonably turn out. *Camp v. Rogers*, 44 Conn. 291.

In considering a *Massachusetts* statute, which provided that a party whose lands suffered damages from the cattle of another may maintain an

OWNERSHIP—(See also OWNER).—The right by which a thing belongs to an individual to the exclusion of all other persons.¹

OYSTERS—(See also FISH AND FISHERIES, vol. 8, p. 23).

I. Property in Oysters, 307

II. State Regulation of Oyster Industry, 308

action of trespass against the owner. The court said, "we are of the opinion that the word 'owner' in this section is used in a popular sense and is intended to apply to the person in whom the general property of the animals is enumerated, and embraces those also who are in possession under a special title or by virtue of lien." *Sheridan v. Bean*, 8 Met. (Mass.) 284. See also *Hartford v. Brady*, 114 Mass. 470.

In the provisions of the revenue law of the United States which require the delivery of distilled spirits by the government warehouseman to the owner when the tax is paid, "Congress, in employing the word 'owners' made use of a general word to avoid circumlocution and needless specification, and this general word is a word of description, intended to designate any person who, upon the payment of the government dues, is, in law, entitled to the possession of the goods." *Conrad v. Fisher*, 37 Mo. App. 352, 403.

An owner does not cease being the owner by chartering his vessel for a time, nor does a charterer, although he may become owner *pro hac vice*, become owner for all purposes. The term 'owner' must be modified by the completion of the description. He can neither sell nor mortgage the vessel, nor use her for a different purpose from that specified. He cannot, like the owner, complete an hypothecation by a mortgage at his residence, no matter how much he may need "wings and legs to the forfeited hull to get back, for the benefit of all concerned." *Clarke v. The Cumberland*, 30 Feb. Rep. 449.

Law *New York* 1872, ch. 498, § 1, as amended by Laws 1880, ch. 145, provides that a person keeping any animals at livery or pasture, or boarding the same, for hire, under any agreement with the owner thereof, may detain such animals until all charges for their keeping shall have been paid. *Held*, that a mortgagor of certain horses, who, after having defaulted, in the performance of the conditions

of the mortgage, but being still in the possession of the horses, entered into an agreement with the plaintiff for their keeping, was an "owner" of the horses, within the meaning of the statute. *Corning v. Ashley* (Supreme Ct.), 4 N. Y. Supp. 255.

But owner (as used in the Abandoned and Captured Property act of Congress, enabling the owner of property sold by the government to recover the proceeds from the treasury), does not include a factor, although, having been entrusted with the property for sale, he has made advances upon it. Making such advances gives him a lien, with a right of possession, gives him a special property, but does not constitute him "owner." *United States v. Villalonga*, 23 Wall. (U. S.) 35, 42.

Nor is a person who has paid a deposit on purchase of a share in a ship, but who has not been registered, an "owner" within § 147 of the English Merchant Shipping act. *Hughes v. Sutherland*, 7 Q. B. D. 160; 50 L. J., Q. B. 567.

And one who simply holds the legal title to a water craft as security for the amount due him upon the sale of it, having neither the possession nor control of the craft, is not an "owner" within the meaning of sections 5880 and 5882, Rev. St. of *Ohio*, which provide, that he shall be liable for supplies furnished such craft. *Hemm v. Williamson* (Ohio 1890), 25 N. E. Rep. 1.

Refers to Legal Title.—*Kentucky* Gen. St., Ch. 92, requiring that property shall be assessed for taxation against the "owner," refers to the person who holds the legal title, absolute or qualified. Therefore an administrator residing in this State, and holding, as such, stocks and bonds, is liable to taxation on them here, although the distributees or beneficial owners may be non-residents. *Baldwin v. Shine*, 84 Ky. 502.

1. *Converse v. Kellogg*, 7 Barb. (N. Y.) 590 (1850); *Hill v. Cumberland Valley Mut. Protection Co.*, 59 Pa. St. 477 (1858).

I. PROPERTY IN OYSTERS.—At common law, the right to take oysters of natural growth from land under public navigable water is a common or public right, governed by the rule of the common law applicable to the taking of fish generally from such waters.¹

In the case of oysters planted and their increase in clearly marked and defined beds, a different rule obtains, the oysters in such case becoming the property of the planter.²

In the law of *Louisiana*, perfect ownership is perpetual; imperfect, such as will terminate at a certain time or on a condition being fulfilled. *Marshall v. Pearce*, 34 La. Ann. 559 (1882).

1. See FISH AND FISHERIES, vol. 8, p. 23. And see *Martin v. Waddell*, 16 Pet. (U. S.) 410; *Coolidge v. Williams*, 4 Mass. 140; *Porter v. Shehan*, 7 Gray (Mass.) 435; *Proctor v. Wells*, 103 Mass. 216; *Peck v. Lockwood*, 5 Day (Conn.) 28.

In *Brown v. De Groff*, 50 N. J. L. 409, the court by VAN SYCKEL, J., said: "The right to take shell-fish below high water mark, from natural beds in the tide waters of this State, is a part of the public right of fishery which has been fully recognized and cannot now be controverted "It is a right common to all the citizens of the State, which may be exercised by them at will, except so far as it is restrained by positive law or by grants from the State to individuals." See also *Paul v. Hazelton*, 37 N. J. L. 106, 163; *Arnold v. Mundy*, 6 N. J. L. 1; 10 Am. Dec. 356; *Gough v. Bell*, 21 N. J. L. 157; *Gough v. Bell*, 22 N. J. L. 441; *Stevens v. Patterson etc. R. Co.*, 34 N. J. L. 532; 3 Am. Rep. 269.

2. In *State v. Willis*, 104 N. Car. 764, the court by SHEPHERD, J., said: "A natural as distinguished from an artificial oyster-bed is one not planted by man, and in any shoal, reef or bottom where oysters are to be found growing, not separately, or at intervals, but in a mass or stratum, and in sufficient quantities to be valuable to the public."

In *Fleet v. Hegeman*, 14 Wend. (N. Y.) 46, the court by NELSON, J., said: "As to all inanimate things an absolute property in possession may be acquired in them; such as goods, plate, money; and if the article in question could be considered as falling within that description, there could be no doubt the defense taken would be untenable unless there

was an abandonment in fact. Oysters have not the power of locomotion any more than inanimate things, and when property has once been acquired in them no good reason is perceived why it should not be governed by the rules of law applicable to inanimate things."

In *State v. Taylor*, 27 N. J. L. 111, 62 Am. Dec. 347, the court by GREENE, C. J., said: "The owner has the same absolute property in oysters (planted in the public or navigable waters of the State, if they were planted in a place where oysters do not grow naturally, and the spot is so designated by stake or otherwise, that the oysters can be readily distinguished) that he has in inanimate things or domestic animals; and the rule that applies to animals *feræ naturæ* do not apply to them. See also *Britton v. Hill*, 27 N. J. Eq. 389; *Post v. Kreischer*, 32 Hun (N. Y.) 48; *People v. Hazen*, 121 N. Y. 313.

In *McCarty v. Holman*, 22 Hun (N. Y.) 53, the court by GILBERT, J., said: "We are of opinion also that the same right of property exists to and embraces the offspring of parent oysters so planted which remain within the bed so designated, and is not restricted to the identical oysters planted. Young oysters when expelled, are about $\frac{1}{16}$ of an inch in length, and about 2,000,000 are capable of being closely packed in a cubic inch (*Chamb. Encyc.*). Fishermen catch them spat. They are wafted away by currents and would be lost unless they found an object to which they could adhere. The plaintiffs provided means within the bed which they planted to save the spat of oysters, and we are of opinion that their property in the oysters grown from the spat so preserved is quite as good as that in the parent oysters, whether the spat proceeded from the oysters which they planted or from other oysters."

In all such cases as have been above cited, it seems that it is imperative upon the owner not only clearly to mark and define the grounds occupied by him for

OYSTERS—PACKAGE—PACKAGES.

II. STATE REGULATION OF OYSTER INDUSTRY.—The value of the oyster industry and the danger of the rapid extermination of the oyster, in the absence of legal protection, has led to legislation in most of the Atlantic seaboard States, having for its object the regulation of the industry and the protection and increase of the oyster. The right of the States to legislate upon the subject is undoubted.¹ These statutory provisions are substantially similar in the various States.

PACKAGE; PACKAGES.—See note 2.

oyster cultivation, but he must see that such grounds are kept thus clearly marked and defined during his whole period of occupancy. If this is not done the law will not protect him against the trespass of third persons. *Brinckerhoff v. Starkins*, 11 Barb. (N. Y.) 248.

At common law the right of a person, as between himself and the State to plant oysters on premises within the State, was at most a license or permission to gather and so plant under certain conditions, and be protected in his ownership in the oysters thus planted against third persons taking them, the State having the legal right at any time to terminate or withdraw the license. *Fleet v. Hegeman*, 14 Wend. (N. Y.) 41.

Post *v. Kreischer*, 32 Hun (N. Y.) 48. This case was reversed on appeal, but the reversal was on another point. The reasoning of the court below on the point stated above, was not questioned. See Post *v. Kreischer*, 103 N. Y. 110.

Title to Land Under Water Derived from Colonial Grants.—A majority of the questions concerning the ownership of oysters that have been planted, have arisen under the question of ownership of the bottom upon which they have been planted. It is now well settled that, regardless of the general title of the State to lands under water within its boundaries, grants made by the colonial governors and subsequently ratified by acts of colonial and State legislatures, carry with them several and exclusive rights of fisheries. This is so whether the grant be to a town or an individual. *Rogers v. Jones*, 1 Wend. (N. Y.) 238; 19 Am. Dec. 493; *Brookhaven v. Strong*, 60 N. Y. 72; *Hand v. Newton*, 92 N. Y. 89; *Robbins v. Ackery*, 91 N. Y. 98; *North Hempstead v. Thompson*, 8 N. Y. St. Rep. 901; affirmed by court of appeals, 115 N. Y. 635; *People v. New York etc. R. Co.*,

84 N. Y. 568; *Southampton v. Mecox Bay Oyster Co.*, 116 N. Y. 1; *Huntington v. Lowndes*, 40 Fed. Rep. 565.

The case of *Lowndes v. Dickerson*, 34 Barb. (N. Y.) 586, is overruled on this point by the authorities above cited.

1. In *McCready v. Virginia*, 94 U. S. 391, it was held that the State of *Virginia* was entitled to prohibit citizens of other States from planting oysters in a river within its boundaries where the tide ebbs and flows, although its own citizens have the privilege of planting. That such a prohibition was not forbidden by art. 4, § 2, of the federal constitution, nor by art. 1, § 8, see also *Smith v. Maryland*, 18 How. (U. S.) 71; *People v. Lowndes*, 55 Hun (N. Y.) 469.

The legislature may delegate authority to regulate such fisheries. *People v. Thompson*, 30 Hun (N. Y.) 457; *Sutter v. Vanderveer*, 47 Hun (N. Y.) 366; *Smith v. Levinus*, 8 N. Y. 472.

In *Dize v. Lloyd*, 36 Fed. Rep. 651, it was adjudged that the *Maryland* oyster law of 1886, exacting a license fee of \$3 per ton from every vessel employed in dredging for oysters, was not unconstitutional as imposing a tonnage tax, and that the further provision of the act, making the possession by an unlicensed vessel of instruments for oyster dredging *prima facie* evidence of an intention to violate the law, was unobjectionable.

2. Where there is a provision in an express receipt stipulating that if the value of the property is not disclosed, that the shipper will not be entitled to more than \$50 for the loss of each package, the word "package" was held to mean a small bundle or parcel by the appearance of which the carrier could derive no adequate notion of the value. A bale of cotton is not such a package. *Southern Express Co. v. Crook*, 44 Ala. 468. And where there were

PACKER.—See note 1.

PACKING JURY.—See note 2.

PAINTINGS.—See note 3.

PALACE CARS.—See SLEEPING CARS.

PALMISTRY.—See note 4.

three bales, all embraced in one receipt, it was held, that the limitation did not apply to the three bales, but to each one separately. *Boscowitz v. Adams Express Co.*, 93 Ill. 524; 34 Am. Rep. 191. But in *Lamb v. Camden etc R. Co.*, 2 Daly (N. Y.) 434, it was held, that "package" might be understood to mean a bale of cotton.

U. S. Rev. Stat., § 3437, imposed an internal revenue tax upon friction matches in parcels or packages of one hundred or less. The word "package or parcel" was held to mean a bundle put up for transportation or for commercial handling, a thing in form to become, as such, an article of merchandise or delivery from hand to hand. A parcel is a small package, parcel being the diminutive of package. So where a manufacturer put up matches in boxes within two compartments, it was held that the compartments were not taxable separately. *United States v. Goldback*, 1 Hughes (U. S.) 529.

Paintings, exceeding the value of £10, laid upon one another without any covering or tie in a wagon which has sides but no top, were held to be a "parcel or package" within the English Carriers act (11 Geo. IV & Wm. IV, ch. 68, §§ 1 and 2), and that the value not having been declared, there was no liability on the part of the carrier as for paintings of a value exceeding £10 sterling. *Whaite v. Lancashire & Yorkshire R., L. R.*, 9 Ex. 67.

1. "This is a term well understood in London, and means a person employed by merchants to receive, and (in some instances) to select goods for them from manufacturers, dyers, calenderers, etc., and pack the same for exportation." Arch, Bank'ry (11th ed.) 37.

2. "Whether we consult the most approved lexicographers or adopt the popular meaning of the term 'to pack,' as applied to a jury, the charge clearly imports the improper and corrupt selection of a jury, sworn and empanelled for the trial of a cause." *Mix v. Woodward*, 12 Conn. 289.

3. A "painting," within the English Carriers act (11 Geo. IV and 1 Wm. IV, ch. 68, § 1), exempting carriers from liabilities for paintings, engravings, or pictures, of a value exceeding £10, unless the value shall be declared and the increased charge paid, does not mean everything upon which painting has been done by a workman, but rather something of value as a painting, and something on which skill has been bestowed in producing it. Per *CLEASBY, B.*, in *Woodward v. London Northwestern R. Co.*, 3 Exch. Div. 121.

Whether certain articles fall within the description of "paintings" in the act, is a question of fact for the jury. It was here held that colored imitations of rugs and carpets, and colored working designs, each of them valuable, and designed by skilled persons and hand-painted, but having no value as works of art, were not "paintings" within the act.

In *Arthur v. Jacoby*, 103 U. S. 677, it was held that paintings on porcelain, the value of which depended upon the skill of the artist, were dutiable as "paintings" and not as "china, porcelain, and parian ware, gilded, ornamented, or decorated in any manner" within another provision of the then existing Tariff act.

4. The English statute (5 Geo. IV, ch. 83, § 4) makes punishable as a rogue and vagabond "every person . . . using any subtle craft, means, or device by palmistry, or otherwise, to deceive and impose on any of his majesty's subjects." It was held in *Monck v. Hilton*, 2 Exch. Div. 268, that an attempt to deceive and impose upon certain persons by falsely pretending to have the supernatural faculty of obtaining from invisible agents and the spirits of the dead, answers, messages, and manifestations of power, namely, noises, raps, and the winding up of a music box, come within the words "by palmistry, or otherwise," and justify a conviction. "Palmistry," the court said, "was used by good writers in the sense of a trick with the hand."

PANDECTS—PANEL—PAPER—PAPERS.

PANDECTS (In Civil Law).—The name of an abridgment or compilation of the civil law, made by Tribonian and others, by order of the emperor Justinian, and to which he gave the force of law A. D. 533.¹

PANEL—(See also IMPANEL, vol. 9, p. 950; JURY AND JURY TRIAL, vol. 12, p. 331).—A schedule or roll containing the names of the persons whom the sheriff returns to serve on trials. The body of persons summoned, and in attendance upon the court to act as jurors, is also sometimes called the panel.²

PAPER; PAPERS.—"Paper" is a manufactured substance composed of fibers (whether vegetable or animal) adhering together, in form consisting of sheets of various sizes and of different thicknesses, used for writing or printing or other purposes to which flexible sheets are applicable.³

1. It is also known by the name of Digest, because in his compilations the writings of the jurists were reduced to order and condensed *quasi digestæ*. The emperor, in 530, published an ordinance entitled *De Conceptione Digestorum*, which was addressed to Tribonian, and by which he was required to select some of the most distinguished lawyers to assist him in composing a collection of the best decisions of the ancient lawyers, and compile them in fifty books, without confusion or contradiction. The instructions of the emperor were to select what was useful, to omit what was antiquated or superfluous, to avoid contradictions, and by the necessary changes, to produce a complete body of law. This work was a companion to the Code of Justinian, and was to be governed in its arrangement of topics by the method of the Code. Justinian allowed the commissioners, who were sixteen in number, ten years to compile it; but the work was completed in three years, and promulgated in 533. A list of the writers from whose works the collection was made, and an account of the method pursued by the commissioners, will be found in Smith's Dict. of Gr. & R. Antiq. About a third of the collection is taken from Ulpian; Julius Paulus, a contemporary of Ulpian, stands next. These two contributed one-half of the Digest. Papinian comes next. The Digest, although compiled in Constantinople, was originally written in Latin, and afterwards translated into Greek. The Digest is divided in two different ways; the first into fifty books, each book in several titles, and each title in several extracts or *leges*,

and at the head of each series of extracts is the name of the lawyer from whose work they were taken. 2 Bouv. L. Dict. 345.

2. Beasley v. People, 89 Ill. 575; Porter v. Cass, 7 How. Pr. (N. Y.) 443; Abb. L. Dict.; And. L. Dict.

Panel signifieth a little part. A jury is said to be empanelled when the sheriffe hath entered their names into the panel, or little piece of parchment. Co. Litt. 158, o.

The word "panel" includes within its definition the jurors' returned upon a special venire to fill out the deficiency after the regular panel has been exhausted. People v. Coyodo, 40 Cal. 586.

See also State v. Gurlagh, 76 Iowa 141, where it was held, in view of the fact that the word panel in one sentence of the section of a statute under consideration was applied to the whole number of jurors summoned, but in other sentences, the word was applied to the jurors selected by the clerk by lot, that the word must be held to mean the one or the other, according to the connection in which it was used.

3. Attorney Gen'l v. Barry, 4 H. & N. 470.

In Pott v. Arthur, 104 U. S. 735, it was held that, within the meaning of the Tariff act, books were not "paper or a manufacture of paper," BRADLEY, J., saying: "No man of literary culture, it is true, would call a book paper, or a manufacture of paper, any more than he would designate a masterpiece of Raphael as canvas or a manufacture of canvas."

The word "papers" in the Montana Crim. Prac. act, § 354, which provides that a new trial shall be granted, when

PAR.—Equal. The word is used to denote a state of equality or equal value. Bills of exchange, stocks, and the like, are at par when they sell for their nominal value; above par or below par, when they sell for more or less.¹

PARALLEL.—See note 2.

the jury has received any evidence, papers, or documents, not authorized by the court, does not mean newspapers, or perhaps even include them. The object of the statute is to prevent the jury from receiving any evidence, papers or documents which are not authorized by the court. *State v. Jackson* (Mont. 1890), 24 Pac. Rep. 216. See also **NEWSPAPERS**, vol. 16, p. 490.

In *Hart v. Marshall*, 4 Minn. 552, it was held that while disbursements may be recovered for printing "papers on appeal," long duplicate arguments cannot be said to fall within the words "papers on appeal."

Paper Mill.—By the seventy-third section of 7 & 8 Vict., ch. 15, premises which are used solely for the manufacture of paper are excluded from the operation of the Factory acts.

A was possessed of paper mills in H, and of a mill at M. At the latter place he employed steam power to prepare what is called "half-stuff," which is made from cotton waste and refuse and rags. The half-stuff was afterwards sent to the mills in H, to be manufactured into paper. *Held*, that the mill at M was exempted from the operation of the Factory act, although the "half-stuff" was capable of being converted into articles other than paper. *Coles v. Dickinson*, 111 Eng. C. L. Rep. 604; 16 C. B., N. S. 604. See also **APPARATUS**, vol. 1, p. 615.

My Books and Papers—in a Will.—The expression "all my books and papers of every description" in a will, was held to include promissory notes, payable to the testator. *Perkins v. Mathes*, 49 N. H. 107.

Commercial Paper.—Paper governed by the rules established upon the customs of merchants; bills of exchange, promissory notes, negotiable bank checks. And L. Dict. See also **BILLS AND NOTES**, vol. 2, p. 313; **NEGOTIABLE INSTRUMENTS**; **CHECKS**, vol. 3, p. 211.

Negotiable Paper.—See **NEGOTIABLE INSTRUMENTS**, vol. 16, p. 479.

1. Bouv. L. Dict.

"Par value" means pound for pound, or a dollar in money for every dollar in

security. *Delafield v. Illinois*, 2 Hill (N. Y.) 159.

Where an act of the *Pennsylvania* assembly required the notes of the suspended *United States* bank to be taken at par, it was held that par meant the amount really due including interest. *Hogg's Appeal*, 22 Pa. St. 488.

The words "par bank notes" have a distinct technical meaning. They are, in commercial and financial parlance, used to denote a state of equality or equal value; an equality of actual with nominal value. *Bachman v. Roller*, 9 Baxt. (Tenn.) 410; 40 Am. Rep. 97.

The words "to be paid in currency that is at par," in a promissory note, mean currency equal to gold. *Crim v. Sellars*, 37 Ga. 324; *Galloway v. Jenkins*, 63 N. Car. 147.

Par of Exchange.—The par of the currencies of any two countries means the equivalence of a certain amount of the currency of the one in the currency of the other, supposing the currency of both to be of the precise weight and purity fixed by their respective mints. The exchange between the two countries is said to be at par when bills are negotiated on this footing—*i. e.*, when a bill for £100 drawn on London sells in Paris for 2520 frs., and *vice versa*. Bouv. L. Dict.

"Par value," in its customary and commercial sense, with reference to exchange between different States or countries, has been well defined to be the equivalency of a certain amount of the currency of one country in the currency of the other." *Delafield v. Illinois*, 26 Wend. (N. Y.) 224.

A current phrase which has no other meaning than the value of the pound sterling formerly fixed by law for purposes of revenue. *Commonwealth v. Haupt*, 10 Allen (Mass.) 44.

2. In the specification of a patent for a horse clipping machine, "parallel" was construed in its popular sense of going side by side, and not in its purely mathematical sense. *Clarke v. Adie*, 2 App. Cas. 423.

It was enacted that "no street railroad should thereafter be constructed in the city of St. Louis nearer to a par-

PARAPHERNAL.—Paraphernal property is the wife's extra-dotal separate property, which she can manage alone during coverture.¹

PARAPHERNALIA—(See also MARSHALLING ASSETS, vol. 14, p. 739; WIFE'S SEPARATE PROPERTY).—The wife's paraphernalia is a term borrowed from the Roman law, and derived from the Greek language, signifying something over and above her dower. Our law uses it to signify such apparel and ornaments of the wife, suitable to her position in society, as are given her by her husband (for if given her by third persons they are commonly supposed to be designed for her separate use, and are absolutely hers, free from his control). Paraphernalia are the property of the husband, and if he chooses to dispose of them in his life-time, he is at liberty to do so; but he cannot deprive his wife of them by his will, nor do they go, at his decease, to his personal representative, except that, so far as may be necessary, to pay his debts after exhausting the rest of his estate, the jewels may be appropriated for that purpose, but in no case her necessary apparel.²

allel road than the third parallel street from any road now constructed, or that may hereafter be constructed, except the roads hereinbefore mentioned." *Held*, that two street railroads to be parallel, in the meaning of the statute, must have substantially the same general direction throughout their entire routes. *St. Louis R. Co. v. North Western etc. R. Co.*, 1 Cent. L. J. 521. And see *Cronin v. Highland St. R. Co.*, 144 Mass. 254.

By mathematical definition, "parallel lines" are straight lines; but in common speech about boundaries, the words are often used to represent lines which are not straight, but photographs of each other; and courts, in passing on questions of boundaries, often use them in the latter sense. *Fratt v. Woodward*, 32 Cal. 230; 91 Am. Dec. 573; *Jackson v. Lucett*, 2 Cal. (N. Y.) 363; *Williams v. Jackson*, 5 Johns. (N. Y.) 489; *Winthrop v. Dockendorff*, 3 Me. 103.

1. *Brown's L. Dict.*; *Guilbreau v. Cornier*, 2 La. 205.

It was held in *Cambre v. Grabert*, 33 La. Ann. 246, that a gift by a husband to a wife, in consideration of marriage, is not paraphernal property. The court said: "Art. 2383 of the code provides that 'all property which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage, or to belong to her at the time of the marriage, is paraphernal.'" See also *Gates v. Le Jendre*, 10

La. 74. But see *Newman v. Eaton*, 27 La. Ann. 341, where the court intimated that property given in consideration of the marriage by the husband to the wife, was paraphernal.

Plaintiff, a married woman, purchased certain property in her own name, at a probate sale of the succession of her father, made for the payment of debts and to effect a partition, the price of which was less than her share in the succession. The sale of the property of the succession was directed to be made for one-tenth cash, and the balance on credit. The act of sale declared that the price had been "in hand paid." The succession was solvent. In a partition subsequently made between the heirs, a note given by the plaintiff for the credit portion of the price was given up to her, as a payment *pro tanto* on her share in the succession. *Held*, that the interest of plaintiff in the succession of her father being paraphernal, the property so purchased by her must also be considered paraphernal, being an exception to the general rule that property purchased during marriage, whether in the name of the husband or wife, belongs to the community; and that the law, in this respect, was the same before the promulgation of the civil code of 1825, as afterwards. *Stroud v. Humble*, 2 La. Ann. 930.

2. 1 Minor's Inst. 302, citing 2 Black. Com. 435, 436, 1 Lom. Ex. 455, *et seq.*; 1 Bright's H. & Wife 286.

"In its strict legal sense that term

PARCEL—(See also BUNDLE, vol. 2, p. 249; PACKAGE).—(a) A small bundle or package. (b) A tract of land of indeterminate size, but usually not large.¹

PARCENARY (Estate In)—(See also PARTITION).

1. Definition and Character, 313.

2. How Created, 314.

3. Properties, 314.

4. Continuance of the Estate, 315.

5. Incidents, 315.

(a) Actions By or Against Parceners, 315.

(b) Liability of Co-parceners One to Another, 315.

(c) Conveyance by One Parcener to Another, 316.

(d) Curtesy and Dower, 316.

6. How Dissolved, 316.

7. Partition, 316.

1. Definition and Character.—Estates in parcenary or co-parcenary are estates of which two or more persons form one heir.²

At common law such an estate arose where a man died seised of an inheritance and his next heirs were two or more females. In such a case they all inherited; and these co-heirs were called co-parceners, or for brevity parceners. Or the estate might arise by particular custom, as by the custom of gavel-kind, when land descended to all the males in equal degree, as sons, brothers, uncles, etc. All the parceners put together make but one heir; and have but one estate among them.³

(paraphernalia) has no possible application to the property of a man. Applying the doctrine *noscitur a sociis* to the testamentary provision here in question, it seems reasonable to suppose that, if the testator meant anything by the word paraphernalia, in making a bequest of 'furniture, bedding, ornaments and paraphernalia,' he meant such jewels, apparel and personal ornaments as he might leave at his death, or such of them, at least, as were suitable to his station in life and his circumstances." *In re Cooper*, 5 Dem. (N. Y.) 496.

Thus, pearls and jewels, usually or sometimes worn by the wife, although articles of mere ornament, have been held to fall within the term paraphernalia. A widow has been sustained in the claim to her gold watch and several gold rings, as paraphernalia, which had been given to her at the funerals of relatives. *Mougey v. Hungerford*, 2 Exch. Cas. Abr. 156, cited in Brown's L. Dict.

What shall be considered as paraphernalia of the wife, is a question for the court. A gold watch, worth a \$100, the gift of a husband to his wife, cannot be considered as among the paraphernalia of the wife, when the husband, at the time of the gift, was a man of limited means or small property, and afterwards died insolvent. *Vass v. Southall*, 4

Ired. (N. Car.) 301. See also MARSHALLING ASSETS, vol. 14, p. 739.

1. And. L. Dict.; Abb. L. Dict. See also *Martin v. Cole*, 38 Iowa 146, where the word was held to apply to a section of land.

The terms of a judicial sale of lands were, that the purchaser should pay the auctioneer's fee of \$25 on each parcel sold. Seventeen city lots were sold by one cry and bid, and for a gross sum. *Held*, that these together constituted one parcel; the auctioneer was not entitled to a fee on each lot. *Miller v. Burke*, 6 Daly (N. Y.) 171.

The word "parcel" is not a sufficient description of the property alleged in an indictment to have been stolen. The prisoner was indicted for stealing "one parcel, of the value of one shilling, of the goods," etc. The parcel in question was taken from the hold of a vessel, out of a box broken open by the prisoner. *Held*, an insufficient description. *Reg. v. Bonnee*, 7 Cox (C. C.) 13.

But an indictment for stealing "a parcel of oats" is sufficiently certain. *State v. Brown*, 1 Dev. (N. Car.) 137; 17 Am. Dec. 562.

Parcel or Package.—See PACKAGE.

2. 1 Washb. Real Prop. 414; 4 Kent Com. 366.

3. 2 Minor's Inst. 433; 2 Black. Com. 287; *Gilpin v. Hollingsworth*, 3 Md.

In the *United States* land descends equally to the heirs of an intestate, without regard to sex or primogeniture, who take either as tenants in common or as parceners.¹

Parceners hold a position intermediate between joint tenants and tenants in common. Like joint tenants they have among them only one single freehold, so long as no partition is made. Like tenants in common, they have among them no *jus accrescendi*; but upon the death of one parcener, a descent takes the place of her aliquot share. And one parcener may at common law convey to another by an assurance proper to convey a several estate, as a feoffment. But such conveyance might also be made by release.²

2. How Created.—Estates of co-parcenary arise by descent and never by purchase, differing in this respect from a joint tenancy or a tenancy in common. Therefore, if two sisters purchase land to hold to them and their heirs, they are not parceners but joint tenants, and hence it also follows that no lands can be held in co-parcenary but estates of inheritance; but there may be a joint tenancy or tenancy in common in an estate for years, as well as in an estate in fee.³

3. Properties.—The properties of the estates of parceners are in some respects like those of joint tenants. They have the same unities of interest, title, and possession, but there is no unity of time necessary to create an estate in co-parcenary, nor have they that entirety of interest which belongs to joint tenants. They constitute but one heir, how many soever they be, but are properly entitled each to the whole of a distinct moiety and not as

190; *Hoffar v. Dement*, 5 Gill (Md.) 132.

1. In *Virginia, Ohio, West Virginia, Delaware, Kentucky, Missouri, Arkansas, Colorado, Wyoming, and Florida*, by statute, estates descend in parcenary; and in *New Jersey, Pennsylvania, Indiana, South Carolina, New Hampshire, Rhode Island, New York, Oregon, Georgia, and Alabama*, in common. It would seem there were no statutory provision to the contrary, that the heirs would take by co-parcenary. *Stimson's Am. Stat. L.*, §§ 1375, 3131. See also STATUTES OF DESCENT AND DISTRIBUTION.

It is said by CHANCELLOR KENT (4 Kent Com. 367) that, "As estates descend in every State to all the children equally, there is no substantial difference left between co-parceners and tenants in common. The title inherited by more persons than one is, in some of the States, expressly declared to be tenancy in common, as in *New York* and *New Jersey*. And where it is

not so declared the effect is the same. And the technical distinction between co-parcenary and estates in common, may be considered as essentially extinguished in the *United States*." And by Mr. Washburn (1 Washb. on Real Prop. 414, 415) that of these estates "little more need be said than to give some idea of their nature and incidents, because of their infrequency as subjects of reference in this country." And again, "As in some of the States children and heirs take by descent expressly as tenants in common, and as such is constructively the effect of a descent in most if not all the States, the distinction of estates in co-parcenary is of comparatively little practical importance, and properly gives place to the familiar form of joint estates in universal use, tenancy in common."

2. Co. Litt. 164 a; Co. Litt. 9b; Challis Real Prop. 301, 302. See also JOINT TENANTS, vol. 11, p. 1057.

3. 2 Black. Com. 188; 2 Minor's Inst. 434, and authorities cited.

joint tenants are, *per nihil et per totum* to the whole jointly, and to nothing separately. Of course, therefore, there is no *jus accrescendi*, or survivorship between them, for each part descends severally to their respective heirs, though the unity of possession may be continued.¹

4. Continuance of the Estate.—As long as an estate is held by two or more persons by descent, they are parceners. Thus, if one or two daughters, to whom an estate passed by descent from their ancestor, die, her heir becomes parcener with the survivor. If both of the daughters die, their heirs become parceners. “And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners.” Hence, in the case of co-parceners, the descent may be either *per stirpes* or *per capita*.²

5. Incidents—(a) *Actions By or Against Parceners.*—As parceners form but one heir, they must join or be joined in suits touching the right to the property descended to them. But there is this distinction, if co-parceners be seised or entitled, and then die leaving issues, these issues shall not join in a droitual action, because several rights descended to them from several ancestors; but in a like case, as their possession is joint, they must join in a possessory action.³ In respect to the necessity of joining in suits, parceners resemble joint tenants and differ from tenants in common.⁴

Entry by, or possession by one parcener is an entry by or possession by all, wherever they might sue jointly for the possession.⁵ Consequently, one parcener cannot maintain an action of ejectment against his fellow without proof of actual ouster, any more than one joint tenant, or tenant in common, can maintain such an action without like proof.⁶

(b) *Liability of Co-parceners One to Another.*—Co-parceners are not liable one to the other for trespass either at common law or by statute, for the reason that each is rightfully entitled to the possession of the whole. Co-parceners are not liable to each other at common law for waste, but in this respect by statute, in most, if not all of the States, they, together with other co-tenants, have been made liable.⁷ As to a co-parcener's accountability for profits, where he has received more than his share from the common property, at common law he was not accountable; but, as joint

1. 2 Black. Com. 188 ; 2 Minor's Inst. 434, 435; Campbell v. Heron, 1 Tayl. (N. Car.) 199. See also JOINT TENANTS, vol. II, p. 1057.

2. Freeman on Co-ten. & Part., § 83, citing Chitty on Descents 75; 4 Dane Abr. 758. See also 2 Black. Com. 188; 2 Minor's Inst. 435.

3. 2 Minor's Inst. 436; 2 Black. Com. 188; Bac. Abr. Co-parcener, (B.); Hoffer v. Dement, 5 Gill (Md.) 132; Daniels v. Daniels, 7 Mass. 134.

4. JOINT TENANTS, vol. II, p. 1135.

5. 2 Minor's Inst. 436; 2 Black. 188; Co. Litt. 188, 243; Gill v. Fauntleroy, 8 B. Mon. (Ky.) 188; Manchester v. Doddridge, 3 Ind. 363.

6. Minor's Inst. 436; Co. Litt. 51, 52; Gilb. Ten. 29; Buchanan v. King, 22 Gratt. (Va.) 422, 423; Hannon v. Hannon, 9 Gratt. (Va.) 146; Manchester v. Doddridge, 3 Ind. 360. See also JOINT TENANTS, vol. II, p. 1057.

7. 2 Minor 346; 2 Black. Com. 188.

tenants and tenants in common have been made expressly accountable for such excess, the rule as to parceners is believed to have been changed by construction, partly because equity for many years has obliged them to render such an account, and partly from the "irresistible reasonableness of the thing," and the force of the analogy of the case of joint tenants and tenants in common.¹

(c) *Conveyance by One Parcener to Another*.—Parceners may convey at common law, the one to the other by release, like joint tenants; or one may enfeoff another of his part and make delivery like tenants in common.² But these distinctions are of no practical value now, as all conveyances in the *United States* are made by deed.

(d) *Curtesy and Dower*.—Unlike a joint tenancy, an estate of co-parcenary has always been liable to curtesy and dower.³

6. How Dissolved.—"An estate in co-parcenary is dissolved by the severance of any one of its constituent unities. To sever the unity of interest or title, as by one parcener aliening her share to a stranger, whilst the unity of possession is preserved, is to convert it into a tenancy in common, whilst if the unity of possession is dissolved, the tenants hold in severalty."⁴

7. Partition.—Co-parceners coming to their estate by the act of the law, were indulged by the common law with the privilege or right of enforcing a partition against their tenants, a privilege which was denied to joint tenants and tenants in common, they coming to their estate by their own act.⁵

1. 2 Minor's Inst. 437, citing 4 Kent's Com. 366, n. (d); 1 Lom. Dig. 632; 2 Lom. Dig. (2 A. 1), p. 495; Dean v. Wade, and Drury v. Drury, 1 Ch. Rep. 48, 49; Graham v. Graham, 6 Mon. (Ky.) 562; O'Bonnon v. Roberts, 2 Dana (Ky.) 55; Chinn v. Murray, 4 Gratt. (Va.) 348. See also JOINT TENANTS, vol. II, p. 1057; TRESPASS; WASTE.

2. 2 Minor's Inst. 438; 1 Th. Co. Litt. 683, n. (E.); Id. 789.

3. 2 Minor's Inst. 438; 1 Th. Co. Litt. 691, n. (L.) 789, n. (T.).

4. 2 Minor's Inst. 438; 2 Black. Com. 188, 189.

Estates in co-parcenary may be terminated by partition, by alienation, or by a union of the interests of all the co-parceners in one parcener. Where there are more than two parceners, and one aliens his share, the others remain co-parceners as between one another, but are tenants in common, with the alienee of the part so conveyed. Freem. on Co-ten. & Part., § 84; Clutton on Descent 78.

"To sum up the foregoing points, it will be observed that for some purposes parceners constitute a single person and have but one single estate between them, while for other purposes they are regarded as being several persons and as having several estates.

"1. They make together but one heir to their ancestor. Yet they were separate persons for the purpose of escheat by attainder. If a man had died leaving no sons but two daughters living, one of whom had been attainted of felony, one moiety would have escheated. (Co. Litt. 163 b.)

"2. They can convey *inter se* either by assurances proper to convey several estates, or by release.

"3. They pass (at common law) their whole aliquot share to their descendants, *per stirpes*, whether the descent occurs before or after the death of their common ancestor." Challis Real Prop. 301, 302,

5. See PARTITION.

PARDON—(See also AMNESTY, vol I, p. 556; INFAMY, vol. 10, p. 606.)

- I. Definition, 317.
- II. Classification, 317.
 1. *Absolute or Full Pardon*, 317.
 2. *Conditional Pardon*, 317.
 3. *General Pardon, or Amnesty*, 317.
- III. History and Doctrine of Pardon, 318.
- IV. The Pardoning Power; Its Exercise and Extent, 318.
 1. *At Common Law*, 318.
2. *In the United States Government*, 319.
3. *In the States Generally*, 320.
- V. Effect of Pardon, 325.
 1. *Full Pardon*, 325.
 2. *Conditional Pardon*, 328.
 3. *General Pardon*, 320.
- VI. Construction and Validity of the Instrument of Pardon, 329.
- VII. Pleading and Proof, 330.
- VIII. Miscellaneous, 331.

I. DEFINITION.—Pardon is an act of grace proceeding from the powers entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.¹

II. CLASSIFICATION—1. **Absolute or Full Pardon.**—An absolute or full pardon is one which frees the criminal without any condition whatever.²

2. **Conditional Pardon.**—A conditional pardon is one to which some condition is annexed, the performance of which is necessary to its validity.³

3. **A General Pardon or Amnesty.**⁴—A general pardon or amnesty is one which extends to all offenders of the same kind. It may

1. Bouv. L. Dict. (15th ed.) 150.

This definition was laid down by CHIEF JUSTICE MARSHALL in United States *v.* Wilson, 7 Pet. (U. S.) 150, and has been cited with approval in nearly all the cases which have followed throughout the States. See also Bacon's Abridgment, tit. Pardons; *Ex parte* Wells, 18 How. (U. S.) 307; People *v.* Bowen, 43 Cal. 439; 13 Am. Rep. 148.

LORD COKE defines pardon as "a work of mercy, whereby the king, either before or after attainder, sentence or conviction, forgiveth any offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical." 3 Inst. 233.

Bishop says: Pardon is a remission of guilt. 1 Bish. Crim. Law, § 898, and note.

Pardon has been also defined as a declaration of record by a sovereign that a particular individual is to be relieved from the legal consequences of a particular crime. Whart. Crim. Law, § 591.

2. Chit. Crim. Law 704; Whart. Crim. Law, § 591 a.

If the pardon is a full or an absolute pardon, its collateral and consequential

effects cannot be abridged by its language, for such effects depend on the law. Cook *v.* Middlesex, 26 N. J. L. 326; Cook *v.* Middlesex, 27 N. J. L. 637; People *v.* Pease, 3 Johns. Cas. (N. Y.) 333.

3. 4 Black. Com. 400; State *v.* Fuller, 1 McCord (S. Car.) 178.

Any condition may be annexed to a pardon, whether precedent or subsequent, not forbidden by law, and it lies on the grantee to perform it. Flavell's Case, 8 W. & S. (Pa.) 197; *Ex parte* Wells, 18 How. (U. S.) 307, and note.

A pardon may also be only partial. See U. S. Rev. Stat., § 5330.

A pardon is an exercise of sovereign clemency towards the guilty, and not of justice towards the innocent. Therefore a full restitution or compensation for suffering, is not necessarily contemplated. Cook *v.* Freeholders of Middlesex, 26 N. J. L. 326; 27 N. J. L. 637.

It operates prospectively only, and will not entitle the party to restitution or indemnity. Cook *v.* Freeholders of Essex, 26 N. J. L. 326; 27 N. J. L. 637.

4. See AMNESTY, vol. 1, p. 556.

There seems to be some confusion as

be express, as when a general declaration is made that all offenders of a certain class shall be pardoned, or implied, as in case of the repeal of a penal statute.¹

III. HISTORY AND DOCTRINE OF PARDON.—The power to pardon has always existed as prerogative of the English crown. Indeed this very important function of government seems to have grown up with the common law itself.² While this power has sometimes been used by parliament and limited and controlled by that body,³ in general it has been exercised by the king and left entirely to his judgment and discretion.⁴ The doctrine of pardon in the *United States* is essentially the same as that of *England*, being derived from it.

IV. THE PARDONING POWER, ITS EXERCISE AND EXTENT—1. **At Common Law.**—As stated above, the power of pardoning offences in *England* is lodged in the crown, being one of the king's prerogatives. Anciently it seems to have been shared with him by

to the use of the terms amnesty and general pardon, amnesty being used sometimes in a more limited sense than the latter term. We use the terms in this article as synonymous and in their broader sense.

1. Bouv. L. Dict., Pardon; Vattel's Law of Nations, bk 4, § 20.

2 Bishop's Crim. Law, § 898, defines amnesty as a general pardon of rebels for treason or other political offences, or the forgiveness one sovereign grants to the citizens of another nation for violation of international law.

"The distinction between pardon, amnesty and reprieve," says Abbot, seems to be that pardon permanently discharges the individual designated from all or some specified penal consequences of his crime, but does not affect the legal character of the offence committed, while amnesty obliterates the effect, and declares that the government will not consider the thing done punishable, and hence operates in favor of all persons involved in it, whether mentioned and specified or not, and reprieve only temporarily suspends execution of punishment, leaving the legal character of the act unchanged and the individual subject to its consequences in time to come. Abb. Law Dict., Pardon.

2. Bacon's Abr., Pardon A; 4 Black. Com. 400; *Sterling v. Drake*, 29 Ohio St. 457; 23 Am. Rep. 762.

3. 2 Hawk., ch. 37, p. 82; 1 Chit. Crim. Law 766; Eng. Stat., 12 & 13 Wm. III, ch. 2; Eng. Stat., 31 Car. II, ch. 2.

4. "The king," says LORD COKE, "is himself the legal prosecutor of every indictment for crime. It is a general

rule that he may by means of pardon remit any punishment due to public justice, or any fine or forfeiture which he himself would otherwise receive after the offence has been committed." 3 Inst. 233.

The king condemns no man; that rugged task he leaves to his courts of justice. The great operation of his scepter is mercy. 4 Black. Com. 398.

"Law," says an able writer, "cannot be framed on principles of compassion to guilt; yet justice must be administered in mercy; this is promised by the king in his coronation oath, and it is that act of his government which is the most personal, and most entirely his own. Law of Forfeiture (Eng.), 99.

Without such a power of clemency to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality and in that attribute of the Deity whose judgments are always tempered with mercy. JUSTICE WAYNE, in *Ex parte Wells*, 18 How. (U. S.) 308.

CHIEF JUSTICE MARSHALL, delivering the opinion of the court in *United States v. Wilson*, 7 Pet. (U. S.) 150, says: "As this power has been exercised from time immemorial by the executive of that nation whose language is our language and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon and look unto their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

the Lords of Marches and others who had *jura regalia* by grant or prescription ;¹ but by act of 27 Hen. VIII is now restricted solely to the person of the king.² Parliament also has always claimed the right of exercising this privilege, and amnesty or general pardon has for the most part been extended to offenders by this body instead of by the Crown.³

In general the pardoning power of the king extends to any offence whatever against either the common or the statute law so far as the public is concerned. He may pardon a crime at any time after commission, either before conviction or after.⁴ He may grant conditional⁵ and general pardons as well as special or absolute pardons. This prerogative is in general a matter of pure discretion to be exercised according to his majesty's pleasure and judgment in each individual case ;⁶ but to this there are some important exceptions.⁷

2. In the United States Government.—By the constitution the power to pardon offences against the *United States*, except in cases of impeachments, is conferred upon the President.⁸ Its exercise and the manner of its exercise, with this single exception, is placed without condition or limitation solely at his discretion.

1. 3 Inst. 233; Bacon's Abr., tit. Pardon; 4 Black. Com. 399.

2. No person or persons of what estate or degree soever they be, shall have power to remit any treasons or felonies whatsoever, nor any accessories to the same nor any outlawries for such offences whether committed in *England* or *Wales* or the marches of the same, but that the king shall have the whole and sole authority thereof united and kent in the imperial crown of his realm as of good right and equity it appertaineth. Act 27 Hen. VIII, ch. 24, § 1.

3. 1 Chit. Crim. Law 771; Hawk., bk. 2, ch. 37, § 8.

4. Bacon's Abr., tit. Pardon B; 4 Black. Com. 399.

5. The king may extend his mercy upon what terms he pleases, and may annex to his bounty any condition, either precedent or subsequent, on the performance of which the validity of the pardon will depend, and this by the common law. 4 Black. Com. 400.

There seems to be some difference of opinion as to the king's power to grant a general pardon or amnesty. As stated above, this power has been usually exercised by or through parliament. There can be no doubt, however, that the crown has this power both by principle and precedent.

LORD HOLT holds "that the very parliamentary pardon itself comes from the king." LORD BACON seems to have regarded a pardon by parliament as only supplemental to that of the crown. "A general pardon," says he, "may proceed from the king alone, or from the king with the authority of parliament in addition." See 8 Am. Law Reg., N. S. 526 and 532, for a full discussion of this subject.

6. 1 Chit. Crim. Law 765.

7. The king cannot by any previous license prevent the punishment of any offence which is *malum in se*. 2 Hawk., ch. 37, § 82. Nor after suit brought discharge the informer's part of the penalty. 3 Inst. 238. Nor can he discharge an aggrievance of a citizen in an action against another. 3 Inst. 237. Nor release a recognizance to keep the peace. 3 Inst. 238. Nor can he pardon a common nuisance. 2 Hawk., ch. 37, § 33.

He may not pardon a parliamentary impeachment. Acts 12 and 13 Wm. II, ch. 2. Nor does the power extend to the Habeas Corpus act. Act 31 Car. II, ch. 2.

There may be also pardons granted as of common right. 1 Chit. Crim. Law 766.

8. Pardoning Power of the President.—Const. U. S., art. 2, § 2.

Nor is its exercise in any way subject to legislative control.¹ This plenary power conferred upon the President is co-extensive with the power of punishment, embracing every offence known to the law. It may be exercised at any time after the commission of the offence. It includes the power to grant conditional pardons,² general pardons,³ reprieves, and commutations.⁴

3. In the States Generally.—The power to pardon offences against the several States is conferred by their constitutions upon the executives thereof, but subject, in many of the States, to various limitations upon its exercise. Some require a concurrence of one branch of the legislature, while in others a board of pardons is provided whose recommendation is a prerequisite. The provisions of the respective State constitutions upon this subject are given in substance in the note below.⁵

1. These propositions are clearly laid down in *United States v. Wilson*, 7 Pet. (U. S.) 150; *Ex parte Wells*, 18 How. (U. S.) 307; *Ex parte Garland*, 4 Wall. (U. S.) 333.

How Exercised.—The President may exercise his power to pardon in several ways: 1st. It may be given to a person under conviction by name. 2nd. It may be given to a person or a class of persons by description. 3rd. It may be given by general proclamation, forgiving all who may be guilty of certain offences. *Lapeyre v. United States*, 17 Wall. (U. S.) 191.

2. *Haym v. United States*, 7 Ct. of Cl. 443; *United States v. Greathouse*, 2 Abb. (U. S.) 364; *United States v. Wilson*, 7 Pet. (U. S.) 150; 19 Am. Dec. 679, and note 68.

3. Some difference of opinion has arisen upon this proposition. It has been thought that the President has not power to confer pardon upon a class or community of offenders, that a general pardon or amnesty must be conferred by Congress. This position is clearly erroneous. It is now established beyond question that this power is bestowed solely upon the President. It seems clearly to have been contemplated by the framers of the constitution itself. HAMILTON, writing on this subject, says: "The principal argument for refusing the power of pardoning in this case in the chief magistrate is this: In seasons of insurrection or rebellion there are often critical moments when a well-timed offer of pardon to insurgents or rebels may restore the tranquillity of the commonwealth. Federalist (Dawson's ed.), No. 73.

For a comprehensive exposition of this subject see 8 Am. Law Reg. (N. S.)

512 and 577, in which the author, after a copious citation of authorities, says: "The clear conclusion would seem to be that the power to grant general pardon or amnesty for offences against the *United States* is an executive and not a legislative power, and that it cannot be created, exercised or controlled by any act of Congress.

4. *Ex parte Wells*, 18 How. (U. S.) 307.

5. *Alabama*.—The governor has power to remit fines and forfeitures under such regulations as may be prescribed by law, and after conviction to grant reprieves, commutations and pardons in all cases of crime against the State, except treason and impeachment. In cases of murder, arson, rape, forgery, perjury and larceny, the offender is not released from civil disability unless expressed in the pardon. A report must be made of all pardons, reprieves, fines remitted, etc., to the next session of the legislature with reasons for granting the same. *Alabama Const.* 1875.

The power to remit fines and forfeitures is confided by the State constitution to the governor alone, and cannot be exercised by the legislature; and therefore any act of the legislature which attempts, directly or indirectly, to remit a fine, either before or after it has been paid, is unconstitutional. *Haley v. Clark*, 26 Ala. 439.

Arkansas.—In all criminal and penal cases (except treason and impeachment), the governor shall have power to grant reprieves of sentences and pardons, after conviction, to remit fines and forfeitures under such regulations as the law shall provide. In case of treason he may stay execution till next meeting of the senate, by and with con-

sent of which he may grant pardon. He shall communicate to the general assembly at next meeting all pardons, reprieves, etc. *Arkansas Const.* (1874).

The constitution limits the pardoning power of the governor to cases of convicted criminals. Hence it is no infringement on the executive's right for the legislature to pass a general act of pardon or amnesty in favor of criminals who have not been convicted. *State v. Nichols*, 26 Ark. 74.

The pardoning power is not necessarily an executive function, but resides where the constitution places it. In the absence of legislation, it vests no more power in the executive than the legislative or judicial. *State v. Nichols*, 26 Ark. 74.

The failure of the legislature to regulate the exercise of the constitutional power of remitting fines vested in the governor, does not deprive him of that power. *Baldwin v. Scoggin*, 15 Ark. 427.

The governor of *Arkansas* has the constitutional power to pardon convicts, on such conditions as he may choose to impose, or upon the terms specified in the statutes; and if the pardon does not follow the terms of this statute, it will be considered as granted under the general power. *Ex parte Hunt*, 10 Ark. 284.

California.—The governor has power to grant reprieves and pardons after conviction for all offences against the State, except treason and impeachment, upon such conditions, restrictions and limitations as he thinks proper, subject to such regulations as the law may prescribe in the manner of applying for pardons. He has power to suspend an execution of sentence until the legislature assembles in case of treason. He is required to communicate all pardons, etc., with name, date of sentence and date of pardon to the legislature. *California Const.*, art. 7, § 1.

The pardoning power, whether exercised under the federal or State constitution, is the same in its nature and effect as that exercised by the representatives of the English crown in this country in colonial times. *People v. Bowen*, 43 Cal. 439; 13 Am. Rep. 148.

California Pen. Code, § 1590, giving to prisoners certain deductions from their term of imprisonment for good conduct, is not unconstitutional, as an infringement of the right of the governor to pardon, and no order from the governor is necessary before discharging a

prisoner whose term, after allowing his credits for good conduct, has expired. *Re Wadleigh*, 82 Cal. 518.

Colorado.—The governor has power to grant reprieves, commutations and pardons after conviction, for all offences against the State except treason and impeachment. The manner of applying for pardon, etc., is regulated by law. Governor must report all cases of pardons, etc., to the next legislature, with reasons for granting same. *Colorado Const.*, art. 4, § 7.

Connecticut.—The governor shall have power to grant reprieves after conviction (in all cases of crime except impeachment) until the end of the next session of the general assembly and no longer. *Connecticut Const.*, art. 4, § 10.

Delaware.—The governor shall have power to remit fines and forfeitures, to grant reprieves and pardons for all offences against the State except impeachment. He shall set forth fully in writing the grounds upon which he shall grant any pardon, etc., to be recorded in the general register of his official acts, and be laid before the general assembly at their next session. *Delaware Const.* (1831), art. 3, § 9.

Florida.—The governor has power to suspend the collection of fines and forfeitures, to grant reprieves and pardons for a period not exceeding sixty days from conviction, except in cases of impeachment.

The governor, justices of the supreme court, attorney-general, or a major part of them—the governor being one of them—may grant pardons, reprieves, and commutations upon what conditions they think proper. May also remit fines and forfeitures, but cannot grant pardon in cases of impeachment and treason. The manner of applying for pardon is regulated by law. *Florida Const.* (1868), art. 6, § 11.

Georgia.—The governor shall have power to grant reprieves and pardons, commute penalties and remit any part of a sentence for all offences against the State, except impeachment. *Georgia Const.* (1868), art. 9, § 2.

The governor may grant a pardon as well before as after conviction, and such pardon will bar any prosecution for the offence. *Domineck v. Bowdoin*, 44 Ga. 357; *Grubb v. Bullock*, 44 Ga. 379.

In all cases of application for pardon or reprieve, a certified copy of the evidence taken down at the trial of the criminal should accompany the application. *Bird v. Breedlove*, 24 Ga. 623.

Iowa.—The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offences against the State, except treason and impeachment, subject to regulations prescribed by law. He may remit fines and forfeitures, and suspend execution in case of treason until the meeting of the general assembly. He must report to that body his action with reason therefor. *Iowa Const.*, art. 4, § 10.

Illinois.—The governor shall have power to grant reprieves, commutations and pardons after conviction, for all offences, subject to such regulations as law may provide relative to the manner of applying therefor. *Illinois Const.*, art. 5, § 13.

Indiana.—The governor shall have power to grant reprieves, commutations and pardons after conviction, for all offences except treason and impeachment; to suspend execution for treason until legislature meets. He may remit fines and forfeitures under such regulations as may be prescribed by law. Legislature may constitute a council of the State officers, without whose advice the governor cannot act in certain cases. All cases of pardon, etc., must be reported to the legislature. *Indiana Const.* (1851), art. 5, § 17.

Kansas.—Pardoning power shall be vested in the governor under such regulations and restrictions as the law may prescribe. *Kansas Const.* (1859), art. 1, § 7.

Kentucky.—The governor has power to remit fines and forfeitures, and grant reprieves and pardons except in cases of treason and impeachment. He may grant reprieves for treason until the end of next session of the legislature. He has no power to remit dues to officers in any penal or criminal case. *Kentucky Const.* (1850), art. 3, § 10.

Louisiana.—The governor shall have power to grant reprieves for all offences except impeachment. With consent of the Senate he may grant pardons and remit fines and forfeitures. May grant reprieves in case of treason until the meeting of the assembly. Where the prisoner is not sentenced to hard labor, the governor's reprieve will release from custody until the final act of the legislature. *Louisiana Const.* (1868), tit. 3; *State v. Rose*, 29 La. Ann. 755.

The pardoning power has always been construed in *Louisiana* in the same manner as in *England*. *McDowell v. Couch*, 6 La. Ann. 366.

Maine.—After conviction the governor has power, with the advice of the council, to remit forfeitures and penalties and to grant reprieves and pardons, except for impeachment. The council consists of seven citizens chosen by the general assembly. *Maine Const.*, art. 5, § 2.

Massachusetts.—The power of pardoning offences, except in cases of impeachment, is placed in the governor and a council of nine persons chosen by the legislature. *Massachusetts Const.* (1780), art. 5, § 4; *Commonwealth v. Lockwood*, 109 Mass. 322.

A recommendation of mercy by the jury to the governor, is not a question of law or principle, but only one of fact which must be left to his discretion. *Opinions of Chief Justice*, 120 Mass. 600.

Maryland.—The governor may grant reprieves and pardons except for impeachment, unless for offences prohibited by other articles of the constitution. He may remit fines and forfeitures, but no other debts due to the State. Notice must be given in one or more newspapers of the application for the pardon and the day the decision will be rendered. The pardon, with reasons for granting same, must be reported to the legislature. *Maryland Const.* (1867), art. 2, § 20.

Michigan.—The governor may grant reprieves, commutations and pardons, except for treason and impeachment, upon whatever conditions he deems proper. He may suspend execution for treason until the meeting of the general assembly. He must report proceedings to the legislature. Application for pardon, etc., is regulated by law. *Michigan Const.*, art. 5, § 11; *People v. Moore*, 62 Mich. 496.

Missouri.—The governor may grant reprieves, commutations and pardons, after conviction, except in cases of impeachment and treason, subject to such conditions, limitations and restrictions as he may think proper. Application for pardon is regulated by law. He must report proceedings to the legislature. *Missouri Const.* (1873), art. 5, § 8.

In *Ex parte Collins*, 94 Mo. 22, it was held that under the act of 1865 and Rev. Stats., § 6533, a convict was not entitled to a discharge as of right until he had served three-fourths of the term of his sentence.

The power of pardoning is an executive function and does not belong to the legislature. *State v. Sloss*, 25 Mo. 292; 69 Am. Dec. 467.

It extends to the granting of pardons as well before as after conviction. *State v. Woolery*, 29 Mo. 300.

Minnesota.—The governor shall have power to grant reprieves and pardons, after conviction, for all offences against the State except for impeachment. *Minnesota Const.*, art. 5, § 4.

Mississippi.—In all criminal and penal cases, except treason and impeachment, the governor may grant reprieves and pardons, remit fines, and stay collection of forfeitures until the end of the next session of the legislature. He may remit the same with consent of the Senate. He may stay execution for treason until the end of the next session of the legislature. No pardon can be granted in cases of felony after conviction, until the application for the same shall be published for thirty days in some newspaper in the county where the crime was committed. The petition for pardon must set forth the reasons why such pardon should be granted. *Mississippi Const.* (1890), art. 5, § 124.

The governor of *Mississippi* has power to pardon a contempt committed against the circuit court, and to remit the sentence of fine and imprisonment. *Ex parte Hickey*, 4 Smed. & M. (Miss.) 751.

Nebraska.—The governor may grant reprieves, commutations and pardons after conviction, under such conditions, etc., as he thinks proper, except in cases of treason and impeachment. He may grant reprieves for treason until meeting of the legislature. He must report proceedings to that body. The manner of applying for pardon is regulated by law. *Nebraska Const.* (1875), art. 5, § 13.

Nevada.—The governor may suspend the collection of fines and forfeitures, and grant reprieves for a period not exceeding sixty days after conviction, except for treason and impeachment. In case of treason he may suspend execution until the meeting of the legislature. The governor, justices of the supreme court, and attorney general or a major part of them—the governor being one of them—may grant reprieves, commutations and pardons and remit fines and forfeitures, subject to conditions, etc., which they deem proper, except in cases of treason and impeachment. Application for pardon must be regulated by law. *Nevada Const.* (1868), art. 5, § 13.

The governor of the territory of

Nevada had no authority to commute a sentence of death to imprisonment for life, and such commutation did not authorize the delivery of a prisoner whose sentence was so commuted to the warden of the prison. *Ex parte James*, 1 Nev. 319.

The governor of this State has no authority to grant a pardon without the concurrence of two members beside himself of the pardoning board. *Ex parte James*, 1 Nev. 319.

Pardon may be granted after the term of imprisonment is ended. *State v. Foley*, 15 Nev. 64; 37 Am. Rep. 458.

North Carolina.—Governor may grant reprieves, commutations and pardons, except for impeachment, under such conditions, etc., as he deems proper. May suspend execution for treason until the meeting of the legislature. Must report proceedings to that body. Application for pardon, etc., must be governed by law. *North Carolina Const.* (1868).

It is within the pardoning power of the governor to remit part of a fine, though not to add to or commute a punishment. *State v. Twitty*, 4 Hawks (N. Car.) 193.

The governor may pardon after a verdict of guilty and sentence thereon, though the prisoner has taken an appeal not yet determined. *State v. Alexander*, 76 N. Car. 231; 22 Am. Rep. 675.

New Hampshire.—The power of pardon, except for convictions of impeachment by the Senate shall be in the governor, with the advice of a council of five elected by the people. *New Hampshire Const.* (1792), art. 5, § 2.

The governor, as chief executive magistrate, has the power of reprieve; but the governor and council have not this power, by virtue of the power to pardon given them by the constitution. *Ex parte Howard*, 17 N. H. 545.

New Jersey.—The governor may suspend the collection of fines and forfeitures and grant reprieves for ninety days after conviction, except in cases of impeachment and treason. The governor, chancellor and the six judges of the court of error and appeals or a major part of the same, the governor being one of them, may remit forfeitures and fines and grant pardons in all cases except treason and impeachment. *New Jersey Const.* (1844), art. 5.

New York.—The governor shall have power to grant reprieves and

pardons after conviction in all crimes against the State except treason and impeachment under such conditions, restrictions and limitations as he thinks proper, subject to regulations of law as to the manner of applying for the same. He must communicate all proceedings of pardons, etc., with names and date of crime and conviction to the legislature. *New York Const.* (1846), art. 4, § 5.

A general power to grant pardons includes the power to grant a conditional pardon; and it is a legal and proper condition that the criminal convicted shall leave the *United States* and not return. *People v. Potter*, 1 Park. (N. Y.) 47; 1 *Edm. Sel. Cas.* (N. Y.) 235.

Ohio.—Same as *New York*.

The governor may grant reprieves in cases of treason until the meeting of the legislature. *Ohio Const.* (1851), art. 3.

The governor may relieve a prisoner sentenced to death, and at the expiration of the period of suspension neither an order of court nor consent of the prisoner is necessary to authorize the sheriff to carry the sentence into effect. *Sterling v. Drake*, 29 *Ohio St.* 457; 23 *Am. Rep.* 762.

Oregon.—Same as *New York Const. Oregon*, art. 4, § 4.

Pennsylvania.—The governor may remit fines and forfeitures, grant reprieves, commutations and pardons, except for impeachments. But no pardon shall be granted nor sentence commuted except on recommendation in writing from (1) the lieutenant governor, (2) the secretary of the commonwealth, (3) the attorney general, (4) secretary of internal affairs or any three of them, upon hearing in open session with due public notice, a full discussion and reasons for action. All pardons, etc., must be recorded in the office of the secretary of the commonwealth. *Pennsylvania Const.* (1873), art. 4, § 9.

The power of the governor of *Pennsylvania* to grant pardons does not extend to remitting the costs to which the prisoner may have been sentenced upon conviction. *Ex parte M'Donald*, 2 *Whart.* (Pa.) 460.

The governor may annex to a pardon any condition, whether precedent or subsequent, not forbidden by law, and it lies on the grantee to perform it. If he does not, in case of a condition precedent, the pardon does not take ef-

fect; in case of a condition subsequent, the pardon becomes null; and, if the condition is not performed, the original sentence remains in full force, and may be carried into effect. *Flavell's Case*, 8 *Watts & S.* (Pa.) 197; *State v. Chancellor*, 1 *Strobh.* (S. Car.) 347.

The governor of *Pennsylvania* had no power to remit penalties incurred under the act of April 2nd, 1830, "for regulating hawkers and peddlers." The fines and penalties which the governor may remit are such, and such only, as are now or were originally payable to the State. *Shoop v. Commonwealth*, 3 *Pa. St.* 126.

A pardon is an act of mere grace, and is not founded on any preliminary steps that furnish legal merits or a legal title. *Commonwealth v. Hallows*, 44 *Pa. St.* 210; 84 *Am. Dec.* 431.

South Carolina.—The governor has power to grant reprieves and pardons after conviction, except for impeachment, under such restrictions as he deems proper. May remit fines and forfeitures unless otherwise directed by law. He must report proceedings to general assembly. *South Carolina Const.*, art. 3, § 11.

Section 4 of the act of *South Carolina* of 1827, directing fines and forfeitures incurred or imposed in any court of sessions to be paid to the commissioners of public buildings for public purposes, did not deprive the governor of the power conferred by the constitution to remit so much of any fine or forfeiture as is not by law given to the informer, or other private persons, for private purposes. *State v. Simpson*, 1 *Bailey* (S. Car.) 378.

Tennessee.—The governor shall have power to grant reprieves and pardons after conviction, except for impeachment. *Tennessee Const.* (1870), art. 3, § 6.

Texas.—In all criminal cases except treason and impeachment the governor may grant reprieves, commutations and pardons. He may remit fines and forfeitures, subject to such rules as may be prescribed by law. With consent of the Senate he may pardon treason. He must file with the secretary of State his reasons for granting any pardon or remission, etc. *Texas Const.* (1876), art. 4, § 11.

Under a provision of law authorizing the governor to remit forfeitures "after conviction," he may remit a judgment of forfeiture against the sureties on a bail bond, although the

V. EFFECT OF PARDON—1. Full Pardon.—The effect of a full pardon is to remove the punishment and all legal disabilities consequent on the criminal; giving the offender a new credit, capacity, and character, so that in the eye of the law he is as innocent as if he had never committed the crime,¹ with the general limitation,

principal is not convicted. *State v. Dyches*, 28 Tex. 535.

Governor cannot revoke a pardon after delivery and acceptance by the grantee or his agent. *Rosson v. Stehr*, 23 Tex. App. 287.

Vermont.—The governor and council may grant pardons and remit fines, except for treason and murder, in which they shall have power to grant reprieves until the end of the next session of the legislature, except in cases of impeachments. The council consists of governor, lieutenant governor and twelve councilmen chosen by the people. *Vermont Const.* (1793).

West Virginia.—The governor has power to remit fines and penalties in cases regulated by law, and to commute capital punishment, grant reprieves and pardons, except for murder. When the prosecution has been carried into the house of delegates a full report of proceedings must be made to that body, with reasons for granting the same. *West Virginia Const.*

Wisconsin.—Same as *New York*. *Wisconsin Const.* (1848), art. 5, § 6.

1. General Effect.—*Bacon's Abr.*, tit. Pardon, A, 4 *Black. Com.* 402; 1 *Chit. Crim. Law* 776; *Ex parte Garland*, 4 *Wall. (U. S.)* 333. It was formerly doubted whether a pardon could do more than take away the punishment, leaving the crime and its disabling consequences unremoved. But it has long been settled that a pardon, whether by the king or by act of parliament, removes not only the punishment but all the legal disabilities consequent on the crime.

The king's pardon doth not only clear the offence itself, but all the dependencies, penalties, and disabilities incident with it. *Cuddington v. Wilkens*, *Herb. Reports (Eng.)* 81-82; *Gilb. Ev.* 128; *Knote v. United States*, 95 *U. S.* 149; *Osborn v. United States*, 91 *U. S.* 474. A full pardon removes all disabilities and restores all rights consequent on judgment. *Wood v. Fitzgerald*, 3 *Oregon* 568; *Commonwealth v. Bush*, 2 *Duv. (Ky.)* 264; *State v. Foley*, 15 *Nev.* 64; 37 *Am. Rep.* 458.

In *New York*, the effect of a pardon was held to be to acquit the offender of the penalties annexed to his conviction, and give him a new credit and capacity; but not to affect or annul the second marriage of his wife, nor the sale of his property by persons appointed to administer on his estate, nor divest his heirs of the interest acquired in his estate in consequence of his civil death. *Re Deming*, 10 *Johns. (N. Y.)* 232.

And it was held that one sentenced to the state prison for life in *New York*, and afterwards pardoned, was restored to his rights and duties as a parent, and become entitled to the custody of his children, who had been placed under the care of a guardian appointed during his civil death. *Re Deming*, 10 *Johns. (N. Y.)* 232.

A pardon of the president of the *United States*, after condemnation, as to all the interest of the *United States* in the penalty incurred by a violation of the embargo laws, and directing all further proceedings on behalf of the *United States* to be discontinued, was held not to remit the interest of the custom-house officers in a moiety. *United States v. Lancaster*, 4 *Wash. (U. S.)* 64.

Pardon for conspiracy to defraud the revenues, does not cancel a judgment for forfeiture for fraud upon the revenue. *Ex parte Weimer*, 8 *Biss. (U. S.)* 321.

Property confiscated by judgment cannot be restored by the president. It is national property and must be disposed of by Congress. *Knote v. United States*, 10 *Ct. of Cl.* 397.

A fine, to which the State is entitled may be remitted by the executive, even after it has been paid, and in such case it will be repaid. *Re Flournoy*, 1 *Ga.* 606.

But if an individual is entitled to a fine imposed, or any part of it, it is a vested right, and cannot be divested by the executive. *Re Flournoy*, 1 *Ga.* 606.

A full pardon, granted and accepted before seizure of property, or the institution of proceedings to condemn it, was held to be a bar to a judgment of condemnation under the confiscation acts. *United States v. Athens Armory*, 35 *Ga.* 344.

A pardon of a fine discharges judgment upon a note for amount of the fine. *Parrott v. Wilson*, 51 Ga. 225.

After a fine has been paid over to the informer, a subsequent remission of the fine by the governor will not give the person fined a right of action to recover it. *Rucker v. Bosworth*, 7 J. J. Marsh. (Ky.) 645.

In *Rankin v. Beaird*, 1 Ill. 123, it was held that the legislature of *Illinois* can, by an act, release a person from imprisonment who has been convicted of forgery, though one-half of the fine imposed against him goes to the person attempted to be defrauded by the forger.

A person was convicted of a criminal offence and sentenced to imprisonment for a specified time, and to pay a fine of \$100. Subsequently, he was pardoned "of said crime of which he stands convicted." Held, that he was discharged from the fine, as well as the imprisonment, but not from the costs. *Holliday v. People*, 10 Ill. 214.

A person convicted and attainted of felony, prior to March 29, 1799, was held not civilly dead, so as to divest his estate; and it was held that, after a pardon, he could maintain an action concerning an estate holden by him prior to conviction. *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118.

A pardon in general terms of the "crimes whereof he is convicted," includes all fines. *Commonwealth v. Shisler*, 2 Phila. (Pa.) 256.

Where the forfeiture of an estate to the commonwealth on account of treason, and in pursuance of an act of the legislature, is complete, a pardon without words of restitution does not restore the estate. *Aldrich v. Jessop*, 3 Grant Cas. (Pa.) 158.

A pardon by the governor does not discharge the moiety of a fine which goes to the informer. *Rowe v. State*, 2 Bay (S. Car.) 565; *State v. Williams*, 1 Nott & M. (S. Car.) 26.

Where a justice of the peace, in *Virginia*, forfeited his office, and became disqualified from acting under his commission, on account of a judgment and conviction against him for felony, it was held that a pardon did not avoid the forfeiture or restore his capacity. *Fugate's Case*, 2 Leigh (Va.) 724.

It restores an officer whose rank has been reduced by a court martial, to his former relative rank according to the date of his commission. 12 Op. Atty.-Gen 547.

Fines, Forfeitures and Penalties.—At

the common law, where a person committed such a crime as worked an attainder and forfeiture of estate, he could only be restored to his estate and right of inheritance by act of parliament. Bac. Abr., tit. Pardon H. But 5 Geo. IV, ch. 84, § 26. protects felons who have received a remission of their sentences in the enjoyment of all property acquired by them since their conviction, and not merely such property as has been acquired by their own industry. *Gough v. Davies*, 2 Kay & J. 623; 25 L. J., Ch. 677.

In the *United States*, a pardon relieves from forfeiture of property seized, so far as the right accrues to the government. *Armstrong's Foundry v. United States*, 6 Wall. (U. S.) 766; *United States v. Athen's Armory*, 2 Abb. (U. S.) 129; *Osborn v. United States*, 91 U. S. 474.

Pardon of an offence bars a civil action brought to recover a penalty on the same act. *United States v. McKee*, 4 Dill. (U. S.) 128.

A judgment for a penalty against T, under the revenue laws, B being adjudged moiety as first informant. Held, that pardon remitted the moiety due to B as well as to the United States. *United States v. Thomason*, 4 Biss. (U. S.) 336.

Restores Competency as a Witness or Jurymen.—Where one has been disqualified on account of conviction of crime to testify, his competency is restored by a pardon. 1 Greenl. Ev. (14th ed.), § 377; *State v. Dodson*, 16 S. Car. 453; *Rivers v. State*, 10 Tex. App. 177; *Hester v. Commonwealth*, 85 Pa. St. 139; *Martin v. State*, 21 Tex. App. 1.

An instrument in writing, issued by the president, under the seal of the *United States*, directing that one who had been sentenced to the penitentiary for robbing the mail, be forthwith released from prison, was held to be a pardon, which annulled the sentence, and restored the prisoner to his competency as a witness. *Jones v. Harris*, 1 Strobb. (S. Car.) 160.

But where the disability does not grow out of the judgment, but out of the character of the crime itself, as perjury; or where the disability is annexed to the crime by express words of the statute, pardon will not restore competency. 1 Greenl. Ev. (14th ed.), § 378; *Blanc v. Rodgers*, 49 Cal. 15.

A pardon remitting to the convict "the residue of the punishment he was

however, that it does not restore offices forfeited or property interests vested in others in consequence of conviction and judgment.¹

sentenced to endure," was held not to restore his competency as a witness, though otherwise as to a full pardon. *Perkins v. Stevens*, 24 Pick. (Mass.) 277.

Pardon also restores competency to sit on a jury. *Puryear v. Commonwealth*, 83 Va. 51.

The pardon of a person, by the president of the *United States*, restores such person to the rights and privileges of a citizen of the *United States*; but it does not, without the assent of the State, where the sovereign power of the State has excluded him from the right of suffrage, restore him to the exercise of that right. *Ridley v. Sherbrook*, 3 Coldw. (Tenn.) 569.

A pardon by the president of the *United States* was held to remove the convict's disqualification to hold office. *Hildreth v. Heath*, 1 Ill. App. 82.

The general assembly can alone restore the privilege of voting to one convicted of an infamous crime by an express act passed for that purpose, not a pardon by the governor. Opinion of Judges, 4 R. I. 583.

Restores one to citizenship who has been disfranchised. 9 Op. Atty.-Gen. 478.

A pardon, by the president of the *United States*, of one convicted of passing a counterfeit note, and sentenced to three years' imprisonment, liberating the prisoner on payment of costs, was held to restore the prisoner's competency as a witness. *Hoffman v. Coster*, 2 Whart. (Pa.) 453.

1. Limitation of Effect.—*Ex parte* Gowland, 4 Wall. (U. S.) 366.

Costs.—A pardon cannot remit costs that go to third persons. *Smith v. State*, 6 Lea (Tenn.) 637.

The governor's pardon of a person convicted of a crime, does not discharge the defendant from the costs of prosecution, nor is the governor authorized to remit the costs in such case. *State v. Farley*, 8 Blackf. (Ind.) 229; *Estep v. Lacy*, 35 Iowa 419; 14 Am. Rep. 498; *Re Ruhl*, 5 Sawy. (U. S.) 186. Pardon does not prevent re-arrest for costs. *Ex parte* Boyd, 34 Kan. 570; *State v. Mooney*, 74 N. Car. 98; 21 Am. Rep. 487.

But a pardon in *Mississippi*, pleaded before conviction, bars a judgment for

court costs and witness fees. *White v. State*, 42 Miss. 636. Nor can a pardoned convict be held in confinement for payment of costs adjudged against him. *Ex parte* Gregory, 56 Miss. 164.

A pardon by the governor of persons convicted of assault and battery, when pleaded before sentence, discharges the defendants from liability for costs. *Commonwealth v. Hitchman*, 46 Pa. St. 357.

But otherwise when the pardon is subsequent to the conviction. *Schuylkill v. Reifsnnyder*, 46 Pa. St. 446.

A pardon by the governor of a person convicted of fornication and bastardy, when pleaded before sentence, discharges the defendant from liability for costs, as well as for the maintenance of the bastard child. *Commonwealth v. Ahl*, 43 Pa. St. 53.

Execution for fine and costs, issued after pardon, is void. *Blanchard v. State*, Wright (Ohio) 377.

Vested Interests and Forfeitures.—Though a pardon remit a penalty, yet if it be already paid into the *United States* treasury, it cannot be drawn out without an act of Congress. 8 Op. Atty.-Gen. 281.

Pardon of all interests of *United States* in a penalty, does not remit custom house officers' moiety or moiety due the informer. *United States v. Lancaster*, 4 Wash. (N. S.) 64; *United States v. Harris*, 1 Abb. (U. S.) 110.

But where it remits the whole penalty it remits the moiety adjudged to the informer. *United States v. Thomasson*, 4 Biss. (U. S.) 336.

Pardon does not restore forfeited offices or property. *Knote v. United States*, 10 Ct. of Cl. 397; *Ex parte* Garland, 4 Wall. (U. S.) 333. Nor invalidate judicial confiscations. *United States v. Six Lots of Ground*, 1 Woods (U. S.) 234. Nor rights vested in others by judicial process. *Osborn v. United States*, 91 U. S. 474. Nor entitle to proceeds of property condemned, paid into the U. S. Treasury. *Knote v. United States*, 95 U. S. 149.

The federal power cannot remove penalties imposed by the State courts Wharton's Crim. Law, § 591g. *Ridley v. Sherbrook*, 3 Coldw. (Tenn.) 569.

2. Conditional Pardon.—The effect of any other than a full pardon must be determined by the special terms of the instrument of pardon itself. When any condition is annexed to the pardon, the condition must be performed or the original sentence remains in full force and may be carried into effect.¹ If, however, the condition annexed is illegal or impossible, the condition is void and the pardon absolute.

A statutory disqualification of "every person convicted of felony" from carrying on certain businesses, is removed by a free pardon under the royal sign-manual. *Hay v. Justices*, 24 Q. B. Div. 561.

For a discussion as to the effect of a free pardon and a review of the English decisions bearing upon the subject, see 25 Law J. 123.

1. Effect of Conditional Pardon.—The king may extend his mercy on what terms he pleases, and may annex any condition he thinks fit, whether precedent or subsequent, on the performance of which the validity of the pardon will depend. 4 Black. Com. 401; Co. Lit. 274 *b*. The same doctrine obtains in the United States. *Ex parte Wells*, 18 How. (U. S.) 307-331 and note; *United States v. Wilson*, 7 Pet. (U. S.) 150; *Flavell's Case*, 8 W. & S. (Pa.) 197; *State v. Chancellor*, 1 Strobb. (S. Car.) 347; 47 Am. Dec. 557.

The recital in a pardon of a specific offence, limits its effect to that offence, and embraces no other. *Ex parte Weimer*, 8 Biss. (U. S.) 321.

Condition Precedent and Subsequent.—The condition annexed to a pardon may be either precedent or subsequent, and it lies in the grantee to perform it. If he does not in case of condition precedent, the pardon does not take effect; in case of condition subsequent, the pardon becomes null and void. *Flavell's Case*, 8 W. & S. (Pa.) 197; *Ex parte Wells*, 18 How. (U. S.) 307; *Waring v. United States*, 7 Ct. of Cl. 501.

Breach of Conditions.—A convict who has broken the conditions of his pardon may be remanded to the penitentiary to serve out the balance of his sentence, though the time in which he was to serve has expired. *State v. Barnes* (S. Car. 1890), 10 S. E. Rep. 611.

If conditions are broken, the criminal may be remanded, without hearing, to serve his unexpired term of punishment. *Ex parte Kennedy*, 135 Mass. 48.

Upon breach of conditions, legal

status becomes the same as it was before pardon was granted. *Arthur v. Craig*, 48 Iowa 264; 30 Am. Rep. 395.

The time between the conditional pardon and subsequent arrest shall be taken to be a part of the term of sentence. *West's Case*, 111 Mass. 443.

Pardon on Condition of Leaving the State.—A pardon, granted by the governor to a convict on condition that he leave the State never to return, is authorized by *South Carolina Const.*, art. 3, § 11, which provides that the governor may grant pardons after conviction, except in cases of impeachment, "in such manner, on such terms, and under such restrictions as he shall think proper." *State v. Barnes* (S. Car. 1890) 10 S. E. Rep. 611.

A condition may be annexed to a pardon, that the offender shall submit to a specific punishment, and then leave the State, never to return; and the infliction of the specified punishment will not dispense with the performance of the other part of the condition; but, on the offender's failing to perform it within a reasonable time, the pardon is forfeited, and the execution of the original sentence may be enforced. *State v. Addington*, 2 Bailey (S. Car.) 516; 23 Am. Dec. 150. See also *State v. Smith*, 1 Bailey (S. Car.) 283.

Re Lockhart, 1 Disney (Ohio) 105; *Commonwealth v. Philadelphia Co. Prison*, 4 Brewst. (Pa.) 320; *Ex parte Marks*, 64 Cal. 29; 49 Cal. 684.

Under the constitution of *Michigan*, a person charged with violating the conditions of his pardon must be regularly examined, informed against, and tried, like any other person charged with crime. *People v. Moore*, 62 Mich. 496.

Where one is pardoned on condition of leaving the country in a certain time, the court ordered the time during which he was sick and deranged not to be included. *Ely v. Hallett*, 2 Cai. (N. Y.) 57.

Where a pardon recited that the prisoner should "leave the State without delay," and he left but returned in five months, it was held that the

3. General Pardon.—The effect of a general pardon or amnesty is the same in principle as any other. It differs only in its extent and application. Being a public act the courts must take judicial knowledge of it in administering justice to its beneficiaries.¹

VI. CONSTRUCTION AND VALIDITY OF AN INSTRUMENT OF PARDON.—An instrument of pardon is a deed, to the validity of which delivery and acceptance are essential.² Its terms must be construed

condition was performed. *Ex parte* Hunt, 10 Ark. 284.

Repugnant and Void Conditions.—The condition must be possible, moral and legal. *State v. Smith*, 1 Bailey (S. Car.) 283; *State v. Addington*, 2 Bailey (S. Car.) 516; 23 Am. Dec. 150; *Lee v. Murphy*, 22 Gratt. (Va.) 789; 12 Am. Rep. 563.

Where a condition was annexed to a pardon by the governor of *Virginia*, it was held that the executive had no authority to pardon upon condition, and that such pardon was absolute. *Commonwealth v. Fowler*, 4 Call (Va.) 35.

It was held in *Woodward v. Murdock* 124 Ind. 439, that the governor's parol on conditions accepted by the prisoner should not be held to operate as an unconditional pardon; that the governor was the sole judge of the breach of the terms of the parol, and had power for a breach to order a rearrest.

1. Effect of Amnesty.—In cases arising under the act of Congress of Aug. 6th, 1861, for the seizure and confiscation of property used in aid of the rebellion, a full pardon and amnesty of the claimant by the president was held to relieve him of so much of the penalty as was due to the United States. *Armstrong's Foundry*, 6 Wall. (U. S.) 766.

A general pardon does not entitle its beneficiaries to proceeds of confiscated property after such proceeds have been paid into the treasury of the *United States*. *Knote v. United States*, 95 U. S. 149; *Bragg v. Lorio*, 1 Woods (U. S.) 209; *United States v. Six Lots of Ground*, 1 Woods (U. S.) 234. But where proceeds are not actually paid into the treasury and still in power of the court, they must be restored. *Brown v. United States*, *McCahon* (Kan.) 229.

The amnesty proclamation, of Dec. 8th, 1863, extended to persons who, prior to the date of proclamation, had been convicted and sentenced for the offences described in such proclamation. *Great-house's Case*, 2 Abb. (U. S.) 382.

That of February 25th, 1868, included those pardoned before, upon conditions

they had never complied with. *Waring v. United States*, 7 Ct. of Cl. 501.

If the act of Congress of January 24th, 1865, providing that no one shall be admitted to the bar of the *United States* courts as an attorney without taking the oath required by the act of July 2d, 1862, were valid, the oath required thereby could not be exacted from one who has received the pardon of the president for all offences "arising from participation, direct or implied, in the rebellion." *Ex parte Garland*, 4 Wall. (U. S.) 333.

An act may be a public offence and punishable as such, and yet a right of any one injured to recover damages may exist. Thus a person who engaged in rebellion against the *United States*, is liable to private individuals for acts of trespass committed by him while in the rebellion; and a pardon of the public offence will not relieve him from his civil responsibility. *Hedges v. Price*, 2 W. Va. 192; 94 Am. Dec. 507.

Where an act authorizing the governor to issue a proclamation of amnesty and pardon, was repealed before a plea of pardon under it was filed, the plea was held rightly overruled, notwithstanding that the indictment was filed and *capias* executed before the repeal, and the case was continued by the prosecution. *Michael v. State*, 40 Ala. 361.

The *Kentucky* amnesty statute of February, 1867, was adjudged unconstitutional so far as it affected civil remedies for private wrongs. *Terrill v. Rankin*, 2 Bush (Ky.) 453; 92 Am. Dec. 500.

2. Nature of an Instrument of Pardon.—JUSTICE MARSHALL, in *United States v. Wilson*, says: "A pardon is a deed to the validity of which delivery is essential, and delivery is not complete without acceptance. It may be then rejected by the person to whom it is tendered, and if it be rejected we have discovered no power in a court to force it on him. It may be supposed that no being condemned to death would reject a pardon, but the rule must be the same.

strictly, and, as in a grant, in favor of the grantee.¹

VII. PLEADING AND PROOF OF PARDON.—A pardon may be pleaded in bar of the indictment, in arrest of judgment or in bar of execution, but the courts can take no notice of it unless so pleaded and also proved, except in case of an amnesty or general pardon, of which the court must take judicial knowledge.²

in capital cases and misdemeanors. A pardon may be conditional and the condition may be more objectionable than the punishment inflicted by the judgment. *United States v. Wilson*, 7 Pet. (U. S.) 150. *Matter of DePuy*, 3 Ben. (U. S.) 307.

Delivery and Acceptance.—Delivery and acceptance of a pardon are complete when the grantor has parted with his entire control of dominion over the instrument, intending it to pass to the grantee. It may be accepted either by the prisoner or his agent. If the agent accept the pardon on behalf of the grantee, the pardon takes effect immediately upon its delivery. *Rosson v. Stehr*, 23 Tex. App. 287.

If given to the prison keeper it is constructive delivery, and cannot be revoked, but if still in the hands of the agent of the grantor it may be revoked, as where it is in the hands of the marshal, he being only a messenger of the president. *Matter of De Puy*, 3 Ben. (U. S.) 307.

Delivery to the warden of the penitentiary, though the prisoner is still in jail, is an irrevocable delivery. *Ex parte Powell*, 73 Ala. 517; 49 Am. Rep. 71.

So to one suing for the release of the prisoner. *Ex parte Reno*, 66 Mo. 266; 27 Am. Rep. 337.

Delivery and acceptance of a pardon may be shown by circumstantial evidence. *Hunnicut v. State*, 18 Tex. App. 498; 51 Am. Rep. 330.

Validity.—A pardon, granted by the *de facto* governor is valid, though he may not have a perfect title to the office; but a pardon granted by one who merely claims to hold over after expiration of his time, and after acts and declarations or disclaimer of any right to hold over, is valid. *Ex parte Smith*, 8 S. Car. 495.

A pardon is not void because there is no entry of it made in the office of the secretary of State. *Ex parte Reno*, 66 Mo. 266; s. c., 27 Am. Rep. 337.

Where a pardon was made out, executed and delivered to the warden of the State prison for the discharge of

Francis B. Edymoire, and it appeared, on return by the warden to a writ of *habeas corpus* that the name of the prisoner, in fact, was Francis B. Edymoin, it was held that the variance was unimportant, and did not vitiate the pardon. *Re Edymoin*, 8 How. Pr. (N. Y.) 478.

A pardon is valid, though on the date of conviction, as recited therein, no legal conviction could have occurred. *Martin v. State*, 21 Tex. App. 1.

But where a pardon has been obtained upon misinformation or fraud, it is void. *Bacon's Abr.*, tit. Pardon D; *Commonwealth v. Kelly*, 9 Phila. (Pa.) 586; *Rosson v. Stehr*, 23 Tex. App. 287.

Revocation.—No subsequent action of the executive can revoke a pardon once tendered and accepted. *State v. Nichols*, 26 Ark. 74; *Ex parte Reno*, 66 Mo. 266; 27 Am. Rep. 337; *Knapp v. Thomas*, 39 Ohio St. 377; 48 Am. Rep. 462.

1. *Haym v. United States*, 7 Ct. of Cl. 443; *State v. Shelton*, 65 N. Car. 294.

2. **Pardon Must be Pleaded.**—It is a constituent part of the judicial system that the judge sees only with judicial eyes and knows nothing respecting any particular case of which he is not judicially informed. A private deed not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted upon. *United States v. Wilson*, 7 Pet. (U. S.) 150; *State v. Blalock*, Phill. (N. Car.) 242. See also *CRIMINAL PROCEDURE*, vol. 4, p. 798. *Greathouse's Case*, 2 Abb. (U. S.) 382.

"Pardon" is the forgiveness of an offence granted by the executive, sometimes before, but usually after conviction, to one who is certainly guilty. It is not noticed by the court unless in some way pleaded by the person pardoned. But "amnesty" is the abolition or oblivion of the offence granted by the legislative power, before trial, generally to whole classes who it is supposed may be guilty. *State v. Blalock*, Phill. (N. Car.) 242.

Proof of Pardon.—A pardon granted

VIII. MISCELLANEOUS.—Contracts for procuring or buying a pardon for a convict are void and against public policy, and a court of equity will on this ground declare them null and void.¹

The analogy of foreign convictions may be applied to foreign pardons.²

PARENT AND CHILD—(See ABDUCTION, vol. 1, p. 21; ADOPTION, vol. 1, p. 204; ADVANCEMENTS, vol. 1, p. 216; APPRENTICES, vol. 1, p. 636; BASTARDY, vol. 2, p. 129; CHILDREN, vol. 3, p. 229; CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15; DIVORCE, vol. 5, p. 745; DURESS, vol. 6, p. 57; EDUCATION, vol. 6, p. 158; FALSE IMPRISONMENT, vol. 7, p. 661; GIFTS, vol. 8, p. 1308; GUARDIAN AND WARD, vol. 9, p. 85; HABEAS CORPUS, vol. 9, p. 161; HOMESTEADS, vol. 9, p. 423; INFANTS, vol. 10, p. 613; MASTER AND SERVANT, vol. 14, p. 740).

I. In General, 332.

1. *Definition*, 332.

2. *Gifts and Transactions Between Parent and Child*, 332.

3. *Advancements* (See ADVANCEMENTS, vol. 1, p. 216), 336.

4. *Sale of Expectant Estates*, 336.

5. *Claims for Services*, 336.

6. *The Quasi Parental Relation*, 342.

II. Adoption (See ADOPTION, vol. 1, p. 204), 345.

III. Legitimacy, 345.

by a governor of a State under its great seal is evidence *per se* without further proof. *United States v. Wilson*, 7 Pet. (U. S.) 150.

So a communication from the Senate that a recommendation of pardon has been favorably acted upon is sufficient proof. *State v. Baptiste*, 26 La. Ann. 134.

One who claims the benefit of a pardon granted upon conditions, must make clear affirmative proof that the conditions have been complied with. *Haym v. United States*, 7 Ct. of Cl. 443; *Waring v. United States*, 7 Ct. of Cl. 501; *Scott v. United States*, 8 Ct. of Cl. 457.

In order to take the benefit of the amnesty act of 1866-7, it was held only necessary to show that the defendant was an officer or soldier, and that the felony charged was committed in the discharge of his duties as such. *State v. Keith*, 63 N. Car. 140.

A plea which sets up an amnesty proclamation, containing exceptions, must aver that the respondent is not within any of the exceptions specified therein. *St. Louis Street Foundry v. United States*, 6 Wall. (U. S.) 770, note.

The copy of the governor's minutes are not evidence of a pardon; the war-

rant should be produced or its loss accounted for. *Spalding v. Saxton*, 6 Watts (Pa.) 338.

One who is convicted for the second time of a felony, and sentenced, according to the statute, to duplicated punishment, cannot plead, in exoneration of the increased punishment, an executive pardon of the former conviction. *Mount v. Commonwealth*, 2 Duv. (Ky.) 93; *Evans v. Commonwealth*, 3 Met. (Mass.) 453.

1. *Bouv. Inst.*, n. 3857, but a contract with an attorney at law that the latter shall endeavor to secure a pardon, and that if successful a stipulated sum shall be paid for his services, is not in itself illegal. *Moyer v. Cantieny*, 41 Minn. 245.

Where a commonwealth's attorney is entitled to 25 per cent. of fines collected on prosecutions for gaming, and he takes a bond from a person convicted to pay the amount due him, provided the governor does not, by a certain day, remit the fine, and the governor subsequently remits nearly all the fine, the attorney cannot recover on such bond. *Routt v. Feemster*, 7 J. J. Marsh. (Ky.) 231.

2. *Wharton's Crim. Law*, § 591 g; *Wh. Con. of Law*, § 938; *Ridley v. Sherbrook*, 3 Coldw. (Tenn.) 569.

IV. Duties of Parents, 345.

1. *Protection*, 345.
2. *Education*, 346.
 - (a) *Religious Education*, 346.
 - (b) *Apprentices* (See also APPRENTICES, vol. i, p. 36), 347.
3. *Maintenance*, 348.
 - (a) *In General*, 348.
 - (b) *Power of Child to Bind the Parent as Agent*, 356.
 - (c) *Maintenance in Equity*, 358.

V. Rights of Parents, 362.

1. *Right of Control*, 362.
2. *Criminal Misconduct of Parents*, 363.
3. *Custody of Children*, 364.
 - (a) *At Common Law*, 364.
 - (b) *In Equity*, 365.
 - (c) *American Rule*, 368.
 - (d) *Custody in Divorce* (See also DIVORCE, vol. V, p. 832), 372.

(e) *Contracts Transferring Parental Right*, 373.

4. *Right to Children's Services and Earnings*, 379.
5. *Right to the Property of the Child*, 384.

VI. Rights and Liabilities in Case of Torts, 385.

1. *Right of Parent Where the Child Is Injured*, 385.
 - (a) *Loss of Service*, 385.
 - (b) *Seduction* (See SEDUCTION), 390.
 - (c) *Damages*, 390.
2. *Liability of Parent Where the Child is the Injuring Party*, 392.

VII. Duties of Children, 394.

VIII. Rights of Children, 395.

1. *To Use the Property of the Parent*, 395.
2. *Emancipation*, 395.
3. *Suits Against Parents*, 399.

IX. Commitment of Children to Penal and Charitable Institutions, 400.

I. IN GENERAL—1. **Definition.**—From the relation of parent and child flow various rights, duties and liabilities which the law recognizes and enforces, and which give rise to what is termed the law of parent and child, and concerning which it is proposed here to treat. The ordinary sense of the word parent is confined to the immediate father or mother; but in construing wills, it sometimes is used, in furtherance of the intention of the testator, to denote any lineal ancestor.¹ A person is said to be *in loco parentis* when he is invested with the rights and charged with the duties of a parent.²

2. **Gifts and Transactions Between Parent and Child**—(See also GIFTS, vol. 8, p. 1334).—A gift between parent and child is valid unless prejudicial to the creditors of the donor. It may be by deed or will, if realty; and a gift of personalty is valid if the purpose is verbally expressed and is accompanied by delivery, actual or constructive;³ but where the donee is a minor living with his parent,

1. *Sibley v. Perry*, 7 Ves. 530; *Ross v. Ross*, 20 Beav. 645. "I have tried hard to understand that part of the judgment in *Ross v. Ross* that deals with the shifting meaning of the word 'parent.'" *BRETT, L. J.*, in *Ralph v. Carrick*, 48 L. J., Ch. 809.

The relation of parent and child is *prima facie* established if the parents are recognized as husband and wife. *Dalton v. Bethlehem*, 20 N. H. 505; *Illinois L. & L. Co. v. Bonner*, 75 Ill. 315.

2. A person *in loco parentis* "is a

person who means to put himself in the situation of a lawful father of the child, with reference to the father's office and duty of making provision for the child." *Brinkerhoof v. Merselis*, 24 N. J. L. 680.

As to whether a testator puts himself *in loco parentis*, see *In re Hamlet*, 57 L. J., Ch. 107; *Ex parte Pye*, 18 Ves. 140; *Powys v. Mansfield*, 3 Myl. & Cr. 359; s. c., 7 L. J., Ch. 478; *Pym v. Lockyer*, 5 Myl. & Cr. 29; s. c., 10 L. J., Ch. 153.

3. *Kellogg v. Adams*, 51 Wis. 138;

and the delivery is constructive only, the gift must be proved by clear and conclusive evidence.¹ A parent may settle property in

Janborn v. Goodhue, 28 N. H. 48; 59 Am. Dec. 398; *Danley v. Rector*, 10 Ark. 11; 50 Am. Dec. 242; *Hall v. Howard*, Rice L. (S. Car.) 310; 33 Am. Dec. 115; *Holeman v. Fort*, 3 Strobb. S. Car.) Eq. 66; 51 Am. Dec. 665; *Davis v. Richardson*, 10 Yerg. (Tenn.) 90; 31 Am. Rep. 581; *Hillebrant v. Brewer*, 6 Tex. 45; 55 Am. Dec. 757; *Grover v. Grover*, 2 Pick. (Mass.) 261; 5 Am. Dec. 319.

A deed of personal property, from parent to child, the parent not indebted at the time, by which it is agreed that the parent shall keep possession during life, is not void. *Bohn v. Headley*, 7 Har. & J. (Md.) 257.

Where parents convey land in fee to a child without consideration, the presumption is that the deed was delivered. *Vaughan v. Goodman*, 1 West. Rep. 545.

"As to the father's alleged gift the presumption must be strongly in favor of the father's continued possession as head of the family." *Schouler Dom. Rel.*, § 270. And the parent may resume possession of articles given by parent. *Cranz v. Croger*, 22 Ill. 74; *Stovall v. Johnson*, 17 Ala. 14.

1. *Hillebrant v. Brewer*, 6 Tex. 45; 55 Am. Dec. 757; *Sims v. Sims*, 8 Port. (Ala.) 449; 33 Am. Dec. 293; *Collins v. Loftus*, 10 Leigh (Va.) 5; 34 Am. Dec. 719.

In *Martrick v. Linfield*, 21 Pick. (Mass.) 325; s. c., 32 Am. Dec. 265, a father gave his adult daughter who was living in his family, a female calf, whose dam had died, if she would bring it up. She brought it up by hand, and it was fed on the father's farm, and after it became a cow the milk was used in his family, and no charge was made by the father for the board of the daughter or for the keeping of the cow, nor by the daughter for her work or for the milk of her cow. It was held that there was sufficient proof of a gift and delivery to show property in the daughter, as against a creditor of the father.

Where a father made a contract with his son, then living with him, that he would give him a slave for doing certain work upon a mill, which was done, and the slave conveyed to the son—held, that the slave could be taken in execution for the debt of the father. *Godfrey v. Hays*, 6 Ala. 501. But see

Danley v. Rector, 10 Ark. 211; 50 Am. Dec. 242.

A slight consideration will support a contract made by a parent with a child. *Shepherd v. Bevin*, 9 Gill (Md.) 32; *Bohn v. Headley*, 7 Har. & J. (Md.) 257.

Where a son purchases and stocks a farm for an indigent parent who resides and labors thereon, the produce of the farm cannot be taken for the son's debt. *Brown v. Scott*, 7 Vt. 57.

Transfers of Land.—A bond, executed by a son to his parent, for \$500, with interest annually if demanded, is a valuable consideration, and will sustain a conveyance of land as a purchase, although it is the intention of the parties that the principal of the bond shall not be exacted. *Jackson v. Peek*, 4 Wend. (N. Y.) 300.

The relation of father and son is a good consideration for a promise by the father to convey land to the son, and such promise will be enforced against his heirs. *Mahan v. Mahan*, 7 B. Mon. (Ky.) 579.

If a parent permit his minor child to improve and settle a tract of land, the child acquires a title by such improvements, as effectually as if he were of age. *Galbraith v. Black*, 4 S. & R. (Pa.) 207. And see *Jenison v. Graves*, 2 Blackf. (Ind.) 441. But see also *Bell v. Hallenbeck*, *Wright* (Ohio) 751; *Fonda v. Van Horne*, 15 Ward (N. Y.) 631; *Brown v. McDonald*, 1 Hill Eq. (S. Car.) 297.

The heir apparent is presumed to pay off a charge on his father's estate for his own benefit. *Crow v. Pettin-gill*, 38 L. J., Ch. 186.

No express contract need be proved to enable a son to recover from his father's estate for a house built by the son on the father's land in the lifetime of the latter. *Byers v. Thompson*, 66 Ill. 421; *Kurtz v. Hibner*, 55 Ill. 514; *Hillebrands v. Nibbelink*, 44 Mich. 413. But see *contra* *Foster v. Emerson*, 5 Chy. (Ont.) 135.

Where the father built on land of the son the latter was allowed to hold the improvements. *Curry v. Lloyd*, 22 Fed. Rep. 258.

Transfer for Support.—Where a father advanced in years offered his son his farm if he would come and support him, which he did, held there was

equity on his children, just as he may on his wife, and on much the same principles.¹

Gifts from the child to the parent, especially when made just after attaining majority or while still under the parental control and authority, are looked upon with suspicion, and the donee is required to show that they were the spontaneous acts of the child with a full understanding of his rights and position, or equity will set them aside.²

not such part performance as would take the case out of the statute of frauds. *Black v. Black*, 2 E. & A. (Ont.) 419. But see *Willette v. Sabanin*, 12 Ont. Rep. 248; *Rucker v. Abell*, 8 B. Mon. (Ky.) 566; 48 Am. Dec. 406. But see *contra* *Christy v. Barnhart*, 14 Pa. St. 260; 53 Am. Dec. 538; *Young v. Glendenning*, 6 Watts (Pa.) 509; 31 Am. Dec. 492; *Dugan v. Gettings*, 3 Gill. (Md.) 138; 43 Am. Dec. 306; *Bechtel v. Cone*, 52 Md. 707.

An agreement by a child for the support of his parents, in consideration of a conveyance of a farm, or an advancement in money, is valid. *Leedy v. Crumbaker*, 13 Ind. 523; *House v. House*, 6 Ind. 60; *Pratt v. Pratt*, 42 Mich. 174; *Brown v. Knapp*, 79 N. Y. 136. And see *Ikerd v. Beavers*, 106 Ind. 483.

A father orally agreed to convey to his son his homestead in consideration of the son's living with him, attending to his business, and taking care of him and his wife during their lives. The son faithfully fulfilled his engagement. After the death of the father, suit in equity was brought by some of the heirs to repudiate the contract, and for the distribution of all the lands equally among the heirs. *Held*, that the son was entitled for his services to an equitable lien on the land, and could not justly be required to surrender his possession of the land until he had been indemnified. *Speers v. Sewell*, 4 Bush (Ky.) 239.

A father conveyed his farm to his son, conditioned for the support of himself and his then wife, the mother of the grantee, during each of their lives. After the death of the grantee's mother, the father married again, and upon the son's objecting to support the second wife under the contract, the father told him to bring in his claim for her support against the father's estate after his death, whereupon the son did support her until his father's death. *Held*, that from these facts, the auditor was justified in finding a contract by the father

to pay, after his death, to the son the expenses of the support of the second wife up to that time. *Sprague v. Sprague*, 30 Vt. 483. And see further *Dowell v. Applegate*, 15 Fed. Rep. 419; *Collier v. French*, 64 Iowa 577; *Howard v. Rynearson*, 50 Mich. 307; *Price v. Jones*, 105 Ind. 543; *Edwards v. Morgan*, 100 Pa. St. 330; *Miller's Appeal*, 100 Pa. St. 568; *Ackerman v. Fisher*, 57 Pa. St. 457; *Woods v. Land*, 30 Mo. App. 176.

1. *Hagar v. Hagar*, 71 Mo. 610. *Compare* *Knowles v. Erwin*, 43 Hun (N. Y.) 150; *Hiatt v. Williams*, 72 Mo. 214; *Kurtz v. Hibner*, 55 Ill. 514. And such a settlement is not necessarily void as against creditors. *Hinde v. Longworth*, 11 Wheat. (U. S.) 213; *Seward v. Jackson*, 8 Cow. (N. Y.) 406; *Haines v. Haines*, 6 Md. 435; *Carter v. Grimshaw*, 49 (N. H.) 100; *Wilson v. Kohlheim*, 46 Miss. 346; *Kaye v. Crawford*, 22 Wis. 320; *Morrell v. Scherrick*, 54 Ill. 269; *Gardner v. Schooley*, 25 N. J. Eq. 150; *Griffin v. First Nat. Bank*, 74 Ill. 259; *Borneman v. Sidlinger*, 15 Me. 429; 33 Am. Dec. 626; *Sterry v. Arden*, 1 Johns. Ch. (N. Y.) 261; s. c., 12 Johns. (N. Y.) 536; *Washband v. Washband*, 27 Conn. 424; *Rockhill v. Spraggs*, 9 Ind. 32; *Pierson v. Armstrong*, 1 Iowa 282; *Stafford v. Stafford*, 41 Tex. 111; *Borum v. King*, 37 Ala. 566; *Morris v. Ward*, 36 N. Y. 587; *Williams v. Fitch*, 18 N. Y. 546.

2. *Gifts Just After Majority.*—*Taylor v. Staples*, 8 R. I. 170; *Van Donge v. Van Donge*, 23 Mich. 321; *Rider v. Kelso*, 53 Iowa 367; *Miller v. Simonds*, 72 Mo. 669; *Jacox v. Jacox*, 40 Mich. 473; *Taylor v. Taylor*, 8 How. (U. S.) 183; *Baldock v. Johnson*, 14 Oregon 546; *Turner v. Collins*, L. R., 7 Ch. App. 329; *Savery v. King*, 5 H. L. C. 626; *Wright v. Vanderplank*, 2 K. & J. 1; *Cuninghame v. Anstruther*, 2 Scotch App. 223; *Bergen v. Udall*, 31 Barb. (N. Y.) 9; *Hawkins' Appeal*, 32 Pa. St. 263; *Berkmeyer v. Kellerman*, 32 Ohio St. 239; *Archer v. Hudson*, 7 Beav. 560; *Wright*

v. Vanderplank, 8 De G. M. & G. 133. *Compare Tate v. Williamson*, L. R., 2 Ch. App. 56. Undue influence will not be necessarily presumed. *Rhodes v. Cook*, 2 S. & St. 448; *Firmin v. Pulham*, 2 De G. & S. 99. *Compare King v. King*, 3 Jur., N. S. 609. And the gift may become binding by acquiescence. *Willoughby v. Bridewake*, 11 Jur., N. S. 524, 706; *Turner v. Collins*, L. R., 7 Ch. App. 329; *Potts v. Surr*, 13 W. R. 909; *Jarraf v. Oldham*, L. R., 9 Eq. 463.

"The law on this subject is well settled. A child may make a gift to a parent, and such gift is good, if not tainted with parental influence. Parental influence is to be presumed as long as the parental authority and dominion last, and while they last it lies on the parent to prove that the parental influence is not exercised, which he must do by showing that the child had independent advice, or in some other way. When the parental influence is disproved, gifts by children stand on the same footing as any other gifts, and the question to be tried is whether there is a deliberate unbiased intention on the part of the child to give to the parent." *TURNER, L. J.*, in *Wright v. Vanderplank*, 8 De G. M. & G., p. 146. And, in the same case, *L. J. KNIGHT-BRUCE* speaks of "the rigid strictness and the watchful jealousy with which, on principles of natural justice, and upon considerations important to the interests of society, the law of this country examines, scrutinizes, and, if I may borrow an old expression, weighs in golden scales, every transaction between a guardian and ward, or between a parent and child, which, including or consisting of a gift from the younger to the elder, takes place so soon after the termination of the legal authority that the ward or child may in consequence probably not be in the largest, amplest sense, not in mind as well as in person, an entirely free agent," and *cf.* remarks of *LORD ELDON* in *Hatch v. Hatch*, 9 Ves. 292.

The same rule applies to undue influence by one *in loco parentis*. *Archer v. Hudson*, 7 Beav. 560; *Kempson v. Ashbee*, L. R., 10 Ch. 15; *Graham v. Little*, 3 Jones Eq. (N. Car.) 152.

If a son give all his property to his father, the latter, undertaking to pay the son's debts, the presumption is that the surplus belongs to the son, unless the father can prove that he was to take it for his own benefit. *May v. May*, 33 Beav. 81.

A mortgage and subsequent sale by a son who has just attained his majority, effected under his father's influence and to his own injury, has been annulled. *Savery v. King*, 13 E. L. & Eq. 100. *Cf. Baker v. Bradley*, 13 E. L. & Eq. 449.

"The principle of equity is, that if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete emancipation, without any benefit moving to the child, the presumption is that an undue influence has been exerted to procure that liability on the part of the child; and that it is the business and duty of the party who endeavors to maintain such a transaction to show that such presumption is adequately rebutted; but that the presumption may be always removed." *Schouler Dom. Rel.*, § 271; *Archer v. Hudson*, 7 Beav. 551; *Houghton v. Houghton*, 15 Beav. 278.

The purchase of property by a child from its parent is not a badge of fraud. Presumptions are in favor of its fairness rather than otherwise. *State v. True*, 20 Mo. App. 176; *Noble v. Moses*, 81 Ala. 530.

The burden is on the father to show no undue influence. *Worrall's Appeal*, 110 Pa. St. 349.

Gift to Child by Parent.—Where, however, the gift is made by the parent to the child, the presumption is that it was caused by the ordinary promptings of affection. *Beauland v. Bradley*, 3 Sm. & G. 339; *Millican v. Millican*, 24 Tex. 426. *Compare State v. True*, 20 Mo. App. 176. Unless the child was the guiding mind and the parent dependent. *Highberger v. Stiffler*, 21 Md. 338; *Simpler v. Lord*, 28 Ga. 52; *White v. Smith*, 51 Ala. 405; *Gore v. Sumersall*, 5 T. B. Mon. (Ky.) 504; *Griffiths v. Robins*, 3 Madd. 191. *Compare Cowee v. Cornell*, 75 N. Y. 91; *Whelan v. Whelan*, 3 Cow. (N. Y.) 537.

Peace of the Family.—"On the other hand, in transactions between members of the same family, even though that relation subsists between them from whence the court will infer the moral certainty of considerable influence, and the probability of its having been exercised, yet if the transaction be one that tends to the peace or security of the family, to the avoiding of family disputes and litigation, or to the preservation of the family property, the principles by which such transactions must

3 Advancements—See ADVANCEMENTS, vol. 1, p. 216.

4. Sale of Expectant Estates.—The sale of expectant estates by heirs is not encouraged by the law,¹ but in equity such sales, if made *bona fide* and for valuable consideration, will be supported.²

5. Claims for Services.—Ordinarily, where one person renders services for another which are known to and accepted by him, the law implies a promise on his part to pay therefor. But where it is shown that the person rendering the service is a member of the family of the person served and receiving support therein, either as parent, child, or other near relative, a presumption of law arises that such services were gratuitous. The conditions are not such as show a mutual intention to contract according to the ordinary course of dealing and the common understanding of men.³

be tried are not those applicable to dealings between strangers, but such as on the most comprehensive experience have been found to be most for the interest of families." Schouler Dom. Rel., § 271, citing *Houghton v. Houghton*, 15 Beav. 278; 11 E. L. & Eq. 134. And see *Hartopp v. Hartopp*, 21 Beav. 259; *Stockley v. Stockley*, 1 V. & B. 23; *Williams v. Williams*, L. R., 2 Ch. 294; *Baker v. Bradley*, 7 De G. M. & G. 597; *Jenner v. Jenner*, 2 De G. F. & J. 359; *Bellamy v. Sabine*, 2 Ph. 425. But the son must have a reasonable knowledge of what he is doing. *Meadows v. Meadows*, 16 Beav. 401; *Fane v. Fane*, L. R., 20 Eq. 698.

1. Schouler Dom. Rel., § 272; Sugden, Vendors 314; 1 Story Eq. Juris., § 336-339; 2 Kent Com. 475; *Trull v. Eastman*, 3 Met. (Mass.) 121; *Boynton v. Hubbard*, 7 Mass. 112; *Varick v. Edwards*, Hoff. Ch. (N. Y.) 383.

An agreement by a person with his father to set up no claim as heir to his father's estate after his father's death is of no binding obligation. *Needles v. Needles*, 7 Ohio St. 432.

2. *Curtis v. Curtis*, 40 Me. 24; *Nevill v. Snelling*, L. R., 15 Ch. Div. 679; *Lord v. Jeffkins*, 35 Beav. 7; *Shelly v. Nash*, 3 Mad. 232.

A son in the lifetime of the father, has no interest in his estate, and a release thereof to the father is void. *Robinson v. Robinson*, Brayt. (Vt.) 65. And compare *Walker v. Walker*, 67 Pa. St. 185. The burden is on the purchaser to show the fairness and good faith. *Cook v. Field*, 15 Q. B. 460; *O'Rourke v. Bolingbroke*, L. R., 2 App. Cas. 814; *Jenkins v. Pye*, 12 Pet. (U. S.) 241; *Poor v. Hazleton*, 15 N. H. 564; *Powers' Appeal*, 63 Pa. St. 443; *Fitch v.*

Fitch, 8 Pick. (Mass.) 480; *Field v. Mayor etc.*, 6 N. Y. 179; *Bacon v. Bonham*, 33 N. J. Eq. 614. And see *Bispham Eq.*, § 220.

3. See MASTER AND SERVANT, vol. 14, p. 768.

Scully v. Scully, 28 Iowa 548; *Chadwick v. Devore*, 69 Iowa 637; *Traver v. Shiner*, 65 Iowa 57; *Wilson v. Wilson*, 52 Iowa 44; *Cowan v. Musgrave*, 73 Iowa 384; *Burges v. Burgess*, 109 Pa. St. 312; *Geary v. Geary*, 67 Wis. 248; *Leary v. Leary*, 68 Wis. 662; *Pellage v. Pellage*, 32 Wis. 136; *Sawyer v. Hebard*, 58 Vt. 375; *Cobb v. Bishop*, 27 Vt. 624; *Allen v. Allen*, 60 Mich. 635; *Coe v. Wager*, 42 Mich. 49; *Perry v. Perry*, 2 Duv. (Ky.) 312; *Weir v. Weir*, 3 B. Mon. (Ky.) 645; 39 Am. Dec. 487; *Ledbetter v. Ledbetter*, 2 La. Ann. 215; *Andover v. Merrimack Co.*, 37 N. H. 437; *Hall v. Hall*, 44 N. H. 293; *Heywood v. Brooks*, 47 N. H. 231; *Miller's Appeal*, 100 Pa. St. 568; *Prickett v. Prickett*, 20 N. J. Eq. 478; *Gardner v. Schooley*, 25 N. J. Eq. 150; *Smith v. Smith*, 30 N. J. Eq. 564; *State v. Connaway*, 2 Houst. (Del.) 206; *Cohen v. Cohen*, 2 Mackey (D. C.) 227; *Spiegelberg v. Mink*, 1 N. Mex. 308; *Barrett v. Barrett*, 5 Oregon 411; *Williams v. Barnes*, 3 Dev. (N. Car.) 348; *Hays v. Seward*, 24 Ind. 352; *Lipe v. Eisenlerd*, 32 N. Y. 229; *Robinson v. Raynor*, 28 N. Y. 494; *Sprague v. Nickerson*, 1 U. C. Rep. 284; *Hart v. Hart*, 41 Mo. 441; *Smith v. Myers*, 19 Mo. 433; *Griffin v. First Nat. Bank*, 74 Ill. 259; *Freeman v. Freeman*, 65 Ill. 106; *Young v. Herman*, 97 N. Car. 280; *Doane v. Doane*, 46 Vt. 485; *Harris v. Currier*, 44 Vt. 468; *Greenwell v. Greenwell*, 28 Kan. 675; *Bundy v. Hyde*, 50 N. H. 122; *McConnell's Appeal*, 97 Pa. St. 35; *Medsker*

Therefore, before the person rendering the service can recover, the express promise of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by the one of receiving, and by the other of making, compensation therefor.¹ The presumption, in such case, being against a contract, the law requires, when a promise is alleged to have been made, that the proof be direct, clear and positive, especially so when the claim is against the estate of an intestate relative, so as to leave no doubt as to the understanding and intention of the parties. It must be shown that the deceased intended to, and did, assume a legal obligation to the plaintiff of such character that it could be legally enforced against him.² These rules are applicable, although perhaps with

v. Richardson, 72 Ind. 323; *Brown v. Yaryan*, 74 Ind. 305; *Wilcox v. Wilcox*, 48 Barb. (N. Y.) 329; *Guenther v. Birkicht*, 22 Mo. 439.

Burden of Proof.—A child may recover against a father upon an express agreement to pay wages during minority. But the burden is upon the child of proving the agreement, by clear evidence. *Titman v. Titman*, 64 Pa. St. 480; *Smith v. Milligan*, 43 Pa. St. 107; *Ledbetter v. Ledbetter*, 2 La. Ann. 215; *Conger v. Van Aernum*, 43 Barb. (N. Y.) 602; *Moore v. Moore*, 3 Abb. App. Dec. (N. Y.) 303; *Shirley v. Bennett*, 6 Lans. (N. Y.) 512; *Smith v. Denman*, 48 Ind. 65; *Pellage v. Pellage*, 32 Wis. 136; *Shrimp v. Settegast*, 36 Tex. 296; *Neel v. Neel*, 59 Pa. St. 347.

1. "The persons claiming compensation must go a step further, and establish that there was an expectation by both parties that a compensation should be paid. In other words, the person seeking compensation must establish that the services were not performed gratuitously, and the presumption which prevails because of the existence of the family relation must be overcome by affirmative evidence. It is not essential that the amount of the compensation should be agreed upon." *McGarvy v. Roods*, 73 Iowa 363; *Scully v. Scully*, 28 Iowa 548; *Keegan v. Malone*, 62 Iowa 207; *Young v. Herman*, 97 N. Car. 280; *Howe v. North*, 69 Mich. 272; *Bostwick v. Bostwick*, 71 Wis. 273; *Wall's Appeal*, 111 Pa. St. 460; *Pollock v. Ray*, 85 Pa. St. 428; *Moyer's Appeal*, 112 Pa. St. 290; *Shane v. Smith*, 37 Kan. 55; *Harris v. Currier*, 44 Vt. 468; *Robinson v. Cushman*, 2 Den. (N. Y.) 152; *Taylor v. Lincumfelter*, 1 Lea (Tenn.) 83; *Osier v. Hobbs*, 33 Ark. 216; *Feiertag v. Feier-*

tag, 73 Mich. 297; s. c., 80 Mich. 489; *Lee v. Lee*, 6 G. & J. (Md.) 316; *Gore v. Summersall*, 5 T. B. Mon. (Ky.) 513; *Lynn v. Lynn*, 29 Pa. St. 369; *Hilbish v. Hilbish*, 71 Ind. 27; *Doane v. Doane*, 46 Vt. 485.

A promissory note given by a widow to her adult daughter for domestic service rendered, is evidence that the service was rendered on an understanding that it should be paid for. *Petty v. Young*, 43 N. J. Eq. 654.

"The mere expectation on the one part to pay, and on the other part to receive wages, never expressed by the parties to each other, does not constitute an express contract, though, if established by competent evidence, such expectations may sometimes give color to circumstances tending that they entered into an express contract." *Wood Master & Servant*, § 72 (2nd ed.), citing *Tyler v. Burrington*, 39 Wis. 376.

2. **Express Promise.**—"The declarations of a parent may admit the filial devotion and real worth of his child, and the profit he may derive from her services. They may reach farther and disclose his own sense of obligation and his settled purpose to compensate. But all this is insufficient to raise a promise." *Leidig v. Coover*, 47 Pa. St. 534.

"But when a son seeks to recover compensation for such services as his filial duty and common humanity require him to render his aged parent, he must come here with some better proof than loose declarations of gratitude and of an intention to compensate, made by an old man in the extremity of his last sickness." *Zimmerman v. Zimmerman*, 129 Pa. St. 229.

In *Cooper v. Cooper*, 147 Mass. 370, a woman lived with a man many years supposing herself to be his wife. At

not the same force, to adult children living with the parents.¹

his death she learned that he had a wife living. *Held*, she could not recover for services as housekeeper. But see *Higgins v. Breen*, 9 Mo. 497; *Fox v. Dawson*, 8 Martin (La.) 94.

"It seems to us that a father and mother living in the family of a son, having all their necessary wants supplied by the son as members of his family, the father being of the age of seventy-seven years when he commenced so living, and living with him until he was about eighty-two years old, ought to make out a pretty clear case of an agreement on the part of the son to pay him wages for his services, when he seeks to charge the estate of such son with a claim for such services after his death." *Bostwick v. Bostwick*, 71 Wis. 273.

"When, however, services are rendered by a son to his father upon an alleged parol contract of the father to convey lands to the son, even a stronger degree of proof is required. To establish such a contract, the evidence must not only be direct, positive, express, and unambiguous, but the contracting parties must be brought face to face, the witnesses must have heard the bargain when it was made or must have heard the parties repeat it in each other's presence. A contract is not to be inferred from the declarations of one of the parties only, every presumption is against the claimant in such a case." *Burgess v. Burgess*, 109 Pa. St. 312.

In *Walker's Estate* we took occasion to express our reluctance with which we listen to claims for wages by a son against the estate of a deceased parent, and subsequent experience has not changed or modified the opinion then entertained. It is pregnant with danger, as we verily believe, as well to the rights of creditors as to the other heirs, and cannot, of course, be entitled to countenance from the court, unless accompanied with clear proof of an agreement not depending upon idle and loose declarations, but on unequivocal acts of the intestate—as, for example, a settlement of an account, or money paid by the father to the son as wages, distinctly thereby manifesting that the relation which subsisted was not the ordinary one of parent and child, but master and servant." *Candor's Appeal*, 5 W. & S. (Pa.) 513; *Ulrich v. Arnold*, 120 Pa. St. 170; *Hall v. Finch*, 29 Wis. 278; 9 Am. Rep. 559; *Griffin v. First National Bank*,

74 Ill. 259; *Putnam v. Town*, 34 Vt. 429; *Hall v. Hall*, 44 N. H. 293; *Brown's Appeal*, 112 Pa. St. 18; *Price v. Jones*, 105 Ind. 543; *Dowell v. Applegate*, 15 Fed. Rep. 419; *Collier v. French*, 64 Iowa 577; *Wence v. Wycoff*, 52 Iowa 644; *Howard v. Ryneerson*, 50 Mich. 307; *Byrnes v. Clark*, 57 Wis. 13; *Campbell v. McKerricher*, 6 Ont. Rep. 85. *Wells v. Perkins*, 43 Wis. 160. In an action brought by a son to recover for the support and maintenance of his deceased father, the court clearly instructed that, in order to recover, the plaintiff must prove an express contract with the deceased, and "that such express contract may be established by what is called circumstantial evidence," with the qualification "that only such circumstances, clearly proved, as are equivalent to direct and positive proof" are sufficient. *Held*, correct. *Pritchard v. Pritchard*, 69 Wis. 373.

1. Adult Children.—The mere fact that the child, on attaining his majority, continued to labor for the parent as a member of the family for a long while, or that he did burdensome and disagreeable labor, is not sufficient evidence of itself to prove an implied promise to pay wages for it, although the extraordinary character of the labor might be pertinent evidence in aid of other competent evidence to raise such implication. Such implied promise may be proven by pertinent declarations of the parties in the presence of each other, and facts and circumstances inconsistent with a purpose on the part of the parent and child that the latter should labor simply as a member of the father's family without wages for his labor, such as that the father had paid the child wages—had repeatedly done so; that the father declared his obligations and purpose to pay wages, had promised to do so; that the child had said in the presence of his father, that he was working for wages and the father did not dissent; that the child had taken a part of the crop, sold the same on his own account with the father's knowledge and consent; that the child had paid for his own clothing, and the like evidence. Of course such evidence would be subject to proper explanation, and the opposing party might produce countervailing evidence." *Young v. Herman*, 97 N. Car. 280. But see *Williams v. Barnes*, 3 Dev. (N. Car.) 348,

dissenting opinion by DANIELS, J., who says: "There is a natural and legal obligation on the part of the parent to maintain his child during infancy. The law has fixed the time during which the child shall be considered an infant to the period of twenty-one years. The parent during this period has a right to the services of the child to enable him to fulfil his obligations. But after the period of twenty-one years, the parent is released from his obligation and the child is bound to maintain himself; and the law likewise releases the child from the obligation of giving his labor and services to the parent, because it then becomes necessary for him to use his industry for his own maintenance. Therefore, when he labors for the parent after the time he arrives at the age of twenty-one years the law raises a promise, by the parent to pay as much as the labor of the child is reasonably worth. The circumstances of the relationship of parent and child may go to the jury as evidence, with other facts and circumstances, to aid the defence of the parent, upon the question whether the labor of the child was gratuitous or not, but it does not operate as an exception to the rule of law." And see *Hauser v. Sain*, 74 N. Car. 552. But see *Guild v. Guild*, 15 Pick. (Mass.) 129; *Andrus v. Foster*, 17 Vt. 556; *Hays v. McConnell*, 42 Ind. 285; *Guenther v. Birkicht*, 22 Mo. 439; *Morton v. Rainey*, 82 Ill. 215; *Miller v. Miller*, 16 Ill. 296; *Cooper v. Cooper*, 12 Ill. App. 478; *Griffin v. First Nat. Bank*, 74 Ill. 259; *Pellage v. Pellage*, 32 Wis. 136; *Prickett v. Prickett*, 20 N. J. Eq. 478; *Ridgway v. English*, 22 N. J. L. 409; *Green v. Roberts*, 47 Barb. (N. Y.) 521; *Mosteller's Appeal*, 30 Pa. St. 473. *Zerbe v. Miller*, 16 Pa. St. 488; *Watson v. Watson*, 1 Houst. (Del.) 209; *Munger v. Munger*, 33 N. H. 581; *Willis v. Dunn*, *Wright* (Ohio) 134; *Adams v. Adams*, 23 Ind. 50; *Smith v. Denman*, 48 Ind. 65; *Hart v. Hart*, 41 Mo. 441; *Fitch v. Peckham*, 16 Vt. 150; *Putnam v. Town*, 34 Vt. 429. Compare *Poultney v. Glover*, 23 Vt. 328.

The mere fact that a child, after attaining her majority, continued to reside with her parents, raises no presumption that a note long afterwards given her by her father was in consideration of her services. *Arnold v. Franklin*, 3 Ill. App. 141.

The plaintiff, after he came of age, lived with and worked for his father,

the defendant, who said he would reward him well and provide for him in his will. *Held*, that the plaintiff could not recover compensation for his services during the lifetime of his father. *Patterson v. Patterson*, 13 Johns. (N. Y.) 379. And see *Freeman v. Freeman*, 65 Ill. 106; *McRae v. McRae*, 3 Bradf. (N. Y.) 199.

The administrator was allowed for money paid a grown-up son for services in managing his father's plantation during the latter's life, upon proof of their value, and that they were rendered with the father's knowledge and approval, though no special contract was ever made about them. It appeared that the son "found" himself and his horse. *Kinnebrew v. Kinnebrew*, 35 Ala. 628.

The rule, that when a child remains with its parent after majority, no recovery can be had for services rendered unless by express contract, does not apply where a lad taken into the family of his uncle, and maintained there till he becomes of age, afterwards continues to reside there, and works for his uncle, but furnishes his own clothes and pays his own medical bills. These facts imply a contract on the part of the uncle to pay him what his services are reasonably worth. *Morton v. Rainey*, 82 Ill. 215.

Quantum Meruit.—Although a contract by a father to pay for services rendered by a child remaining at home, after coming of age, will not be implied, yet, if an express contract to pay is proved, but the rate of wages is not agreed upon, a recovery may be had upon *quantum meruit*. *Byrnes v. Clark*, 57 Wis. 13; *Manseau v. Mueller*, 45 Wis. 430; *Friermuth v. Friermuth*, 46 Cal. 42; *Schwartz v. Hazlett*, 8 Cal. 118. And see *Tremont v. Mt. Desert*, 36 Me. 390. Compare *Putnam v. Town*, 34 Vt. 429.

Where an agreement to make a will in favor of plaintiff for services is void as a contract, the promise contained therein to pay her for her services is sufficient to rebut the presumption growing out of the relationship of the parties that the services were to be gratuitous, and will sustain an action on the *quantum meruit*. *Ellis v. Cary*, 74 Wis. 176; *Wallace v. Long*, 105 Ind. 522.

Where a son agrees to work for his father during the father's life, on the understanding that he is to be paid therefor out of his father's estate, and

There are, however, many cases where the contract upon which the plaintiff is allowed to recover is implied from circumstances that fairly indicate that the services were not understood by the parties to be gratuitous, and, as the existence of the contract is a question for the jury,¹ the courts have allowed verdicts to stand which have not always seemed warranted under the rules laid down.² The family relation also excludes the idea of an implied

the father turns the son away without good cause, so that he cannot perform the contract, the son can maintain his action for his labor already performed, and upon the common counts. *Updike v. Ten Broeck*, 32 N. J. L. 105; *Gary v. James*, 4 Desaus. (S. Car.) 185.

The fact that the occupant of land is the son of the owner is not sufficient to raise the legal conclusion that it was to be held free of rent, though slight additional evidence might warrant such a conclusion. *Oakes v. Oakes*, 16 Ill. 106; *Hayes v. Seward*, 24 Ind. 352. And see *Whipple v. Dow*, 2 Mass. 415.

If the father had been paying wages to his child during minority, a continuance in his service after attaining majority will be presumed to be on the same terms. *Fort v. Gooding*, 9 Barb. (N. Y.) 371.

Where an adult son assumes entire control and management of the business, works the farm and adds to the family profits by his extra skill, he can recover for it. *Adams v. Adams*, 23 Ind. 50. And see *Fisher v. Fisher*, 5 Wis. 472; *House v. House*, 6 Ind. 60.

1. *Partlow v. Cooke*, 2 R. I. 451; *Green v. Roberts*, 47 Barb. N. Y. 521; *Adams v. Adams*, 23 Ind. 50; *Hart v. Hart*, 41 Mo. 441; *Andrus v. Foster*, 17 Vt. 556; *Prickett v. Prickett*, 20 N. J. Eq. 478; *Davison v. Davison*, 13 N. J. Eq. 246; *Coe v. Wager*, 42 Mich. 49.

In an action by a daughter against her father's estate for services rendered in his lifetime, the evidence showed that, while plaintiff was away from home working for herself, her mother was taken sick; that plaintiff then returned home, whether at her parents' request did not appear, and cared for her parents until their death; and that the father had on several occasions spoken of compensating plaintiff for her services. *Held*, that it presented a case to go to the jury on the question of an implied promise to pay. *Koch v. Hebel*, 32 Mo. App. 103.

2. *Hillebrands v. Nibbelink*, 44 Mich. 413; 40 Mich. 646.

Where a daughter rendered services to her insane mother in taking care of her and waiting on her, and intended, while so doing, to charge for the same, and such services were necessary to the comfort and well-being of the mother, the daughter may recover their value. But if the services were rendered as acts of gratuitous kindness, and as a member of the family, with no intention of charging for the same, the daughter cannot recover for them, and in such case it makes no difference how meritorious and valuable they may have been to the mother. *Reando v. Misplay*, 90 Mo. 251; *Broderick v. Broderick*, 28 W. Va. 378; *Fisher v. Fisher*, 5 Wis. 472; *Harshberger v. Alger*, 31 Gratt. (Va.) 52; *O'Connor v. Beckwith*, 41 Mich. 657; *Brock v. Cox*, 38 Mo. App. 40.

A son may recover of his father's administrator for labor done during his minority, if he produces proof from which a promise of payment by the father may be presumed, though he prove no express promise. *Engleman v. Engleman*, 1 Dana (Ky.) 438; *Freeman v. Robinson*, 38 N. J. L. 383; 20 Am. Rep. 399; *Lunay v. Vantyne*, 40 Vt. 501; *McMillen v. Lee*, 78 Ill. 443; *Carey v. Barrett*, 4 Oregon 171.

As a request from the father—*Dougherty v. Whitehead*, 31 Mo. 255; *Grandin v. Reading*, 10 N. J. Eq. 370; *Roberts v. Swift*, 1 Yeates (Pa.) 209; *Jones v. Jincey*, 9 Gratt. (Va.) 708; *Wilsey v. Franklin* (Supreme Ct.), 10 N. Y. Supp. 833; *Carey v. Post*, 2 Cin. (Ohio) 62; *Parker v. Parker*, 33 Ala. 459; *Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Amey's Appeal*, 49 Pa. St. 126; *Steel v. Steel*, 12 Pa. St. 64.

Deceased, being ill, sent for her daughter, who had a family, to come and care for her. The daughter left her home and lived with, and took care of, her mother for more than three years, deceased frequently remarking that she should be well rewarded. In an action against the executor of the mother—*held*, that plaintiff should recover the

contract between parties related by marriage and living together,¹

value of her services. *Markey v. Brewster*, 10 Hun (N. Y.) 16.

The plaintiff's father-in-law left his boarding place and came to live with the plaintiff. No express agreement to pay for his board was shown, but it was in evidence that the father-in-law said that he would board nowhere else, and that he had enough to pay for his board. In an action against his administrator for the price of his board, the court charged the jury that the plaintiff could not recover without "clear and satisfactory proof of an express contract." This ruling was held erroneous on appeal, and the court held that the simple question for the jury was whether the parties understood that the board was not gratuitous but that it was to be paid for. *Smith v. Milligan*, 43 Pa. St. 107.

Legacy.—The rule does not apply to services which are rendered with the understanding that they are to be rewarded at discretion with a legacy. *Baxter v. Gray*, 3 M. & G. 771; *Little v. Dawson*, 4 Dall. (U. S.) 111; *Neal v. Gilmore*, 79 Pa. St. 421. And see *Sword v. Keith*, 31 Mich. 247; *Roberts v. Swift*, 1 Yeates (Pa.) 209. Where the deceased fails to make the legacy, see *Miller v. Lash*, 85 N. Car. 51; *Ellis v. Cary*, 74 Wis. 176.

"Where a party renders services for another in the *hope* of a legacy and in sole reliance upon a person's generosity without any contract, express or implied, that compensation should be provided for him by will or otherwise, and the party for whom the services were rendered dies without making such provision, no action lies. But where, from the circumstances of the case, it is manifest that it was understood by both parties that compensation should be made by will, and none is made, an action lies to recover the value of such services." *Wood on Master and Servant*, § 71 (2nd ed.), citing *Martin v. Wright*, 13 Wend. (N. Y.) 460; *Campbell v. Campbell*, 65 Barb. (N. Y.) 645; *Eaton v. Benton*, 2 Hill (N. Y.) 576; *Patterson v. Patterson*, 13 Johns. (N. Y.) 379; *Shakespeare v. Markham*, 10 Hun (N. Y.) 311; *Woodward v. Bugsbee*, 4 Thomp. etc. (N. Y.) 393; *Robinson v. Raynor*, 28 N. Y. 494; *Lee v. Lee*, 6 Gill & J. (Md.) 316.

Subsequent Promise.—A promise to pay for services after they are rendered is actionable. *Jacobson v. LaGrange*, 3

Johns. (N. Y.) 199; *Mathewson v. Fitch*, 22 Cal. 86; *Cornell v. Vanartsdalen*, 4 Pa. St. 364; *Snyder v. Castor*, 4 Yeates (Pa.) 353. See, *contra*, *Dowell v. Applegate*, 15 Fed. Rep. 419; *Chadwick v. Devore*, 69 Iowa 637; *Allen v. Bryson*, 67 Iowa 591; *Van Sandt v. Cramer*, 60 Iowa 424.

1. Services.—Where a son-in-law lived in the family of his wife's father, and worked for him—*held* assumpsit would not lie for wages, unless there was an agreement. *Lovet v. Price*, *Wright* (Ohio) 89; *Sprague v. Waldo*, 38 Vt. 139; *Oxford v. McFarland*, 3 Ind. 156; *Bowney v. Haydock*, 40 N. J. Eq. 513; *Van Sandt v. Cramer*, 60 Iowa 424; *Sawyer v. Hebard*, 58 Vt. 375; *Sprague v. Waldo*, 38 Vt. 141; *Coe v. Wager*, 42 Mich. 49; *Hall v. Finch*, 29 Wis. 27; *Butler v. Slam*, 50 Pa. St. 456; *Murdock v. Murdock*, 7 Cal. 511; *Lantz v. Frey*, 14 Pa. St. 201; *Sharp v. Cropsey*, 11 Barb. (N. Y.) 224; *King v. Kelly*, 28 Ind. 89; *Cauble v. Ryman*, 26 Ind. 207.

A laborer, hired for a certain time and for a certain price, intermarried with his employer's daughter, a member of her father's family, and continued to work for his wife's father for several years, the wife, in the meanwhile, remaining with her father and rendering services for him, and he furnishing her and the children who were the issue of her marriage with food and clothing. There was no agreement made in regard to the services of the daughter, or the food and clothing of herself and her children, or the services of her husband. *Held*, that the father was not liable for the services of his daughter; that he could not claim compensation for the food and clothing of herself and children, and that he was bound to pay her husband what his services were reasonably worth after the time for which he had been engaged had expired. *Conger v. Van Aernum*, 43 Barb. (N. Y.) 602.

Where a mother-in-law performed menial services in the house of her son-in-law—*held*, that it was for the jury to say whether there was an implied contract for compensation. *Smith v. Myers*, 19 Mo. 433. And compare *Amey's Appeal*, 49 Pa. St. 126; *Wright v. Donnell*, 34 Tex. 291.

Board.—A son-in-law cannot recover for board and attendance during the sickness of his mother-in-law who lives

and generally like considerations apply to all persons who occupy family relations. The presumption is against any implied contract for services or board. This is true of brother and sister,¹ and uncle and nephew or niece.²

6. The Quasi Parental Relation.—The policy of the law seems to be to encourage and extend the family relation, so that where persons assume the relation of parent and child they shall be entitled to all the rights and subject to all the liabilities of that relation. Thus, while a man is under no obligation to support the child of his wife by a former husband, yet, if he receives the child into his own house and educates and supports him, discharging to him all the duties as a parent, it would seem that he would be entitled to claim the savings of the child.³ He certainly is entitled to recover damages for an injury to such step-

with him as a member of his family. *Mariner v. Collins*, 5 Harr. (Del.) 290.

Where a father-in-law boarded in the family of his son-in-law, the father-in-law being a man of wealth, and contributing nothing by labor or money to the maintenance of the household, while the son-in-law was dependent upon his labor for his support—*held*, that the presumption did not arise that the services were gratuitous by reason of the relationship. *Rogers v. Millard*, 44 Iowa 466. And see *Wence v. Wykoff*, 52 Iowa 644; *Schoch v. Garrett*, 69 Pa. St. 144; *Faloon v. McIntyre*, 118 Ill. 292.

1. Brother and Sister.—*Morris v. Barnes*, 35 Mo. 412; *Bowen v. Bowen*, 2 Bradf. (N. Y.) 336 (brothers); *Hall v. Finch*, 29 Wis. 278; 9 Am. Rep. 559; *Allen v. Bryson*, 67 Iowa 820 (brothers-in-law); *Keegan v. Malone*, 62 Iowa 208; *Ayers v. Hull*, 5 Kan. 419; *O'Connor v. Beckwith*, 41 Mich. 657; *Robinson v. Cushman*, 2 Den. (N. Y.) 149; *Carpenter v. Weller*, 15 Hun (N. Y.) 134; *Taylor v. Lincenufelter*, 1 Lea (Tenn.) 83.

"In all cases except that of parent and child, there must be evidence beyond the relationship, that the creation of no debt was intended. Where the parties are brother and sister, the sister claiming compensation for her services, the burden of showing family relationship, or other cause, to exclude the implication of his promise to pay for the services, is upon the brother. Because of the fact that they are brother and sister, less evidence besides would be required to establish that they lived together as a family than if they were strangers. If he shows that they so

lived, the jury ought not to find an implied promise." *Curry v. Curry*, 114 Pa. St. 367; *Mayfaith's Appeal* (Pa.), 2 Atl. Rep. 28. And see *Russell's Estate*, 7 Phila. (Pa.) 64.

Contra as to cousins. *Gallaher v. Vought*, 8 Hun (N. Y.) 87; *Neal v. Gilmore*, 79 Fa. St. 421.

2. *Defrance v. Austin*, 9 Pa. St. 309; *Weir v. Weir*, 3 B. Mon. (Ky.) 645; 39 Am. Dec. 487; *Starkie v. Perry*, 71 Cal. 495; *Partlow v. Cooke*, 2 R. I. 451. But see *Thornton v. Grange*, 66 Barb. (N. Y.) 507; *Wall's Appeal*, 111 Pa. St. 460; *Pollock v. Ray*, 85 Pa. St. 428; *Graham v. Graham*, 34 Pa. St. 475.

A girl, upon the death of her mother, was turned away from home by her father, at the age of 14, and at the suggestion of her aunt and her grandmother, she went to live with an uncle and aunt, with whom she remained until she was 25 years of age, when she married. She subsequently brought suit against the uncle for work and labor. No express contract to pay her was asserted; and it appeared that she was kindly treated and provided for in a better manner than she would have been if she had merely received ordinary wages. *Held*, that she was not entitled to recover for her services. *Hays v. McConnell*, 42 Ind. 285.

3. *Williams v. Hutchinson*, 3 N. Y. 312; 53 Am. Dec. 301; *Gerber v. Bauerline*, 17 Oregon 115; *Mulhern v. McDavitt*, 16 Gray (Mass.) 406; *Gerdes v. Weiser*, 54 Iowa 593; 36 Am. Rep. 256; *Russell v. Switzer*, 63 Ga. 723; *Hill v. Hanford*, 11 Hun (N. Y.) 538. See *Freto v. Brown*, 4 Mass. 675.

child,¹ and, on the other hand, he may be liable for the support of such child, may be bound by his contracts for necessities,² and may have the same claim on the estate of the child for maintenance as an own parent.³ The ordinary presumption against any compensation for board furnished or services rendered applies.⁴ This rule also applies between grandparent and grand-

1. *Whitaker v. Warren*, 60 N. H. 20; 49 Am. Rep. 302; *Clark v. Bayer*, 32 Ohio St. 299; 30 Am. Rep. 593; *Ball v. Bruce*, 21 Ill. 161; *Maguinay v. Saudek*, 5 Sneed (Tenn.) 146; *Irwin v. Dearman*, 11 East 23; *Edmondson v. Machell*, 2 T. R. 4; *Bartley v. Richtmyer*, 4 N. Y. 38; *Kinney v. Laughe-nour*, 89 N. Car. 365; *Wilson v. Sproul*, 3 P. & W. (Pa.) 49; *Bracy v. Kibbe*, 31 Barb. (N. Y.) 273.

2. *In re Besondy*, 32 Minn. 385; *St. Ferdinand etc. Academy v. Bobb*, 52 Mo. 357; *Norton v. Ailor*, 11 Lea (Tenn.) 563; *Smith v. Rogers*, 24 Kan. 140; 36 Am. Rep. 254. And *infra*, this title, *Maintenance*.

A man married a woman pregnant by another man. *Held*, that, as he had full knowledge of the fact, he must be considered *in loco parentis* to the child when born. *Miller v. Anderson*, 43 Ohio St. 473.

3. *Ela v. Brand*, 63 N. H. 14; *Mowbry v. Mowbry*, 64 Ill. 383.

A stepfather who has voluntarily supported the step-children, cannot afterwards charge them for their past maintenance, though they have some property of their own. *Brown v. Sockwell*, 26 Ga. 380; *Gillett v. Camp*, 27 Mo. 541; *Sharp v. Cropsey*, 11 Barb. (N. Y.) 224; *Williams v. Hutchinson*, 3 N. Y. 312; 53 Am. Dec. 301; *Gerdes v. Weiser*, 54 Iowa 591; 37 Am. Rep. 229; *Douglas' Appeal*, 82 Pa. St. 169.

In 1871, A married a widow having a son ten years old, who, in 1874, was reasonably well educated. They all lived on land owned by the mother as dower, with fee in her son, the present worth of whose interest—all the property he had—was \$977.55. On the death of the son in 1878, A brought a claim against his estate for \$799.83 for maintenance and education between 1874 and 1878. *Held*, that the estate was not liable, as the claim was not for necessities. *Gayle v. Hayes*, 79 Va. 542; *Springfield v. Bethel* (Ky. 1890), 14 S. W. Rep. 592. But see *Boyd v. Jones* (Ky.), 2 S. W. Rep. 552.

For what alimony or support is

allowable to a grandmother in destitute circumstances, from the estate of her grandchildren, see *Succession of Lyons*, 22 La. Ann. 627.

4. **Stepchild.**—*Cooper v. Martin*, 4 East 70; *Stone v. Carr*, 3 Esp. 1; *Sharp v. Cropsey*, 11 Barb. (N. Y.) 224; *Murdock v. Murdock*, 7 Cal. 511; *Larsen v. Hansen*, 74 Cal. 320; *Gillett v. Camp*, 27 Mo. 541; *Hussee v. Roundtree*, *Busbee* (N. Car.) 110; *Mull v. Walker*, 100 N. Car. 46; *Davis v. Goodenow*, 27 Vt. 715; *Ormsby v. Rhoades*, 59 Vt. 505; *Re Dissenger*, 39 N. J. Eq. 227; *McCarthy v. Mayor etc. of N. Y.*, 96 N. Y. 8; *Beardsley v. Hotchkiss*, 96 N. Y. 221; *Brush v. Blanchard*, 18 Ill. 46; *McMahill v. McMahill*, 113 Ill. 461. *Compare Schwarz v. Schwarz*, 26 Ill. 81; *Mulhern v. McDavitt*, 16 Gray (Mass.) 404.

A step-daughter who is a member of the family of her step-father cannot recover for services rendered as his housekeeper without proving an express promise or agreement on his part to pay her therefor. *Ellis v. Cary*, 74 Wis. 176.

To entitle a step-son to recover from his step-father compensation for services rendered while the son remained a member of the father's family after attaining his majority, the jury must be satisfied, by a preponderance of evidence, that there was an express promise to make compensation. Such promise may be established by circumstantial evidence. But a promise must be established. The law does not imply a contract from rendering an acceptance of service. *Wells v. Perkins*, 43 Wis. 160.

The relation of step-father and step-son, where the latter is under the guardianship of the former and a minor, is sufficient consideration to support a contract with a person to act as substitute for the step-son in a military company. *Franklin v. Mooney*, 2 Tex. 452.

In an action for services rendered and for goods furnished to defendant's intestate, the fact that plaintiff was the step-son of decedent, and a member of

child living together in the same family.¹ The relationship is not limited to persons who are connected by consanguinity or affinity, but may be established between entire strangers, and when so established the ordinary rules and presumptions will apply.²

his family, does not require him to prove an express contract by decedent to pay, but it is sufficient if he proves facts and circumstances showing that decedent expected to pay, and plaintiff to receive, the value of such services and goods. *Davis v. Gallagher*, 55 Hun (N. Y.) 593; *Lantz v. Frey*, 14 Pa. St. 201; s. c., 19 Pa. St. 366. And see *Mellor v. Lanagan*, 6 Phila. (Pa.) 232; *Guenther v. Birkicht*, 22 Mo. 439.

That the wife stated in the presence of the step-father that the daughter should be paid for her work will not bind him, by his acquiescence, unless he knew that she continued her service in reliance upon it. *Harris v. Smith*, 79 Mich. 54.

1. **Grandchild.**—"It seems to be settled law, certainly in this State, that if a grandfather receives his grandchild or grandchildren into his family, and treats them as members thereof—as his own children—he and they are *in loco parentis et liberorum*; and hence if the grandchild in such case shall do labor for the grandfather as a son or daughter does ordinarily as a member of the family of his or her father, in that case, in the absence of any agreement to the contrary, no presumption of a promise on the part of the grandfather to pay the grandchild for his labor arises. The presumption is to the contrary. The grandchild, as to his labor or services so rendered in such case, is on the same footing as a son or daughter. And this is so, after the grandchild attains his majority, if the same family relation continues." *Dodson v. McAdams*, 96 N. Car. 149; *Hudson v. Lutz*, 5 Jones (N. Car.) 217; *Hauser v. Sain*, 74 N. Car. 552. *Duffey v. Duffey*, 44 Pa. St. 399; *Butler v. Slam*, 50 Pa. St. 456; *Davis v. Goodenow*, 27 Vt. 715; *Shepherd v. Young*, 8 Gray (Mass.) 152; *Schrimph v. Settegast*, 36 Tex. 296; *Windland v. Deeds*, 44 Iowa 98; *Barhite's Appeal*, 126 Pa. St. 404. Compare *Moyer's Appeal*, 112 Pa. St. 290; *Thorp v. Bateman*, 37 Mich. 68.

When an orphan child is taken by its grandmother into her family, and furnished for years with necessary board, clothing and tuition, she thereby

places herself *in loco parentis* towards it; and in the absence of all evidence showing a claim of remuneration on her part, or an admission of indebtedness by the child, the law will not presume a debt against its estate in her favor. *Mobley v. Webb*, 83 Ala. 489; *Walters v. Mayhew* (Supreme Ct.), 8 N. Y. Supp. 771.

Where E became infirm and unable to help himself, and H, his step-granddaughter and her husband, came to live with him under some arrangement not fully disclosed, but not as members of his family, and at E's death, H presented a claim for services rendered under an implied contract, *held* she was entitled to recover. *Ensey v. Hines*, 30 Kan. 704.

2. **Strangers.**—"About the only difference in the rule of law as between strangers living together as one family is, that as to relatives no contract for compensation to be made on either side will be implied, but any contract claimed to exist must be specifically and affirmatively shown, while as between strangers a contract for compensation will be implied unless the contrary is shown either expressly or impliedly, from the affirmative circumstances expressly shown to exist in the case. In all cases, however, when the exact relation of the parties is clearly shown, when it is shown that the parties, though strangers to each other, have nevertheless lived together as one family, as parent and child for instance, and that no express contract was made for compensation to either party, none on the one side for wages, and none on the other side for board, lodging, clothing, schooling, spending money, etc., then the same rule will apply as though the parties were near relatives." *Wyley v. Bull*, 41 Kan. 206; *Thorp v. Bateman*, 37 Mich. 68; *Windland v. Deeds*, 44 Iowa 98; *Smith v. Johnson*, 45 Iowa 308; *Schrimph v. Settegast*, 36 Tex. 296; *Hay v. Walker*, 65 Mo. 17; *Bennett v. Stevens*, 8 Oreg. 444. And see *Thorn-ton v. Grange*, 66 Barb. (N. Y.) 507; *Tyler v. Burrington*, 39 Wis. 376; *Neal v. Gilmore*, 79 Pa. St. 421; *Griffin v. Potter*, 14 Wend. (N. Y.) 209; *Livingstone v. Ackerton*, 5 Cow. (N. Y.) 531;

II. ADOPTION.—See ADOPTION OF CHILDREN, vol. 1, p. 204.

III. LEGITIMACY.—As to the status of children born out of wedlock, and the various questions connected with that status, see BASTARDY, vol. 2, p. 129; CHILD, vol. 3, p. 229; DOMICIL, vol. 5, p. 857; LEGITIMACY, vol. 13, p. 224.

In the absence of statutes the father is under no legal obligation to maintain his illegitimate child,¹ but the relationship has been regarded as a sufficient consideration to support an express promise to pay for the child's support.²

IV. DUTIES OF PARENTS.—The law imposes three duties on parents towards their children—their protection, their education and their maintenance.

1. Protection.—The duty of protection is rather permitted than enjoined by any municipal laws; nature, in this respect, says Blackstone, "working so strongly as to need rather a check than a spur."³

Mountain v. Fisher, 22 Wis. 93; *Ryan v. Lynch*, 9 Mo. App. 18; *Hartman's Appeal*, 3 Grani's Cas. (Pa.) 271.

This is true of adopted children. *Lunay v. Vantyne*, 40 Vt. 501; *Shirley v. Vail*, 3 Abb. App. Dec. (N. Y.) 313, n.; *Brown v. Welsh*, 27 N. J. Eq. 429.

1. See BASTARDY, vol. 2, p. 162; *Simmons v. Bull*, 21 Ala. 501; *Holmes v. State*, 2 Greene (Iowa) 501; *Dalton v. Halpin*, 27 La. Ann. 382. Compare *Gibney v. Fitzsimmons*, 5 La. Ann. 250.

The only legal liability of the father for the maintenance of an illegitimate child is for such judgment as may be rendered against him in a prosecution for bastardy. *Marlett v. Wilson*, 30 Ind. 240; *O'Gara v. Riddell*, 19 La. Ann. 504; *State v. Howard*, 1 Swan (Tenn.) 133.

That the mother is bound to maintain her illegitimate child, see *Friesner v. Synonds*, 46 N. J. Eq. 521.

2. See SEDUCTION; *Hargraves v. Freeman*, 12 Ga. 342; *Moncrief v. Ely*, 19 Wend. (N. Y.) 405; *Furrillio v. Crowther*, 7 Dowl. & Ry. 612; *Nichols v. Allen*, 3 C. & P. 36.

There is no implied promise from the father of a bastard child to the mother to furnish it a support. *Wiggins v. Keizer*, 6 Ind. 252.

Verbal declarations of the father of a bastard, that the latter shall be supported out of his estate after his death, does not give the bastard a right of action against his father's administrator. *Duncan v. Pope*, 47 Ga. 445; *Nine v. Starr*, 8 Oregon 49.

An illegitimate child was supported by relatives of the mother, at the request of the father, and upon his promise that they should be paid, and that if the child survived him he would provide for her by will sufficiently to enable her to pay therefor. He died before the child, but made no such provision. After coming of age the child promised to repay the expenditures. *Held*, that an action lay against the father's estate to recover therefor; and that such action could be maintained by the child. *Todd v. Weber*, 95 N. Y. 181; 47 Am. Rep. 20.

An action lies by an illegitimate child against the administrators of his putative father, on a promise of the intestate, made in consideration of services. *Conrad v. Conrad*, 4 Dall. (U. S.) 130.

3. *Schouler Dom. Rel.*, § 234; 2 Kent Com. 189. And see 1 Bl. Com. 447 (*Sharswood's ed.*), which says: "A parent may by our laws maintain and uphold his children in their lawsuits without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defence of the persons of his children; nay, where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged the son's quarrel by beating the other boy, of which beating he afterwards unfortunately died, it was not held to be murder, but manslaughter merely." But see on this point the note by Judge *Sharswood*.

A parent is not bound to employ counsel to defend the suits of his

2. Education.—The duty of providing a child with a proper education does not seem to be enjoined by positive enactment, although the duty is generally recognized by the text writers.¹ In America, the State, under its public school system, relieves the parent of this duty, although it seems that he has the right to insist on the education of his child by the State.² The duty, however, does not extend to providing the child with a trade or profession.³

(a) **RELIGIOUS EDUCATION.**—In England the right of the father to have his children educated in his own religion, both during his lifetime and after his death, seems to be established.⁴ In

minor children. *Hill v. Childress*, 10 Yerg. (Tenn.) 514.

"The doctrine of parental protection seems to have required little or no special judicial discussion in modern times. *Schouler Dom. Rel.*, § 234.

1. See also *EDUCATION*, vol. 6, p. 160; *Schouler Dom. Rel.*, § 235; 1 Bl. Com. 450; 2 Kent Com. 189.

A father is bound to educate and maintain his infant child; and if another person performs this natural duty for him, with his knowledge and consent, the father is bound to pay a reasonable sum to such person. *Thompson v. Dorsey*, 4 Md. Ch. 149. And see *Jones v. Stockett*, 2 Bland (Md.) 409.

In England, under statute, a parent may be prosecuted for neglecting to educate his child. *School Board v. Jackson*, L. R., 7 Q. B. D. 502. But apart from statute the duty of education cannot be enforced at law. *Hodges v. Hodges*, Peake Add. Cas. 79.

2. In some States the father of a child unlawfully excluded from a public school may apply for a *mandamus* against the school board to compel them to admit the child to the school. *People v. Board of Education*, 18 Mich. 400 (case of a negro). And see *Burdick v. Babcock*, 31 Iowa 562. Subject, however, to reasonable school regulations as to the right to expel. *Hodgkins v. Rockport*, 105 Mass. 475. But the parent has no right of action against the school committee who order his child's expulsion from a public school. *Dona-hoe v. Richards*, 38 Me. 376; *Learock v. Putnam*, 111 Mass. 499. So a teacher in a public school is not liable for refusing to teach a child. *Spear v. Cummings*, 23 Pick. (Mass.) 224. Nor the trustees for refusing to admit the child to the school. *Boyd v. Blaisdell*, 15 Ind. 73.

3. *Turner v. Gaither*, 83 N. Car. 357;

35 Am. Rep. 574; *Schouler Dom. Rel.*, § 242; 2 Kent. Com. 202.

"In the case under consideration, however, where the son is twenty years of age and in perfect health so as to be able to support himself by his own industry, I doubt whether any court is authorized to compel his mother to furnish means of obtaining a professional education, whatever may be the amount of her property." *In re Ryder*, 11 Paige (N. Y.) 185.

4. "The law unquestionably does give great weight to the right of a father to have his children educated in his own religion both during his lifetime and after his death; and if a father has done nothing to forfeit or abandon his right to have his child educated in his own religion, we think that the court cannot refuse to order a child to be educated in the religion of its father because it thinks that the child would be more happy or contented and possibly be better provided for by its mother's relations. On this ground in *Hawksworth v. Hawksworth*, L. R., 6 Ch. 539, we affirmed an order made by VICE-CHANCELLOR WICKENS, which ordered a girl of eight years old, notwithstanding that her mother was a Protestant, to be educated in the religion of her father, a Catholic." *Andrews v. Salt*, L. R., 8 Ch. 622; *Talbot v. Earl of Shrewsbury*, 4 Myl. & Cr. 672; *In re Agar Ellis*, 10 Ch. Div. 49; *In re Meade*, 5 Ir. R., Eq. 98; *In re North*, 11 Jur. 7; *Austin v. Austin*, 34 Beav. 257; *Witty v. Marshall*, 1 Y. & C., N. C. 68; *In re Race*, 3 Jur., N. S. 339, n. Even where the father has left no specific directions, on his death it will be presumed that his wishes were that they shall be educated in his own religion. *In re North*, 11 Jur. 7; *Campbell v. Mackey*, 2 Myl. & Cr. 34; *Skinner v. Orde*, L. R., 4 P. C. 60; *Re Montague*, L. R., 28 Ch.

the United States, these questions have not occupied the attention of the courts.¹

(b) APPRENTICES—(See also APPRENTICES, vol. I, p. 636).—At common law the father is entitled to bind out his child as an apprentice for the purpose of learning some useful trade or profession.² This, however, is very different from assigning the child's services for his own benefit; that the parent cannot do.³

Div. 82; *Hawksworth v. Hawksworth*, L. R., 6 Ch. 539. The court, however, interferes with caution. *In re Grimes*, 11 Ir. Rep., Eq. 465; *Hill v. Hill*, 31 L. J., Ch. 505.

In *Lyons v. Blenkin*, Jac. 245, LORD ELDON declared that "with the religious tenets of either party I have nothing to do, except so far as the law of the country calls on me to look on some religious opinions as dangerous to society."

In *Reg. v. Clark*, 7 E. & B. 186, on the death of the father who was a Protestant, the child was sent to a Protestant school. Later, the mother, a Catholic, sought to gain the custody. The child, an intelligent girl of ten years, "expressed great repugnance to leaving her present school, assigning as her reasons that, much as she loved her mother, she would not go to a school where she would be taught idolatrous worship of the Virgin and saints." The court held that inasmuch as the father had left no directions as to the religious education of his child, that the mother was entitled to the custody, and the wishes of the child could not be regarded.

The court will interfere to take a child from parents who hold atheistical or irreligious opinions. *In re Besant* L. R., 11 Ch. Div. 508; *Thomas v. Roberts*, 3 De. G. & Sm. 758; *Shelley v. Westbrooke*, Jac. 266; *D'Alton v. D'Alton*, L. R., 4 P. D. 87. And see, for a full treatment of the subject, *Simpson Law of Infants* (2nd ed.), p. 129 *et seq.*; *Schouler Dom. Rel.*, § 235.

1. "Over the religious discipline and instruction of children, courts have no jurisdiction. Human laws deal only with the civil rights and duties belonging to the relation of parent and child. A case might possibly arise in which the religious faith of the relator or of the respondent, might be taken into consideration and turn the scale which would otherwise be even." *State v. Bratton*, 15 Am. L. Reg., N. S. 359.

A father has no right to control or interfere with the rights of conscience

of his minor child who has arrived at the age of discretion. *Commonwealth v. Sigman*, 2 Clark (Pa.) 36.

Although a father may not compel his child, against the child's convictions of right, to become a member of any religious denomination, he may lawfully restrain the child from violating the religious obligations which he has taken. Thus, where the child has become a member of any denomination, the father may restrain him from severing his connection with that denomination and joining another. *Commonwealth v. Armstrong*, 1 Clark (Pa.) 146.

In *People v. Gates*, 43 N. Y. 40, the court refused to take a child from the Shakers on account of their religious belief.

On *habeas corpus* for the possession of a child it should be entrusted, if in other respects its interests can be as well subserved, to the custody of a person of the same religion with its parents. *In re Doyle*, 16 Mo. App. 159.

In re Dickson's Infants, 12 Pr. Rep. (Ontario) 659, the father, who was a Presbyterian, applied for the custody of his two children, aged three and five, who were with their mother, a member of the Salvation Army, on the ground of her religion. It was held that on account of the extreme youth of the children, the question was prematurely raised.

2. *In re McDowle*, 8 Johns. (N. Y.) 328; *Crombie v. McGrath*, 139 Mass. 550; *Peters v. Lord*, 18 Conn. 337; *Doane v. Covell*, 56 Me. 527; *Castor v. Aicles*, 1 Salk. 68; *Rex v. Ditchingham*, 4 T. R. 769. On the death of the father, the mother succeeds to his right to apprentice. *People v. Gates*, 43 N. Y. 40. The person taking the apprentice must be *sui juris*. *Rex v. Petrox*, 4 T. R. 196; *Rex v. Guildford*, 2 Chitty 284.

3. *United States v. Bainbridge*, 1 Mason (U. S.) 71; *In re Lewis*, 88 N. Car. 31; *Musgrove v. Kornegay*, 7 Jones (N. Car.) 71; *Thorpe v. Rankin*, 19 N. J. L. 36; *Repubblica v. Keppele*,

3. Maintenance—(a) IN GENERAL.—The duty of parents to provide for the maintenance of their children is a principle of natural law. The obligation continues until the child is in a condition to provide for himself, and it extends only to a necessary support. And such is the rule of the common law.¹ The obligation was extended by statute, 43 Eliz., ch. 2, so as to secure to children, who, through physical or mental infirmity, should be unable to support themselves, a support, though no longer of tender years; the statute created also a correlative obligation on the part of adult children to support their aged and infirm parents.² The provisions of this statute have been enacted, in substance, in the various States of the Union. They serve the double purpose of assuring a support at the hands of those who, at natural law, should be required to furnish it, and of relieving the public from a

2 Dall. (Pa.) 197; *Commonwealth v. Baird*, 1 Ashm. (Pa.) 267. And see *Nickerson v. Easton*, 12 Pick. (Mass.) 110. And it seems that the child cannot be bound as an apprentice without his consent *Stewart v. Pickets*, 2 Humph. (Tenn.) 151; *Stringfield v. Heiskell*, 2 Yerg. (Tenn.) 546; *Musgrove v. Kornegay*, 7 Jones (N. Car.) 71. Unless the indenture specifies the particular trade to be taught it is void. *In re Goodenough*, 19 Wis. 274.

The whole matter of apprenticeship is regulated by local statutes in the United States. *Phelps v. Pittsburg*, R. Co. 99 Pa. St. 108. The requirements of the statutes must be complied with in the execution of the indenture or the infant may avoid it. *Brown v. Whittemore*, 44 N. H. 369; *People v. Gates*, 43 N. Y. 40; *In re Goodenough*, 19 Wis. 274; *Cannon v. Stuart*, 3 Houst. (Del.) 223; *Graham v. Kinder*, 11 B. Mon. (Ky.) 60; *Doane v. Covel*, 56 Me. 527; *State v. Taylor*, 3 N. J. L., 352. So the infant may avoid the indenture where it is procured by fraud. *Mitchell v. McElvin*, 45 Ga. 558; *Webb v. England*, 29 Beav. 44. The infant alone, however, can take advantage of any informalities; *Lobdell v. Allen*, 9 Gray (Mass.) 377; *Van Dorn v. Young*, 13 Barb. (N. Y.) 286; *Fowler v. Hollenbeck*, 9 Barb. (N. Y.) 309. And where the indenture is void, see *Kerwin v. Wright*, 59 Ind. 369; *Lets v. Brooks*, Hill & D. Supp. (N. Y.) 36.

On habeas corpus, however, the court will not order the infant against his will into the custody of the master, even if the indenture is valid. *Lea v. White*, 4 Sneed (Tenn.) 73; *Commonwealth v. Robinson*, 1 S.

& R. (Pa.) 353; *Rex v. Reynolds*, 6 T. R. 497. Nor if the contract is void will he be necessarily compelled to return to his parent against his will. *People v. Weissenbach*, 60 N. Y. 385; *In re Goodenough*, 19 Wis. 274; *Commonwealth v. Hamilton*, 6 Mass. 273. The usual rule to look to the welfare of the child will be followed. *People v. Gates*, 43 N. Y. 40; s. c., 39 How. P. R. (N. Y.) 74; *Ballenger v. McLain*, 54 Ga. 159; *Hatcher v. Cutts*, 42 Ga. 616; *Graham v. Kinder*, 11 B. Mon. (Ky.) 60; *In re Goodenough*, 19 Wis. 274.

1. 1 Bl. Com. 447; 2 Kent. Com. 189.

2. "And be it further enacted that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner, and according to that rate, as by the justices of peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be assessed; (2) upon pain that every one of them shall forfeit twenty shillings for every month which they shall fail therein." Blackstone, in commenting on this statute, says: "For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence; but thought it unjust to oblige the parent against his will to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature if the children were deserving of such

burden that it should not be required to assume.¹ Apart from stat-

favors.* 1 Bl. Com. 449. But *cf.* Wellesley *v.* Duke of Beaufort, 2 Russ. 23, per Lord Eldon.

1 Guion *v.* Guion, 16 Mo. 48. In some States the provision as to grandparents is omitted. Pub. Stat. Mass., Ch. 84, § 5. This feeble and scanty provision of law was intended for the indemnity of the public against the maintenance of paupers. 2 Kent. Com. 191.

But the provisions of these statutes cannot be extended by the courts.

A father is under no legal obligation to support an adult widowed daughter, or her infant offspring. Haynes *v.* Waggoner, 25 Ind. 174. And a man is not liable for the support of his wife's parents. Commrs. of the Poor *v.* Gansett, 2 Bailey (S. Car.) 320; Rex *v.* Munden, 1 Stra. 190. But, on the other hand, a son-in-law cannot charge his mother-in-law for board when visiting him, except by express agreement. Sawyer *v.* Hebard, 58 Vt. 375. And a father-in-law cannot be called on to support his son-in-law. Friend *v.* Thompson, Wright (Ohio) 636.

Under the statute law of France, which provides that a father-in-law must make an allowance to a son-in-law who is in need, so long as a child of the marriage is living, a son-in-law, a French citizen, obtained a decree in the French courts for an allowance against his father-in-law, who was an American citizen, then residing in France. The son-in-law subsequently brought an action of debt on the decree in the courts of the United States to recover the amount of the decreed payment. Held, that the suit could not be maintained, the laws of France upon which such decree was made, being local in their nature and operation and are designed to regulate the domestic relations of those who reside there, and to protect the public against pauperism. De Brimont *v.* Penniman, 10 Blatchf. (U. S.) 436.

A Step-father cannot be compelled to support his step-children, although they may be members of his family. Brookfield *v.* Warren, 128 Mass. 287; Commonwealth *v.* Hamilton, 6 Mass. 273; Dennysville *v.* Trescott, 30 Me. 470; Tubb *v.* Harrison, 4 T. R. 118; Feto *v.* Brown, 4 Mass. 675; Worcester *v.* Marchant, 14 Pick. (Mass.) 510; Brush *v.* Blanchard, 18 Ill. 46; Bond *v.* Lockwood, 33 Ill. 212; McMahon *v.* McMa-

hill, 113 Ill. 461. Even though he has bound himself by an ante-nuptial contract so to do. Phelps *v.* Phelps, 72 Ill. 545; *In re* Besondy, 32 Minn. 385; Brown's Appeal, 112 Pa. St. 18; Ormsby *v.* Rhoades, 59 Vt. 505; Gerber *v.* Bauerline, 17 Oregon 115; Gay *v.* Ballou, 4 Wend. (N. Y.) 403; Bartley *v.* Richtmyer, 4 N. Y. 38.

"The husband is not bound by law to maintain a child of the wife by a former husband. But if he receives such child into his own house, he is then considered as standing in *loco parentis*, and is responsible for the maintenance and education of the child so long during its minority as it lives with him, for by so doing he holds the child out to the world as part of his family. This is precisely the obligation of the father as respects the support of his minor child." Maguinay *v.* Saudek, 5 Sneed (Tenn.) 147; *In re* Besondy, 32 Minn. 385; Gerdes *v.* Weiser, 54 Iowa 591; 36 Am. Rep. 256, n.; Engelhardt *v.* Yung, 76 Ala. 534; Horton's Appeal, 94 Pa. St. 62; Hill *v.* Hanford, 11 Hun (N. Y.) 536; Sharp *v.* Cropsey, 11 Barb. (N. Y.) 224; Stone *v.* Carr, 3 Esp. 1; *In re* Dissenger, 39 N. J. Eq. 227; Norton *v.* Ailor, 11 Lea (Tenn.) 563; Smith *v.* Rogers, 24 Kan. 140; 36 Am. Rep. 254; Mulhern *v.* M'Davitt, 16 Gray (Mass.) 404; Mowbry *v.* Mowbry, 64 Ill. 383; Gorman *v.* State, 42 Tex. 221; St. Ferdinand etc. Academy *v.* Bobb, 52 Mo. 357. But after the death of the mother the father is no longer held. Brown's Appeal, 112 Pa. St. 18.

"The policy of the law seems to be to encourage and protect that (the family) relation—to encourage an extension of the circle and influence of the domestic fireside. And unless compelled by some rigid law we should not by our decision establish a rule calculated to deter the husband from adopting his wife's children by a former marriage into his family. The marriage with the mother, it has been held, severs the relation which would otherwise exist between her and her children as guardian of their persons. If, therefore, the husband voluntarily adopts them into his family, educates and supports them, and discharges his whole duty towards them, as a parent and a good citizen, the law should be liberally construed in his favor. . . . So he is liable for

ute, however, it may be doubted whether there is any obligation on the parent to support his adult children that can be enforced in an action against him,¹ but cases are not wanting that hold that the duty of the parent to support his child, whether that duty

necessaries furnished to a child standing in that relation, to the same extent that he is liable for necessities furnished to his own." *Williams v. Hutchinson*, 3 N. Y. 312; 53 Am. Dec. 301.

A step-father who assumes the relation of a parent to his infant step-son, accepts the parental obligation of supporting him, so far as such obligation would affect the claim of a father for an allowance out of the child's property for maintenance. *Ela v. Brand*, 63 N. H. 14.

Ability to Support.—On a complaint under the Pub. Stat. of Mass., ch. 84, § 7, by a town against a father for the support of his adult pauper daughter, it may properly be found that he is of "sufficient ability" to contribute to such support, where the value of his entire property, above his debts, is between \$5,000, and \$6,000, notwithstanding he is in poor health, unable to do hard work, has a wife and infant child depending on him, and his income is less than his expenses. *Templeton v. Stratton*, 128 Mass. 137; *Dover v. McMurphy*, 4 N. H. 158.

An insane pauper mother is under no obligation to support her child. *Jenness v. Emerson*, 15 N. H. 486. And see *Sanford v. Lebanon*, 31 Me. 124; *Farmington v. Jones*, 36 N. H. 271.

When Liability Accrues.—The liability of a father to support his son, who is unable to support himself, does not accrue until proceedings have been had pursuant to the statute; consequently the furnishing of supplies to the son before such proceedings have been had, is not a benefit to the father, so as to constitute a legal consideration for his promise, made after the supplies were furnished, to pay for them. *Loomis v. Newhall*, 15 Pick. (Mass.) 159; *Cook v. Bradley*, 7 Conn. 57; *Mills v. Wyman*, 3 Pick. (Mass.) 207.

A father is not obliged to support his illegitimate child. *Forrest v. McRea*, 2 Kerr (New Br.) 174. *Contra* as to the mother. *Friesner v. Symonds*, 46 N. J. Eq. 521.

In some States an adult son is compelled by statute to support his mother. *Smith v. Lapeer Co.*, 34 Mich. 57; *Dierkes v. Philadelphia*, 93 Pa. St. 270.

1. Non-enforceable Duty.—"And it is obvious that it (the English law) makes no provision for strangers to furnish children with necessities, against the will of parents, even in extreme cases. For if it can be done in extreme cases it can in every case where the necessity exists; and the right of a parent to control his own child will depend altogether upon his furnishing necessities suitable to the varying taste of the times. There is no stopping place short of this, if any interference whatever is allowed. If the parent abandons the child to destitution, the public authorities may interfere, and, in the mode pointed out by statute, compel a proper maintenance. But this, according to the English common law, which prevails in this State, is not the right of every intermeddling stranger." *Gordon v. Potter*, 17 Vt. 348.

"There is no legal obligation on a parent to maintain his child independent of the statutes, and therefore a third person who may relieve the latter even from absolute want cannot sue the parent for reasonable remuneration, unless he expressly or impliedly contracted to pay." *Chitty*, note to 1 Bla. Com. 458.

Where goods are sold to a minor on his credit, without the knowledge, order or consent of his father, a subsequent promise by the latter to pay therefor is invalid for want of a legal consideration. *Freeman v. Robinson*, 38 N. J. L. 383; 20 Am. Rep. 399.

Baldwin v. Holt, 46 Mo. 265; 2 Am. Rep. 515; *Varney v. Young*, 11 Vt. 258; *Shelton v. Springett*, 11 C. B. 452; *Urmston v. Newcomen*, 4 A. & E. 899; *Seaborne v. Maddy*, 9 C. & P. 497; *White v. Mann*, 110 Ind. 74; *Owen v. White*, 5 Port. (Ala.) 435; 30 Am. Dec. 572; *French v. Benton*, 44 N. H. 28; *Certwell v. Hoyt*, 6 Hun (N. Y.) 575, *semble*; *Carey v. Barrett*, 4 Oregon 171; *McMillen v. Lee*, 78 Ill. 443.

"On the whole, the principles of law applicable to this class of cases seem to take the form of these propositions: That a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon a promise

be legal or moral, is sufficient to raise an implied promise on the part of the parent to pay for necessities furnished the child;¹ and the general doctrine of the American cases is that, inasmuch as a parent is under a natural obligation to furnish necessities for his infant children, if the parent neglect that duty, any person who supplies such necessities is deemed to have conferred a benefit on the delinquent parent for which the law raises an implied promise to pay on the part of the parent; but in order to authorize any person to act for the parent in such a case, there must be a clear and palpable omission of duty in that respect on

to pay for them; and that such promise is not to be implied from mere moral obligation, nor from the statutes providing for the reimbursement of towns; but the omission of duty from which a jury may find a promise by implication of law must be a legal duty, capable of enforcement by process of law. In accordance with these principles, it will be for the jury to say, in a given case, whether all the facts and circumstances warrant the finding of a promise express or implied. In reaching a result, they will be at liberty, of course, and will be likely to take into consideration all the circumstances connected with the parent's neglect, as indicating his intention, views and purposes with regard to the wants of his child, and the weight and controlling influence of all the evidence, governed by the rules of law as we have endeavored to promulgate them, will undoubtedly seldom fail to result in substantial justice and equity." *Kelley v. Davis*, 49 N. H. 187.

The English cases leave no doubt as to the rule. In *Mortimore v. Wright*, 6 M. & W. 482, the defendant's son, while living away from home and earning wages, fell ill and was unable to pay for necessities with which he was supplied. In an action brought against the father to recover the value of such necessities, the court held that there was no evidence to go to the jury in the case. LORD ABINGER, C. B., said: "In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son than a brother or an uncle, or a mere stranger would be. If a father does any specific act, from which it may reasonably be inferred that he had authorized his son to contract a debt, he may be liable in respect of the debt so contracted; but the mere moral obligation on the father to maintain his child, affords no inference of a legal promise to pay his debts. . . . In order

to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person." And in *Shelton v. Springett*, 11 C. B. 452, MAULE, J., said: "People are very apt to imagine that a son stands in this respect upon the same footing as a wife. But that is not so. If it be asked: Is, then, the son to be left to starve? the answer is, he must apply to the parish, and they will compel the father, if of ability to pay for his son's support. That is the course which the law points out. But the law does not authorize a son to bind his father by his contracts."

In *Rawlins v. Goldfrap*, 5 Ves. Jr. 440, it is said that the law cannot do more than compel the parent to prevent the child's being a charge upon the public.

1. "Without further citation of authorities we announce as our conclusions that it is the legal as well as moral duty of parents to furnish necessary support to their children during minority; that a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same, and that such promise may be inferred on the grounds of the legal duty imposed." *Porter v. Powell*, 79 Iowa 151. In this case a girl of 14, with the consent of her father, went to live at a place 30 miles distant from her home, where for three years she contracted for, earned, and controlled her own wages, her father neither furnishing nor agreeing to furnish her with necessities. Held that, while the daughter was emancipated from the duty of service to the father, there was no such emancipation from care and control as would release him from liability for necessities furnished her, and that a physician who attends her in sickness, though without the

the part of the parent.¹ The father is not necessarily absolved from his obligation to support his minor child because the child

father's knowledge, can recover from him for the services rendered.

Jordan v. Wright, 45 Ark. 237.

Funeral Expenses.—The parent is liable for the decent funeral expenses of his child, and the claim is a privileged one against the estate of the father in insolvency. *Sullivan v. Horner*, 41 N. J. Eq. 299.

1. Implied Promise.—*Pidgin v. Cram*, 8 N. H. 350.

"The father is under the natural obligation to furnish his child with necessary and suitable wearing apparel, if he be of sufficient ability, and if he neglect his duty anyone can supply the child, and the law in such case will imply a promise upon the part of the father to pay for them, and he will not be heard to allege the contrary; but if he has not been derelict in his duty, no one has the right to charge the father with supplies for the child that he or the child may judge that the child needs without authority from the parent so to do." *Allen v. Jacobi*, 14 Ill. App. 277.

"So far as the duty of support certainly belongs to the parent as a legal obligation, and is neglected, any other person may perform it and will be regarded as performing it for him; and on general principles the law will raise a promise on the part of the parent to compensate the party who thus did for him what he was by law bound to do. But this rule is carried no further than its reason extends, and is guarded by many restrictions from becoming the means of injury to the parent. Thus, we have seen, that if the child be living with the parent, or as it is said in some cases, if he be *sub potestate parentis*, the law will not presume that the parent neglects the child, but will presume a due care of him until the contrary is shown; and of the propriety and sufficiency of the clothing, etc., the parents must judge; and if a stranger under such circumstances supplies the child even with necessities he certainly cannot hold the parent upon the contract implied by his duty without proving a clear and unquestionable abandonment and neglect of that duty.

"If the supplier seeks to make the parent responsible, on the ground that his authority was given to the child, then, if the goods supplied were necessities, it would seem from the cases, as

we have said, that slight evidence is sufficient to prove such authority; as that the father saw the son wear the clothes, or knew that he had received them and made no objection. But if the things supplied were strict and absolute necessities, needful for the child's subsistence, or if the child is living away from the parent, under circumstances which indicate desertion by the parent, or that the child has been expelled from his house, or caused to leave it by the wrongful acts of the parents, then the authorities and *dicta* to which we have referred lead to the conclusion that whoever supplies the wants of the child may recover from parent." 1 Parson's Contr. 306.

"The remedy to compel a parent to furnish necessities for his infant children is not by a petition to this court (chancery). The performance of that duty must be enforced by a proceeding under the statute, by an application to the general sessions for an order on the parent for the support of his child. Or a stranger may furnish necessities for the child and recover of the parent compensation therefor where there is a clear and palpable omission of duty on the part of the parent in supplying a minor child with necessities (*citing Van Valkinburgh v. Watson*, 13 Johns. (N. Y.) 480; 7 Am. Dec. 395). And it seems that the neglect of a parent to provide for his infant child of tender years, and who is incapable of providing for himself, is an indictable misdemeanor (*citing Rex v. Friend*, Russ & Ry. C. 20)." *Re Ryder*, 11 Paige (N. Y.) 185.

Nichols v. Steger, 6 Lea (Tenn.) 393; *Judge v. Barrows*, 59 Wis. 115; *Young v. Heater*, 63 Iowa 668; *Eitel v. Walter*, 2 Bradf. (N. Y.) 287; *Tyler v. Arnold*, 47 Mich. 564; *Cromwell v. Benjamin*, 41 Barb. (N. Y.) 558; *Keaton v. Davis*, 18 Ga. 457; *Schnuckle v. Bierman*, 89 Ill. 454; *Thayer v. White*, 12 Metc. (Mass.) 343; *Poock v. Miller*, 1 Hilt. (N. Y.) 108; *Henry v. Betts*, 1 Hilt. (N. Y.) 156; *Townsend v. Burnham*, 33 N. H. 270; *Rogers v. Turner*, 59 Mo. 116; *Tompkins v. Tompkins*, 11 N. J. Eq. 512; *Van Valkinburgh v. Watson*, 13 Johns. (N. Y.) 480; 7 Am. Dec. 395; *Furman v. Van Sise*, 56 N. Y. 435; 19 Am. Rep. 687; *Clinton v. Rowland*, 24 Barb. (N. Y.) 634; *Nicholson v. Spencer*, 11 Ga. 607;

has voluntarily left home.¹ The liability to support an adult child is purely statutory.² The mother, after the death of the

Gotts v. Clark, 78 Ill. 229; 1 Ill. App. 454; *Holtzman v. Castleman*, 2 Mac Arthur (D. C.) 555; *Wilson v. Wilson*, 52 Iowa 44.

If a father sends his infant son away to school he is liable for the price of a new overcoat rendered necessary by the climate, and for the price of new clothing necessary to replace that which the son has outgrown. *Parker v. Tillinghast*, 19 Abb., N. Cas. (N. Y.) 190.

A father is not bound to pay for gold pencils and kid gloves for his son, though they are proper for his station in life, unless it appear that the child was then destitute of such necessities. *Brown v. Deloach*, 28 Ga. 486.

It will not be presumed, in the absence of evidence to the contrary, that kid gloves, cologne, fiddle-strings, bridles and spurs, walking-canes, powder-flasks, and caps, a silk cravat, and a silk and linen coat, which constitute the bulk of a bill of particulars, are such articles as will bind a parent upon any implied or express contract to pay for necessities furnished to his minor children. *Lefils v. Sugg*, 15 Ark. 137.

Farmington v. Jones, 36 N. H. 271, was a case where a town sued a parent for medical attendance and board of a daughter during an attack of smallpox. The daughter was visiting in Farmington and while there was taken ill. The town authorities established the house as a pest-house and refused to permit the inmates to leave it. The court ordered a nonsuit, as there appeared "no clear and palpable neglect of duty on the part of the parent."

Plaintiff and defendant married sisters, and the latter's wife died, leaving an infant five months old. Defendant told plaintiff's wife that he wished her to take the child, and try how she "could get along with it." From this she supposed defendant intended to give her the child. Plaintiff kept the child in his family for more than two years, when defendant took it away. *Held*, that plaintiff could recover the value of its maintenance. *Goetschins v. Hunt* (Supreme Ct.), 5 N. Y. Supp. 307.

1. *People v. Strickland*, 13 Abb., N. Cas. (N. Y.) 473.

2. **Adult Child.**—In *Blachley v. Laba*, 63 Iowa 22; 50 Am. Rep. 724, a physi-

cian sued a father for medical services rendered his adult unmarried daughter who lived in his family. The physician was called by the daughter, but with the knowledge of the father and without dissent by him. The court says: "The fact that an adult child is a member of the family of the father does not render him liable for necessities furnished upon request of the child. The father as head of the family is not liable for necessities furnished its members other than the wife and minor children."

In *Crane v. Baudouine*, 55 N. Y. 258, the daughter "was much past her majority; she was married; she had lived with her husband and their children separately from their father in a house of their own; she was at the time living with her husband and their children. Her husband was bound primarily to supply for her all that she needed. Though she was brought from their own house to that of the defendant (the father), it was at her mother's instance and for a special purpose—that of having her under the immediate care and attention of her mother. No reason for the removal other than this is shown. This did not impose upon him any greater obligation than existed before. Nor did it give ground for the law to imply a special obligation. Again, the interest exhibited in the case by the defendant to the plaintiff; his recital to him of a history of her trouble; his presence when the plaintiff made his professional calls, alone and in consultation; his receiving directions as to treatment; his recognition, to others, of the fact that the plaintiff was in attendance; his recital to others of the plaintiff's opinion of the patient's condition; and his knowledge of the frequency and length of continuance of the plaintiff's visits, without any disclaimer on the part of the defendant of liability, are relied upon as circumstances making a basis for an implication." The court goes on to say: "It is true that particular acts will sometimes give rise to particular obligations, duties and liabilities. But the party whose acts are thus to affect him must be in such predicament as those acts have, of legal necessity, a significance attached to them at the time which he may not afterward repel. . . . So far as legal responsibility

father, is bound to support her children, if of sufficient ability. The statute of Elizabeth expressly includes the mother.¹

In case of a voluntary separation of the parents, the father is *prima facie* liable for the support of his children, although they may be in the custody of the mother. This is true also in case of divorce, although the matter may be regulated by the decree. The award of the custody of the child to the mother is presumed to relieve the father from his obligation to support, except where there are special circumstances from which the obligation may arise or be inferred.²

was concerned the defendant, though the father of the patient, was a stranger to her and to her necessities." *White v. Mann*, 110 Ind. 74; *Hawkins v. Hyde*, 55 Vt. 55; *Wood v. Gill*, 1 N. J. L. 449; *Norris v. Dodge*, 23 Ind. 190; *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Allen v. Allen*, 60 Mich. 635; *Boyd v. Sappington*, 4 Watts (Pa.) 247; *Vetch v. Russell*, 3 Q. B. 927.

1. Mother.—In *Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344, the estate of a widowed mother who was insane was held liable for support, clothing, medical attendance and funeral expenses furnished her daughter. The court says: "The mother is the head of the family when the father is dead. She has the same control over the minor children as he had, and we see no reason why her duties to them should not be the same. . . . If the unfortunate mother of this child had retained her reason, and left the child in this institution, where, the proof is, that all parents are expected to pay something for their children when they can possibly do so, the law under the circumstances would have implied a promise to pay for such necessary clothing as she had agreed to furnish to the child when she placed it there, and as she neglected to furnish." *Finch v. Finch*, 22 Conn. 411; *Gladding v. Follett*, 2 Dem. (N. Y.) 58; aff. in 95 N. Y. 652; *Lapworth v. Leach*, 79 Mich. 6; *Dedham v. Natick*, 16 Mass. 135; *Nightingale v. Withington*, 15 Mass. 272. But see *Whipple v. Dow*, 2 Mass. 415; *Dawes v. Howard*, 4 Mass. 97; *Englehart v. Young*, 76 Ala. 534; *Pierce v. Pierce*, 64 Wis. 73; 54 Am. Rep. 581; *Mowbry v. Mowbry*, 64 Ill. 383.

In *Elliott v. Gibbons*, 30 Barb. (N. Y.) 498, the guardian was not allowed to recover from the mother the cost of the child's support.

During the life of the father the mother cannot be held. *Gladding v.*

Follett, 95 N. Y. 652; *Gilley v. Gilley*, 79 Me. 292. Even though the father is imprisoned for crime. *Gleason v. Boston*, 144 Mass. 25.

2. Separation or Divorce.—"On the whole, therefore, my conclusions are: (1) That as a general rule the obligation to support the child rests primarily upon the father, but that even this is governed more or less by the peculiar circumstances of the case; (2) that in the case of a separation or divorce, while the obligation continues to rest, as a general rule and independent of special circumstances upon the husband, it is materially affected by the facts of each particular case, and may be, and usually is, and properly should be, regulated by the terms of the decree, if there be a judicial separation or divorce; (3) that the award of the care and custody of the child to the mother must be presumed to carry with it the obligation to support, in the absence of evidence to the contrary, or at least to relieve the father from the obligation to furnish such support upon the call of the mother; (4) at all events, that he is not so liable without a previous demand or refusal, or an abandonment of the child, which must be regarded as equivalent to a demand and refusal; (5) that mere omission to support, on the part of the father, or the mother's support of the child in the absence and during the nonresidence of the father, is not such a refusal as obliges the father to respond for the expenses incurred by the mother; (6) that to make the father thus liable in a case where a divorce has been decreed and the care and custody of the child are awarded to the mother and alimony to the wife, there must be special circumstances averred in the complaint or appearing in the evidence from which the obligation must arise, or may be reasonably inferred." *Burritt v. Burritt*, 29 Barb. (N. Y.) 124, 131.

"The defendant sent his wife and children to live with the plaintiff, and had then demanded the children from his wife, who refused to deliver them up. The defendant then brought *habeas corpus* for the children, and it was agreed between the attorneys that, pending the proceedings, the children should remain in the custody of the wife. *Held*, that although the refusal to surrender the children to the defendant would otherwise have prevented his liability for necessities supplied to them thereafter, yet his subsequent consent that they should remain with the mother pending the controversy continued his liability to the plaintiff for necessities furnished them while in the custody of the mother pending such proceedings." *Grunhut v. Rosenstein*, 7 Daly (N. Y.) 164; *Rumney v. Keyes*, 7 N. H. 571; *Kimball v. Keyes*, 11 Wend. (N. Y.) 33; *Walker v. Laighton*, 31 N. H. 111; *Reynolds v. Sweetser*, 15 Gray (Mass.) 78.

A decree of divorce giving the custody of infant children to the mother, either temporarily or permanently, will not relieve the father from his obligation to support them. He is bound to maintain them as long as they are too young to earn their own livelihood; and chancery will at a subsequent term entertain the petition of the mother to recover from him her reasonable and proper advances for their support since the divorce, and for an order for their future support. *Holt v. Holt*, 42 Ark. 495; *Bauman v. Bauman*, 18 Ark. 320; 68 Am. Dec. 171; *Cowls v. Cowls*, 8 Ill. 435; 44 Am. Dec. 708; *Buck v. Buck*, 60 Ill. 105; *McCarthy v. Hinman*, 35 Conn. 538; *Welch's Appeal*, 43 Conn. 342; *Buckminster v. Buckminster*, 38 Vt. 248; 88 Am. Dec. 652; *Conn. v. Conn*, 57 Ind. 323; *Courtright v. Courtright*, 40 Mich. 633; *Thomas v. Thomas*, 41 Wis. 229. But see *Hancock v. Merrick*, 10 Cush. (Mass.) 41; *Fitler v. Fitler*, 33 Pa. St. 50.

"If, notwithstanding such (of the wife) misconduct, he suffer his child to live separate from him with her, he thereby constitutes her his agent to contract for the child's necessities, and is liable to those who furnish them upon his credit." *Gill v. Read*, 5 R. I. 343.

Gilley v. Gilley, 79 Me. 292. Here the mother obtained a divorce from the father for "desertion and lack of support," but no decree was made for custody of the children or alimony. She was allowed to recover for the support of the children on the promise implied

from the circumstances. The court lays stress on the fact that the father was entitled to the earnings of the children so long as no decree of custody away from him has been made. *Stanton v. Willson*, 3 Day (Conn.) 37.

In *Bazeley v. Forder*, L. R., 3 Q. B. 559, the wife was living apart from the husband on account of his misconduct, and had the custody of the child. It was held by a majority of the court (*BLACKBURN, MELLOR and LUSH, J. J.*), that, as the wife under such circumstances had the right to pledge the credit of the husband for her own reasonable expenses, the support of the child could be classed among such expenses. *COCKBURN, C. J.*, dissented, on the ground that the father was never liable in absence of statute for the support of his children.

This doctrine has been carried still further in *Pretzinger v. Pretzinger*, 45 Ohio St. 452, where the wife was divorced for misconduct of the husband, and the custody of the child given to her with an allowance to her personally as alimony. At the time of the divorce the husband was a bankrupt, but later, on acquiring property, the mother sued him for support of the child. It was held that where the father loses the custody of the child through his own misconduct, he is bound to support it and to recompense the mother or any third person for necessities furnished the child. And see *Plaster v. Plaster*, 47 Ill. 290; 53 Ill. 445; *Conn. v. Conn*, 57 Ind. 323; *Boggs v. Boggs*, 49 Iowa 190; *Courtright v. Courtright*, 40 Mich. 633; *Buckminster v. Buckminster*, 39 Vt. 248; 88 Am. Dec. 652; *Holt v. Holt*, 42 Ark. 495. In some States the statute puts the burden on the father after divorce, or at least imposes the burden of support on both parents. *Welch's Appeal*, 43 Conn. 342. Compare *Finch v. Finch*, 22 Conn. 417; *Wilson v. Wilson*, 45 Cal. 399.

It seems that in Indiana the wife must make her claim for support on the trial of the divorce suit or be forever barred. *Husband v. Husband*, 67 Ind. 583; 33 Am. Rep. 110.

A father is not liable for the support of his minor child after the custody of the child has been given to the mother by a decree of this court, under the statute of 1874, ch. 205. *Brow v. Brightman*, 136 Mass. 187; *Johnson v. Onsted*, 74 Mich. 437.

If a wife leaves her husband without justifiable cause, taking their minor

(b) POWER OF CHILD TO BIND PARENT AS AGENT.—There is no such relation existing between parent and child, though the child be living with his parent as a member of his family, as will make the acts of the son more binding upon the father than the acts of any other person, unless circumstances show an authority actually given, or legally to be inferred;¹ but the courts are so zealous to enforce the obligation of a parent to support his child that very slight circumstances will suffice to justify a jury in finding the authority of the child to bind the parent for necessities.² Yet the rule of principal and agent is to be reason-

child with her, and the husband is able and willing to support the child, and so informs the wife and a third person, with whom she places the child, the fact that the father makes no attempt to obtain the custody of the child does not of itself authorize the wife to pledge his credit for necessities furnished to the child by such third person at the request of the wife. *Baldwin v. Foster*, 138 Mass. 449.

1. *Paul v. Hummel*, 43 Mo. 119; *White v. Mann*, 110 Ind. 74; *Wallace v. Ellis*, 42 Ind. 582; *Ritch v. Smith*, 82 N. Y. 627; *Cromwell v. Benjamin*, 41 Barb. (N. Y.) 558; *Raymond v. Loyl*, 10 Barb. (N. Y.) 483; *Van Valkenburgh v. Watson*, 13 Johns. (N. Y.) 480; 7 Am. Dec. 395; *Gordon v. Potter*, 17 Vt. 348; *Tompkins v. Tompkins*, 11 N. J. Eq., 512; *Freeman v. Robinson*, 38 N. J. L. 383; 20 Am. Rep. 399; *McNamara v. McNamara*, 62 Ga. 200; *Thompson v. Dorsey*, 4 Md. Ch. 149; *Wharton Agency*, §§ 13-15; *Story Agency*, § 7; *Mortimore v. Wright*, 6 M. & W. 482; *Carey v. Barrett*, 4 Oregon 171; *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Bushnell v. Bishop Hill Colony*, 28 Ill. 204; *Gotts v. Clark*, 78 Ill. 229; *Dexter v. Blanchard*, 11 Allen (Mass.) 365.

Without proof of authority from the father, a son has no more right than a stranger to lend his father's goods. *Johnson v. Stone*, 40 N. H. 197.

There must be a contract, express or implied. *Bailey v. King*, 41 Conn. 365; *Clark v. Clark*, 46 Conn. 586; *Kernodle v. Caldwell*, 46 Ind. 153; *Rogers v. Turner*, 59 Mo. 116; *Harper v. Lemon*, 38 Ga. 227; *Byers v. Thompson*, 66 Ill. 421; *Allen v. Jacobi*, 14 Ill. App. 277; *Johnson v. Smallwood*, 88 Ill. 73; *McMillen v. Lee*, 78 Ill. 443; *Tyler v. Arnold*, 47 Mich. 564; *Todd v. Weber*, 95 N. Y. 181; 47 Am. Rep. 20; *Wilson v. Wilson*, 52 Iowa, 44.

A son, a minor, who rides his father's

horse with his permission, may bind him, by a contract, for that which, in common prudence, would be necessary for the existence or preservation of the horse. *White v. Edgman*, 1 Overt. (Tenn.) 19.

2. 1 Bl. Com. 488, Chitty's note; *Jordan v. Wright*, 45 Ark. 237.

In *Freeman v. Robinson*, 38 N. J. L. 383; 20 Am. Rep. 399, the plaintiff supplied the defendant's son with goods on credit without his knowledge or consent. The court holds that the moral obligation was not a sufficient consideration to support a subsequent promise to pay for the goods. Stress was laid on the fact that there was evidence that the goods sold were necessities, the court saying: "The case fails to show the existence of any moral duty on the part of the defendant towards his son, which would require him to supply the goods sued for." Nevertheless the court lays down the rule in plain terms, that "no action can be maintained against a father for goods purchased on credit by his minor child, even though they be necessities, unless the father has expressly or impliedly authorized the purchase on credit. The authority of an infant to bind the father by contract for necessities may be inferred from slight evidence. But, nevertheless, where the parent gives no authority and enters into no contract, he is no more liable to pay a debt contracted by his child even for necessities than a mere stranger would be. The mere moral obligation of a parent to maintain his child affords no legal inference of a promise to pay a debt contracted by him even for necessities." *Chilcott v. Trimble*, 13 Barb. (N. Y.) 502; *Swain v. Tyler*, 26 Vt. 9; *Clark v. Clark*, 46 Conn. 586; *Murphy v. Ottenheimer*, 84 Ill. 39.

In an action to recover for supplies furnished to the defendant's minor son, evidence that the son had been in the

ably enforced; and in all cases where there appears neither palpable moral delinquency on the part of the parent, nor evidence of authority actually conferred upon the child, nor a contract by a parent himself or his agent, the parent cannot be

habit of purchasing supplies in his father's name at various stores in the place where the plaintiff did business, and that the defendant had regularly paid the bills for the same without objection, is sufficient to establish the son's authority to purchase at the plaintiff's store. *Fowlkes v. Baker*, 29 Tex. 135; *Booker v. Tally*, 2 Humph. (Tenn.) 308; *Plotts v. Rosebury*, 28 N. J. L. 146; *Wilkes v. McClung*, 32 Ga. 507; 29 Ga. 371; *Thayer v. White*, 12 Met. (Mass.) 343; *Bryan v. Jackson*, 4 Conn. 288; *McKenzie v. Stevens*, 19 Ala. 691; *Avery v. Leach*, 9 Hun (N. Y.) 106; *Henry v. Betts*, 1 Hilt. (N. Y.) 156.

A father's payment of his son's bills to B without objection after publishing a notice forbidding all persons to trust the son on his account, held to be a waiver of his rights under the notice, so far as B was concerned. *Bailey v. King*, 41 Conn. 365.

If a father authorizes a merchant or his clerk to let his minor daughter have from their store whatever she wants, he thereby makes her his agent to contract, and he is bound by her acts, though she exceeds what is actually necessary for her comfort. *Harper v. Lemon*, 38 Ga. 227.

A minor, who voluntarily leaves his father's house, either to seek his fortune or to avoid necessary restraint, carries with him no credit even for necessities. *Weeks v. Merrow*, 40 Me. 151; *Owen v. White*, 5 Port. (Ala.) 435; 30 Am. Dec. 572; *Hunt v. Thompson*, 4 Ill. 179; 36 Am. Dec. 538; *Raymond v. Loyl*, 10 Barb. (N. Y.) 483; *Johnson v. Gibson*, 4 E. D. Smith (N. Y.) 231; *Angel v. McLellan*, 16 Mass. 28.

But not where the child leaves his father's house through fear of violence. *Stanton v. Wilson*, 3 Day. (Conn.) 37; *Pidgin v. Cram*, 8 N. H. 350; *Kimball v. Keyes*, 11 Wend. (N. Y.) 32; *Walker v. Loughton*, 31 N. H. 111; *VanValkinburg v. Watson*, 13 Johns. (N. Y.) 480; 7 Am. Dec. 395; *Reynolds v. Sweetser*, 15 Gray (Mass.) 78; *Owen v. White*, 5 Port. (Ala.) 435; 30 Am. Dec. 572.

A father was held liable to a physician for medical attendance upon his minor son, at the house of the father, with his knowledge and assent, on an

implied promise, although the son had left his house against his will, and refused to return on his request, but, on being taken sick, returned and was received. *Deane v. Annis*, 14 Me. 26.

Proof that the child had forged the parent's name to a note which was paid by the parent with knowledge of the fact, is no proof to charge the parent for some other act of the child not acquiesced in by the parent. *Greenfield Bank v. Crafts*, 2 Allen (Mass.) 269.

Adult Child.—Where the child is of age, the presumption of agency is not so easily raised, and the parent is not bound for services rendered to the child or for goods furnished him, even though he requests them, and the child is living with him, unless a distinct promise to pay on his part can be proved. *Wood v. Gill*, 1 N. J. L. 449; *Hawkins v. Hyde*, 55 Vt. 55; *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Blachley v. Laba*, 63 Iowa 32; 50 Am. Rep. 720; *Crane v. Baudouine*, 55 N. Y. 256; *Townsend v. Burnham*, 33 N. H. 270.

Where a father calls for a coffin for his son, who had come of age and had a family of his own, upon one who knew all the circumstances of the case, the law does not raise an implied promise of payment on the part of the former. *Norris v. Dodge*, 23 Ind. 190. But see *Kernodle v. Caldwell*, 46 Ind. 153, where it was held that a father is liable for the board of his daughter over 21 years of age, if furnished at his request, though no promise to pay such board be made in writing. *Patton v. Hassinger*, 69 Pa. St. 311 ("whoever took care of John would be well paid for it").

The father may give in evidence the pecuniary ability of the child. *Boyd v. Sappington*, 4 Watts (Pa.) 247; *contra Norris v. Dodge*, 23 Ind. 190.

The fact that a father promised to pay for goods purchased by and charged to the separate account of his adult daughter, who with her children by a divorced husband was living in the father's family, does not relieve the daughter from paying for them, unless they were furnished under an agreement that the vendors would look alone to the father for payment. *Brewer v. Warner*, 126 Pa. St. 151.

held liable for the acts of the child.¹ In any event, the burden of proof is on the person seeking to charge the parent.²

(c) MAINTENANCE IN EQUITY—(See also GUARDIAN AND WARD, vol. 9, p. 100).—The principle is clearly established that a father must maintain and educate his minor children, if he has the ability, and he has, at common law, no right to reimbursement for any expenditures for those purposes; and no allowance can be made to him out of the property of the children, while his own means are sufficient.³ But when the father is not

1. *Schouler Dom. Rel.*, § 241; *Eitel v. Walter*, 2 Bradf. (N. Y.) 287; *Raymond v. Loyl*, 10 Barb. (N. Y.) 483; *Bushnell v. Bishop Hill Colony*, 28 Ill. 204; *Tyler v. Arnold*, 47 Mich. 564. And see *Loomis v. Newhall*, 15 Pick. (Mass.) 159.

In A's action against B for necessities furnished to C, infant son of B, the fact that receipts for payments by C were by A given to C in his own name, and that the bills for the balance presented to B were also made out by A to C, are, if not explained, conclusive that the credit was given to C and not to B. *Bartels v. Moore*, 9 Daly (N. Y.) 235.

A conditional offer to pay for goods ordered by the child must be clearly accepted to bind the parent who makes it. *Andrews v. Garret*, 6 C. B., N. S. 262. Of course the father may contract for supplies on the child's account if he chooses to. *Bryan v. Jackson*, 4 Conn. 288. And see *Brown v. Deloach*, 28 Ga. 486; *Deane v. Annis*, 14 Me. 26.

The rule of agency is sometimes allowed to operate for the benefit of the father, the child who, as an infant, could not bind himself, being treated as the parent's agent. *Darling v. Noyes*, 32 Iowa 96.

Liability of Administrator.—An administrator is not liable for supplies furnished to a minor child after his intestate's death. *Pryor v. West*, 72 Ga. 140, or before. *Burns v. Madigan*, 60 N. H. 197.

2. **Burden of Proof.**—*White v. Mann*, 110 Ind. 74; *VanValkinburgh v. Watson*, 13 Johns. (N. Y.) 480; 7 Am. Dec. 395; *Gotts v. Clark*, 78 Ill. 229; *McGoon v. Irvin*, 1 Pin. (Wis.) 526; 44 Am. Dec. 109. Compare *Murphy v. Ottenheimer*, 84 Ill. 39.

In an action against a father for clothing furnished to his son, who was away from home, plaintiff testified that at the time of ordering the clothes the son said that "he had nothing but a very thin overcoat, and that he had outgrown his

other clothes." Defendant testified that he could not state what clothes his son had when he went to school, but that he had furnished his son with what clothing he thought was necessary and proper for him. *Held*, that it was error to direct the jury to find for defendant. *Parker v. Tillinghast*, 19 Abb. N. C., (N. Y.) 190.

The father may show declarations of the plaintiff tending to show that he knew the child had no authority to purchase. *Green v. Gould*, 3 Allen (Mass.) 465.

3. *Wellesley v. Beaufort*, 2 Russ. 128; *Butler v. Butler*, 3 Atk. 60; *Darley v. Darley*, 3 Atk. 399; *Chapline v. Moore*, 7 Mon. (Ky.) 150; *Tanner v. Skinner*, 11 Bush (Ky.) 120; *Tompkins v. Tompkins*, 18 N. J. Eq. 303; *Walling's Case*, 35 N. J. Eq. 105; *Stevens v. Stevens*, 23 N. J. Eq. 296; *Kinsey v. State*, 98 Ind. 351; *Haase v. Rochrscheid*, 6 Ind. 67; *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214; *Cruger v. Heyward*, 2 Desaus. (S. Car.) 94; *Dupont v. Johnson*, Bailey Eq. (S. Car.) 279; *Godard v. Wagner*, 2 Strobb. Eq. (S. Car.) 1; *Hines v. Mullins*, 25 Ga. 606; *Stovall v. Johnson*, 17 Ala. 14; *Addison v. Bowie*, 2 Bland (Md.) 606; *Thompson v. Dorsey*, 4 Md. Ch. 149; *Litchfield v. Londonderry*, 39 N. H. 247; *Ela v. Brand*, 63 N. H. 14; *Bradin v. Mercer*, 44 Ohio St. 339; *Buckley v. Howard*, 35 Tex. 565; *Burke v. Turner*, 85 N. Car. 500; *Griffith v. Bird*, 22 Gratt. (Va.) 73; *Wood's Estate*, 13 Phila. (Pa.) 391; *Succession of Trosclair's*, 34 La. Ann. 326; *Pearce v. Olney*, 6 R. I. 269; *Holtzman v. Castleman*, 2 Mac Arthur (D. C.) 555; *Fuller v. Fuller*, 23 Fla. 236; *Beardsley v. Hotchkiss*, 96 N. Y. 201. See also GUARDIAN AND WARD, vol. 9, pp. 100-104.

Where a father is able to support a child, he cannot charge for maintenance and education, and the expenses of a voyage abroad. *Harland's Case*, 5 Rawle (Pa.) 323.

of sufficient ability to support them, the court will order so much of their income to be applied to that purpose as is necessary.¹ The child's fortune and the circumstances of the father, will be considered in deciding what, if any, allowance should be made. The welfare of the child requires that he should be educated and maintained in accordance with the social position which his means will enable him to enjoy; and the whole or any part of the expense thereof will be charged upon his estate, according as the circumstances of the father require.² The parent should, properly, before applying his child's income to its support, procure the sanction of the court,³ but the expenses of past maintenance may

1. *Fuller v. Fuller*, 23 Fla. 236. See also *GUARDIAN AND WARD*, vol. 9, p. 100.

No allowance can be made the father when the son is articulated out. *In re Stables*, 21 L. J., Ch., N. S. 620; 13 E. L. & Eq. 61; *Watts v. Steele*, 19 Ala. 656; 54 Am. Dec. 207; *Dawes v. Howard*, 4 Mass. 97; *Trimble v. Dodd*, 2 Tenn. Ch. 500; *Carter v. Rolland*, 11 Humph. (Tenn.) 333; *Tompkins v. Tompkins*, 18 N. J. Eq. 303.

Newport v. Cook, 2 Ashm. Pa.) 332; *Jerome v. Lick*, Cooper Ch. (U. C.) 32; *Buckworth v. Buckworth*, 1 Cox 80; *Re Kane*, 2 Barb. Ch. (N. Y.) 375; *Otte v. Becton*, 55 Mo. 99; *Baines v. Barnes*, 64 Ala. 375; *Tanner v. Skinner*, 11 Bush (Ky.) 120; *Welch v. Burris*, 29 Iowa 186; *Ela v. Brand*, 63 N. H. 14; *Harring v. Coles*, 2 Bradf. (N. Y.) 349.

In *Myers v. State*, 45 Ind. 160, it was held by the court that the fact that the father was very poor and in indigent circumstances during the time that he was guardian, is not sufficient to authorize him to use the money of his ward for his ward's support, unless it further appeared that the father and guardian was not able by his labor to provide for the proper support, maintenance and education of his ward. And see *State v. Roche*, 91 Ind. 406; *Corbaley v. State*, 81 Ind. 62.

2. The burden is upon the father to show the necessity for contribution from her estate, and he will be charged with her support during such periods as he does not clearly show the necessity for such contribution. *Fuller v. Fuller*, 23 Fla. 236.

So where, although the father has a large income, yet if the income of the infants is larger, an allowance may be made. *Jervois v. Silk Coop.*, Eq. 52; *Culbertson v. Wood*, 5 Ir. Rep., Eq. 23;

Greenwell v. Greenwell, 5 Ves. 194; *Hoste v. Pratt*, 3 Ves. 730; *Ex parte Penleaze*, 1 Bro. C. C. 387 n.; *Heysham v. Heysham*, 1 Cox. 179. And notwithstanding the father's misconduct. *Allen v. Coster*, 1 Beasl. 201. But see *In re Marx*, 5 Abb., N. Cas. (N. Y.) 224, which holds that a parent is not under obligation to support his minor children if they have property; and a husband who is administrator of his wife's estate may be allowed, in his account, for money of the estate applied to the support of their children.

So where the father was poor and disabled and his child lived with him; *Watts v. Steele*, 19 Ala. 656; 54 Am. Dec. 207.

In *McKnight v. Walsh*, 23 N. J. Eq. 136, an attempt was made to credit the estate of the father as guardian with expenditures necessary for him to support an establishment suitable for a wealthy child as a member of his family. CH. ZABRISKIE said: "I am not willing to adopt a principle by which the fortune of infant daughters derived from their mother shall be appropriated to maintain their father, his second wife and her family, in a manner that his own means will not warrant, because it is suitable to the condition and prospects of the infants. They might, perhaps, be authorized to pay their proportional share of the expense of such an establishment, but the principle should go no further." And see *Burke v. Turner*, 85 N. Car. 500.

3. *Burke v. Turner*, 85 N. Car. 500.

A direction by a testator that his executors invest \$25,000 of the estate and pay the interest thereof toward the proper maintenance and education of his daughter's child or children, authorizes only so much of the income to be expended as will maintain and educate her child in a manner proper or suitable.

be allowed on a proper case shown.¹ The father, even if not needy, may maintain the child from any fund vested in him for that purpose.²

ble to his condition or fortune. Under such direction, no part of the income could be appropriated to the support of the father without an order. *McKnight v. Walsh*, 23 N. J. Eq. 136.

Application should be made in advance for the allowance; and, though an allowance for past maintenance will be granted, an enquiry as to granting it will not be directed as a matter of course, but only upon a special case showing good grounds therefor. It will be directed in a suit for an account against the father in possession of and managing her estate, where the pleadings justify it. *Fuller v. Fuller*, 23 Fla. 236.

1. Past Maintenance.—An allowance to a father from the property of his infant child to reimburse the father for the expense of the child's maintenance will not, ordinarily, be made. To justify it, special circumstances must appear. *Beardsley v. Hotchkiss*, 96 N. Y. 201.

To entitle a father even to an enquiry as to the propriety of making an allowance to him for the past maintenance of his infant children, he must state a special case, showing the extent of his means at the time such support was furnished, and the particulars of the extraordinary expenditures for the actual benefit of the infants, which created an equitable claim in his favor. *Smith v. Geortner*, 40 How. Pr. (N. Y.) 185.

Carmichael v. Hughes, 20 L. J., Ch. N. S. 396; 6 E. L. & Eq. 71; *Ex parte Bond*, 2 Myl. & K. 439; *Brown v. Smith*, L. R., 10 Ch. Div. 377; *McDaid's Estate*, 14 Phila. (Pa.) 253; *Stewart v. Lewis*, 16 Ala. 734; *Patton v. Patton*, 3 B. Mon. (Ky.) 160; *Alston v. Alston*, 34 Ala. 15; *Osborne v. Van Horn*, 2 Fla. 360; *Re Kane*, 2 Barb. Ch. (N. Y.) 375; *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214; *Otte v. Becton*, 55 Mo. 99. And compare *Presley v. Davis*, 7 Rich. Eq. (S. Car.) 105.

G, who was the guardian of his children, maintained and educated them at his own expense, and made no charge against them. Up to his death his estate was ample to pay his debts, but by losses occurring after his death his estate became insolvent. His creditors filed a bill to have the amount expended for the support of the children taken from their estate and applied to swell the

estate of the insolvent. *Held*, that as the father had made no claim during his lifetime, and had been amply able to support his children, the bill be dismissed. *Griffith v. Bird*, 22 Gratt. (Va.) 73. So also in *In re Kerrison's Trusts*, L. R., 12 Eq. 422, where a father had settled on trustees a fund for the maintenance of his children, but nevertheless supported the children out of his own means, suffering the fund to accumulate, it was held that on the bankruptcy of the father, his assignee could not reach the unexpended income of the trust fund, although the father could have used it had he seen fit.

It is to be noted, however, that in England an exception has arisen in this respect with ante-nuptial contracts. There it is settled by authority that the father is a purchaser of so much of the fund as would have been proper to apply to the support of the children and that can be reached by creditors. *Mundy v. Earl Howe*, 4 Bro. C. C. 223.

The court will allow what it would have ordered. *Stopford v. Lord Canterbury*, 11 Sim. 82; *Bruin v. Knott*, 1 Phill. 572.

Adult Child.—It seems hardly probable that the father could be allowed for maintenance from the estate of an adult child, except on proof of some contract. *Otte v. Becton*, 55 Mo. 99; *In re Cottrell's Estate*, L. R., 12 Eq. 566.

2. Allowance from Special Fund.—*Hawkins v. Watts*, 7 Sim. 199; *Andrews v. Partington*, 2 Cox 223; *Hughes v. Hughes*, 1 Bro. 387; *Kendall v. Kendall*, 60 N. H. 527; *Freeman v. Coit*, 27 Hun (N. Y.) 447; *Mundy v. Earl Howe*, 4 Bro. C. C. 224; *Stocken v. Stocken*, 4 Sim. 152; *Ransom v. Burgess*, L. R., 3 Eq. 773.

M, by a written instrument, gave to his granddaughter \$1,000 as "inheritance," and placed it in the hands of her guardian, her father being dead, the instrument providing that, in case of the donee's death before she arrived at the age of 21 years, the said sum should be paid back with interest to the grantor or his heirs. The granddaughter was penniless, and the laws of *Pennsylvania* made the grandfather liable for her support in such case. *Held*, upon petition of the granddaughter's mother, that the guardian

Although the modern tendency is to hold that the mother is bound to support her children after the death of the father, yet the courts show special favor to the mother, and, if the child has property, they will charge the expense of education and maintenance on such property rather than force her to contribute.¹ In

should be required to make her an annual allowance of \$50 from the income of the fund for her daughter's education and maintenance until the latter should reach the age of seven, the guardian, after the receipt of the money, having entered into an agreement to make such an allowance. *Leiby's Appeal*, 49 Pa. St. 182.

Where a testator bequeathed a fund to trustees to be retained by them for the purpose of educating a child of a third person, without any provision for the maintenance of such child—*held*, that while the child remained with his father, the trustees had no right to pay anything to the father on his account, but only that payment should be made by them for the expense of the education of the child when away from his father at school; and that, there being no objection to the child's remaining with his father, except that this would deprive him of the benefit of the legacy, the court could not direct him to be taken from his father, without the consent of the latter, and placed at school. *Jones v. Stockett*, 2 Bland (Md.) 409.

And see *Pearce v. Olney*, 5 R. I. 269.

Where the fund is given as a mere bounty, the father must still support. *Hoste v. Pratt*, 3 Ves. 729; *Hawley v. Gilbert*, Jac. 354; *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214.

See also where the interest of the infant in the fund is contingent. *Ex parte Kebble*, 11 Ves. 604; *Errat v. Barlow*, 14 Ves. 202; *Turner v. Turner*, 4 Sim. 430; *Re Davison*, 6 Paige (N. Y.) 136.

1. **Allowance to Mother.**—*Haley v. Bannister*, 4 Madd. 275; *Hughes v. Hughes*, 1 Bro. C. C. 387; *Lanoy v. Duchess of Athol*, 2 Atk. 444; *Beasley v. Magrath*, 2 Sch. & Lef. 35; *Ex parte Petre*, 7 Ves. 403; *Gladding v. Follett*, 2 Dem. (N. Y.) 58. On app. 95 N. Y.) 652; *Whipple v. Dow*, 2 Mass. 415; *Bruin v. Knott*, 9 Jur. 979; *Wilkes v. Rogers*, 6 Johns. (N. Y.) 566; *Heyward v. Cuthbert*, 4 Desaus. Eq. (S. Car.) 445; *Otte v. Becton*, 55 Mo. 99; *Osborne v. Van Horn*, 2 Fla. 360.

"The law shows special favor to the mother, and her application for past maintenance will be granted in cases where that of a father would not be listened to. This, we apprehend, grows out of her naturally dependent position, and of the consequent reluctance of the courts to encroach upon her estate. We do not, however, undertake to say that her affirmative application for past maintenance will in all cases be granted when the child has property of his own, though his support was not intended to be a gratuity. The circumstances of the case might be such as to render it altogether inequitable. . . . The courts are not, ordinarily, careful to require of a mother who remains unmarried, as in the case of a father, that a special case be made, showing the inadequacy of her own means, and the necessity of an allowance for that reason." *In re Besondy*, 32 Minn. 385.

A mother surviving the father may support her child gratuitously, though not bound to do so; and having done so, she cannot afterwards demand and receive compensation out of its estate; but, when she has the control and management of the child's estate, as guardian or administratrix, the support and education of the child are presumptively a charge on that estate, and an intention on her part to assume it gratuitously must be clearly shown; and the fact that she kept no account against the child is not sufficient to raise the presumption of an intended gratuity, when it also appears that she kept no accounts with the estate of the father, of which she was administratrix. *Englehardt v. Yung*, 76 Ala. 534.

The parents of a minor child lived in separation, and the mother supported it. Lands were subsequently devised to the child; the child died, and the parents became its sole heirs. *Held*, that the mother was entitled to allowance out of its estate, for such support, and she was not estopped by a partition of the lands made on her petition between herself and her husband. *Pierce v. Pierce*, 94 Wis. 73; 54 Am. Rep. 581.

case of divorce the court may order maintenance for the child on the same principles as alimony for the wife.¹

The court, in allowing maintenance, will generally restrict it to the income from the child's property; but where the property is small and the income is not sufficient for his support, the capital may be broken into, although rarely to allow for past maintenance when his future support will be thereby rendered doubtful.²

V. RIGHTS OF PARENTS.—The rights of parents are a result from their duties, being given them partly as a recompense for the duties imposed on them, and partly to aid them in fulfilling those duties. These rights are, in general, to the control and custody of the child and to receive his earnings.³

1. Right of Control.—In assertion of this right of control the law gives the parent the right of moderate correction of his child in a reasonable manner; and the courts are reluctant to interfere in matters of family discipline.⁴ This right of moderate correction

When a mother is unable to support and educate her son, and the income of his estate is insufficient to do so, the amount expended by her for his support and education, though without a special order of a probate court, is a charge on the *corpus* of his estate. *Freybe v. Tiernan*, 76 Tex. 286.

If a mother has maintained her own children, the presumption is that she did it gratuitously, and, in the absence of any express or implied promise to pay her for maintaining them, she is not entitled to be reimbursed therefor. *Seitz's Appeal*, 87 Pa. St. 159. *In re Cottrell's Estate*, L. R., 12 Eq. 566; *McDaid's Estate*, 14 Phila. (Pa.) 253 *acc*. But see *Pennock's Est.*, 11 Phila. (Pa.) 75.

A court of chancery will not make the support of infant children a charge upon the property of their widowed mother, nor upon their stepfather, where ample provision is otherwise made for their support. *Mowbry v. Mowbry*, 64 Ill. 383.

1. Divorce.—*Wilson v. Wilson* 45 Cal. 399; *Holt v. Holt*, 42 Ark. 495; *Milford v. Milford*, L. R., 1 P. & D. 715. And see *Bazeley v. Forder*, L. R., 3 Q. B. 559; *McCarthy v. Hinman*, 35 Conn. 538; *Cowls v. Cowls*, 8 Ill. 435; 44 Am. Dec. 708.

2. Allowance from Principal.—*Schouler Dom. Rel.*, § 240; 2 Story Eq. Juris., § 1355; Am. & Eng. Encyclopedia vol. 9, p. 103; *Guardian and Ward*; *Barlow v. Grant*, 1 Vern. 255; *Bridge v. Brown*, 2 Y. & C. (Ch.) 181; *Ex parte Green*, 1 Jac. & W. 253; *Osborne v. Van Horne*, 2 Fla. 360; *Newport v. Cook*, 2

Ashm. (Pa.) 332. And see *Donovan v. Needham*, 15 L. J., Ch. 193; *In re Bostwick*, 4 Johns. Ch. (N. Y.) 100; *Otte v. Becton*, 55 Mo. 99; *Cox v. Storts*, 14 Bush (Ky.) 502.

Where the child's estate goes over on his death, the court cannot break into the *corpus* to provide for his maintenance. *In re Turner*, 10 Barb. (N. Y.) 557; *Deen v. Cozzens*, 7 Robt. (N. Y.) 178. And see *McKnight v. Walsh*, 23 N. J. Eq. 136; *Leiby's Appeal*, 49 Pa. St. 182.

3. 1 Bl. Com. 452; 2 Kent. Com. 203.

The law recognizes no distinction of color or race; and all fathers, whatever may be their standing in society, have precisely the same legal authority and control over their children. *People v. Cooper*, 8 How. Pr. (N. Y.) 288.

The court may interfere against the paternal authority, when it becomes necessary for the safety and protection of the infant. *Faulk v. Faulk*, 23 Tex. 653.

Mother.—Upon the death of the father, it is the duty of the mother to exercise authority over her children. *Osborne v. Allen*, 26 N. J. L. 388.

The mother of an infant daughter, merely as mother, has no authority to intervene, or to exercise any authority in an action between such infant daughter and her husband, for a divorce. *E. B. v. E. C. B.*, 28 Barb. (N. Y.) 299.

4. Chastisement.—See ASSAULT, vol. 1, p. 794.

A parent is punishable for an "excessive" punishment of his child, and what constitutes excess is a question of fact for a jury. *Johnson v. State*, 2

applies also to persons *in loco parentis*, as a step-parent,¹ or school teacher.²

2. Criminal Misconduct of Parents—(See HOMICIDE, vol. 9, p. 592). Where, however, a parent is guilty of cruelty towards his children, he may be indicted and punished;³ and so, too, where he

Humph. (Tenn.) 283; 36 Am. Dec. 322; State v. Blaker, 1 Brews. (Pa.) 311.

"The father went to the house where his daughter, who was sick, was living, and told her she must go with him. She refused, and he replied: "You are my daughter, and must go." He then took her by the waist and attempted to lift her, but on her exclaiming: "That hurts me," he desisted. The defendants then picked up the chair in which she sat and took her to a wagon and drove her slowly to a room provided for her by her father. There was medical evidence that it was unwise to remove her in the condition she was then in. It appeared that the object in removing the girl was to get her under the influence of the Roman Catholic church. *Held*, that the evidence warranted the jury in finding that the force used was unjustifiable and excessive, and a conviction was sustained. *Commonwealth v. Coffey*, 121 Mass. 66.

"The law as to correction has reference to a child capable of appreciating correction, and not to an infant two and one-half years old. Although a slight slap may be lawfully given to an infant by its mother, more violent treatment of an infant so young by her father would not be justifiable." *Martin B. in Reg. v. Griffin*, 11 Cox. C. C. 402; 1 Hawk. P. C. (6th ed.), ch. 60, § 23; 1 Bl. Com. 453; 1 Kent Com. 204. In *Neal v. State*, 54 Ga. 281, the father struck his daughter, ten years old, "one lick with a saw twenty-two inches long and three-quarters of an inch wide." The court call him a "brute." The father is liable for assault for excessive punishment. *State v. Bitman*, 13 Iowa 485; *Fletcher v. People*, 52 Ill. 395; *Smith v. Slocum*, 62 Ill. 354. But the presumption is that the punishment was reasonable, and that must be rebutted by evidence showing that the punishment was excessive and without proper cause. *Anderson v. State*, 3 Head (Tenn.) 451.

Where a father to punish his son for theft, having repeatedly punished him ineffectually, beat him so severely with a rope that he died, he was held guilty

of manslaughter only. *Anon.*, 1 East P. C. 261.

Where a mother, in anger at her child, threw a small iron poker at it which accidentally hit and killed another child, she was held guilty of manslaughter only. *Rex v. Conner*, 7 C. & P. 438. See also HOMICIDE, vol. 9, p. 592.

In North Carolina and Pennsylvania, a somewhat different rule is laid down.

"The test, then, of criminal responsibility is the infliction of permanent injury by means of the administered punishment, or that it proceeded from malice, and was not in the exercise of a corrective authority. It would be a dangerous innovation, fruitful in mischief, if, in disregard of an established rule assigning limits to parental power, it were to be left to a jury to determine in each case whether a chastisement was excessive and cruel, and to convict when such was their opinion." *State v. Jones*, 95 N. Car. 588; 59 Am. Rep. 282. Here the father beat his daughter, 16 years of age, with a stick the size of one's thumb, raising welks on her back, choked her, and threw her violently to the ground dislocating her thumb. *Compare State v. Harris*, 63 N. Car. 1; *Commonwealth v. Seed*, 5 Clark (Pa.) 78.

1. A step-father is *in loco parentis* of his wife's children by a former husband so long as they are supported and maintained by him; and he has the same right of reasonable chastisement to enforce his authority. *Gorman v. State*, 42 Tex. 221; *State v. Alford*, 68 N. Car. 322; *Stanfield v. State*, 43 Tex. 167; *Snowden v. State*, 12 Tex. App. 105; 41 Am. Rep. 667 (brother).

2. As to the right of a teacher to chastise a child, see ASSAULT, vol. 1, p. 794, *et seq.*; FALSE IMPRISONMENT, vol. 7, p. 666.

3. Where a parent imprisoned his child, a blind and helpless boy, in a cold and damp cellar, without fire, during several days in midwinter, giving as an excuse that the boy was covered with vermin, and had been annointed by

permits the child to starve,¹ or suffers the life of the child to be endangered for want of proper food or clothing, or abandons it to the elements.² The concealment of the birth of a child is generally, by statute, an indictable offence.³

3. Custody of Children.—See HABEAS CORPUS, vol. 9, p. 240.

(a) AT COMMON LAW.—At common law the father possessed the paramount right to the custody and control of his minor children, except in case of a gross breach of duty.⁴ This was the rule at law in England, until the passage of the statutes 2 and 3 Vict., ch. 54, known as the Talfour act, which materially modified the then existing law.⁵ On the death of the father the mother suc-

ceeds the father with kerosene, this was held needless cruelty which rendered the father subject to indictment and punishment. *Fletcher v. People*, 52 Ill. 395.

1. The parent is guilty of murder. 4 Bl. Com. 182-3; 2 Bish. Cr. L., §§ 688, 712; *Reg. v. White*, L. R., 1 C. C. 311.

2. *Rex v. Saun*, 7 C. & P. 277; *Reg. v. Phillpot*, Dears. 179; 6 Cox C. C. 140; *Furman v. Van Sise*, 56 N. Y. 435; 19 Am. Rep. 687; *Reg. v. Pelham*, 8 Q. B. 959; *Reg. v. Renshaw*, 2 Cox C. C. 277; *Reg. v. Chandler*, Dears. 453. If the charge be starving the child, it must be shown that it was not competent to assist itself. *Reg. v. Friend*, R. & R. 20; *Reg. v. Shepherd*, 9 Cox C. C. 123. But the parent also must have the ability. *Reg. v. Pelham*, 8 Q. B. 959; *Reg. v. Ryland*, L. R., 1 C. C. 99; *Reg. v. Rugg*, 12 Cox C. C. 16. Where, through belief that God would heal the child, the parents refused to call a physician and the child died, it was held that the parents were not guilty of homicide. *Reg. v. Wagstaffe*, 10 Cox C. C. 530. And see *Albricht v. State*, 6 Wis. 74. *Contra* by statute. *Reg. v. Downes*, L. R., 1 Q. B. D. 25; 13 Cox C. C. 111. But even under the statute there must be neglect. *Reg. v. Morby*, L. R., 8 Q. B. D. 571; s. c., 15 Cox C. C. 35.

One who, with no natural or legal duty, voluntarily seeks and assumes the care and custody of a child, is amenable to the statute if he fails to perform the duty required, to the injury of the child. It is not requisite to aver or prove that he had means of support; he must either perform his duty or surrender such care and custody. *Cowley v. People*, 83 N. Y. 464.

There are statutes making it indictable "to abandon or expose" a child. *Reg. v. White*, L. R., 1 C. C. 311; 12 Cox C. C. 83; *Shannon v. People*, 5

Mich. 71; *Bull v. State*, 80 Ga. 704; *Jemerson v. State*, 80 Ga. 111; *Benefield v. State*, 80 Ga. 107. At common law, an indictment for abandoning should aver an assault. *Reg. v. Mulray*, 3 Crawf. & D. C. C. 318. Where exposure, which causes the death of a child is wilful, the crime is murder; if by neglect, it is manslaughter. *United States v. Knowles*, 4 Sawy. (U. S.) 417; *Rex v. Smith*, L. & C. 607; 10 Cox C. C. 82; *Reg. v. Walters*, C. & M. 164; *Reg. v. Chandler*, Dears. C. C. 453; *Reg. v. Mabbett*, 5 Cox C. C. 339; *Reg. v. Conde*, 10 Cox C. C. 547. And see *Reg. v. Knights*, 2 F. & F. 46.

See also ABANDONMENT, vol. 1, p. 3.

3. See CONCEALMENT OF BIRTH, vol. 3, p. 416.

4. *People v. Olmstead*, 27 Barb. (N. Y.) 9; *In re Kottman*, 2 Hill (S. Car.) 363; *Ex parte Hopkins*, 3 P. Wms. 151; *Ex parte McClellan*, 1 Dowl. P. C. 81; *Rex v. Johnson*, 2 Ld. Raym. 1333; *Rex v. Isley*, 5 A. & E. 441; *Ball v. Ball*, 2 Sim. 35; *McBride v. McBride*, 1 Bush (Ky.) 15; *Henson v. Walts*, 40 Ind. 170; *Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341; *State v. Barney*, 14 R. I. 62.

In *Rex v. De Manneville*, 5 East 221, a child was taken from the mother's breast and given to the father; and in *Libbey v. Libbey* cases in Ct. of Sessions, 4th series, vol. 4, p. 397, a child eight months' old was taken from the mother who had left the father by reason of his unkindness and given to him.

5. And see also *Infants' Custody* act, 36 and 37 Vict., ch. 12; The judiciary act, 36 and 37 Vict., ch. 12; HABEAS CORPUS, vol. 9, p. 241; *Schouler Dom. Rel.*, § 247; *Re Taylor*, L. R., 4 Ch. Div. 157; *Ex parte Woodward*, 17 Jur. 56. And see *Re Brown*, L. R., 13 Q. B. D. 614; *Re Elderton*, L. R. 25 Ch. Div. 220.

ceeds to his rights,¹ but her absolute right on her remarriage is not so clearly recognized.²

(b) IN EQUITY.—The injustice of the common-law rule was early recognized and the court of chancery assumed a jurisdiction over the persons and estates of infants, making the claims of justice and the interests of the infant override all claims of paternal authority.³

1. **Right of Mother.**—*Villareal v. Melish*, 2 Swanst. 536; *Roach v. Garvan*, 1 Ves. 158; *Reg. v. Clarke*, 7 E. & B. 186; *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375; *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593; *Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344; *State v. Clover*, 16 N. J. L. 419; *Osborn v. Allen*, 26 N. J. L. 388; *In re Van Houten*, 3 N. J. Eq. 220; *State v. Reuff*, 29 W. Va. 751; *Capal v. McMillan*, 8 Port. (Ala.) 197; *Striplin v. Ware*, 36 Ala. 87; Ohio etc. R. Co. v. Tindall, 13 Ind. 366; *Lefever v. Lefever*, 6 Md. 472; *In re Barre*, 5 Redf. (N. Y.) 64; *In re Goodenough*, 19 Wis. 274; *Dedham v. Natick*, 16 Mass. 135.

The mother's rights are sometimes regulated by statute. 23 Vict., ch. 54; *Massachusetts* Pub. Stat., ch. 139, § 4; *State v. Scott*, 40 N. H. 274; *Striplin v. Ware*, 36 Ala. 87; *Heyward v. Cuthbert*, 4 Desaus. (S. Car.) 445.

2. *Worcester v. Marchant*, 14 Pick. (Mass.) 510; *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593; *Whitehead v. St. Louis R. Co.*, 22 Mo. App. 60; *In re Goodenough*, 19 Wis. 274; *Hollingsworth v. Swedenborg*, 49 Ind. 378; *Ex parte Bailey*, 6 Dowl. P. C. 311.

"And it (the natural right of the parent to the custody of the child) is wholly lost and disappears where the mother surviving has, by a second marriage, surrendered that legal discretion which is necessary to render the parental control of benefit to the child." *State v. Scott*, 40 N. H. 274.

The mother has no primary right to the custody of her son, where, her husband being dead, she has married again, so that the effect of awarding the boy to her guardianship will be to take him from the care of blood relatives willing to keep him, and bring him under the control of a step-father. *Spears v. Snell*, 74 N. Car. 210.

But see *Armstrong v. Stone*, 9 Gratt. (Va.) 102; *Cotton v. Wolf*, 14 Bush (Ky.) 238; *Leavel v. Bettis*, 3 Bush (Ky.) 74. But the modern notion con-

sults the welfare of the child, even when the father by will appoints a guardian. *Perkins v. Finnegan*, 105 Mass. 501. In this case the guardian was removed from his office because he had attempted to alienate the affections of the child from the mother who had remarried.

Talbot v. Earl of Shrewsbury, 4 Myl. & Cr. 672; *Macready v. Wilcox*, 33 Conn. 321; *State v. Cheeseman*, 55 N. J. L. 445; *Foster v. Alston*, 6 How. (Miss.) 406. But see *In re Andrews*, L. R., 8 Q. B. 153.

Children of tender years, whose father is dead, will not be removed from the care and custody of their mother, on the ground that she lives with a second husband whose morals are exceptionable, and who is given to profanity in the presence of his family, when there is no danger that they will be personally abused and when they are well fed and clothed, and sent to school, and no charge is made by their step-father for their board or lodging. *Striplin v. Ware*, 36 Ala. 87.

A widow will be deprived of the charge and custody of her infant children where their well-being clearly requires it. *In re Schroeder*, 65 How. Pr. (N. Y.) 194. And see *Maples v. Maples*, 49 Miss. 393; *Commonwealth v. Murray*, 4 Binn. (Pa.) 487.

3. "A Trust."—The equity doctrine seems to proceed on the theory of the paramount authority of the State over all its subjects. See opinion of HAYES, J., in *In re Moore*, 11 Ir. C. L., N. S. 1, where he says: "It is a proposition which will hardly be controverted, that every child of British parents, from the moment at which it comes into existence, is clothed with all the rights and privileges of a British subject. If the individual is of mature age and competent to invoke the protection of the law for his safety, the law has only to afford him that protection when he shall call for it; but if he be of tender years, and so, from defect of understanding, be unable to make known his wants, guide his conduct or assert his rights, the law,

Although the courts of law in the United States have adopted a more liberal view of the law, as will be stated later, yet the chancery courts have assumed the full equity jurisdiction of the English courts,¹ although they are reluctant to interfere when

for his preservation and protection, as well in person as in property, raises certain persons whom it calls guardians.

The right of guardianship, with its correlative duty of maintaining the child, is cast by law, first on the father, and, upon his decease, upon the mother. But the law, which thus bestows the right, has reserved to itself, acting through the courts of justice, the power of careful supervision in its exercise. The dominion which the parent has over the child is a qualified one, and given for the discharge of important trusts. He will be secured in it so long as, and no longer than, he discharges the correlative duties; and a failure in them, under circumstances and to an extent to bring on him the brand of 'unfitness,' amounts to a forfeiture of his right, and warrants the interposition of the proper legal tribunal for the protection of the child, by wresting from the parent the trust which he has abused, or which the court plainly sees he is unable or unwilling to perform." The delegation of power by the State to the parent has been regarded in the nature of a "trust." "Why is the parent entrusted with the care of his children? Because it is generally supposed he will best execute the trust imposed in him, for that it is a trust, of all trusts the most sacred, none of your lordships can doubt." Lord Redesdale in *Wellesley v. Wellesley*, 2 Bligh, N. S. 124; *State v. Reuff*, 29 W. Va. 751; *De Manneville v. De Manneville*, 10 Ves. 52; *State v. Baldwin*, 5 N. J. Eq. 454; *The Etna, Ware* (U. S.) 462; *Lee v. Lee*, 55 Ala. 590; *In re Stockman*, 71 Mich. 180.

"There is no parental authority independent of the supreme power of the State, but the former is derived altogether from the latter. The moment a child is born, it owes allegiance to the government of the country of its birth, and is entitled to the protection of that government; and such government is obligated by its duty of protection to consult the welfare, comfort and interests of such child in regulating its custody during the period of its minority." *Mercein v. People*, 25 Wend. (N. Y.) 64, 35 Am. Dec. 533.

"It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it. That parents are ordinarily entrusted with it, is because it can seldom be put in better hands but when they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties held as they obviously are at its suffrance? The right of parental control is a natural but not an inalienable one *Ex parte Crouse*, 4 Whart. (Pa.) 9.

And see, for equity jurisdiction, *In re Goldsworthy*, L. R., 2 Q. B. D. 7; *Whitfield v. Hales*, 12 Ves. 492; *Ex parte Mountford*, 15 Ves. 445; *Smith v. Bate*, 2 Dick. 631; *In re Jackson*, L. R. 21 Ch. Div. 786; *Butler v. Freeman*, Amb. 302; *Creuze v. Hunter*, 2 Bro. C. C. 449, n.; *Wellesley v. Duke of Beaufort*, 2 Russ. 1.

Chancery interferes and takes the custody from the father whenever he is guilty of gross ill treatment, or cruelty, habitual drunkenness or gross debauchery, or professes atheistic or irreligious principles, or his domestic associations would tend to corrupt the children, or that he otherwise acts contrary to their interests or morals. *Story Eq. Juris.*, § 1341; *Cowls v. Cowls*, 8 Ill. 436, 44 Am. Dec. 708; *State v. Grisby*, 38 Ark. 406, and case *supra*.

1. *Jones v. Stockett*, 2 Bland (Md. 409; *Helms v. Franciscus*, 2 Bland (Md. 544; *Cowls v. Cowls*, 8 Ill. 435, 44 Am. Dec. 708; *Lynch v. Rotan*, 39 Ill. 14; *State v. Stigall*, 22 N. J. L. 286; *McCord v. Ochiltree*, 8 Blackf. (Ind.) 15; *Maguire v. Maguire*, 7 Dana (Ky.) 181; *Lee v. Lee*, 55 Ala. 590; *Myrick v. Jacks*, 33 Ark. 425; *Bowles v. Dixon*, 32 Ark. 92.

"It is a fair presumption that so long as children are under the control of their parents, they will be treated with affection, and their education and morals will be duly cared for. When, however, this presumption is removed, and the morals, safety or interests of the children strongly require the withdrawal from the custody of the father or mother, the court of chancery

the petitioner has an adequate remedy in some other court.¹ Courts of equity may be called on to interfere by injunction to prevent one from attempting to gain possession of an infant by force or stratagem or even from proceeding by *habeas corpus*.² The equity jurisdiction attaches from the very fact of the institution of a proceeding affecting the person or property of an infant which at once becomes a ward of court.³ There is no inflexible rule of procedure, and the court may proceed on a simple peti-

(which is the general guardian and protector of all infants within its jurisdiction) will interfere and place the care and custody of them elsewhere." *Striplin v. Ware*, 36 Ala. 87.

"The court of chancery acted as guardian of all infants; this was one of its most sacred, most worthy and most important duties. Whatever might have been the origin of this power in *England*, it passed to and was exercised by our court of chancery, without any dispute as to its jurisdiction." *Wilcox v. Wilcox*, 14 N. Y. 575. In this case the order was made by a judge in chambers in vacation that the child should be taken from its grandfather who had been appointed guardian by the surrogate court, and with whom the child desired to stay, and be delivered to its mother.

The chancellor, by virtue of his general jurisdiction over infants, may order an infant not only to be relieved from illegal restraint, but to be surrendered to its parents, even when the pleadings show that the statutory remedy is sought. *Richards v. Collins*, 45 N. J. Eq. 283.

In a proceeding in which one parent invokes the equitable powers of the court to obtain the custody of their children as against the other parent, the welfare of the children is the first thing to be considered. *In re Holmes*, 19 How. Pr. (N. Y.) 329.

1. *Aymar v. Roff*, 3 Johns. Ch. (N. Y.) 49.

2. *Wellesley v. Duke of Beaufort*, 2 Russ. 1; *Warde v. Warde*, 2 Phil. Ch. 786; *In re Lyons*, 22 L. T., N. S. 770; *Ellis v. Jessup*, 11 Bush (Ky.) 403; *Aymar v. Roff*, 3 Johns. Ch. (N. Y.) 49; *State v. Grisby*, 38 Ark. 406; *Goodrich v. Goodrich*, 44 Ala. 670; *Hutson v. Townsend*, 6 Rich. Eq. (S. Car.) 249; *Stuart v. Marquis of Bute*, 9 H. L. C. 440; *In re Graham*, L. R., 10 Eq. 530; *In re Hodges*, 3 K. & J. 213.

The court will interfere to prevent the removal of infants beyond the reach

of the court, though such removal is directed by the will of their parent, where it appears to be improper to remove them. *Wood v. Wood*, 5 Paige (N. Y.) 596; *Lawrie v. Lawrie*, 9 Paige (N. Y.) 234. And see *De Manneville v. De Manneville*, 10 Ves. 52; *Duke of Beaufort v. Berty*, 1 P. Wms. 703; 2 Story Eq. Juris., § 1339; 3 Pomeroy Eq. Juris., § 1307.

3. *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103; *Johnstone v. Beattie*, 10 Cl. & F. 42; *Rivers v. Durr*, 46 Ala. 418; *Helms v. Franciscus*, 2 Bland (Md.) 544; *Jenkins v. Whyte*, 62 Md. 427; *Joab v. Sheets*, 99 Ind. 328; *Miner v. Miner*, 11 Ill. 43.

Thus in a case where money was paid into court for an infant not a party to the suit, the infant was held to be a ward in chancery. *De Pereda v. De Mancha*, L. R., 19 Ch. Div. 451. But see *Brown v. Collins*, L. R., 25 Ch. Div. 56.

But in general the court does not interfere unless a question of property is involved, as equity cannot undertake the guardianship of all children. *Wellesley v. Duke of Beaufort*, 2 Russ. 1.

Equity does not consider the pecuniary interests of the child alone a sufficient reason to change the custody of the child. Mere poverty or insolvency of the father is no ground for taking his child from him. *Ex parte Hopkins*, 3 P. Wms. 152; *Colston v. Morris*, Jac. 257, note a; *Re Westmeath*, Jac. 251, note c; *Ex parte Mountfort*, 15 Ves. 445; *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375; *Henson v. Walts*, 40 Ind. 170.

But where property is left to a child on condition that the father surrender the custody of the child, and he does so, he will not later be allowed to reclaim the child. *Blake v. Leigh*, Ambl. 306; *Powell v. Cleaver*, 2 Bro. C. C. 449; *Creuze v. Hunter*, 2 Cox Ch. Cas. 242; *Lyons v. Blenkin*, Jac. 245; *Cook v. Bybee*, 24 Tex. 278; *Jones v. Stockett*, 2.

tion.¹ In some States the statutes place the jurisdiction in relation to the custody of infants on equitable grounds, and the matter is often regulated by statute.²

(c) AMERICAN RULE.—In this country the courts have very generally adopted the rules of the English equity courts. The right of the father to have the custody of his child is, in its general sense, admitted; but this is not on account of any absolute right of the father; but for the benefit of the infant, the law presuming it to be for its interests to be under the care of its natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances and ascertain whether it will be for the real permanent interests of the infant. Neither the father nor mother has any rights that can be allowed to militate seriously against the welfare of the child.³

Bland (Md.) 409. And see *Verser v. Ford*, 37 Ark. 27.

1. *In re Spence*, 2 Phil. Ch. 247; *Creuze v. Hunter*, 2 Cox Ch. Cas. 242; *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103; *Ex parte Warner*, 4 Bro. C. C. 101; *Cowls v. Cowls*, 8 Ill. 435, 44 Am. Dec. 708; *Aymar v. Roff*, 3 Johns. Ch. (N. Y.) 49; *Disbrow v. Henshaw*, 8 Cow. (N. Y.) 349; *Wood v. Wood*, 5 Paige (N. Y.) 596; *State v. Grisby*, 38 Ark. 406; *Jenkins v. Whyte*, 62 Md. 427; *De Manneville v. De Manneville*, 10 Ves. 52.

2. *California Civ. Code*, § 246; *Linden's Estate*, *Myrick Prob.* (Cal.) 215; *Nebraska, Comp. Stat.*, ch. 34, § 6.

3. "The general result of the American cases may be characterized as an utter repudiation of the notion that there can be such a thing as a proprietary right or interest in or to the custody of an infant, or that a claim to such custody can be asserted merely as a claim, and the general drift of opinion is in the direction of treating the idea of trust as the controlling principle in all controversies in relation to such custody." *Hocheimer Custody of Infants*, § 10.

"It is an entire mistake to suppose that the court is, at all events, bound to deliver over the infant to his father, or that the latter has an absolute, vested right in the custody." *United States v. Green*, 3 Mason (U. S.) 482.

"In contests of this kind [between the parents] the opinion is now nearly universal, that neither of the parties has any rights that can be allowed to seriously militate against the

welfare of the child. The paramount consideration is, What is really demanded by its best interests? It is doing no violence to what is taught by judicial experience, to assume that the disputing parties will be more alive to the satisfaction of their own feelings and interests than to the true end of the inquisition, while the innocent subject of the contention is utterly unable to speak or act for itself, and is in danger of being lost sight of in the strife for its possession." *Corrie v. Corrie*, 42 Mich. 509.

"Upon a review of all the authorities binding upon the courts of this State, I have come to the undoubting conclusion, that the right of the father to the custody of his child is not absolute, and that such custody is referable to its interest and welfare, and is to be selected by the court, in the exercise of a sound judicial discretion, irrespective of the claims of either parent." *Mercein v. People*, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653.

"From a careful examination of the authorities at our command, we think the prevailing rule may be briefly stated to be, that in controversies similar to this, especially where the infant is of the tender age of the one contended for, the court will consider only the best interest of the child, and make such order for its custody as will be for its welfare, without any reference to the wishes of the parties." *Sturtevant v. State*, 15 Neb. 459, 48 Am. Rep. 349; *Bonnett v. Bonnett*, 61 Iowa 199, 47 Am. Rep. 810; *Sherwood v. Sherwood*, 56 Iowa 608; *Green v. Green*, 52 Iowa

The right of the father is, however, recognized, subject to the limitations just mentioned, and in some cases with a near approach to the strictness of the old common law;¹ but the courts will promptly declare that right forfeited for any misconduct of the father,² and the tendency is to give very young children to the mother.³ Neither parent is entitled to the custody if it is palpa-

403; *State v. Kirkpatrick*, 54 Iowa 373; *People v. Allen*, 40 Hun (N. Y.) 611; *In re Waldron*, 13 Johns. (N. Y.) 418; *People v. Mercein*, 3 Hill (N. Y.) 399, 36 Am. Dec. 644; *Cook v. Cook*, 1 Barb. Ch. (N. Y.) 639; *Hill v. Hill*, 49 Md. 450; *Bryan v. Lyon*, 104 Ind. 227, 54 Am. Rep. 309; *State v. Baird*, 21 N. J. Eq. 384; *Richards v. Collins*, 45 N. J. Eq. 283; *Petition of Smith*, 13 Ill. 138; *Smith v. Bragg*, 68 Ga. 650; *Gibbs v. Brown*, 68 Ga. 803; *Dumain v. Gwynne*, 10 Allen (Mass.) 270; *United States v. Bainbridge*, 1 Mason (U. S.) 71; *Verser v. Ford*, 37 Ark. 27; *Washaw v. Gimble*, 50 Ark. 351; *McShan v. McShan*, 56 Miss. 413; *Gishwiler v. Dodez*, 4 Ohio St. 615; *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593; *McKim v. McKim*, 12 R. I. 462, 34 Am. Rep. 694; *In re Heather Children*, 50 Mich. 261; *Armstrong v. Stone*, 9 Gratt. (Va.) 102. *Compare* *Petition of Vetterlein*, 14 R. I. 378; *Brinster v. Compton*, 68 Ala. 299; *Wood v. Wood*, 3 Ala. 756; *Ex parte Schumpert*, 6 Rich. (S. Car.) 344.

Custody of minor children—held, to be properly awarded to their mother, though the father alleged that she was unable to take care of them, and an unsuitable person. *Moore v. Moore*, 66 Ga. 336.

1. *McGlennan v. Margowski*, 90 Ind. 150; *Henson v. Watts*, 40 Ind. 170; *State v. Barney*, 14 R. I. 62; *McBride v. McBride*, 1 Bush (Ky.) 15; *Bonney v. Bonney* (Ky. 1887), 3 S. W. Rep. 171; *State v. Bratton*, 10 Am. Law Reg., N. S. 359; *Rust v. Vanvacter*, 9 W. Va. 600; *State v. Baird*, 21 N. J. Eq. 384; *State v. Stigall*, 22 N. J. L. 286; *Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341; *Merritt v. Swinley*, 82 Va. 483; *Latham v. Latham*, 30 Gratt. (Va.) 307; *Johnson v. Terry*, 34 Conn. 259; *Taylor v. Jeter*, 33 Ga. 195; *Cole v. Cole*, 23 Iowa 433; *Miner v. Miner*, 11 Ill. 43; *Joab v. Sheets*, 99 Ind. 328; *Child v. Dodd*, 51 Ind. 484.

As between the father of a motherless girl of four and its maternal grandmother, its custody will be given to the

father, in *habeas corpus* proceedings, unless it clearly appears that a contrary decision should be given. A strong case must be shown before the court will decide against the father. *Miller v. Wallace*, 76 Ga. 479.

In a hard case in *New Hampshire* where the custody was awarded to the father, the court, by BELLOWS, J., says: "In coming to the conclusion which we have reached, we cannot contemplate without pain the suffering that may be caused by the breaking of those ties between the respondent's family and the child, which have been the growth of many years of affectionate care." *State v. Richardson*, 40 N. H. 272.

2. *Bently v. Terry*, 59 Ga. 555, 27 Am. Rep. 399; *McKim v. McKim*, 12 R. I. 462, 34 Am. Rep. 462; *In re Bort*, 25 Kan. 308, 37 Am. Rep. 255; *In re Bullen*, 28 Kan. 781; *English v. English*, 32 N. J. Eq. 738; *Foutz v. Pierce*, 64 Iowa 71; *Drummond v. Ashton*, 8 W. N. C. (Pa.) 563.

In *Heinemann's Appeal*, 96 Pa. St. 112, 42 Am. Rep. 532, the father was deprived of the custody of his child for refusing to call in proper medical assistance, although he "didn't believe in doctors."

Where, on the hearing of an application by a father to obtain the custody of his child from the latter's grandmother, with whom he had been left in the absence of the father in a distant State, it is shown that the child was sick, and that the child's sickness would render it at least perilous to attempt his removal, his sickness is a sufficient reason for refusing the relief sought. Should, however, the child's health become established, the application can be renewed; but it further appearing that the father had been intemperate, and evidence introduced on his behalf tending to show that he had reformed, it would seem that a sufficient time should be allowed to elapse, to test the fact and sincerity of the father's reformation, the welfare of the child being the paramount enquiry. *Ex parte Murphy*, 75 Ala. 409.

3. *State v. Baird*, 18 N. J. Eq. 194;

bly against the child's welfare,¹ and it may be awarded to a third person.² The proceeding for the recovery of the custody of a child is generally by writ of *habeas corpus*;³ and while the court is bound to free a person from illegal restraint, it is not bound to decide who is entitled to the custody, but it may decide that question when it deems proper and alter custody in its discretion,⁴

State *v.* Kirkpatrick, 54 Iowa 373; Commonwealth *v.* Smith, 1 Brews. (Pa.) 347; Commonwealth *v.* Hart, 14 Phila. (Pa.) 352; McKim *v.* McKim, 12 R. I. 462, 34 Am. Rep. 694; State *v.* Paine, 4 Humph. (Tenn.) 523, where a boy of seven was awarded to the father and a girl of five and a boy of three to the mother.

A father applied to obtain possession of his infant child, less than five years old, detained by the grandfather, with whom the mother resided. It was ordered that the mother be permitted to retain possession of the child; that she be responsible for its maintenance, and that the grandfather should give security to indemnify the father from all liability for its support and maintenance. *Ex parte* Schumpert, 6 Rich. (S. Car.) 344.

In a contest between husband and wife for the custody of their two children, aged five and six years, where there is no objection to the mother personally, it is for the welfare of the children, considering their tender years, that they be left with her. An enquiry as to the father's ill treatment of his wife is pertinent as bearing upon the father's right to take the children from their mother. *In re* Prav, 60 How. Pr. (N.Y.) 194.

"Where the father is a man of fair character, of a just disposition, and is able and willing to take care of and provide for his children, he is vested with the paramount right to their custody. The only exception to this is in the case of an infant of tender years, whose helpless condition and physical wants require the nurture of its mother." State *v.* Bratton, 15 Am. Law Reg. N. S. 379. And compare People *v.* Brown, 35 Hun (N. Y.) 324.

1. Corrie *v.* Corrie, 42 Mich. 509; People *v.* Chagaray, 18 Wend. (N. Y.) 637; Bedell *v.* Bedell, 1 Johns. Ch. (N. Y.) 604; Barrere *v.* Barrere, 4 Johns. Ch. (N. Y.) 187; Maples *v.* Maples, 49 Miss. 393; Richards *v.* Collins, 45 N. J. Eq. 283; Garner *v.* Gordon, 41 Ind. 92; Joab *v.* Sheets, 99 Ind. 328; State *v.* Reuff, 29 W. Va. 751; Armstrong *v.*

Stone, 9 Gratt. (Va.) 102; State *v.* Kirkpatrick, 54 Iowa 373; Dumain *v.* Gwynne, 10 Allen (Mass.) 270; *In re* Schroeder, 65 How. Pr. (N. Y.) 194.

2. *In re* Murphy, 12 How. Pr. (N. Y.) 513; *In re* Clifton, 47 How. Pr. (N. Y.) 122; *In re* Bort, 25 Kan. 308, 37 Am. Rep. 255; Lapitino *v.* Giglio, 6 Phila. (Pa.) 304; Commonwealth *v.* Nutt, 1 Browne (Pa.) 143; *In re* Diss Debar (Supreme Ct.), 3 N. Y. Supp. 667; McCarthy *v.* Hinman, 35 Conn. 538; Green *v.* Green, 52 Iowa 403. See DIVORCE, vol. 5, p. 836.

3. See HABEAS CORPUS, vol. 9, p. 242; Dowling *v.* Todd, 26 Mo. 267; *In re* Poole, 2 McArthur (D. C.) 583, 29 Am. Rep. 628; Davis *v.* Davis, 75 N. Y. 221; Moore *v.* Christian, 56 Miss. 408, 31 Am. Rep. 375; Ellis *v.* Jessup, 11 Bush (Ky.) 403; Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Farnsworth *v.* Richardson, 35 Me. 267.

The finding of the court on *habeas corpus* is not to be disturbed on appeal, unless it is plainly against the evidence. Jenkins *v.* Clark, 71 Iowa 552; Gibbs *v.* Brown, 68 Ga. 803; Payne *v.* Payne, 39 Ga. 174.

An adjudication on *habeas corpus* is *res adjudicata* in all future controversies relative to the same matter and on the same state of facts. State *v.* Bechdel, 37 Minn. 360. See Bonny *v.* Bonny (Ky. 1888), 9 S. W. Rep. 404; Mercein *v.* People, 25 Wend. (N. Y.) 64.

"He should enter through the straight gate of the law to obtain such possession, and not attempt to climb over it in some other and wrongful way." Jones *v.* Cleghorn, 54 Ga. 9. Compare Commonwealth *v.* Fee, 6 S. & R. (Pa.) 255.

4. Commonwealth *v.* Addicks, 5 Binn. (Pa.) 520, 2 S. & R. (Pa.) 174; Mercier *v.* People, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653; *In re* Waldron, 13 Johns. (N. Y.) 418; State *v.* Paine, 4 Humph. (Tenn.) 523; Ward *v.* Roper, 7 Humph. (Tenn.) 111; State *v.* Smith, 6 Me. 462, 20 Am. Dec. 324; Foster *v.* Alston, 6 How. (Miss.) 406; State *v.*

and if the child has reached years of discretion, its wishes will be consulted in disposing of the custody.¹ What constitutes years of discretion is a question not free from difficulty; in England that age is arbitrarily set at fourteen years,² and some courts in this country have seemed inclined to adopt that rule,³ but the prevailing rule in America is that the age of discretion is to be ascertained not only by the years of the child, but by its capacity, information, intelligence and judgment. The court will look to all these evidences of capacity, and if it finds the child able to reason sensibly, though as a child, in regard to his condition, preferences and prospects, it will take his wishes into consideration.⁴

Stigall, 22 N. J. L. 286; Commonwealth v. Briggs, 16 Pick. (Mass.) 203; Commonwealth v. Hammond, 10 Pick. (Mass.) 274; Commonwealth v. Maxwell, 6 Law Rep. 214; Nickols v. Giles, 2 Root (Conn.) 461; State v. Banks, 25 Ind. 495; *Ex parte* Williams, 11 Rich. (S. Car.) 452; State v. Richardson, 40 N. H. 272; Gardenhire v. Hinds, 1 Head (Tenn.) 402; State v. King, 1 Ga. Dec. 93; Armstrong v. Stone, 9 Gratt. (Va.) 102.

"The real question is not, what are the rights of the father or mother to the custody of the child, but what are the rights of the child. . . . They have not unfrequently been treated as if they were cases involving the rights of property rather than mere personal rights, and as if the parents were setting up conflicting claims to a property in the child. The true view is, that the rights of the child alone are to be considered, and those rights clearly are to be protected in the enjoyment of its personal liberty, according to its own choice, if arrived at the age of discretion, and, if not, to have its personal safety and interests guarded and secured by law, acting through the agency of those who are called upon to administer it." *In re Gregg*, 5 N. Y. Leg. Obs. 265.

1. "Years of Discretion."—"And if the infant be of sufficient discretion, it will also consult its personal wishes. It will free it from all undue restraint, and endeavor, as far as possible, to administer a conscientious, parental duty with reference to its welfare." *United States v. Green*, 3 Mason (U. S.) 482; *Brinster v. Compton*, 68 Ala. 299; *State v. Paine*, 4 Humph. (Tenn.) 523; *Clark v. Bayer*, 32 Ohio St. 299; 30 Am. Rep. 593; *Gishwiler v. Dodez*, 4 Ohio St. 615. See 16 West. Jur. 445; *State v. Baird*, 18 N. J. Eq. 194.

2. *In re Connor*, 16 Ir. C. L. 112; *In re Agar-Ellis*, L. R., 10 Ch. Div. 49; L. R., 24 Ch. Div. 317. And sixteen in the case of girls. *Reg. v. Hawes*, 2 E. & E. 332; *nom. Ex parte* Barford, 8 Cox (C. C.) 405. And see *Mallinson v. Mallinson*, L. R., 1 P. & D. 221; *Anonymous*, 2 Ves. 274; *Reg. v. Clark*, 7 E. & B. 186; *Ex parte* Hopkins, 2 P. Wms. 152.

3. *State v. Richardson*, 40 N. H. 272; *In re Goodenough*, 19 Wis. 274; *Bou-nell v. Berryhill*, 2 Ind. 613.

"While in doubtful cases the wishes of a child of this age will be sought, and to some extent will be observed, we cannot for a moment agree that a boy of thirteen can be allowed, at pleasure, to abandon his filial duties and select elsewhere a home more agreeable either to his desires or to his worldly interests." *Moore v. Christian*, 56 Miss. 408; 31 Am. Rep. 375.

4. *State v. Bratton*, 15 Am. Law Reg., N. S. 379.

"In all cases of this description of the right to the custody and control of a female of an age to have a will and to form some judgment for herself, it is the established custom of the court to ascertain the opinion or inclination of the minor. The weight of this depends on the minor's maturity of mind and capacity to judge. We are satisfied, by an examination, that this girl is capable of judging what will best promote her own welfare, and that she came to Massachusetts on a visit; that she was taken from the friends and associates under whose care and protection she came, clandestinely and forcibly, by her mother, with some assistance; that she is strongly inclined to remain with the society of Shakers; and that they take sufficient care of her education. We are therefore of opinion that she be discharged from the custody and re-

(d) CUSTODY IN DIVORCE.—See DIVORCE, vol. 5, p. 832 for a full discussion of the subject with citation of authorities. In general, it may be said that the welfare of the child is the governing principle with the courts.¹

straint of her mother, and be at liberty to go, if she pleases, with her guardian appointed under the laws of *Connecticut*." *Curtis v. Curtis*, 5 Gray (Mass.) 535; *Foutz v. Pierce*, 64 Iowa 71; *Brinster v. Compton*, 68 Ala. 299, *Ellis v. Jessup*, 11 Bush (Ky.) 403; *People v. Mercein*, 8 Paige (N. Y.) 47; *Spears v. Snell*, 74 N. Car. 210, *Maples v. Maples*, 49 Miss. 393.

Young Children.—The wishes of quite young children have been regarded. *In re Poole*, 2 McArthur (D. C.) 583; 29 Am. Rep. 628 (boy of eight); *State v. Scott*, 30 N. H. 274 (boy of eleven); *Merritt v. Swimley*, 82 Va. 433 (girl of thirteen); *Drummond v. Ashton*, 8 W. N. C. (Pa.) 563 (girls of nine and sixteen). The court says there is "no inflexible seven-year rule"; *In re McDowle*, 8 Johns. (N. Y.) 328; *Commonwealth v. Hammond*, 10 Pick. (Mass.) 274 (child of eleven); *People v. Chagaray*, 18 Wend. (N. Y.) 639 (children nine, thirteen, fifteen, all consulted); *Woodruff v. Conley*, 50 Ala. 304 (girl of nine).

The custody of children will not be given to the father, if it be shown that they prefer to stay with the mother, and she can and will give them better education, support and promotion of their well being. *In re Watson*, 10 Abb. N. Cas. (N. Y.) 215.

So held as to a boy of fourteen and a girl of sixteen years, although their father was a respectable physician, able to support and educate them; he living apart from their mother, and having a housekeeper not related to them.

"Besides, the wishes of the child herself, now about seven years of age, are not wholly to be overlooked. With an intelligence little less than remarkable in one so young, she communicates her inclinations and begs that they be not disregarded." *Commonwealth v. Barney*, 4 Brews. (Pa.) 408.

A girl of fourteen was allowed to remain with her mother, although the father, who had been divorced, had married a woman who "attends church, teaches in a Sabbath school and plays upon a piano and organ." *Hewitt v. Long*, 76 Ill. 399. On the other hand, courts have disregarded the wishes of children of even an advanced age.

"In point of law, a child of such tender years, seven or eight, has no will no power of judging or electing, and therefore his will and choice are to be wholly disregarded. The natural and strong feelings of a child, which induce him to cling instinctively to those whom he has been accustomed to regard as his natural protectors, cannot be regarded as the exercise of a legal will or an intelligent course." *Commonwealth v. Taylor*, 3 Met. (Mass.) 72. Here the child was seven or eight years old. *Armstrong v. Stone*, 9 Gratt. (Va.) 102 (seven years); *Rust v. Vanvacter*, 9 W. Va. 600 (girl of eight); *State v. Richardson*, 40 N. H. 272 (girl of ten); *Henson v. Walts*, 40 Ind. 170 (girl of eleven); *Shaw v. Nachtwey*, 43 Iowa 653, a girl of twelve was decidedly opposed to going to her father. The court held that her wishes were not to be regarded in opposition to her best welfare. *Ex parte Williams*, 11 Rich. (S. Car.) 452 (boy of fifteen); *Heinemann's Appeal*, 96 Pa. St. 112; 42 Am. Rep. 532 (five and eight, too young).

The nearer the child is to his majority the more regard the court will pay to his wishes. *Maples v. Maples*, 49 Miss. 393 (boy of eighteen); *In re Lyons*, 22 L. T., N. S. 770 (girl of eighteen).

1. Where a divorce has been granted, and no provision is made in the decree for the custody of an infant child, the father has no vested right to such custody, but in a *habeas corpus* proceeding by him to obtain it, the sole consideration is what disposition will subserve the best interests of the child. *Giles v. Giles* (Neb. 1890), 46 N. W. Rep. 916.

"We know of no absolute rule of law that the father is entitled to the custody of the children when he obtains a divorce from the bonds of matrimony on the ground of bigamy and adultery committed by the wife." *Haskell v. Haskell*, 152 Mass. 16.

"The welfare of infancy, involving that also of the commonwealth, defines the sphere of parental duties and rights. And these preferred rights and duties are correlative. The character and destiny of the citizen are molded by the domestic tutelage of the nursing. Therefore whenever the parents are separated

(e) CONTRACTS TRANSFERRING PARENTAL RIGHT. — Inasmuch as the courts consider the delegation of the right of custody to a parent in the nature of a trust, the parent will not be allowed to divest himself of such custody, it being placed upon him by the law, not for his gratification, but on account of his duties.¹ Contracts for the surrender of the care and custody of children are held to be against public policy and no bar to the parent in an attempt to regain such custody.² The father cannot by agree-

by divorce, although, *prima facie*, the abstract right and duty of the father are superior to those of the mother, yet the court dissolving the union should confide the care and custody of their infant child to the parent most trustworthy and capable; and, if neither of them shall be worthy of such a delicate and eventful trust, the interest of the child and the public may authorize the transfer of the custody to a stranger." *Adams v. Adams*, 1 Duv. (Ky.) 167.

1. *St. John v. St. John*, 11 Ves. 526; *Reg. v. Smith*, 22 L. J., Q. B. 116; 16 E. L. & Eq. 221; *Villareal v. Mellish*, 2 Swanst. 237; *Reg. v. Clarke*, 7 E. & B. 186; *Brook v. Logan*, 112 Ind. 183; 2 Am. St. Rep. 177; *Westmeath's Case*, Jac. 251, n.; *In re Agar Ellis*, L. R., 10 Ch. Div. 49; *Hunt v. Hunt*, 4 Greene (Iowa) 216; *Byrne v. Love*, 14 Tex. 81; *Cook v. Bybee*, 24 Tex. 278; *Burger v. Frakes*, 67 Iowa 460; *State v. Baldwin*, 5 N. J. Eq. 454; 45 Am. Dec. 399; *Republica v. Keppele*, 2 Dall. (U. S.) 197.

Where the good of the child will apparently be as well promoted in one family as the other, it will not be taken from its father, and placed with its grandparents, with whom it has lived since the death of its mother, on the ground that the father had by parol given it to them. *Weir v. Marley*, 99 Mo. 484.

Probably, however, the cases that hold that no transfer of custody will be allowed, go no further than to say that where there is no other element than mere transfer of custody, the parent's claim is not lost. *Johnson v. Terry*, 34 Conn. 259; *Cook v. Bybee*, 24 Tex. 278; *State v. Baldwin*, 5 N. J. Eq. 454; 45 Am. Dec. 399.

2. *Reg. v. Smith*, 22 L. J., Q. B. 116; *In re Edwards*, 42 L. J., Q. B. 99; *Wishard v. Medaris*, 34 Ind. 168; *Copeland v. State*, 60 Ind. 394; *In re Bullen*, 28 Kan. 781; *Beller v. Jones*, 22 Ark. 92; *State v. Baldwin*, 5 N. J. Eq. 454; 45 Am. Dec. 399; *In re Lewis*, 88 N. Car. 31; *People v. Mercein*, 3 Hill (N. Y.)

399; 36 Am. Dec. 644; *Bustamento v. Analla*, 1 New Mex. 255; *In re Clements*, 78 Mo. 352; *Verser v. Ford*, 37 Ark. 27. See 16 Western Jurist 437.

A father is not debarred from recovering his child bound out by the public authorities without his consent. *Goodchild v. Foster*, 51 Mich. 599; *Farnham v. Pierce*, 141 Mass. 203; *vide Brinster v. Compton*, 68 Ala. 299; *In re Larson*, 31 Hun (N. Y.) 539.

In the case of a girl of six years surrendered to its maternal grandparents on the death of its mother, the court ordered the child to be returned to the father after five years, saying: "Had this contest arisen three or four years ago, during the period of helpless infancy; or had it been deferred until the child grew to be some twelve or thirteen years old and the affections of long association and tender treatment had been allowed to supplant the ties of blood . . . a different question would have arisen." *In re Scarritt*, 76 Mo. 565; 43 Am. Rep. 768.

Where the father of a child had by written agreement with a third person placed the child in the custody of such person for a limited time, and at the expiration of such time, sought to recover custody by writ of *habeas corpus*, held, that the claims of the defendant were not to be considered in view of the fact that he took the child under an express written agreement providing for its surrender, and that the preferences and wishes of the child, while not to be ignored, were not entitled to a controlling influence, the paramount interest of the child being the primary consideration. *Shaw v. Nachtwey*, 43 Iowa 653.

In *State v. Libby*, 44 N. H. 321, the father gave his daughter, two years and a half old, to the respondent, under an agreement that she should be his, and he should bring her up. Four years after he attempted to reclaim her in this action. The court held that, in the absence of circumstances showing that it would be hazardous to the per-

ment with the mother divest himself of the custody of his child,¹ nor, it seems, can he deprive her of her rights by any agreement.² The breach of a contract to assign the custody of a child by the parent would seem not to be actionable.³ Where, however such contracts have been made, the courts sometimes refuse to restore the custody to the parent; not, however, by force of the contract, but on equitable grounds connected with the welfare of the child.⁴ So where the parent has relinquished the custody of his child, with or without agreement, and by his conduct has allowed a condition of affairs to arise which cannot be altered without risking the happiness and best interests of the child, as for example where the child has formed new ties and is well and tenderly cared for, the parent will not be allowed to assert his legal claim to the child, and his rights will not be recognized by

manent interests of the child to make the change, it would decree custody to the father, upon the father's refunding certain money expended by the respondent for the child.

In *Barlow v. Kennedy*, 17 Low. Can. Jur. 253, the father and mother were both Catholics. The mother dying when the child (a girl) was eighteen months old, the father being then in indigent circumstances, gave the child to Barlow, a Protestant, to bring up and educate as though his own child. This agreement was reduced to writing, but never signed by the father. After four years the father demanded the child without having paid anything to the support of the child, and, on *habeas corpus* the custody of the child was decreed to him, although the father was still a poor day laborer and had remarried while Barlow was amply able to support the child.

1. *Farrington v. Norwich*, 21 Conn. 543; *Johnson v. Terry*, 34 Conn. 259; *Vansittart v. Vansittart*, 4 K. & J. 62; 2 De G. & J. 249; *Walrond v. Walrond*, 28 L. J. Ch. 97; *Hope v. Hope*, 26 L. J. Ch. 417; *Adams v. Oaks*, 20 Johns. (N. Y.) 282; *Adams v. Foster*, 20 Johns. (N. Y.) 452; *Andrews v. Salt*, L. R., 8 Ch. 622; *People v. Mercein*, 3 Hill (N. Y.) 399; 36 Am. Dec. 644. Compare *Wodell v. Coggeshall*, 2 Met. (Mass.) 89; *State v. Smith*, 6 Me. 462.

2. *Moore v. Christian*, 56 Miss. 408; 31 Am. Rep. 375; *State v. Reuff*, 29 W. Va. 751.

3. See *Farnsworth v. Richardson*, 35 Me. 267. Compare *Commonwealth v. McKeagy*, 1 Ashm. (Pa.) 248; *Lowry v. Button*, *Wright* (Ohio) 330.

4. **Refusal to Restore Custody.**—The

court in *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321, sums up the propositions of law governing such cases as follows:

"1. The father is the natural guardian and is *prima facie* entitled to the custody of his minor child . . .

The second proposition of law is that a child is not in any sense like a horse or any other chattel, subject matter for absolute and irrevocable gift or contract. The father cannot by merely giving away his child release himself from the obligation to support it, nor be deprived of the right to its custody.

. . . The third proposition is that a parent's right to the custody of a child is not like the right of property, an absolute and uncontrollable right.

The fourth proposition is that, though the gift of the child be revocable, yet when the gift has once been made, and the child has been left for years in the care and custody of others who have discharged all the obligations of support and care which naturally rest upon the parent, then whether the courts will enforce the father's right to the custody of the child will depend mainly upon the question whether such custody will promote the welfare and interest of such child. . . . The fifth proposition is, that in questions of this kind three interests should be considered. The right of the father must be considered; the right of the one who has filled the parental place for years should be considered. . . . Above all things the paramount consideration is, What will promote the welfare of the child?"

In *Commonwealth v. Gilkerson*, 1 Phila. (Pa.) 194, a daughter sought to be discharged from the custody of her father. Six years before he has by

the courts. The permanent welfare of the child is the guiding principle in all cases,¹ and this principle has been carried so far

agreement under seal transferred her to her uncle and aunt, who agreed to adopt her. She was then nine years old. The uncle died and the father regained possession of the girl, who preferred to remain with her aunt. The court said: "In this case the parental authority has been solemnly renounced for six years, and the child has grown to the age of fifteen years. She has been estranged from the customs and government of her father's house. She has formed new habits and views, and become accustomed to different associations and modes of living. And now the father, disregarding his own contract, and the wishes and comfort of his child, seeks to re-establish the parental authority. We should be glad if he could effect it by the influence of parental kindness and consistently with honesty. We dislike to see the paternal and filial relation severed, and should love to see the broken bond reunited. But it cannot well be done by the enforcement of it as a legal right. The father himself broke the bond, and the law will not help him now to mend it. He emancipated his daughter by his own solemn act, and all restraint upon her by him is now improper. We must therefore discharge her from restraint, and leave her to elect with whom she shall go."

"A parent by transplanting his offspring into another family and surrendering all care of it for so long a time that its interest and affections all attach to the adopted home, may thereby seriously impair his right to have back its custody by judicial decree. In a controversy over its possession, its welfare will be the paramount consideration in controlling the discretion of the court." *Richards v. Collins*, 45 N. J. Eq. 283.

A widow, unable to provide for her children, placed her three months' old infant in the care of a sister-in-law who kept it nine years caring for it as her own. The mother re-married and demanded the child, but made no further demand for four years and visited the child but once. The mother had other children, but nothing appeared against the fitness or ability of the mother to care for the child. She brought *habeas corpus*, but the child was allowed to re-

main with the aunt. *Hossie v. Potter* (R. I. 1888), 17 Atl. Rep. 129; *Bonnett v. Bonnett*, 61 Iowa 199, 47 Am. Rep. 810; *Bentley v. Terry*, 59 Ga. 555; *Commonwealth v. Dougherty*, 1 Pa. Leg. Gaz. 63; *Ex parte Schumpert*, 6 Rich. (S. Car.) 344; *Armstrong v. Stone*, 9 Gratt. (Va.) 102.

In proceedings by a father for possession of his child, it appeared that he, incapable of supporting her because of poverty and the mother's death, had voluntarily renounced the custody and control of the child to the respondents, people of high moral character, who, taking the child at the age of six months, had, according to agreement, at their own expense, nurtured and maintained her for six years in a comfortable home; that they were abundantly able and willing to care for and educate her; that the affection between them was that of parent and child; that the father had ever regarded her with aversion, and expressed a doubt of his being her father. *Held*, that though the father be a man of good character and repute, and now capable of supporting the child, the court, in the exercise of its discretion, was justified in remanding her to the custody of the respondents; and that the exercise of such discretion was not inconsistent *Wisconsin* with Rev. St., § 3964, providing that "the father of the minor, if living, and, in case of his death, the mother while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the custody of the person of the minor, and to the care of his education." *Sheers v. Stein*, 75 Wis. 44.

1. **Relinquishment of Right.**—In *Chapsky v. Wood*, 26 Kan. 650; 40 Am. Rep. 321, the parents, being poor, orally gave their daughter at birth to the mother's sister, who well cared for and kept it five years and a half. The father having acquired wealth, applied for the child sometime after the death of his wife. He intended to entrust the child to the care of his mother and sister who had never recognized its mother. The court refuses the application, using the following significant language: "Yet the child, if it goes, goes to the care of its father; and while there is no testimony showing that the father

is what might be called an unfit person, that his life has not been a moral one, yet we can but think that it is developed, both by testimony and his manner and appearance on the stand, that there is a coldness, a lack of energy, and a shiftlessness of disposition, which would not make his personal guardianship of the child the most likely to ripen and develop her character fully. He seems to us like a man still and cold, and a warm hearted child would shrink and wither under the care of such a nature, rather than ripen and develop. These are facts that we can but notice, and they have in them no imputation against the father of an unkind nature or an immoral life; but the facts as they impress us are that the child would not really grow to its fullest promise under the care of such a man.

"Again, and lastly, the child has had, and has to-day, all that a mother's love and care can give. The affection which a mother may have and does have, springing from the fact that the child is her offspring, is an affection which perhaps no other can really possess; but so far as it is possible, springing from years of patient care of a little helpless babe, from association, and as an outgrowth from those little cares and motherly attentions bestowed upon it, an affection for the child is seen in Mrs. Wood that can be found nowhere else. And it is apparent that so far as a mother's love can be equalled, its foster mother has that love and will continue to have it." After calling attention to the fact that the relatives of the father have never seen the child and disowned and repudiated its mother in her lifetime, the court adds: "Human impulses are such that doubtless they (the father's sister and mother) would form an affection for the child—it is hardly possible to believe otherwise; but to that deep, strong, patient love which springs either from motherhood or from a patient care during years of helpless babyhood, they will be strangers."

"They cannot have this; and to my mind, I am frank to say, this last is the controlling consideration. And these three considerations are those which compel us to say that we cannot believe it wise or prudent to take this child away from its present home, where it has been looked upon as an own child."

In *Verser v. Ford*, 37 Ark. 27, an infant daughter whose mother had died

at its birth, was then by the father's assent taken by the mother's parents, and was properly supported and cared for until she was nearly three years of age, when the father, who had re-married, demanded her. The child was in delicate health, and the father was of good character and sufficient means. The court denied the application, although laying down the rule that: "It is one of the cardinal principles of nature and of law, that as against strangers, the father, however poor and humble, if able to support the child in his own style of life, and of good moral character, cannot, without the most shocking injustice, be deprived of the privilege by anyone whatever, however brilliant the advantage he may offer. It is not enough to consider the interests of the child alone. As between the father, too, and the mother, or any other near relation of the infant, where sympathies on either side of the tenderest nature may be relied on with confidence, the father is generally to be preferred. In the great majority of cases, his greater ability and knowledge of the world render him the fittest protector, although that is not the test. The preference is conceded to the ties of duty and affection, and attends the primary obligation of the father to maintain, educate, and promote the happiness of the child, according to his own best judgment and the means within his power. Any system of jurisprudence which would enable the courts, in their discretion and with a view solely to the child's best interests, to take from him that right and interfere with those duties, would be intolerably tyrannical as well as Utopian."

So in *Commonwealth v. Daugherty*, 1 Pa. Leg. Gaz. 63, the father, a soldier in the army, gave his motherless daughter, three years old, to his deceased wife's aunt. He married again and saw the child but seldom, contributing nothing to its support. Six years after he applied for the custody of the child, which was refused. The father was a Protestant while the custodian of the child was a Catholic; but the court held that, "If the father has abandoned his child he has lost all control over its religious as well as temporal welfare."

"A parent may relinquish the care, custody and control of his child, and, after having done so, his right to claim it is gone and will not be enforced by the court. Second, such relinquishment

by a parent of a child may be either by a deed or other instrument in writing; or it may be by parol, or by abandonment, or by turning it out of the house and permitting it to go on its own resources; and such relinquishment or abandonment may be presumed from the acts of the parent. Third, where the right of the parent is not clear, the court will regard the interests of the child, and when of sufficient age, its wishes will be consulted."

In *Lyons v. Blenkin*, Jac. 245, three young children, after the death of their mother, were placed, by the father with their grandmother, and on her death they were taken by an aunt, who amply provided for them. When the eldest child was 19 years of age the father applied for their custody. He was a Unitarian minister and the children had been brought up as Baptists. The court refused to order the change, on the ground of the father's long acquiescence in the change.

"It sometimes happens that parents have abandoned their minor children, or by act and word have transferred their custody to another. In such cases where the custodian is in every way a proper person to have the care, training and education of the infant, and the court is satisfied that its social, moral and educational interests will be best promoted by remaining in the custody of the person to whom it was transferred or received when abandoned, the new custody will be treated as lawful and exclusive. After the affections of both child and adopted parent become engaged, and a state of things has arisen which cannot be altered without risking the happiness of the child, and the father wants to reclaim it, the better opinion is that he is not in a position to have the interference of the court in his favor. His parental right must yield to the feelings, interests and rights of other parties acquired with his consent." *Clark v. Bayer*, 32 Ohio St. 299; 30 Am. Rep. 593.

"Ordinarily a father is entitled to the custody of his minor children, and upon *habeas corpus* both courts of law and equity have power to award it to him. The application, however, being addressed to the sound discretion of the court, such award will be withheld when it is made clearly to appear that by reason of unfitness in the father for the trust, or other causes, the permanent interests of the child would be sacrificed by such change of custody;

and in deciding upon this question, the court will take into consideration the condition of the child with the persons from whose custody it is sought to be taken; its relation to them; the present and prospective provision for its support and welfare; the length of its residence there, and whether with the consent of its father and the understanding, tacit or otherwise, that it should be permanent; the strength of the ties that had been formed between them, and, if the child has come to years of discretion, its wishes upon the subject." *State v. Libbey*, 44 N. H. 321; 82 Am. Dec. 223.

"The fact that the child prefers her grandfather to her own mother and her own sister, is an argument for changing her home, that her affections may be restored to their natural channel." *Wilcox v. Wilcox*, 14 N. Y. 575.

"Having performed a parent's duties for nine years, the uncle and aunt, especially when in accordance with the child's interests and inclinations, are entitled to a parent's rights. Those who have borne the cares of the child's earlier infancy should enjoy the comfort of his mature years." *In re Murphy*, 12 How. Pr. (N. Y.) 513.

On *habeas corpus* for the custody of a girl of nine, brought by her paternal against her maternal grandparents, it appeared that at the request of the child's mother, who died when the child was under two years, in Washington, where the father lived, and relators still live, the father placed the child in the custody of respondents, who lived in Michigan, who had kept her ever since, except a few months when in Washington with her father. To regain the child, whose health she feared would suffer in Washington, the maternal grandmother agreed in writing to return the child when the father wished. Respondents refusing to return the child, the father brought *habeas corpus* proceedings, which were dismissed without prejudice, leaving the child with respondents. The father, dying, by will appointed relators guardians of the child, who was about six years old, and they qualified as such in Washington. Soon afterwards respondents qualified as guardians in Michigan. Respondents were fit persons, and well able to maintain the child, who desired to remain with them, while there was some evidence that relators were not. *Held*, that respondents should retain the custody of the child. CAMPBELL

that when the parent lost control of his child through no fault of his own, he was not allowed to reclaim the custody where the child had formed new relations that could not be severed without detriment to the child.¹

J., dissenting. *In re Stockman*, 71 Mich. 180.

On the death of her mother, the father transferred his daughter, then three years old, to her maternal aunt, who brought her up properly, and made her happy. When the child was seven years old, the father brought *habeas corpus* proceedings to recover possession of her. It appeared that the aunt was able and willing to continue to nurture the child, and that the child was unwilling to leave her aunt. The father had other small children, and was living with his sister-in-law, to whom he was not married. The father was ruined in fortune, of dissipated habits, and often away from home, his home being ruled by his sister-in-law. The evidence also showed that his other children were given out to be taken care of and were whipped and neglected when at home. *Held*, that the child should not be returned to the custody of her parent, it appearing that it would not be for her best interest. *Coffee v. Black*, 82 Va. 567.

Merritt v. Swimley, 82 Va. 433 ("the welfare of the child is the pole star by which the discretion of the court is to be guided." *Washaw v. Gimble*, 50 Ark. 351; *People v. Porter*, 23 Ill. App. 196; *Paddock v. Eager* (Supreme Ct.), 10 N. Y. Supp. 710; *Drumb v. Keen*, 47 Iowa 435; *In re Beckwith*, 43 Kan. 159; *Sturtevant v. State*, 15 Neb. 459, 48 Am. Rep. 349; *Brinster v. Compton*, 68 Ala. 299; *Jones v. Darnall*, 103 Ind. 569, 53 Am. Rep. 545.

"The court will not exchange a certainty for an uncertainty." *Drummond v. Ashton*, 8 W. N. C. (Pa.) 563; 22 Alb. L. J. 183; *Bentley v. Terry*, 59 Ga. 555; 27 Am. Rep. 399; *Smith v. Bragg*, 68 Ga. 650; *Janes v. Cleghorn*, 54 Ga. 9; *Taylor v. Jeter*, 133 Ga. 195; *Miller v. Wallace*, 76 Ga. 479 (where the respondents rely on a contract, it must be "clear and distinct"); *Spears v. Snell*, 74 N. Car. 210; *State v. Barrett*, 45 N. H. 15; *Ellis v. Jessup*, 11 Bush (Ky.) 403; *In re Goodenough*, 19 Wis. 274; *Pool v. Gott*, 14 L. R. 269; *In re Waldron*, 13 Johns. (N. Y.) 418; *In re Turner*, 41 L. J., Q. B. 142; *People v. Erbert*, 17 Abb. Pr. (N. Y.) 395 and

note; *McShan v. McShan*, 56 Miss. 413; *Bryan v. Lyon*, 104 Ind. 227; *United States v. Green*, 3 Mason (U. S.) 482; *Commonwealth v. Barney*, 4 Brews. (Pa.) 408; *Gardenhire v. Hinds*, 1 Head (Tenn.) 402; *Sword v. Keith*, 31 Mich. 248.

So although the father cannot assign, he can relinquish his rights, and, having done so, his claims will no longer be recognized by the courts. *Curtis v. Curtis*, 5 Gray (Mass.) 535; *Commonwealth v. Hammond*, 10 Pick. (Mass.) 274; *Kerwin v. Wright*, 59 Ind. 369; *State v. Barrett*, 45 N. H. 15. But see *State v. Richardson*, 40 N. H. 272; *Rust v. Vanvactor*, 9 W. Va. 600.

1. "Suppose, by a pure misfortune, as insanity or being cast away and being compelled to live among savages, a father has left his child destitute and dependent upon charity—does that give the child the right to form such new relations as to take from the father the right to the custody of the child? Upon the best reflection, I am satisfied that it does . . . If, by misfortune,

the child has made new relations in life, so deep and strong as to change its whole nature and character, the father has no right to reclaim it. I am satisfied that this is a sound proposition. The child is not the father's property. It is a human being and has rights of its own." *Ex parte O'Neal*, 3 Am. Law Rev. 578.

In *Dumain v. Gwynne*, 10 Allen (Mass.) 270, the husband was imprisoned for felony, and the mother, being unable to support her children, gave her daughter two years old to a charitable institution to be placed in some good family. Some years after the husband, having been discharged and acquired some property, he and his wife applied for the restoration of the child. The court refused it, saying, "Without holding that the rights of either parent in respect to the children are absolutely lost, we must nevertheless hold that they are subject to the rights of the other party to the contract above mentioned, it having been freely and fairly made, and being a suitable contract for the wife to make."

"Cases like the present should be de-

4. Right to Child's Services and Earnings—(See MASTER AND SERVANT, vol. 14, p. 755).—As compensation for the duty of maintenance the parent has a right to a minor child's services and earnings, unless such right has been released voluntarily. This is certainly true of the father,¹ and the better opinion gives the same right to the mother after the death of the father, especially where the child is supported by her.² This right of the parent

ded with a due regard to the rights and also the affections of the parents, at with a paramount regard for the welfare of the children. It should be kept in mind, that one of the important objects of the law is, to encourage and promote, as far as possible, the exercise of mutual affection between parents and children, and that one of the purposes of education is to train children to the cultivation of filial affection. But, unfortunately, there are cases where the policy of the law is best promoted by the separation of the children from one or both of their parents." *Humain v. Gwynne*, 10 Allen (Mass.) 70. In this case the matron of the institution to which the children had been committed declined to disclose where the children were. The court sustained her position saying: "In some of our public institutions it has been deemed expedient to keep parents in ignorance of the place where homes have been found for their children, on account of the disposition often manifested to visit them and excite uneasiness and discontent in their minds. Such influences may be feared in this case, and there may be just cause for the suggestion made by the respondent's counsel, that if the former character of the father were made known among the present schoolmates and associates of the children it might cause annoyance and injury to them at their resent tender age. The children ought not to be thus exposed, unless the judge who hears the cause shall have some ground to believe that their welfare requires it."

1. "There is no doubt of the right of a father to the services of his children during their minority. It results at once from the parental duty and obligation to maintain them, and from the deep interest, moral, religious, and social, which the parental relation necessarily involves in the comfort, happiness, and preservation of offspring." *Plummer v. Webb*, 4 Mason (C. C.) 380; *The Etna, Ware* (U. S.) 462; *Steele*

v. Thacher, Ware (U. S.) 91; *Lord v. Poor*, 23 Me. 569; *Stone v. Pulsipher*, 16 Vt. 428; *Godfrey v. Hayes*, 6 Ala. 501; 41 Am. Dec. 58; *Stovall v. Johnson*, 17 Ala. 14; *Allen v. Allen*, 60 Mich. 635; *Shute v. Dorr*, 5 Wend. (N. Y.) 204; *People v. Mercein*, 3 Hill (N. Y.) 399; 36 Am. Dec. 644; *Jenness v. Emerson*, 15 N. H. 486; *Gale v. Parrot*, 1 N. H. 28; *Bener v. Edginton*, 76 Iowa 105; *Morse v. Welton*, 6 Conn. 547; *Day v. Everett*, 7 Mass. 145; *Nightingale v. Withington*, 15 Mass. 272; *McGinnis v. Steamboat Grand Turk*, 9 Pitts. L. J. 257; 1 Bl. Com. 453; 2 Kent Com. 193; *Plummer v. Webb*, 4 Mason (U. S.) 380; *Roby v. Lyndall*, 4 Cranch (C. C.) 351.

A plaintiff in an action for services done by his minor son is not required to prove the legitimacy of his son. *Haight v. Wright*, 20 How. Pr. (N. Y.) 91.

2. See MASTER AND SERVANT, vol. 14, p. 756.

Matthewson v. Perry, 37 Conn. 435; 9 Am. Rep. 339; *Burk v. Phips*, 1 Root (Conn.) 487; *Morse v. Welton*, 6 Conn. 547; *Hammond v. Corbett*, 50 N. H. 501; 9 Am. Rep. 288; *Ohio etc. R. Co. v. Tindall*, 13 Ind. 366; *Hollingsworth v. Swedenborg*, 49 Ind. 378; *State v. Baltimore etc. R. Co.*, 24 Md. 84; *Harford Co. v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Natchez etc. R. Co. v. Cook*, 63 Miss. 38; *Valentine v. Bladen*, Harp. (S. Car.) 9; *Campbell v. Campbell*, 11 N. J. Eq. 268; *Cain v. Devitt*, 8 Iowa 116; *Jones v. Buckley*, 19 Ala. 604; *Kennedy v. New York Cent. etc. R. Co.*, 35 Hun (N. Y.) 186 (and cases there cited); *Furman v. Van Sise* 56 N. Y. 435; 19 Am. Rep. 687; *Ballard v. St. Albans Advertiser Co.*, 52 Vt. 325; *Gray v. Durland*, 5 Barb. (N. Y.) 100; *Day v. Oglesby*, 53 Ga. 646; *Guion v. Guion*, 16 Mo. 52; *Riley v. Jameson*, 3 N. H. 23 (but only where she actually supports the child).

The fact that the minor is not dependent upon the mother, but contributes to her support, does not alter the rule or deprive the mother of the right

may in certain cases extend to adult children.¹ The right of action for a child's services is presumed to be in the father, either on the contract of service if there is one, or, in the absence of any agreement, on a *quantum meruit*.² Where the contract is made by

which the law confers. *Simpson v. Buck*, 5 Lans. (N. Y.) 337.

Re-marriage.—A mother's right to her minor child's services ceases when she re-marries and the child is supported by its step-father. *Whitehead v. St. Louis etc. R. Co.*, 22 Mo. App. 60; *St. George v. Deer Isle*, 3 Me. 390. And compare *Hammond v. Corbett*, 50 N. H. 501; *Hays v. Seward*, 24 Ind. 352; *Lind v. Sullestadt*, 21 Hun (N. Y.) 364. In *Burke v. Louisville etc. R. Co.*, 7 Heisk. (Tenn.) 451, it was held that on the death of the father, the child's clothing belongs to the mother and she can sue for its destruction.

At common law, the mother had no right to the services and earnings. *Schouler Dom. Rel.*, § 254; 1 Bl. Com. 453. And this seems to be the law in *Pennsylvania*. *Fairmount etc. R. Co. v. Stutler*, 54 Pa. St. 375; *Commonwealth v. Murray*, 4 Binn. (Pa.) 487.

The common law rule that the father is entitled to the custody and control of his minor children is modified by *Pennsylvania* act of May 4, 1855, § 3, providing that, in case of his neglect to provide for them, the mother shall succeed to his rights and duties, provided she affords the children a good example. *Held*, that this latter proviso prevents the mother from recovering the wages of a minor son, if the presumption of her good character is rebutted by proof. *Eustice v. Plymouth Coal Co.*, 120 Pa. St. 299. And see *Morris v. Low*, 4 Stew. & P. (Ala.) 123; *Pray v. Gorham*, 31 Me. 240; *Boynton v. Clary*, 58 Me. 236; *E. B. v. E. C. B.*, 28 Barb. (N. Y.) 300; *Snediker v. Everingham*, 27 N. J. L. 143.

A widow made a contract with A that her minor son should work for him at an agreed rate, she boarding him. After the contract was completed, she sued A for the wages. *Held*, that she could maintain the action; that the son had assented to the contract, and had his living out of it, and was therefore bound by it, so that A was not liable to him. *Clapp v. Green*, 10 Met. (Mass.) 439. See 15 Cent. L. J. 25.

Where a statute provided that every master of a ship that should carry or transport out of this government an in-

fant, etc., without the consent of his parents, should be liable for the damages sustained by the parent, etc., in a special action of the case—*held*, that no action could be maintained by the infant's mother and step-father, they having no legal right to the minor's society or services. *Worcester v. Marchant*, 14 Pick. (Mass.) 510.

1. After attaining majority the child may elect to remain with the father as his servant, and be supported by him, or may be incapable of emancipation by reason of imbecility; and if in such case he continues to live with the father, the latter will be liable for the child's support and entitled to receive his wages. In *Brown v. Ramsay*, 29 N. J. L. 117, the court, *WHELPLEY, J.*, says: "The law will not presume any change in the existing relation of parent and child from the mere fact that the child is twenty-one, whether emancipation has taken place or not must be a question of fact, not of law." *Overseers of the Poor v. Bethlehem*, 16 N. J. L. 119. Compare *Stovall v. Johnson*, 17 Ala. 14; *Jenness v. Emerson*, 15 N. H. 486.

2. *Dufield v. Cross*, 12 Ill. 397; *Shute v. Dorr*, 5 Wend. (N. Y.) 204; *Hollingsworth v. Swedenborg*, 49 Ind. 378; *Monaghan v. School Dist.*, 38 Wis. 100; *Benson v. Remington*, 2 Mass. 113; *Brown v. Ramsay*, 29 N. J. L. 117; *Letts v. Brooks, Hill & D. Supp.* (N. Y.) 36; *Van Dorn v. Young*, 13 Barb. (N. Y.) 286; *Jones v. Buckley*, 19 Ala. 604. Compare *Campbell v. Cooper*, 34 N. H. 49.

A, his minor son, and B, agreed that the son should work for B until his majority, the wages to be paid to the son. *Held*, that A could maintain an action against B for a breach of the agreement, and could recover the expense of obtaining other employment for the son. *Dickinson v. Talmage*, 138 Mass. 249.

Where a son purchases land, to be paid for in part by labor, and his brothers, being minors, work for him in doing the work to be performed by the contract, although this may give the father a personal claim for the services of the minors, it cannot raise a trust out of the land purchased in favor of him. *Jenison v. Graves*, 2 Blackf. (Ind.) 441.

Laws *New York*, 1850, ch. 266, § 1, providing that "it shall be necessary for the parents or guardians of such minor children as may be in service to notify the party employing such minor, within thirty days after the commencement of such service, that said parent or guardian claims the wages of said minor, and in default of such notice payment to such minor shall be valid," was not intended to prevent the parent from collecting any wages if he failed to give notice within the time specified, and a subsequent notice is sufficient to enable the parent to collect the infant's future earnings. *McClurg v. McKercher*, 56 Hun (N. Y.) 305. And compare *Herrick v. Fritcher*, 47 Barb. (N. Y.) 589; *Everett v. Sherfey*, 1 Iowa 356.

A father may recover compensation for services performed by his minor son, in unlawfully selling intoxicating liquors, if he did not know the character of those services while his son was performing them. *Emery v. Kempton*, 2 Gray (Mass.) 257.

The parent is not affected by any modification of his contract made by the son reducing wages. *Ballard v. St. Albans Advertiser Co.*, 52 Vt. 325; *McDonald v. Montague*, 30 Vt. 357.

Payment to Child.—If a parent makes a contract for the service of his child, and the wages are by the agreement to be paid to the child, the child may in his own name maintain an action for the wages due. *Snediker v. Everingham*, 27 N. J. L. 143; *Eubanks v. Peak*, 2 Bailey (S. Car.) 497.

A parent may authorize his son to contract with his employer and receive wages. *United States v. Mertz*, 2 Watts (Pa.) 406; *Gale v. Parrot*, 1 N. H. 28; *Cloud v. Hamilton*, 11 Humph. (Tenn.) 104; *McIntyre v. Fuller*, 2 Allen (Mass.) 345; *Whiting v. Earle*, 3 Pick. (Mass.) 201; *Mason v. Hutchins*, 32 Vt. 780. And such authority may be implied from circumstances. *Atkins v. Sherbino*, 58 Vt. 248; *Perlinau v. Phelps*, 25 Vt. 478; *Smith v. Smith*, 30 Conn. 111; *Jenness v. Emerson*, 15 N. H. 489; *Armstrong v. McDonald*, 10 Barb. (N. Y.) 300.

Where a minor worked for the defendant, and, after he became of age, brought suit for his wages, and the father was called as a witness on behalf of his son, and made no claim to the wages, and spoke of the transaction as his son's—held, that a recovery under such circumstances, by the son,

would be a bar to any action by the father. *Scott v. White*, 71 Ill. 287.

Payment to a minor under a contract for services made directly with him, but with the knowledge of the parent, is good defence to an action brought by the parent to recover for such services. *Nixon v. Spencer*, 16 Iowa 214.

The plaintiff hired out his minor son to the defendant, and while the son was so hired, remarked to the defendant that he (the plaintiff) should let his son have half his wages. Held, that the defendant had no implied authority to pay more than half the son's wages to the son himself. *Winn v. Sprague*, 35 Vt. 243.

Where a father makes a contract for the services of his minor son, a private arrangement between the father and son that the wages shall be paid to the latter, does not give the son a right of action therefor. *Kauffelt v. Moderwell*, 21 Pa. St. 222.

"The defendant's proposition to the father was, to give his daughter \$700 for the scholastic year, and her board, or its equivalent. There is no doubt that the plaintiff may sue on this promise, although her father might have done so too. In respect to her right to do so, as affected by her minority, it is certain that a father may, by an agreement with his minor child, relinquish to the child the right which he would otherwise have to his services, and may authorize those who employ him to pay him his wages . . . and such an agreement may be inferred from circumstances." *Benziger v. Miller*, 50 Ala. 206.

Usage between parent and child may be set up in defence of a suit by the parent. *Perlinau v. Phelps*, 25 Vt. 478; *Chilson v. Philips*, 1 Vt. 41.

"But the fact that the person employing the minor has paid him his wages will not preclude a recovery therefor by the father, if he has been guilty of no laches that operate to estop him from setting up a claim thereto. The same rule applies in case of the father, as in case of the master of an apprentice, and unless the father has given the minor his time, or permitted him to contract for his services and receive pay therefor, or by some act done which operates as an emancipation of the child from his control, the child can make no valid contract for his services, and can give no discharge therefor. A person hires and pays a minor at his peril. It is his duty to ascertain the legal *status* of the child,

the son, the father may either adopt the contract and recover under it, or repudiate it and sue for the value of the services.¹ A parent, however, has no right to assign his child's services.² Wages due a minor seaman belong to his father, and the latter may sue for them in admiralty;³ but enlistment in the army or navy suspends the parents' right of control, and all wages, bounties, and prize money belong to the minor.⁴ The parent may re-

and if he neglects to do so the fault as well as the consequence is his own." Wood on Master and Servant (2nd ed.), § 14, citing *James v. LeRoy*, 6 Johns. (N. Y.) 274; *Conant v. Raymond*, 2 Aiken (Vt.) 243; *Munsey v. Goodwin*, 3 N. H. 272; *Bowes v. Tibbets*, 7 Me. 457.

Employment of Child Against Will of Parent.—A parent can maintain an action for services against a corporation which knowingly hires and keeps in its employ a minor child of such parent against the latter's will. *Grand Rapids etc. R. Co. v. Showers*, 71 Ind. 451; *Ft. Wayne etc. R. Co. v. Beyerle*, 110 Ind. 100. Or knowledge. *Caill v. Patterson*, 30 Vt. 592; *Keen v. Sprague*, 3 Me. 77; *White v. Henry*, 24 Me. 531; *Dodge v. Favor*, 15 Gray (Mass.) 82. See also, *Weeks v. Holmes*, 12 Cush. (Mass.) 215.

If a father, whose minor son lives with another person, for whom he works and by whom he is taken care of, notifies the latter that if the son continues to work for him he shall exact payment for his services, the father does not thereby become entitled to recover the value of his son's services to him. *Williams v. Williams*, 132 Mass. 304.

Discharge of Child.—Where the minor is employed for a specified time, the employer who contracted with the parent cannot discharge the child without notifying the parent. *Day v. Oglesby*, 53 Ga. 646. But see *Sherlock v. Kimmell*, 75 Mo. 77.

1. *Rogers v. Steele*, 24 Vt. 513. But see *Bell v. Bumpus*, 63 Mich. 375.

Defendant agreed with plaintiff to hire the latter's son at \$25 per month for a year. After more than a year the defendant discharged him, and afterwards took him back, agreeing with him to pay him \$15 per month and allow him part of his time in which to give music lessons. *Held*, that plaintiff, unless he had knowledge of the latter contract and assented to it, had his option either to adopt the contract and claim what was due under it, or to repudiate it

and claim the value of his son's services. In the latter case he would be entitled to the value of his entire time, less the value of the privilege of giving music lessons. *Sherlock v. Kimmel*, 75 Mo. 77; *Huntoon v. Hazelton*, 20 N. H. 388; *Adams v. Woonsocket Co.*, 11 Met. (Mass.) 327; *Weeks v. Holmes*, 12 Cush. (Mass.) 215; *Hennessy v. Stewart*, 31 Vt. 486.

An employer sued by the father of his minor son for wages earned by the latter and claimed by the plaintiff in his right as father, was allowed, under the circumstances, to show that the son had embezzled money from the business, amounting to more than the unpaid wages. A father has not an unqualified right to his son's wages, superior to all offsets and equities between the son and the employer. *Schoenberg v. Voight*, 36 Mich. 310. But compare *The Lucy Anne*, 3 Ware (U. S.) 253.

2. *United States v. Bainbridge*, 1 Mason U. S.) 71; *In re Lewis*, 88 N. Car. 31; *Musgrove v. Kornegay*, 7 Jones (N. Car.) 71; *Pray v. Gorham*, 31 Me. 240; *Morris v. Low*, 4 Stew. & P. (Ala.) 123. But see *Johnson v. Bicknell*, 23 Me. 154; *State v. Smith*, 6 Me. 462; *Day v. Everett*, 7 Mass. 145; *State v. Barrett*, 45 N. H. 15.

3. **Minor Seaman.**—*Gifford v. Kollock*, 3 Ware (U. S.) 45; *White v. Henry*, 24 Me. 531; *Plummer v. Webb*, 4 Mason (U. S.) 380; *The Hattie Law*, 14 Fed. Rep. 880; *Weeks v. Holmes*, 12 Cush. (Mass.) 215. Compare *The Lucy Anne*, 3 Ware (U. S.) 253.

Desertion by a seaman, after attaining his majority, cannot forfeit the father's right to wages earned by him during the latter part of his minority. *Cyffin v. Shaw*, 3 Ware (U. S.) 82. And see *Bishop v. Shepherd*, 23 Pick. (Mass.) 492.

But where the father made no demand before suit, costs were refused him. *The L. B. Snow*, 15 Fed. Rep. 282.

4. **Military Bounties.**—*Carson v. Watts*, 3 Doug. 350; *Rex v. Rother-*

relinquish his right to his child's earnings, and where that has been done a creditor of the parent cannot reach such earnings to apply them in payment of the father's debt; but this holds true only of earnings after such relinquishment.¹

field Greys, 1 B. & C. 345; Commonwealth v. Morris, 1 Phila. (Pa.) 381; Commonwealth v. Gamble, 11 S. & R. (Pa.) 93; Mears v. Bickford, 55 Me. 528; Brown v. Canton, 4 Lans. (N. Y.) 409; Caughey v. Smith, 47 N. Y. 244; United States v. Bainbridge, 1 Mason (U. S.) 84; Magee v. Magee, 65 Ill. 255; Cadwell v. Sherman, 45 Ill. 348; *In re Disinger*, 12 Ohio St. 256; Kelley v. Sprout, 97 Mass. 169; Banks v. Conant, 14 Allen (Mass.) 497; Taylor v. Mechanics' Sav. Bank, 97 Mass. 345 (money paid to minor to act as substitute). Compare Commonwealth v. Cutter, 13 Allen (Mass.) 393.

An infant received a bounty for enlisting in the army. *Held*, that the bounty belonged to him, and not to his father, and that the father, on receiving it, became indebted to his son, a gift not have been intended, and that, therefore, a conveyance by the father to the son in consideration of such indebtedness was not a voluntary conveyance but for a valuable consideration. *Halliday v. Miller*, 29 W. Va. 424.

Whether a father has relinquished his claim to his minor son's town bounty or other earnings, and recognized his right to control it, is a question of fact to be submitted to the jury. *Baker v. Baker*, 41 Vt. 55. Compare *Ayre v. Ayre*, 41 Vt. 302.

But see *contra* *Ginn v. Ginn*, 38 Ind. 526.

Where the defendant enticed away the minor son of the plaintiff, against his father's consent, and placed him in the United States army as a substitute, *held*, that he was liable to the plaintiff for the value of his son's services during the whole period of his absence as a soldier. *Bundy v. Dodson*, 28 Ind. 295.

Right to Enlist.—The question whether a minor over eighteen years of age may enlist in the military service of the United States without the consent of his parent or guardian, seems not to be settled. That he can, see *Phelan's Case*, 9 Abb. Pr. (N. Y.) 286; *Follis' Case*, 19 Leg. Int. (Pa.) 276; *United States v. Taylor*, 20 Leg. Int. (Pa.) 284; *United States v. Blakeney*, 3 Gratt. (Va.) 405; *United States v. Lipscomb*, 4 Gratt. (Va.) 41; *In re*

Riley, 1 Ben. (U. S.) 408; *In re Neill*, 8 Blatchf. (U. S.) 162; *Gormley's Case*, Op. of Atty. Gen., vol. 12 (naval enlistment). That he cannot, see *Wilson's Case*, 18 Leg. Int. (Pa.) 315; *Dobbs' Case*, 9 Am. Law Reg. 565; *United States v. Wright*, 20 Leg. Int. (Pa.) 21; *Commonwealth v. Carter*, 20 Leg. Int. (Pa.) 21; *Henderson's Case*, 20 Leg. Int. (Pa.) 181; *In re Kimball*, 9 Law Rep. 500; *Commonwealth v. Fox*, 7 Pa. St. 236; *In re Carlton*, 7 Cow. (N. Y.) 471. And see *Webb's Case*, 10 Pittsb. Leg. Int. (Pa.) 106; *Jordan's Case*, 11 Am. Law Rev. 749.

1. *Donegan v. Davis*, 66 Ala. 362; *Shortel v. Young*, 23 Neb. 408; *Clemens v. Brillhart*, 17 Neb. 335; *McCloskey v. Cyphert*, 27 Pa. St. 220; *Chase v. Smith*, 5 Vt. 556; *Wambold v. Vick*, 50 Wis. 456; *Lackman v. Wood*, 25 Cal. 147. Compare *Stovall v. Johnson*, 17 Ala. 14; *Godfrey v. Hays*, 6 Ala. 501; 41 Am. Dec. 58.

A father, although insolvent, may, in a *bona fide* contract, promise his minor child a reasonable part of the prospective crop as compensation for the child's labor, and such part will not be liable for the father's debts. *Wilson v. McMillan*, 62 Ga. 16.

"If, however, such arrangement is merely colorable—a mere sham to protect the son's wages from creditors, while, as between the parties, the father is still to control and have the benefit of them, then the transaction is void as against creditors. So, too, after wages are actually earned before emancipation, the gift of such wages or their proceeds to the son would be subject to the ordinary rules which cover voluntary conveyances of property." *Atwood v. Holcomb*, 39 Conn. 270; 12 Am. Rep. 286; *Dierker v. Hess*, 54 Mo. 250.

But this does not mean that the father after his insolvency can relinquish to his child wages earned prior thereto. *Beaver v. Bare*, 104 Pa. St. 58.

"I should much doubt whether a conveyance by the father, who was largely indebted at the time, to a minor son, in consideration of past services of the son, for which the father had agreed to compensate him, could be sustained

5. Right to the Property of the Child.—The parent has, as such, no rights over the child's property, and no natural right to dispose of it,¹ and a payment to the father by a debtor of the child will not constitute a discharge.² The parent can manage his child's property only when appointed as guardian by some court of competent jurisdiction.³ Of course the creditors of the parent

against the creditors of the father, for in general the law considers the child as the servant of the father, and as laboring for him, and a promise by the father to pay for such services, although it might be binding on him, should, it seems to me, be regarded as purely voluntary as against his creditors. Any other rule might lead to the practice of the grossest fraud upon creditors. It would be only necessary for a debtor of doubtful solvency, having a number of minor children, to make a contract with each to pay him so much for his services, and then by way of payment, make a conveyance of his whole estate to him, and thus bid defiance to his creditors." *Dick v. Grissom*, 1 Freem. (Miss.) 434.

"If, in fact a child does work and earn wages, the proceeds of his labor belong to his father, and if the father invests the money so earned, in the purchase of land, taking the title in the name of the child, the father being insolvent, his creditors can subject the land to the payment of their debts." *Winchester v. Reed*, 8 Jones (N. Car.) 379; *Bell v. Hallenback*, *Wright* (Ohio) 751 *acc.*

1. *Alston v. Alston*, 34 Ala. 15; *Wilson v. Wright*, *Dudley* (Ga.) 102; *Griffing v. Hopkins*, 1 Walk. (Miss.) 49; *Judson v. Sierra*, 22 Tex. 365; *Eyans v. Pierce*, 15 Gratt. (Va.) 513.

"In consideration of the duty which the law imposes on a father to furnish adequate support to his child during infancy, the services of the child during that period are due to the father, and if they are rendered to a third person, the right of the father to recover the value thereof is clear and indisputable. But this is the extent of the father's right. He has no title to the property of the child, nor is the capacity of the latter to take property, or receive money, by grant, gift or otherwise, except as a compensation for services, in any degree qualified or limited during minority. Whatever, therefore, an infant acquires which does not come to him as a compensation for services rendered, belongs absolutely to him, and his father cannot interpose any claim to it,

either as against the child or as against third persons who claim title or possession from or under the infant." *Banks v. Conant*, 14 Allen (Mass.) 497.

An assignment by a father of a claim to land belonging to an infant son is void, even if made under a power of attorney from the son to the father. *Pyle v. Cravens*, 4 Litt. (Ky.) 17.

A father cannot convey an easement in land, of which the record title is in his minor son, though he has exercised acts of general ownership over the land. *Farmer v. McDonald*, 59 Ga. 509; *Rex v. Sherrington*, 3 B. & Ad. 714. And the father, as such, cannot be empowered by judicial decree to sell the child's land. *Guynn v. McCauley*, 32 Ark. 97.

Where a father takes a deed in the name of his son and goes into possession, the possession is that of the son. *Lawrence v. Lawrence*, 14 Oregon 77. But the father who buys land in his son's name will not be allowed to perpetrate a fraud on others. *Richardson's Case*, L. R., 19 Eq. 588. *Compare* *Longworth v. Close*, 1 McLean (U. S.) 282.

2. *Linton v. Walker*, 8 Fla. 144; *Perry v. Carmichael*, 95 Ill. 519; *Clark v. Smith*, 13 S. Car. 585; *Jackson v. Combs*, 7 Cow. (N. Y.) 36; *Brown v. State*, 42 Ala. 540.

A father is not, as natural guardian, authorized to receive payment of a legacy to his child. *Miles v. Boyden*, 3 Pick. (Mass.) 213; *Rotherham v. Fanshaw*, 3 Atk. 629; *Dagley v. Tolferry*, 1 P. Wms. 285; *McCreight v. McCreight*, 13 Ir. Eq. 314. *Compare* *Cooper v. Thornton*, 3 Bro. C. C. 96, 186; *Hill v. Chapman*, 2 Bro. C. C. 612. But where the money received is applied to the use of the child, see *Southwestern R. Co. v. Chapman*, 46 Ga. 557.

3. *Keeler v. Fassett*, 21 Vt. 539; 52 Am. Dec. 71; *Alston v. Alston*, 34 Ala. 15; *Nelson v. Goree*, 34 Ala. 565; *McCarty v. Rountree*, 19 Mo. 345; *Young v. Gammel*, 4 Greene (Iowa) 207; *Cowell v. Daggett*, 97 Mass. 434; *Jackson v. Combs*, 7 Cow. (N. Y.) 36; *Kenningham v. McLaughlin*, 3 T. B. Mon. (Ky.) 30. *Compare* *Selden's Appeal*, 31 Conn. 548; *Isaacs v. Boyd*, 5 Port. (Ala.)

have no claim on the property of the child.¹ Clothing and articles of personal apparel or adornment given by the father to his child remain the property of the parent, notwithstanding possession by the child.²

VI. RIGHTS AND LIABILITIES IN CASE OF TORTS—1. Right of Parent Where the Child Is Injured.—(See CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15; DAMAGES, vol. 5, p. 46; DEATH, vol. 5, p. 128; INFANTS, vol. 10, p. 613; MASTER AND SERVANT, vol. 14, p. 740).—(a) LOSS OF SERVICE.—In case a minor child is injured, the parent cannot recover for the injury as such; that right belongs to the child. But the father can recover for the loss to himself caused by the injury, which will be measured by the loss of the child's services during minority, and by the expenses of the illness caused by the injury.³ Strictly speaking, the foundation of the action is

388. But a parent who takes possession of his child's property will be treated as though he were appointed guardian, and must account in the same manner. *Forsyth v. Kreakbaum*, 7 T. B. Mon. (Ky.) 97; *Evans v. Pearce*, 15 Gratt. (Va.) 513; *Sylvester v. Ralston*, 31 Barb. (N. Y.) 286, *Morgan v. Morgan*, 1 Atk. 489; *Thomas v. Thomas*, 2 K. & J. 79.

Where the father has long applied the rents of land to the support of the common establishment a settlement of the account will be presumed. *Smith v. Smith*, 23 Beav. 554; *Wright v. Vanderplank*, 8 De G. M. & G. 133.

Louisiana Law.—In *Louisiana*, parents have a usufruct on the child's estate until majority or emancipation; it is a legal one, lasting only during marriage. *Young v. Carl*, 6 La. Ann. 412.

The parent cannot retain the usufruct of the estate of the minor which he may acquire by his own labor and industry, or which is left to him under the express condition that his father and mother shall not enjoy such usufruct. *Ouliber v. Creditor*, 16 La. Ann. 287.

The father and mother cannot borrow money in the name of their minor children, nor can they bind them by confessing judgment in a court that has no jurisdiction over their domicil. *Michie v. Armat*, 15 La. Ann. 225. *Compare Fisk v. Fisk*, 2 La. Ann. 71; *Lobrano v. Nelligan*, 9 Wall. (U. S.) 295.

1. *Davis v. Living*, Holt N. P. 276; *Viner v. Cadell*, 3 Esp. 88.

The investment by the parent of his child's money for the latter's benefit will be protected as against the creditors, who are chargeable with notice. *McLawrie v. Partlow*, 53 Ill. 340.

2. Child's Clothing.—*Prentice v. Decker*, 49 Barb. (N. Y.) 21; *Parmelee v. Smith*, 21 Ill. 620.

"It is probably true that where a minor child lives with his father, and is supported by him, all things given to the child in the way of support, such as clothing, for instance, would still belong to the father, and not to the child. But things given by the father to the child, not in the way of support, but with the understanding that they should become the property of the child, would undoubtedly become the property of the child. *Hillebrand v. Brewer*, 5 Tex. 566; *Grangiac v. Arden*, 10 Johns. (N. Y.) 293. Also, while the child's clothing, furnished by the father, generally belongs to the father, yet if the child should purchase clothing with his own money or money given him by the father, the clothing would evidently belong to the child. *Dickinson v. Winchester*, 4 Cush. (Mass.) 114; 50 Am. Dec. 760; *Wheeler v. St. Joseph etc. R. Co.*, 31 Kan. 640.

Money entrusted to a child for the purpose of buying clothing and paid by him for another purpose may be recovered by the father. *Burnham v. Holt*, 14 N. H. 367.

3. *Rogers v. Smith*, 17 Ind. 323; *Evansich v. Gulf etc. R. Co.*, 57 Tex. 123; *South & North Ala. R. Co. v. Donovan*, 84 Ala. 141; *Shields v. Yonge*, 15 Ga. 349; 60 Am. Dec. 638; *Mercer v. Jackson*, 54 Ill. 397; *Frick v. St. Louis etc. R. Co.*, 75 Mo. 542; *Castanos v. Ritter*, 3 Duer (N. Y.) 370; *Whitney v. Hitchcock*, 4 Den. (N. Y.) 461; *Magee v. Holland*, 27 N. J. L. 86.

The fact that a child, by her father as next friend, has recovered damages

loss of service, and the parent has no remedy where the child cannot be treated as his servant.¹ The rule in this country, however, is more liberal to the parent, and it seems to be enough that the parent retains the right to claim the service of the child.²

against a corporation for a personal injury, does not bar a subsequent action by him for the loss of her services, occasioned by the same injury. So *held*, where a girl nearly thirteen years old had recovered from a horse-car company \$5,000 for an injury to her arm, and, on her arriving of age, her father recovered from the company \$500 for such loss therefrom. *Wilton v. Middlesex R. Co.*, 125 Mass. 130.

Under a statute allowing an action to the parent of a minor child for injury by the wrong or negligence of another, and the recovery of such damages as may be just, there can be no recovery for injuries personal to the child. *Durkee v. Central Pac. R. Co.*, 56 Cal. 388; 38 Am. Rep. 59; *Pratt Coal etc. Co. v. Brawley*, 83 Ala. 371.

One who, in violation of law, sells a revolver to a boy of fifteen, is not answerable to the boy's parents for loss of service incurred by reason of the boy's carelessly shooting himself, there being nothing to charge the seller with knowledge of the likelihood of such an accident. *Poland v. Earhart*, 70 Iowa 285.

Dog Cases.—A father may sue in case for an injury done to an infant child (then living with him and engaged in his service) by dogs, permitted by the defendant to run at large, after knowledge that such dogs were accustomed to bite mankind. *Durden v. Barnett*, 7 Ala. 169; *Arnold v. Norton*, 25 Conn. 92; *Whittaker v. Warren*, 60 N. H. 20; 49 Am. Rep. 302; *Munn v. Reed*, 4 Allen (Mass.) 431; *M'Carthy v. Guild*, 12 Met. (Mass.) 291; *Plumley v. Birge*, 124 Mass. 57.

1. *Grinnell v. Wells*, 7 M. & G. 1033; *Rogers v. Smith*, 17 Ind. 323; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; *Vanhorn v. Freeman*, 6 N. J. L. 322; *Hammer v. Pierce*, 5 Harr. (Del.) 171; *Hoover v. Heim*, 7 Watts (Pa.) 62; *Dunn v. Cass Ave. etc. R. Co.*, 21 Mo. App. 188.

Very Young Child.—So in *England* it has been held that a parent cannot recover for an injury to a child two and a half years old, as it is too young to be capable of rendering service. *Hall v. Hollander*, 7 Dow. & Ry. 133; 4 B. &

C. 660. The court says: "The gist of the action is the loss of services, and therefore, though the relation of parent and child subsists, yet, if the child is incapable of performing any services, the foundation of the action fails." *Wotton v. Hunt*, T. Raym. 259. Consequently it is doubtful whether a parent has any action for the expenses of the illness of so young a child. *Grinnell v. Wells*, 8 Scott N. R. 745. But see *Hall v. Hollander*, 7 Dow. & Ry. 133. The rule, however, is not so strict in the *United States*. *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49.

A parent may recover the expenses of nursing and healing his minor child, of such tender years that it is incapable of rendering him any service, from one who wilfully or negligently injures such child. *Sykes v. Lawlor*, 49 Cal. 237. Compare *Allen v. Atlanta St. R. Co.*, 54 Ga. 503.

"Even if the child was of very tender years, so as to be incapable of rendering any useful services, the action would doubtless lie, if averments were made of consequential injury by expenses caused in healing the wounds." *Durden v. Barnett*, 7 Ala. 169.

"The precise point, and the only one which we decide is this: If a legitimate infant child, a member of his father's household, and too young to be capable of rendering any service to his father, is wounded or otherwise injured by a third person, or by a mischievous animal owned by a third person, under such circumstances as to give the child himself an action against such person for the personal injury, and the father is thereby necessarily put to trouble and expense in the care and cure of the child, he may maintain an action against such person for an indemnity." *Dennis v. Clark*, 2 Cush. (Mass.) 347.

2. *Hewitt v. Prime*, 21 Wend. (N. Y.) 79; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; *Clark v. Bayer*, 32 Ohio St. 299; 30 Am. Rep. 593; *Sykes v. Lawlor*, 49 Cal. 236; *Karr v. Parks*, 44 Cal. 46; *Sawyer v. Sauer*, 10 Can. 519; *Traver v. Eighth Ave. R. Co.*, 4 Abb. App. Dec. (N. Y.) 422; *Oaklan R. Co. v. Fielding*, 48 Pa. St. 320; *O'Mara v. Hudson River*

On the death of the father the mother succeeds to his rights,¹ and one standing *in loco parentis* to the child may recover for an injury to the child on the same principles.² The parent may also recover for an injury to an adult child, where the child continues, after his majority, to work for the parent without compensation.³

At common law the father had no remedy for injuries causing the immediate death of the child.⁴ Modern statutes have very

R. Co., 38 N. Y. 445; *Kreig v. Wells*, 1 E. D. Smith (N. Y.) 74.

One suing for the loss of service of his child, injured by defendant's negligence, may recover for his own time spent in nursing the child. *Connell v. Putnam*, 58 N. H. 534.

If the parent relinquish his right to the child's services, his right to damages is gone. *Arnold v. Norton*, 25 Conn. 92. And where the child is in the service of another, both the master and the parent have an action. *Wilt v. Vickers*, 8 Watts (Pa.) 227.

1. Right of Mother.—Where a minor, in the discharge of his duty as an employee of a railroad company, receives injuries through the negligence of the company, from which he dies three days afterward, his mother, being his only surviving parent, is entitled by the common law (her son not having been emancipated) to recover of the railroad company damages for the loss of his services from the time the injuries were received by him till his death, and for any incidental expenses incurred by her during that time for medical attention to, care and nursing of him. *Natchez etc. R. Co. v. Cook*, 63 Miss. 38; *Harford Co. v. Hamilton*, 60 Md. 340; 45 Am. Rep. 739; *State v. Baltimore etc. R. Co.*, 24 Md. 84; *Ohio etc. R. Co. v. Tindall*, 13 Ind. 366; *Pennsylvania R. Co. v. Bantom*, 54 Pa. St. 495; *Kennedy v. New York Cent. etc. R. Co.*, 35 Hun (N. Y.) 187; *Hammond v. Corbett*, 50 N. H. 501; 9 Am. Rep. 283; *Matthewson v. Perry*, 37 Conn. 435; 9 Am. Rep. 339; *Gray v. Durland*, 50 Barb. (N. Y.) 100. *Compare Furman v. Van Sise*, 56 N. Y. 435. See also *Davidson v. Abbott*, 52 Vt. 570; 36 Am. Rep. 767.

In an action by a mother for damages for the loss of the services of an infant child, plaintiff must allege and prove that, at the date of the accident, the child was in her service. *Matthews v. Missouri Pac. R. Co.*, 26 Mo. App. 75.

2. Whittaker v. Warren, 60 N. H. 20; 49 Am. Rep. 302; *Moritz v. Garnhart*, 7 Watts (Pa.) 302.

3. Adult Child.—In an action by parents to recover damages for the death of their son, it appeared that the son was twenty-eight years of age when the accident happened. He had been away from home at intervals, after he attained his majority and been in business on his own account. He had returned, however, to his father's house and was engaged in his father's business, for which no compensation was paid him. It appeared that he intended to remain with his father, and that his services were valuable to him in his business. *Held*, that it was for the jury to decide whether there was a reasonable expectation of pecuniary advantage accruing to plaintiffs which was destroyed by the loss of the son. *North Pennsylvania R. Co. v. Kirk*, 90 Pa. St. 15; *Pennsylvania R. Co. v. Keller*, 67 Pa. St. 300; *Mercer v. Jackson*, 54 Ill. 397; *Chicago etc. R. Co. v. Bayfield*, 37 Mich. 205. *Compare Mayhew v. Burns*, 103 Ind. 328.

So, too, under statutes allowing the parent to recover for the death of the child, the parent was allowed to recover for the death of an adult son where the child lived away from home but had been accustomed to contribute to the support of the parent. *Chicago v. Powers*, 42 Ill. 169; *Potter v. Chicago etc. R. Co.*, 22 Wis. 615. *Compare Chicago etc. R. Co. v. Shannon*, 43 Ill. 338. "The pecuniary character of the deceased, his habits of industry, his accustomed earnings, measure of success in business, and the dependence she might reasonably place on him for support and assistance in the future, growing out of his filial kindness and promises of support, were therefore proper evidence for the jury to consider." *Opsahl v. Judd*, 30 Minn. 126.

4. Osborn v. Gillett, L. R., 8 Ex. 88; *Edgar v. Castello*, 14 S. Car. 20; *Carey v. Berkshire R. Co.*, 1 Cush. (Mass.) 475; *McDowell v. Georgia R. Co.*, 60 Ga. 320; *Sherman v. Johnson*, 58 Vt. 40.

generally extended the rights of the parent, giving him a right of action when the child is killed, and when the child is injured by the negligence of railroads and other common carriers, enlarging the rights of widows and dependent parents,¹ but the courts do not lose sight of the old principle that the loss of service is the foundation of the action.² This principle also is the foundation of the parent's right in cases of assault and battery upon the child for which he seeks to recover,³ or where a third person harbors or entices away a child, although here the apparent offence is the wilful and wrongful interruption of the relation subsisting between parent and child.⁴

1. See *DEATH*, vol. 5, p. 129; *Cooley Torts* (2nd ed.), p. 320; *Mayhew v. Burns*, 103 Ind. 328; *Fort Wayne etc. R. Co. v. Beyerle*, 110 Ind. 100; *Louisville etc. R. Co. v. Willis*, 83 Ky. 57; *McDowell v. Georgia R. Co.*, 60 Ga. 320.

One who hires a minor and puts him to dangerous work whereby he is injured, is liable to his father. It is no defence that the father permitted the boy to receive his own wages. *Soldanels v. Missouri Pac. R. Co.*, 23 Mo. App. 516.

A father who sues a railroad company for an injury sustained by his son, who was put to a dangerous employment, must show that the company knew the son was a minor. *Gulf etc. R. Co. v. Redeker*, 67 Tex. 190.

2. *Frank v. New Orleans etc. R. Co.*, 20 La. Ann. 25; *Pennsylvania R. Co. v. Bantom*, 54 Pa. St. 495; *Gann v. Worman*, 69 Ind. 458; *Perry v. Carmichael*, 95 Ill. 519; *Hall v. HOLLANDER*, 4 B. & C. 660; *Grinnell v. Wells*, 7 M. & G. 1033; *Duckworth v. Johnson*, 4 H. & N. 653; *Eager v. Grimwood*, 1 Exch. 61. Compare *Stephenson v. Hall*, 14 Barb. (N. Y.) 222.

3. **Assault and Battery.**—*Hoover v. Heim*, 7 Watts (Pa.) 62; *Cowden v. Wright*, 24 Wend. (N. Y.) 429; *Hammer v. Pierce*, 5 Harr. (Del.) 171; *Kenard v. Burton*, 25 Me. 39. Compare *Hearst v. Sybert*, Cheves (S. Car.) 177.

So for an assault on the high seas, there is a remedy in admiralty. *Plummer v. Webb*, Ware (U. S.) 75.

"I think it was then competent for the jury to look to all the circumstances attending the battery, and to award such damages as they might deem ample and reasonable to compensate the plaintiff and also to vindicate his rights, and prevent similar abuses in future." *Klingman v. Holmes*, 54 Mo. 304.

In case of an assault, no evidence of service is necessary beyond that which the law will imply as between parent and child. *Evans v. Walton*, L. R., 2 C. P. 615.

4. **Harboring or Enticing.**—*Lumley v. Gye*, 2 El. & Bl. 224; *Evans v. Walton*, L. R., 2 C. P. 615; *Thompson v. Howard*, 31 Mich. 309; *Butterfield v. Ashley*, 6 Cush. (Mass.) 249; *Moore v. Christian*, 56 Miss. 408; *Caughey v. Smith*, 50 Barb. (N. Y.) 351; *Kirkpatrick v. Lockhart*, 2 Brev. (S. Car.) 276; *Moritz v. Garnhart*, 7 Watts (Pa.) 302.

In an action for harboring the plaintiff's minor son, if the defendant, knowing that the son had run away, boards him and allows him to work on his farm with the intention of aiding or encouraging, or with the knowledge that it aided or encouraged the son to keep away from the father, he is liable to the action. *Sargent v. Mathewson*, 38 N. H. 54; *Everett v. Sherfey*, 1 Iowa 356.

To enable a father to maintain an action for taking his infant children from his possession, he must show some loss of service; but if this be shown, however small its value, the jury may in addition to this value give him compensation for his wounded feelings. *Magee v. Holland*, 27 N. J. L. 86.

No action will lie, in behalf of a parent, for procuring the marriage of an infant child without the parent's consent. *Jones v. Tevis*, 4 Litt. (Ky.) 25; 14 Am. Dec. 98; *Goodwin v. Thompson*, 2 Greene (Iowa) 329.

A parent cannot maintain an action for enticing away a minor daughter from the parent's service and procuring her marriage, without his consent, to a man of bad character, by fraudulent representations to the magistrate. *Hervy v. Moseley*, 7 Gray (Mass.) 479; *contra Hills v. Hobert*, 2 Root (Conn.) 48.

The burden of proof is on the father to show the enticement. *Covert v. Gray*, 34 How. Pr. (N. Y.) 450, *Nash v. Douglass*, 12 Abb. Pr., N. S. (N. Y.) 187; *Rising v. Dodge*, 2 Duer (N. Y.) 42; *Stuart v. Simpson*, 1 Wend. (N. Y.) 376; *Blake v. Lanyon*, 6 T. R. 121.

Where the agent of a children's aid society, being deceived by a boy, eighteen years of age, who gave a false name and pretended that he was an orphan, sent the boy to a home in the West. *Held*, that an action by the boy's parent to compel his return and for damages, could not be sustained. The fact that the defendant had neglected to make enquiries as to the truth of the boy's story, was not material, as the enquiries would have been fruitless. And the enticement to travel and find new homes which is held out by a children's aid society, being necessary to the conduct of the society and sanctioned by the statute incorporating it, is not an unlawful enticement or solicitation. *Nash v. Douglas*, 12 Abb. Pr., N. S. (N. Y.) 187.

Where the son voluntarily leaves the father's house, there can be no action for enticement; and in a suit for harboring, the father must show the knowledge of the defendant that the child wrongfully left the service of the father. *Caughey v. Smith*, 47 N. Y. 244.

The *quo animo* is always material, and the mere employment of a runaway child is not actionable. *Butterfield v. Ashley*, 6 Cush. (Mass.) 249; *Keane v. Boycott*, 2 H. Bl. 511; *Morgan v. Smith*, 77 N. Car. 37; *Noice v. Brown*, 39 N. J. L. 569; *Sargent v. Mathewson*, 38 N. H. 54.

"To afford shelter is one thing; to encourage filial disobedience another." *Schouler Dom. Rel.*, § 260.

The parent may libel in admiralty for carrying his child beyond seas. *Steele v. Thacher, Ware* (U. S.) 91; *Plummer v. Webb*, 4 Mason (U. S.) 380.

Where a minor left his father's service and went to a port where he was a stranger, and there shipped as of full age, for a whaling voyage, during which he perished—*held*, that the father could not maintain an action for the loss of the services of the son, unless the person who shipped him knew that he was a minor. *Cutting v. Seabury*, 1 Sprague (U. S.) 522; *Weeks v. Holmes*, 12 Cush. (Mass.) 215.

Where the father and mother live apart, the consent of the mother to the child's shipping as a sailor may affect

the remedies of the father. *Wodell v. Coggeshall*, 2 Met. (Mass.) 89. *Compare*, *Worcester v. Marchant*, 14 Pick. (Mass.) 510.

Where the parents of a minor child are living together, the consent of the father to the employment of the minor is necessary to relieve the employer from liability to the father for loss to him of the child's services, arising from injuries received in the employment. The mother's consent is not sufficient. *Gulf etc. R. Co. v. Redeker*, 75 Tex. 310.

Where the child is enticed or harbored, the defendant cannot recoup for the child's board. *Schnuckle v. Bierman*, 89 Ill. 454. But see *contra* where the employment is *bona fide*. *Huntoon v. Hazelton*, 20 N. H. 388.

The father may elect to sue for the child's wages in assumption, or for the enticement in tort. *Thompson v. Howard*, 31 Mich. 309; *Grand Rapids etc. R. Co. v. Showers*, 71 Ind. 451; *Neate v. Harding*, 6 Ex. 349.

The defendant cannot retain any benefit from the child's services. *Foster v. Stewart*, 3 M. & S. 191.

On the death of the father the right of action for enticing or harboring passes to the mother. *Jones v. Tevis*, 4 Litt. (Ky.) 25; 14 Am. Dec. 98; *Moore v. Christian*, 56 Miss. 408; *Blanchard v. Ilsley*, 120 Mass. 487; *Gray v. Durland*, 50 Barb. (N. Y.) 100; *Coon v. Moffet*, 3 N. J. L. 169; 4 Am. Dec. 405. But see *Commonwealth v. Murray*, 4 Binn. (Pa.) 487; 5 Am. Dec. 412.

The form of remedy should be trespass on the case. *Jones v. Tevis*, 4 Litt. (Ky.) 25; 14 Am. Dec. 98; *Sargent v. Mathewson*, 38 N. H. 54; *Noice v. Brown*, 39 N. J. L. 569. *Contra*, that it is *vi et armis*. *Vaughan v. Rhodes*, 2 McCord (S. Car.) 227; 13 Am. Dec. 713.

The father recovers for the expenses of pursuit. *Rice v. Nickerson*, 9 Allen (Mass.) 478.

Criminal Process.—An indictment may lie under fit circumstances. *Langham v. State*, 55 Ala. 114; *State v. Rice*, 76 N. Car. 194 (by statute only); *Reg. v. Prince*, L. R., 2 C. C. 154.

To harbor or entice an innocent child for immoral purposes is criminal. *People v. Marshall*, 59 Cal. 386; *State v. Gordon*, 46 N. J. L. 432; *People v. Cummons*, 56 Mich. 544. See also *ABDUCTION*, vol. 1, p. 21.

And it is immaterial whether force or persuasion was used. *Lawrence v.*

By the statutes giving the next of kin a remedy for death caused by negligence, the child may recover, on the death of his parent, for the loss of education, maintenance, and support.¹ The parent's negligence may defeat his right of action.²

(b) SEDUCTION.—See SEDUCTION.

(c) DAMAGES.—See DAMAGES, vol. 5, p. 46; DEATH, vol. 5, p. 128.

Where a parent sues for an injury to a minor child, the measure of damages is the present value of his future earnings during minority, less the cost of maintenance, and the expenses of the sickness;³ the jury must consider what is the reasonable expecta-

Spence, 99 N. Y. 669. But the criminal prosecution may fail if the girl went voluntarily. *People v. Plath*, 100 N. Y. 590. Or was unchaste. *Jenkins v. State*, 15 Lea (Tenn.) 674.

1. *Death of Parent.*—*Huntingdon etc. R. Co. v. Decker*, 84 Pa. St. 419; *Illinois Cent. R. Co. v. Weldon*, 52 Ill. 290; *Castello v. Landwehr*, 28 Wis. 522; *Howard Co. v. Legg*, 93 Ind. 523; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287; *Kesler v. Smith*, 66 N. Car. 154.

"The loss is what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration ability and disposition to labor, and his habits of living and expenditure." *Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335.

"The loss of a parent's care in the education, maintenance and pecuniary support of children, has, in addition to their moral value, an appreciable pecuniary value. *Tilley v. Hudson River R. Co.*, 29 N. Y. 252; 37 N. Y. 287. In such cases, juries are not confined to any exact mathematical calculation, but are vested with considerable discretion, which the courts will not interfere with, unless it has been abused." *Stoher v. St. Louis etc. R. Co.*, 91 Mo. 509.

"But where the head of a family is taken away, there is a distinct relation between the family circumstances and the family supporter. In such a case we think the fullest insight into the family circumstances is of value in determining to what extent they are injured by the loss of their head." *Staal v. Grand Rapids etc. R. Co.*, 57 Mich. 239.

2. *Pierce v. Millay*, 62 Ill. 133; *Cosgrove v. Ogden*, 49 N. Y. 255; *Kreig*

v. Wells, 1 E. D. Smith (N. Y.) 74; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269. See CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15.

3. *Berton v. Chicago etc. R. Co.*, 55 Iowa 496; *Hussey v. Ryan*, 64 Md. 426; *Mayhew v. Burns*, 103 Ind. 328; *Staford v. Rubens*, 115 Ill. 196; *Pennsylvania etc. Co. v. Lilly*, 73 Ind. 252; *Rockford etc. R. Co. v. Delaney*, 82 Ill. 198; *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95; *Robel v. Chicago etc. R. Co.*, 35 Minn. 84; *Rains v. St. Louis etc. Co.*, 71 Mo. 164; *Hickman v. Missouri Pac. R. Co.*, 22 Mo. App. 344; *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95; *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49; *Hoover v. Heim*, 7 Watts (Pa.) 62.

In an action by a father for an injury to a child, he is entitled to recover for the loss of service of the child, and the expense resulting from the injury for a time not extending beyond his majority, including medical treatment, nursing and the like. *Frick v. St. Louis etc. R. Co.*, 75 Mo. 542.

A parent, in an action against a railway company for a permanent injury to his minor son, is entitled to recover the value of the son's services until twenty-one years old, the expense of medical attendance and nursing, and other expenses rendered necessary by the injury. *Houston etc. R. Co. v. Miller*, 49 Tex. 322. In such case, where the son was nineteen years old, and the injury the loss of an arm,—*held*, that a verdict for \$2,000 was not excessive.

Albert v. State, 66 Md. 325; *State v. Baltimore etc. R. Co.*, 24 Md. 84; *Caldwell v. Brown*, 53 Pa. St. 453.

The damages which may be recovered by a father in his own right for bodily harm to his minor son while travelling on a railroad, through the company's fault, are not restricted to the actual

tion of pecuniary benefit to the parent.¹ If the disability con-

pecuniary loss before suit. Both medical and surgical charges, medicines and nursing, and plaintiff's neglect of business during his son's illness, are to be considered, besides also his probable prospective loss from the child's crippled state, which may render him a burden during a period when he would, but for the accident, be able to support himself, if not assist his father. *Black v. Carrollton etc. R. Co.*, 10 La. Ann. 33.

1. "The rule of law is, that the father is entitled to compensation merely for the pecuniary loss he has sustained; not compensation for his lacerated feelings or his disappointed hopes, for the law cannot compensate these in money, but pecuniary indemnity for pecuniary losses. What he spent to cure his boy, and what profit might have accrued to him from his services, more than can be realized after the injury, are the proper elements of a verdict." *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372.

Though the true measure of damages for the killing of plaintiff's son is "a sum equal to the pecuniary benefit the parent had a reasonable expectation of receiving from the child had he not died," it is not misleading to charge that the damages are "such sum as you may, under the evidence, reasonably believe plaintiff might have received from the assistance of the child had he not been killed, and you may in estimating such sum, if any, consider under the evidence before you, the age of deceased, the time he might have lived, the age of the plaintiff, the time she may probably live, and any other evidence tending to show what damages, if any, she may have suffered by the death of the child. You will find for plaintiff such damages under the instructions heretofore given, as you may think will compensate her for the loss, if any, she may have sustained by the killing." *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496; *Duckworth v. Johnson*, 4 H. & N. 653; *Franklin v. South Eastern R. Co.*, 3 H. & N. 211; *Blake v. Midland R. Co.*, 18 Q. B. 93; *Pym v. Great Northern R. Co.*, 2 B. & S. 759; *Grotenkemper v. Harris*, 25 Ohio St. 510; *Illinois Cent. R. Co. v. Barron*, 5 Wall. (U. S.) 90; *Ewen v. Chicago etc. R. Co.*, 38 Wis. 613; *Mansfield Coal etc. Co. v. McEnery*, 91 Pa. St. 185; *Demarest v. Little*, 47 N. J. L. 28; *At-*

chison etc. R. Co. v. Brown, 26 Kan. 443; *Dalton v. South Eastern R. Co.*, 4 C. B., N. S. 296; *Steel v. Kurtz*, 28 Ohio St. 191.

Special Damage.—The loss of service of a child, who was killed by negligence, and the expense of the sickness of the mother, caused by her grief, are proper items of special damage, in an action on the case. *Ford v. Monroe*, 20 Wend. (N. Y.) 210; *Cleveland etc. R. Co. v. Rowan*, 66 Pa. St. 393.

The parent may recover for his own time spent in nursing. *Connell v. Putnam*, 58 N. H. 534; *Martin v. Wood* (Supreme Ct.), 5 N. Y. Supp. 274.

And costs of prosecuting the suit. *Wilt v. Vickers*, 8 Watts (Pa.) 227.

Wounded feelings of the parent cannot be taken into consideration. *Cowden v. Wright*, 24 Wend. (N. Y.) 429; *Galveston v. Barbour*, 62 Tex. 172; *Caldwell v. Brown*, 53 Pa. St. 453; *Harford Co. v. Hamilton*, 60 Md. 340; 45 Am. Rep. 739. *Compare Magee v. Holland*, 27 N. J. L. 86; *Trimble v. Spiller*, 7 T. B. Mon. (Ky.) 394; *Rooney v. Milwaukee Chair Co.*, 65 Wis. 397; *Cleary v. City R. Co.*, 76 Cal. 240.

Nor for the sufferings of the child. *Sawyer v. Sauer*, 10 Kan. 519.

Where an infant had been disfigured by a vicious animal, it was held that the father could recover only for the expense of healing the wound, and not for any expense in removing the disfigurement. *Karr v. Parks*, 44 Cal. 46.

It is not necessary to show actual damage suffered to warrant a substantial recovery. In an action to recover damages for causing the death of a child three years old, the absence of proof of special pecuniary damage to the next of kin, will not justify the court in nonsuiting the plaintiff or directing a verdict for merely nominal damages. *Ihl v. Forty-Second Street etc. R. Co.*, 47 N. Y. 317; *Gorham v. New York etc. R. Co.*, 23 Hun (N. Y.) 449; *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653; *Grogan v. Broadway Foundry Co.*, 87 Mo. 321; *Hoppe v. Chicago etc. Co.*, 61 Wis. 357; *Little Rock etc. R. Co. v. Barker*, 39 Ark. 491; *Scheffler v. Minneapolis etc. R. Co.*, 32 Minn. 518; *Louisville etc. R. Co. v. Connor*, 9 Heisk. (Tenn.) 19; *Chicago v. Scholten*, 75 Ill. 468; *Union Pac. R. Co. v. Dunden*, 37 Kan. 1; *Quin v. Moore*, 15 N. Y. 432.

tinues beyond majority, the child is entitled to recover for that loss.¹

2. Liability of Parent Where the Child Is the Injuring Party.—The general rule is that a father is not liable for the torts of his minor child:² but this rule does not apply to cases where the tort is committed by the child while engaged in performing work directed by the father, where a child is engaged in the father's service, and in doing work authorized or commanded by him, he is

In *Virginia*, recovery is not limited to pecuniary damages. *Matthews v. Warner*, 29 Gratt. (Va.) 570, Baltimore etc. R. Co. *v.* Noell, 32 Gratt. (Va.) 394.

In *New York*, it is held that pecuniary loss may consist of actual damages, *i. e.*, an actual definite loss capable of proof, and also of prospective and general damages incapable of precise definite estimate. *Houghkirk v. Delaware etc. Canal Co.*, 92 N. Y. 219. Compare *Carpenter v. Buffalo etc. R. Co.*, 38 Hun (N. Y.) 116.

In an action by a father to recover for loss of services of his minor child by reason of an injury caused by the defendant's negligence, evidence as to the pecuniary condition of the plaintiff, the amount of his property, what he earned per day, the size of his family, or his own physical condition, is inadmissible. *Rooney v. Milwaukee Chair Co.*, 65 Wis. 397; *Benton v. Chicago R. Co.*, 55 Iowa 496; *Chicago v. McCulloch*, 10 Ill. App. 459. *Contra*, *International etc. R. Co. v. Kindred*, 57 Tex. 491; *Johnson v. Chicago etc. R. Co.*, 64 Wis. 425.

But evidence of the pecuniary condition of the parent is admissible. *Cooper v. Lake Shore etc. R. Co.*, 66 Mich. 261; *Hoppe v. Chicago etc. R. Co.*, 61 Wis. 369; *Opsahl v. Judd*, 30 Minn. 126; *Barley v. Chicago etc. R. Co.*, 4 Biss. (U. S.) 430, *Chicago v. Powers*, 42 Ill. 169; *Mulcairns v. Janesville*, 67 Wis. 24.

Sometimes punitive or exemplary damages are allowed. *South & North Ala. R. Co. v. Sullivan*, 59 Ala. 272; *Klingman v. Homes*, 54 Mo. 304, *Field on Damages*, § 600. *Contra*, *Black v. New Orleans etc. Co.*, 10 La. Ann. 33.

But when the suit is for the child's benefit, the bodily suffering, deformity of person, and diminished capacity for labor will justify vindictive damages. *Donnell v. Sanford*, 11 La. Ann. 645.

Local statutes may affect damages. *Kennard v. Burton*, 25 Me. 39;

McCarthy v. Guild, 12 Met. (Mass.) 291.

There can be no recovery by the father for the death of an infant in *ventre sa mere*. *Kansz v. Ryan*, 51 Iowa 232.

1. "When a child under twenty-one is injured, the parent can recover for loss of service until the arrival of the child to that age; and if the disability continues beyond that time, the child may recover for the loss." *Traver v. Eighth Ave. R. Co.*, 4 Abb. App. Dec. (N. Y.) 422; *Houston etc. R. Co. v. Miller*, 49 Tex. 322; *McDowell v. Georgia R. Co.*, 60 Ga. 320.

But a parent is entitled to more than nominal damages for the death of a child twenty years and three months old. *Robel v. Chicago etc. R. Co.*, 35 Minn. 84.

But the parent's damages for loss of service may include time after majority on proof of reasonable expectation of pecuniary benefit. *Johnson v. Missouri Pac. R. Co.*, 18 Neb. 690; *Johnson v. Chicago etc. Co.*, 64 Wis. 425; *Birkett v. Knickerbocker Ice. Co.*, 110 N. Y. 504.

Mortality Tables.—The probable duration of life may be ascertained by mortality tables. *Cooper v. Lake Shore etc. R. Co.*, 66 Mich. 261; *Scheffler v. Minneapolis etc. R. Co.*, 32 Minn. 518.

2. *Teagarden v. McLaughlin*, 86 Ind. 476; 44 Am. Rep. 332; *McCalla v. Wood*, 2 N. J. L. 81; *McManus v. Crickett*, 1 East 106.

A parent cannot be held liable for the wilful trespasses and torts of his infant children when he neither assents to nor ratifies them. *Paul v. Hummel*, 43 Mo. 119; *Baker v. Haldeman*, 24 Mo. 219; 69 Am. Dec. 430; *Schlossberg v. Lahr*, 60 How. Pr. (N. Y.) 450; *Scott v. Watson*, 46 Me. 362.

A father who wilfully, carelessly, and negligently suffers his son of eleven to have in his possession a loaded pistol, cannot be made to respond in damages to one injured thereby. [MYRICK, J.]

responsible for loss resulting to others from the negligence of the child,¹ and it has been held that where a father permits his young children to do, upon his premises, acts which are likely to cause injury to passers-by, he is responsible for an injury so resulting, although he did not, by any express words, authorize or direct the acts.² The modern rule of the civil law holds the father responsible

dissenting.] *Haggerty v. Powers*, 66 Cal. 368; 56 Am. Rep. 101; *Baker v. Morris*, 33 Kan. 580; *Edwards v. Crume*, 13 Kan. 348; *Wilson v. Garrard*, 59 Ill. 51 (children maltreating hogs); *Paulin v. Howser*, 63 Ill. 312; *Schaefer v. Osterbrink*, 67 Wis. 495; *Tift v. Tift*, 4 Den. (N. Y.) 177; *Chandler v. Deaton*, 37 Tex. 406 (the father not liable unless he "counselled or abetted"); *Mandoit v. Ross*, 10 Vict. Law Rep. (Australia) 264.

The minor son of the defendant, while riding his father's horse, but not on the father's business, ran over the plaintiff. *Held*, that the father was not liable. *Smith v. Davenport* (Kan. 1891), 25 Pac. Rep. 851, *citing* INFANTS, vol. 10, p. 668.

A minor son, for purpose of his own, in the absence of his father and without his knowledge, took his father's horse and carriage and left the horse unfastened in the street; the horse being frightened ran away, and the carriage collided with the plaintiff's and injured the same. *Held*, that the father was not liable. *Maddox v. Brown*, 71 Me. 432; 36 Am. Rep. 336.

In *Moon v. Towers*, 8 C. B., N. S. 611, the court by WILLES, J., said: "The tendency of juries, where persons under age have incurred debts, or committed wrongs, to make their relatives pay, should, in my opinion, be checked by the courts. No man ought, as a general rule, to be responsible for acts not his own."

1. A minor son, under contract with his father to clear a parcel of land, did it so negligently that a neighbor's property was destroyed by fire. *Held*, in a suit by the neighbor against the parent, that the latter was liable. *Teagarden v. McLaughlin*, 86 Ind. 476; 44 Am. Rep. 332.

In the case of *Beedy v. Reding*, 16 Me. 362, the minor sons of the defendant, being at the same time members of his family, with his team, hauled away the plaintiff's wood. "This (the court said) could hardly have been done without the defendant's knowledge, if it had not his approbation. It

was his duty to have restrained them from trespassing on his neighbor's property, *Qui non prohibet cum prohibere possit, jubet*. And the maxim may be applied with great propriety to minor children residing with and under the control of their father."

Where injuries were caused to a third party through the negligence of a minor son, while driving the horses and carriage of his father, with his approbation *held*, that the son must be regarded as in the father's employment, and for the purposes of the suit, as his servant, and that the father was liable for the injuries. *Lashbrook v. Patten*, 1 Duv. (Ky.) 317.

And see *Strohl v. Levan*, 39 Pa. St. 177, where the court says, the father "made no objection or endeavor to control his son, and if he did not, it was a presumption which the jury might well make, and which I think they were bound to make, that he assented to what was done in the management of the instrument which did the injury." *Newson v. Hart*, 14 Mich. 233.

Where a minor son, who lives with his father and is under his father's control, commits certain wrongful acts, but where the said acts have not been authorized by the father, are not done in his presence, have no connection with the father's business, are not ratified by the father, and from which the father receives no benefit, the father is not liable in a civil action for damages for such wrongful acts. *Edwards v. Crume*, 13 Kan. 348.

But where the daughter was authorized to answer her father's letters, and inserted libellous matter in one, the father was held not liable. *Harding v. Greening*, 8 Taunt. 42.

In *Dunks v. Grey*, 3 Fed. Rep. 862, the father, who had been enjoined from selling a patented invention, held liable to attachment for sales by a minor child living with him.

2. In an action for an injury caused by the frightening of a horse by boys who shouted and fired pistols as the plaintiff was passing their father's premises, it was proper to show that

for the torts of his minor child unless he can show that he was unable to prevent the tort, and this is the law in *Louisiana*.¹

VII. DUTIES OF CHILDREN—(Compare **RIGHTS OF PARENTS**, V).—At common law there is no legal obligation resting on the child to support his parent, but this duty is generally imposed by statute, at least to the extent of relieving the State of the care of paupers.² The law, therefore, does not imply a promise on the part of the child to pay for necessities furnished without his request to the parent,³ but if the child requests that articles be furnished to his parent, he is liable for them on the general principles of the law of contracts.⁴

such acts had previously been performed by the boys, sometimes in their father's presence. *Hoverson v. Noker*, 60 Wis. 511; 50 Am. Rep. 381.

1. Civil Code of *France*, art. 1384.

The father is liable for damages from his minor son's intentionally or carelessly shooting another boy, not in self-defence. *Marionneaux v. Brugier*, 35 La. Ann. 13; *Cleaveland v. Mayo*, 19 La. 414; *Carmouche v. Bouis*, 6 La. Ann. 96; 54 Am. Dec. 558.

The liability of a father for the act of a minor child is not affected by his absence at the time of the act complained of. *Mullins v. Blaise*, 37 La. Ann. 92.

A minor, while obeying a sheriff's command to serve on a *posse comitatus*, is not subject to the paternal authority; hence, his father is not liable for damages then accruing from an accidental shooting by the minor. *Coats v. Roberts*, 35 La. Ann. 891.

2. *Schouler Dom. Rel.*, § 264; *Gilbert v. Lynes*, 2 Root (Conn.) 168; *Stone v. Stone*, 32 Conn. 142; *Dawson v. Dawson*, 12 Iowa 512; *Lebanon v. Griffin*, 45 N. H. 558; *Gray v. Spalding*, 58 N. H. 345; *Becker v. Gibson*, 70 Ind. 239; *Rex v. Munden*, 1 Stra. 190; *Reg. v. Ireland*, L. R., 3 Q. B. 130; *Waterbury v. Hurlburt*, 1 Root (Conn.) 60. *Edwards v. Davis*, 16 Johns. (N. Y.) 281; *Duffey v. Duffey*, 44 Pa. St. 399; *Johnson v. Ballard*, 11 Rich. (S. Car.) 178; *Smith v. Lapeer Co.*, 34 Mich. 58.

The statute requiring a grandchild to support his indigent grandparents, extends to the case of his maternal grandparents. *Ex parte Hunt*, 5 Cow. (N. Y.) 284; *Wethersfield v. Montague*, 3 Conn. 507; *Whiting's Case*, 3 Pittsb. (Pa.) 129.

The statute, requiring certain relatives to support each other, does not

require the son-in-law to support the wife's parents. *Mack v. Parsons*, Kirby (Conn.) 155.

3. *Cook v. Bradley*, 7 Conn. 57; *Lebanon v. Griffin*, 45 N. H. 558; *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Loomis v. Newhall*, 15 Pick. (Mass.) 159.

4. *Gordon v. Dix*, 106 Mass. 305; *Becker v. Gibson*, 70 Ind. 239.

In an action to recover for support and maintenance of the defendants' father, it appeared that the defendants entered into a written contract with the plaintiff, whereby she agreed to support the defendants' father, during his natural life, and the defendants agreed to pay therefor a certain sum per week. The defendants gave notice after several years that they abrogated the contract, and required the plaintiff not to furnish support any longer under the contract. The plaintiff, disregarding this notice, continued for several years to furnish support to the father, and at the end of that time brought this action to recover for the same. *Held*, that she was entitled to the compensation specified in the contract. *Marsh v. Blackman*, 50 Barb. (N. Y.) 329.

Where a child, at the request of his brothers, furnishes support to a parent, they will be liable upon an implied promise to pay. *Stone v. Stone*, 32 Conn. 142. Compare *Estate of Olivier*, 18 La. Ann. 594.

A father-in-law went to live with his son-in-law, saying he would board nowhere else, and that he had enough to pay for his boarding. After his death, in an action by the son-in-law against his administrator to recover for board, attendance, etc., the court instructed the jury that the plaintiff could not recover without clear and satisfactory proof of an express contract between the plaintiff and the defendant inter-

VIII. RIGHTS OF CHILDREN—1. To Use the Property of the Parent.

—The right of the child to bind the parent for necessities has already been treated,¹ but general transactions require proof of actual authority.² It seems, however, that a child has the right to use property belonging to his parent; but not to dispose of it without the consent of the parent.³ The child has no absolute right of inheritance from the parent.⁴

2. Emancipation—(See also MASTER AND SERVANT, vol. 14, p. 756).—A minor child may be freed from the parental control by becoming what is termed emancipated—that is, released from his obligations to his parent; but emancipation is not a right which can be enforced by the child, but rather a privilege which is allowed by the parent, although its consequence is to give certain rights to the child.⁵ As against the public, emancipation does not enlarge the infant's power to bind himself by contract,⁶ but as against the parent, it gives the child the right to his own wages or earnings.⁷ Emancipation may take place in one of several ways: First, by a formal agreement, either in writing or by parol, between parent and child, by which the parent sells or gives to the child

tate, and directed a verdict for the defendant. *Held*, that such instruction and direction was error. *Smith v. Milligan*, 43 Pa. St. 107.

1. See, *supra*, this title, *Duties of Parents*.

2. *Greenfield Bank v. Crafts*, 2 Allen (Mass.) 269.

3. "Where one person uses the property of another who is as to him a stranger, the law implies a promise to pay an equivalent for its use. Yet where members of the same family do the same thing in the ordinary intercourse of life, no such implication will follow; but if an action can be sustained at all, an express promise must be averred and proved. . . . Can there be any doubt that the child may use the books in the father's library; hunt with his gun and dogs; sail in his yacht, and even invite a friend to participate with him in these pursuits or amusements? We think not." *Bennett v. Gillette*, 3 Minn. 423; 78 Am. Dec. 774. In this case the plaintiff's minor daughter invited the defendant to ride with her. The horses ran away and were killed. *Held*, that the defendant was not liable in trover for taking the horses.

But the child has no right to lend the parent's property. *Johnson v. Stone*, 40 N. H. 197.

A father is entitled to recover in his own name money paid by his son, eleven years old, to a shop keeper for

fancy articles, not necessary for the child, on returning the articles. *Sequin v. Peterson*, 45 Vt. 255.

4. *Schouler Dom. Rel.*, § 265; *Eversley, Dom. Rel.*, p. 600; *Ex parte Hunt*, 5 Cow. (N. Y.) 284; *Bosworth v. Beiller*, 2 La. Ann. 293. *Compare Van Dyne v. Vreeland*, 12 N. J. Eq. 142.

5. *Eversley Dom. Rel.*, p. 599; *Schouler Dom. Rel.*, § 267; *Wood on Master and Servant* (2nd ed.), § 25, *et seq.*

Emancipation requires no consideration. *Fort v. Gooding*, 9 Barb. (N. Y.) 371; *Stanley v. National Union Bank*, 115 N. Y. 122.

6. *Person v. Chase*, 37 Vt. 647; *Mason v. Wright*, 13 Met. (Mass.) 306; *Wood on Master and Servant* (2nd ed.), § 32.

7. Revocability of Emancipation.—"A father may, by agreement with his minor child, relinquish to the child the right he has to his services and earnings, and he will afterward have no right to claim his wages from his employers, but the child may claim and recover them in his own name for his own benefit.

"Such an agreement operates as a release of the father's right, and he has no power to claim or resume it afterward; nor will his right revive, unless from the actual agreement of the minor, or one fairly inferable from the circumstances and conduct of the parties.

"An agreement of the father with his

his time and earnings during the whole or any part of his minority.¹ Second, emancipation may be inferred from the conduct of the parent in permitting the child to use his time as though he were emancipated;² but in this case it is necessary to show a complete interruption of the filial relation, as distinguished from a mere

són stands on a different footing from his agreement with a third person to give up to him the control of his child for a limited time, or during his minority. As between them, the right of the father over his child has been held a personal trust which cannot be transferred unless by indenture under the statute, and which it has been held the father may therefore resume at his pleasure; though upon this point the decisions do not all agree." *Hall v. Hall*, 44 N. H. 293; *Torrens v. Campbell*, 74 Pa. St. 470. *Compare Morris v. Low*, 4 Stew. & P. (Ala.) 123; *Chase v. Smith*, 5 Vt. 556; *Janes v. Cleghorn*, 54 Ga. 9.

Emancipation of a minor child, by parol agreement and without consideration, is revocable until acted upon. *Abbott v. Converse*, 4 Allen (Mass.) 530. In this case the court, by CHAPMAN, J., says: "In *Kaufelt v. Moderwell*, 21 Pa. St. 222, there is a *dictum* that 'the private arrangement between father and son is revocable at the father's pleasure; but this cannot be true as a general proposition.'"

"We are of the opinion that when a minor son who has been given his time and his earnings by his father, returns to his father without employment, it is competent for the father to revoke the gift so far as it relates to future employment. . . . The gift of time and earnings by a father to his infant child does not establish a new *status*, but is in the nature of a license." *Dickinson v. Tallmage*, 138 Mass. 249.

Contra, "The only effect of this emancipation, as it is called, was to protect, so long as it continued, the employer in paying his wages to the minor himself. The father could revoke the privilege at any time he chose, and collect and receive his entire wages. *Agricultural etc. Assoc. v. State*, 71 Ind. 86; *Soldanels v. Missouri Pac. R. Co.*, 23 Mo. App. 516; *Everett v. Sherfey*, 1 Iowa 356; *Ream v. Watkins*, 27 Mo. 516.

1. Emancipation by Agreement.—*Morse v. Welton*, 6 Conn. 547; *Atwood v. Holcomb*, 39 Conn. 270, *Wolcott v. Rickey*, 22 Iowa 171; *Mason v. Hutch-*

ins, 32 Vt. 780; *Chase v. Smith*, 5 Vt. 556 (parol); *Hall v. Hall*, 44 N. H. 293; *Rush v. Vought*, 55 Pa. St. 437; *McCloskey v. Cyphert*, 27 Pa. St. 220; *Boynton v. Clay*, 58 Me. 236; *Jenney v. Alden*, 12 Mass. 375; *Wood v. Corcoran*, 1 Allen (Mass.) 405; *Bell v. Bumpus*, 63 Mich. 375; *Shute v. Dorr*, 5 Wend. (N. Y.) 204; *Snediker v. Everingham*, 27 N. J. L. 143; *State v. Barrett*, 45 N. H. 15; *State v. Smith*, 6 Me. 462.

The emancipation may be for a portion of the minority. *Tillotson v. McCrillis*, 11 Vt. 477. *Compare Winn v. Sprague*, 35 Vt. 243. See also *APPRENTICE*, vol. 1, p. 36.

An indenture of apprenticeship, inoperative as against the child by reason of informality, may yet be proof of the intent of the parent to relinquish his right to the child's earnings. *Kerwin v. Wright*, 59 Ind. 369. *Compare Bolton v. Miller*, 6 Ind. 262; *Nickerson v. Easton*, 12 Pick. (Mass.) 110; *State v. Taylor*, 3 N. J. L. 58.

2. Emancipation by Inference from Conduct.—*Johnson v. Terry*, 34 Conn. 259; *Whiting v. Earl*, 3 Pick. (Mass.) 201; *Bener v. Edginton*, 66 Iowa 105; *Holliday v. Miller*, 29 W. Va. 424; *Monaghan v. School Dist. No 1*, 38 Wis. 100; *Fairhurst v. Lewis*, 23 Ark. 435; *Bobo v. Bryson*, 21 Ark. 387; *Canovar v. Cooper*, 3 Barb. (N. Y.) 115; *Shute v. Dorr*, 5 Wend. (N. Y.) 204; *Dennysville v. Trescott*, 30 Me. 470; *West Gardiner v. Manchester*, 72 Me. 509; *Beaver v. Bare*, 104 Pa. St. 58; 49 Am. Rep. 567; *Cloud v. Hamilton*, 11 Humph. (Tenn.) 104; *Cahill v. Patterson*, 30 Vt. 592; *Huntoon v. Hazelton*, 20 N. H. 388; *Ream v. Watkins*, 27 Mo. 516; *Dierker v. Hess*, 54 Mo. 246; *Penn v. Whitehead*, 17 Gratt. (Va.) 503; *Corey v. Corey*, 10 Pick. (Mass.) 29; *Dodge v. Favor*, 15 Gray (Mass.) 82; *Campbell v. Campbell*, 11 N. J. Eq. 268; *Lyon v. Bolling*, 14 Ala. 753.

Where the father permits his son to improve and settle a tract of land, the title will be in the minor as effectually as though he was of full age.

Evidence that a minor was in the habit of doing business on his own ac-

permission by the parent for the child to work on his own account.¹ Third, if the parent forces the child to leave the house, or deserts or abandons him, the child is released from all filial duties which the law will enforce and may seek his own welfare in his own way. Thus an emancipation may be accomplished by wrong and violence and be sustained by law, if the injured party chooses to accept the situation.² Fourth, the marriage of an infant with the consent of the parent works a substantial emancipation, giving the child the right to apply his earnings to the support of his own family;³ but the courts are reluctant to allow an infant by his own act to deprive his parent of his services, and it has been held that marriage without the consent of the parent does

count and in his own name, and that he purchased his own supplies of provisions, and became responsible for them is admissible to prove his emancipation. *Lackman v. Wood*, 25 Cal. 147.

Where a son over twenty years of age, having been a clerk and receiving his own wages, though living with his father, went to California with the consent of his father, who advanced him money to pay his passage, but neither received his earnings nor made any provision for his support while abroad—*held*, that these facts warranted a finding that it was the understanding when the son left that his father's control over and liability for him had ceased, and that the father was not therefore liable for necessities furnished him thereafter. *Johnson v. Gibson*, 4 E. D. Smith (N. Y.) 231.

1. "That a daughter should leave home for temporary employment, even though she might receive the proceeds for her own use, is not so uncommon an occurrence as to authorize an inference of any change in the parental and filial ties. It is the father alone who can emancipate the child. Here is no relinquishment on his part of the right of control over, or the repudiation of his parental obligations to, the child; simply an assent to a particular course of life on her part for the time being; nothing inconsistent with his right to recall her, or claim her earnings at any time in the future. Hence there is an entire failure to sustain an emancipation as defined by the authorities. *Searsmont v. Thorndike*, 77 Me. 504; *Frankfort v. New Vineyard*, 48 Me. 565; *Sumner v. Sebec*, 3 Me. 223; *Monaghan v. School Dist. No. 1*, 38 Wis. 100; *Clinton v. York*, 26 Me. 167 ("preservation or destruction of the

parental and filial relations"); *Bangor v. Readfield*, 32 Me. 60; *Arnold v. Norton*, 25 Conn. 92; *Stiles v. Granville*, 6 Cush. (Mass.) 458.

"We are to distinguish, in fact, between a license for the child to go out and work temporarily and the more formal renunciation of parental rights." *Schouler Dom. Rel.*, § 267 *a*.

2. **Emancipation by Desertion.**—*Lowell v. Newport*, 66 Me. 78.

"This is termed the presumption of necessity." *Schouler Dom. Rel.*, § 267 *a*. And may take place even when the child is six months old. *Liberty v. Palermo*, 79 Me. 473; *Wodell v. Coggeshall*, 2 Met. (Mass.) 89; *Nightingale v. Withington*, 15 Mass. 272; *Brown v. Ramsay*, 29 N. J. L. 117; *Atwood v. Holcomb*, 39 Conn. 270; *Gary v. James*, 4 Desaus. (S. Car.) 185; *Stanbury v. Bertron*, 7 W. & S. (Pa.) 362.

A father who when able to support his minor son forces him to labor abroad for a livelihood is not entitled to his earnings. The law implies an emancipation; and the son may maintain an action for money had and received, if the father appropriates the earnings to another use than that for which the son delivered them to him. *Farrell v. Farrell*, 3 Houst. (Del.) 633.

Where the father turns the son out of doors, he cannot be heard to say that he had no mental intention of emancipating the child. *McCarthy v. Boston etc. R. Co.*, 148 Mass. 550.

3. **Marriage.**—*Dick v. Grissom*, 1 Freem. Ch. (Miss.) 428; *White v. Henry*, 24 Me. 531, 35 Am. Rep. 119; *Aldrich v. Bennett*, 63 N. H. 415; 56 Am. Rep. 529; *State v. Scott*, 30 N. H. 274; *Holtz v. Dick*, 42 Ohio St. 23; *Worcester v. Marchant*, 14 Pick. (Mass.) 510; *Taunton v. Plymouth*, 15

not give the infant a right to retain his own earnings.¹ Fifth, enlistment in the army or navy emancipates the infant so long as the service continues.² Sixth, a child is emancipated on reaching his majority, *ipso facto*.³ Emancipation is a fact to be proved and cannot be presumed;⁴ but the mere fact that the child continues to live at home with his parents does not prevent emancipation from taking place.⁵

Mass. 203; *Beggs v. State*, 55 Ala. 108; *Sherburne v. Hartland*, 37 Vt. 528; *Northfield v. Brookfield*, 50 Vt. 62; *Burr v. Wilson*, 18 Tex. 367; *Rex v. Everton*, 1 East 526.

In *England* this seems to be the only recognized method of emancipation. *Rex v. Wilmington*, 5 B. & A. 525; *Rex v. Roach*, 5 T.R. 247.

1. *White v. Henry*, 24 Me. 531; 35 Am. Rep. 119. But such assent may be inferred. *Bucksport v. Rockland*, 56 Me. 22.

Where, after the application of a minor to be emancipated has been on opposition of his tutor rejected, the minor marries, without the latter's knowledge, in another State, he is not thereby emancipated, and cannot demand an account and settlement. *Louisiana Civ. Code*, art. 367, refers to marriages authorized by, not those in fraud of, the law. *Maillefer v. Saillot* 4 La. Ann. 375. Compare *Porch v. Fries*, 18 N. J. Eq. 204.

"But, while marriage may not emancipate a male minor in all cases, it seems that a female minor is thus emancipated, because the husband is in law entitled to her society." *Wood's Inst.* 64.

2. *Rex v. Walpole St. Peters*, 1 W. Bl. 699; *Rex v. Stanwix*, 5 T. R. 670; *Rex v. Rotherfield Greys*, 1 B. & C. 345. See *Rex v. Woburn*, 8 T. R. 479. And see, *supra*, this title, *Right to Child's Services and Earnings*.

Service in the police force does not emancipate. *Reg. v. Selborne*, 2 E. & E. 275; 29 L. J., M. C. 56.

3. A child, upon arriving at full age, will be held, *prima facie*, to be emancipated, notwithstanding he continues to be a member of his father's family, unless the presumption be rebutted by showing that he was not in fact emancipated, but that he continued to reside in the family of the parent upon the same terms as during his minority. *Poultney v. Glover*, 23 Vt. 328; *State v. Shreve*, 1 N. J. L. 230. This rule does not apply to a child of unsound

mind. *Fremont v. Mt. Desert*, 36 Me. 390; *Scranton Poor District v. Danville*, 106 Pa. St. 446; *Overseers of Washington v. Overseers of Beaver*, 3 W. & S. (Pa.) 548. Or to children unable to care for themselves. *Overseers of Gregg v. Overseers of New Berlin*, (Pa. 1887), 8 Cent. Rep. 527.

4. **Emancipation for the Jury.**—*Beaver v. Bare*, 104 Pa. St. 58, 49 Am. Rep. 567; *Delaware Co. Nat. Bank v. Headley* (Pa. 1886), 2 Cent. Rep. 374; *Sumner v. Sebec*, 3 Me. 223. Compare *Clinton v. York*, 26 Me. 167. See also *Clark v. Fitch*, 2 Wend. (N. Y.) 459. The presumption that a minor is not emancipated is not to be taken by a jury as an element of evidence. *Lisbon v. Lyman*, 49 N. H. 553. "There can be no presumption against the father's express declarations." *Dodge v. Favor*, 15 Gray (Mass.) 82. And the proof should be clear and strong. *Monaghan v. School Dist. No. 1*, 38 Wis. 100. Compare *West Gardiner v. Manchester*, 72 Me. 509.

5. 'The emancipation of the son from the father's control may be as perfect when they both live together under the same roof as if they were separated. The father's renunciation of all legal right to the son's labor is not the less absolute because other family ties remain unbroken, and the son's security in his rights of property would not at all be increased by turning his father out of doors.' *McCloskey v. Cyphert*, 27 Pa. St. 220. In this case the father was insolvent and was living with a minor son who had leased a farm.

"It is not necessary that the father, in order to give his minor son the privilege of receiving the fruits of his own labor, should proclaim the fact from the housetops, or accompany it by some token or ceremonial, as open and as odious as that which formerly attended the manumission of a slave; nor is it necessary to accomplish that end that the son should cease to be a member of his father's family; that

The effect of emancipation is to give the child the right to his own earnings,¹ which cannot be reached by the creditors of the father.² The father has no longer any control of the property of the child,³ and is not bound on any implied promise to pay for his support; in short,⁴ the child may contract with the parent as though he were a stranger.⁵ Where a child has been emancipated he ceases to follow any settlement under the pauper laws thereafter acquired by his father.⁶

3. Suits Against Parents.—Suits of children against parents are not encouraged by the courts, unless to redress clear and palpable injustice. Filial duty should restrain the child from exposing

the dearest domestic ties should be widely sundered, and he driven like some alien or outcast from beneath the paternal roof. The fact that the father has thus relinquished his claims to the son's earnings, may be established either by direct evidence or be implied from circumstances; and where such relinquishment has been *bona fide* effectuated it does not lie in the power of some prowling creditor to wrest from the son the gains he has achieved by honest industry, under the specious and covetous pretext that the property belongs to the father." *Dierker v. Hess*, 54 Mo. 246.

If a daughter after arriving at full age is out at service the greater part of the time, and is free to go where she pleases and control her wages, she is *prima facie* emancipated, although she continues to have her home at her father's in the ordinary way of unmarried daughters. *Hardwick v. Pawlet*, 36 Vt. 320; *Johnson v. Silsbee*, 49 N. H. 543.

1. Effect of Emancipation.—Where a minor is emancipated, his earnings go to his administrator, upon his decease, to be distributed according to law. *Smith v. Knowlton*, 11 N. H. 191; *Lord v. Poor*, 23 Me. 569; *Morse v. Welton*, 6 Conn. 547; *Bobo v. Bryson*, 21 Ark. 387; *Fairhurst v. Lewis*, 23 Ark. 435; *Lyon v. Bolling*, 14 Ala. 753; *Rush v. Vought*, 55 Pa. St. 437; *Chase v. Smith*, 5 Vt. 556; *Boobier v. Boobier*, 39 Me. 406; *Monaghan v. School Dist. No. 1*, 38 Wis. 100.

Persons dealing with a duly emancipated minor are not required to look beyond the decree; he is estopped from invoking a nullity thereof. *Allison v. Watson*, 36 La. Ann. 616.

2. Creditors of Parent.—*Johnson v. Silsbee*, 49 N. H. 543; *Weeks v. Leighton*, 5 N. H. 343; *Bray v. Wheeler*, 29 Vt. 514; *Chase v. Elkins*, 2 Vt. 290;

Lord v. Poor 23 Me. 569; *Manchester v. Smith*, 12 Pick. (Mass.) 113; *McCloskey v. Cyphert*, 27 Pa. St. 220; *Jenison v. Graves*, 2 Blackf. (Ind.) 449.

A minor who had for years been doing business for himself with his own means and with his father's consent, and had thereby acquired property, invested a sum of money in a homestead for his father's family, which was conveyed to the mother. *Held*, that the father's creditors could not subject the homestead to the payment of their debts. *Wolcott v. Rickey*, 22 Iowa 171; *Campbell v. Campbell*, 11 N. J. Eq. 268; *Wilson v. McMillan*, 62 Ga. 16. And see, *supra*, this title, *Rights to Child's Services and Earnings*.

3. *Francisco v. Benepe*, 6 Mont. 243.

4. *Varney v. Young*, 11 Vt. 258.

5. The parent agreed with two daughters he had educated, that they should maintain themselves and receive their own earnings. They both engaged in teaching away from home, and loaned part of their earnings to their father, who gave a mortgage to secure this debt and also money owed to one daughter for household services under an agreement. *Held*, that the mortgage was valid. *Stanley v. National Union Bank*, 115 N. Y. 122; *Wright v. Dean*, 79 Ind. 407; *Steel v. Steel*, 12 Pa. St. 64; *Jenney v. Alden*, 12 Mass. 375; *Lackman v. Wood*, 25 Cal. 147. But the contract must be proved. *Hall v. Hall*, 44 N. H. 293. And the presumption is that services rendered by a child to his parent are gratuitous. *Albee v. Albee*, 3 Oregon 321; *Barrett v. Barrett*, 5 Oregon 411; *Titman v. Titman*, 64 Pa. St. 480; *Heywood v. Brooks*, 47 N. H. 231; *Smith v. Smith*, 30 N. J. Eq. 564.

6. Settlement.—*Orneville v. Glenburn*, 70 Me. 353. Compare *North Yarmouth v. Portland*, 73 Me. 108.

the faults of its parents or worrying them with litigation unless compelled by extreme necessity.¹ Still, there is nothing to prevent a suit by a child against a parent, although the reported cases are extremely few, especially for injuries to the child;² but the parent cannot be held liable for assault for force used in asserting his legal rights.³

IX. COMMITMENT OF CHILDREN TO PENAL AND CHARITABLE INSTITUTIONS.—The law on this subject is entirely statutory, and in many States there are statutes authorizing and requiring the commitment of homeless or vicious children to public institutions devoted to the reformation and care of children devoid of parental care, and in many States the courts are authorized to commit such children to institutions organized by private charity for similar purposes.⁴ The principles involved in the construction of such

Many of the cases on emancipation involve some question as to settlement under the poor laws. *Brewer v. East Machias*, 27 Me. 489. See also **POOR AND POOR LAWS.**

1. *Bird v. Black*, 5 La. Ann. 189.

2. "The question, moreover, is sometimes raised in these days, whether a young son or daughter occupying the filial relation may not, on becoming of age, sue the parent or *quasi* parent for alleged mal-treatment or other injury. With reference to a blood parent, however, all such litigation seems abhorrent to the family discipline which all nations, rude or civilized, have so steadily inculcated, and the privacy and mutual confidence which should obtain in the household. An unkind and cruel parent may and should be punished at the time of the offence, if an offender at all, forfeiting custody, and suffering criminal penalties, if need be; but for the minor child who continues, it may be for long years, at home and un-emancipated, to bring a suit, when arrived at majority, free from parental control and under counter-influences, against his own parent, either for services accruing during infancy, or to recover damages for some stale injury, real or imagined, referable to that period, appears quite contrary to good policy. The courts should discourage such litigation." *Schouler Dom. Rel.*, § 275.

"And here a reason (which is almost a *reductio ad absurdum*) may be urged why a civil action should not be brought: namely, that if the child recovered damages against its father, and died under age, the father, as next of kin to the child, would get back the

unexpended portion of the original amount." *Eversley Dom. Rel.*, p. 60r. Compare *Schrimpf v. Settegast*, 36 Tex. 296.

3. It is as unlawful for an adult child to create a disturbance in a family as for a mere stranger, and the father may as rightfully interpose to preserve the good order and quiet of his household. So where a married daughter engaged in an angry dispute with the servant and refused to desist at her father's request, he was held justified in using force to compel peace. *Smith v. Slocum*, 62 Ill. 354.

Assault and battery will not lie against a person, who, being commissioned by a father living in Cuba to bring his son there from school in New York, does so, without using undue force or personal violence. *Hernandez v. Carnobeli*, 4 Duer (N. Y.) 642.

A son can justify an assault and battery in defence of his father only where the latter was first assailed and was resisting the attack when the former interfered, and only to the extent of such force as was necessary for the father's defence. *Obier v. Neal*, 1 *Houst. (Del.)* 449.

4. An excellent example of these laws may be found in "Acts of Assembly State *Maryland*, 1886, ch. 57. § 1." Any minor, having no parent or guardian, and being destitute of means of support, or suffering through the neglect, bad habits or vicious conduct of its parent, guardian, or other custodian, may be arrested and brought before any judge of a court of record or justice of the peace, and committed by said judge or justice of the peace to any charitable reformatory or other

statutes, however, are founded on familiar principles of law, and have enabled the courts to enlarge the scope of these institutions. Where the commitment of the minor is for a distinct criminal offence he is entitled to all the regular formalities of criminal procedure, and statutes authorizing the summary commitment of minor criminals without a trial by jury have been held unconstitutional.¹ But where the minor has committed no criminal offence the State has authority to commit to a child-saving institution by summary procedure any child who, destitute of parental care, seems likely to grow up to be a charge upon the State either as a criminal or as a pauper. The State interferes in its capacity of *parens patriæ* and assumes the guardianship of such children, and statutes authorizing such commitments are not unconstitutional as arbitrarily interfering with the personal liberty of the citizen guaranteed by the constitution,² even though made without notice to the parent. The right of the parent is sufficiently secured by his right to enquire into the propriety of the commitment by a writ of *habeas corpus*, and to have the custody restored to him on showing the removal of the cause and his competency

institution for the care and custody of minors, incorporated under the laws of this State, subject to the discipline regulations and powers of such institution. See also, Penal Code of *New York*, ch. 3, as amended by laws 1884, ch. 46.

1. *Commonwealth v. Horregan*, 127 Mass. 450; *State v. Ray*, 63 N. H. 406; 55 Am. Rep. 458. But see *Prescott v. State*, 19 Ohio St. 184; 2 Am. Rep. 388, where it was held that a statute authorizing the grand jury to commit a minor accused of crime to a reform school without further process was constitutional. But a statute authorizing the court, after the due conviction of the minor, to suspend sentence, and commit the minor to a private charitable institution and have the county pay the cost of his maintenance is constitutional. *Boys' and Girls' Aid Soc. v. Reis*, 71 Cal. 627.

2. "This is not a penal statute, and the commitment to the public officers is not in the nature of punishment. It is a provision by the commonwealth, as *parens patriæ*, for the custody and care of neglected children, and is intended only to supply to them the parental custody which they have lost. . . . It does not punish the infant by confinement, nor deprive him of his liberty; it only recognizes and regulates, as in providing for guardianship and apprenticeship the parental custody which is an incident of in-

fancy." *Farnham v. Pierce*, 141 Mass. 203.

"The house of refuge is not a prison, but a school. . . . The object of the charity is reformation by training its inmates to industry, by imbuing their minds with the principles of morality and religion, by furnishing them with the means to earn a living; and, above all, by separating them from the corrupting influence of improper associates. To this end, may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriæ*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it. That parents are ordinarily entrusted with it is because it can seldom be put in better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance. The right of parental control is a natural, but not an inalienable one. It is not excepted by the declaration of rights out of the subject of ordinary legislation; and it consequently remains subject to the ordinary legislative power, which, if wantonly or inconveniently used, would soon be constitutionally restricted, but the competency of which, as the government is

constituted, cannot be doubted as to abridgment of indefeasible rights by confinement of the person, it is no more than what is borne, to a greater or less extent, in every school; and we know of no natural right to exemption from restraints which conduce to an infant's welfare. *Ex parte Crouse*, 4 Whart. (Pa.) 9.

"In the first place, we cannot understand that the detention of the child at one of these schools should be considered as imprisonment any more than its detention in the poor-house, any more than the detention of any child at any boarding-school, standing for the time in *loco parentis* to the child. Parental authority implies restraint, not imprisonment. And every school must necessarily exercise some measure of the parental power of restraint over children committed to it. And when the State, as *parens patriæ*, is compelled by the misfortune of the child to assume for it paternal duty, and to charge itself with its nurture, it is compelled also to assume parental authority over it. This authority must necessarily be delegated to those to whom the State delegates the nurture and education of the child. The State does not, indeed, we might say, could not intrude this assumption of authority between parent and child standing in no need of it. It assumes it only upon the destitution and necessity of the child, arising from want or default of parents. And in exercising a wholesome parental restraint over the child, it can be properly said to imprison the child no more than the tenderest parent exercising like power of restraint over children. In the second place, the statute, certainly so far as it is involved here, does not go on failure in the measure of support or education by the parent or on some nice fault finding with the course of the parent with the child. It goes on the total failure of the parent to provide for the child. And it is difficult to comprehend the right of a parent to complain, that the discharge by the State of his own duty to his child, which he has wholly failed to perform, is an imprisonment of the child as against his parental right in it." *Milwaukee Industrial School v. Milwaukee Co.*, 40 Wis. 328.

"In coming to this conclusion we have not overlooked the decisions in other States. In these cases the deten-

tion of abandoned, dependent, or depraved children in houses of refuge, or in industrial or reform schools, is upheld upon the ground that the power of magistrates and county courts to commit, and of such institutions to detain such children, is of the same character of the jurisdiction exercised by the court of chancery over the persons and property of infants, having foundation in the prerogative of the crown, flowing from its general power and duty as *parens patriæ* to protect those who have no other legal protector. . . .

As to the soundness of the reasons given in these cases we have nothing to say. No one of them is an authority for the commitment of a minor charged with the commission of a crime to such an institution, without some kind of a trial and conviction." *State v. Ray*, 63 N. H. 406; 55 Am. Rep. 458; *Prescott v. State*, 19 Ohio St. 184; 2 Am. Rep. 388; Cincinnati House of Refuge v. Ryan, 37 Ohio St. 197; *In re Kruse*, 2 Cin. Sup. Ct. (Ohio) 71; *Jarrard v. State*, 116 Ind. 98; *In re Donahue*, 1 Abb. N. Cas. (N. Y.) 1; 52 How. Pr. (N. Y.) 251; *Roth v. House of Refuge*, 31 Md. 329. And see *Hibbard v. Bridges*, 76 Me. 324. And such statutes are not in contravention of art. 5 of amendments to the constitution of the United States, or §§ 5 and 10 of article 1 of such constitution. *Prescott v. State*, 19 Ohio St. 184; 2 Am. Rep. 388, citing *Twitchell v. Commonwealth*, 7 Wall. (U. S.) 321.

In *Illinois*, the court at one time declared unconstitutional a statute authorizing the commitment to a reform school of children who were "destitute of proper parental care, and growing up in mendicancy, ignorance, idleness and vice." This case is important and valuable because it stands substantially alone in American jurisprudence, and also, because of its vigorous attack on the evident socialistic tendency of these statutes. The court says: "What is proper parental care? The best and kindest parents would differ in the attempt to solve the question. No two can scarcely agree; and when we consider the watchful supervision, which is so unrelenting over the domestic affairs of others, the conclusion is forced upon us, that there is not a child in the land who could not be proved by two or more witnesses to be in this sad condition. Ignorance, idleness, vice, are relative terms. Ignorance is always preferable to error,

but, at most, is only venial. It may be general or it may be limited. Though it is sometimes said, that 'idleness is the parent of vice,' yet the former may exist without the latter. It is strictly an abstinence from labor or employment. If the child perform all its duties to parents and to society, the State has no right to compel it to labor. Vice is a very comprehensive term. Acts, wholly innocent in the estimation of many good men, would, according to the code of ethics of others, show fearful depravity. What is the standard to be? What extent of enlightenment, what amount of industry, what degree of virtue, will save from the threatened imprisonment? In our solicitude to form youth for the duties of civil life we should not forget the rights which inhere in both parents and children. The principle of the absorption of the child in, and its complete subjection to, the despotism of the State, is wholly inadmissible in the modern civilized world."

"Even criminals cannot be convicted and imprisoned without due process of law, without a regular trial according to the course of the common law. Why should minors be imprisoned for misfortune? Destitution of proper parental care, ignorance, idleness and vice, are misfortunes, not crimes. In all criminal prosecutions against minors, for grave and heinous offences, they have the right to demand the nature and cause of the accusation, and a speedy public trial by an impartial jury. All this must precede the final commitment to prison. Why should children, only guilty of misfortune, be deprived of liberty without 'due process of law'?"

"It cannot be said that in this case there is no imprisonment. This boy is deprived of a father's care; bereft of home influences; has no freedom of action; is committed for an uncertain time; is branded as a prisoner; made subject to the will of others, and thus feels that he is a slave. Nothing could more contribute to paralyze the youthful energies, crush all noble aspirations, and unfit him for the duties of manhood."

"These laws provide for the safe-keeping of the child; they direct his 'commitment,' and only a ticket of leave, or the uncontrolled discretion of a board of guardians will permit the imprisoned boy to breathe the pure air of heaven outside his prison walls, and to feel the instincts of manhood by

contact with the busy world. The *mittimus* terms him a 'proper subject for commitment,' directs the superintendent to 'take his body,' and the sheriff endorses upon it, 'executed by delivering the body of the within named prisoner.' The confinement may be from one to fifteen years, according to the age of the child. Executive clemency cannot open the prison doors, for no offence has been committed. The writ of *habeas corpus*, a writ for the security of liberty, can afford no relief, for the sovereign power of the State, as *parens patriæ*, has determined the imprisonment beyond recall. Such a restraint upon natural liberty is tyranny and oppression." *People v. Turner*, 55 Ill. 280; 8 Am. Rep. 645. And see Valuable Note by I. F. Redfield, in 10 Am. Law Reg., N. S. 366.

This decision was greatly modified in *In re Ferrier*, 103 Ill. 367, 42 Am. Rep. 10, where the court says: "We find here no more than such proper restraint which the child's welfare and the good of the community manifestly require, and which rightly pertains to the relations above named, and find no such invasion of the right to personal liberty as requires us to pronounce this statute to be unconstitutional. The decision in *People v. Turner*, 55 Ill. 280; 8 Am. Rep. 645, as to the reform school, we do not think should be applied to this industrial school."

For the Legislature.—In *McLean v. Humphreys*, 104 Ill. 378, the *Illinois* court still further modified the position taken in *People v. Turner*, and laid down the true rule, that the question of procedure was one for the legislative discretion, with which it was no part of the duty of the courts to interfere. The court says: "Assuming then, as we do, the legislature has the right to provide for the education, support and control of these unfortunate beings, it clearly has the right also to provide the necessary instrumentalities or agencies for the accomplishment of these objects. The claim that the act in question is not as well guarded in some respects as might be with a view of preventing abuses, even if well founded, is a matter that addresses itself to the legislative rather than the judicial department of government, and would be no ground for declaring the act unconstitutional."

"The right of the parent to ruin his child either morally or physically has

and fitness.¹ There must be due regard paid to the rights of a child, however, and serious informalities in the commitment, or an exercise of authority unwarranted by law will entitle the child to his release;² but this rule is to be construed for the benefit of the infant, and technical objections will not be considered when the

no existence in nature. The subject has always been regarded as within the purview of legislative authority. How far this interference should extend is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with this exercise of legislative judgment; and to do so would be to invade the province which by the constitution is assigned exclusively to the law making power." *State v. Clottu*, 33 Ind. 409.

1. "We think that the commitment is evidence of the condition of the child, as in need of restraint on account of the neglect of the parent, at the time of the commitment; but that it is not binding upon the father as an adjudication upon his rights, and that he has a right to show that the cause stated for the commitment does not now exist; that he is competent and fit to have the care of his child, and that the welfare of the child will permit of her removal from the present custody." *Farnham v. Pierce*, 141 Mass. 203.

The commitment of a child without proper parental care to the custody of the State board of charities, under *Massachusetts* St. 1882, ch. 181, § 3, is not a conclusive adjudication against the father's right to its custody during the term of the commitment, though *St. Massachusetts* 1886, ch. 330, amends the act of 1882 so as to require that the father shall have notice, and a full hearing and the right of appeal to the superior court; the provision of the statute that the custodian may discharge the child when the object of the commitment is accomplished before the term expires conferring a power affecting the father's rights, the exercise of which he has therefore the right to demand whenever the facts authorizing it exist. KNOWLTON, DEVENS and HOLMES, JJ., dissenting. *In re Kelley*, 152 Mass., 432; *Prescott v. State*, 19 Ohio St. 184; 2 Am. Rep. 388. Even though the statute forbids the writ of *habeas corpus*. *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197; *Goodchild v.*

Foster, 51 Mich. 699; *In re Kruse*, 2 Cin. Sup. Ct. (Ohio) 71. But the contrary is held in *New York*, where a commitment under a statute of this kind is held a final and conclusive adjudication which cannot be reviewed on *habeas corpus*. *In re Donahue*, 1 Abb. N. Cas. (N. Y.) 1; 52 How. Pr. (N. Y.) 251; *In re Moses*, 13 Abb. N. Cas. (N. Y.) 189; 66 How. Pr. (N. Y.) 296; *People v. New York Catholic Protectors*, 38 Hun (N. Y.) 27; 44 Hun (N. Y.) 526; 106 N. Y. 604; *People v. Sisters of St. Dominick*, 1 How. Pr., N. S. (N. Y.) 132. But see *dubitante Church* on *Habeas Corpus*, § 304, citing *Ex parte Siebold*, 100 U. S. 371; *Tweed v. Liscomb*, 60 N. Y. 591.

In *Wisconsin* it is held that the commitment is conclusive as between the institution and the infant, but not between the institution and the parent or guardian. *Milwaukee Industrial School v. Milwaukee Co.*, 40 Wis. 328.

2. *People v. New York Catholic Protectors*, 38 Hun (N. Y.) 127; 44 Hun (N. Y.) 256; 106 N. Y. 104; *People v. House of The Good Shepherd*, 44 Hun (N. Y.) 526; *In re Heery*, 51 Hun (N. Y.) 372; *People v. Mt. Magdalen School of Industry*, 54 Hun (N. Y.) 639; *Hibbard v. Bridges*, 76 Me. 324; *Goodchild v. Foster*, 51 Mich. 599; *Copeland v. State*, 60 Ind. 394.

The principle underlying these cases is the same as that in cases of indentures of apprenticeship under statutes, where the statutory requirements must be strictly followed in order to bind the minor. *Ballenger v. McLain*, 54 Ga. 159; *Ashby v. Page*, 106 N. Car. 328; *People v. Gates*, 43 N. Y. 40; 39 How. Pr. (N. Y.) 74; *Burnham v. Chapman*, 17 Me. 385; *Doane v. Covell*, 56 Me. 527; *Brown v. Whittemore*, 44 N. H. 369; *In re Goodenough*, 19 Wis. 274; *Cannon v. Stuart*, 3 Houst. (Del.) 223; *Graham v. Kinder*, 11 B. Mon. (Ky.) 60; *Reidell v. Congdon*, 16 Pick. (Mass.) 44; *Bardwell v. Purrington*, 107 Mass. 419.

But informalities in the commitment may be amended by a fresh commitment. *In re Barre*, 14 Abb. Pr., N. S. (N. Y.) 426. But see *contra In re Pierce*, 74 Mich. 239.

commitment is evidently to his advantage.¹ The consent of the parent to such commitment cannot legalize it if wrongfully made, nor will such commitment be legal if made at the request of the parent unless made by due process of law.² When the commitment, however, is proper, the courts will protect the right of the institution holding the child to retain custody so long as it is for the benefit of the child.³

1. Ballenger v. McLain, 54 Ga. 159; People v. New York Catholic Protectory, 38 Hun (N. Y.) 127.

2. Commonwealth v. McKeagy, 1 Ashm. (Pa.) 248.

3. Where a mother, after the death of her husband, has placed her children under the charge of an orphan asylum, duly authorized to receive such children, upon her death their relatives have no right to interfere where there is no failure of duty on the part of the asylum. Commonwealth v. St. John's Orphan Asylum, 9 Phila. (Pa.) 571.

Where a child has been duly surrendered by its father to the Brooklyn school, by a writing, pursuant to their charter, such surrender will not be avoided by an order subsequently made by the surrogate, appointing an individual the general guardian of the infant. People v. Kearney, 31 Barb. (N. Y.) 430.

In a proceeding to enforce the surrender of two Chinese infant girls taken under an act conferring powers on certain benevolent corporations in relation to homeless or abused children, whose parents were dead, and who were found at a house of ill repute, the court adjudged that they be surrendered to such corporation; and thereafter a petition was filed by a guardian of the infants, a Chinaman, who claimed that the infants had a grandmother in China able and willing to support them. The court decided that the infants be surrendered to the captain of a vessel bound for Hong Kong, to be taken there, and from thence sent by alleged Chinese friends to their grandmother. The only evidence that the infants had a grandmother, or that they would be sent to her, was Chinese testimony, and a strong suspicion existed of a design to sell the children for immoral purposes. *Held*, that in view of the facts and circumstances, the testimony was insufficient to justify the adjudication, and that it was erroneous. *In re Woman's North Pacific Presby-*

terian Board of Missions, 18 Oregon 339.

A married woman separated from her husband by reason of his intemperance and crime, gave her children up to the managers of a home for destitute children, under a written contract by which the children were to be placed in a good family, the mother agreeing not to seek to discover or take them away. *Held*, upon *habeas corpus* brought by the parents to recover the children, that the contract was valid, and that if it had been properly fulfilled on the part of the managers and the persons taking the children they could not be recovered, and that the court was not bound to require the children to be produced in court, or their residence disclosed to their parents. *Dumain v. Gwynne*, 10 Allen (Mass.) 270. On this last point see *In re Diss Debar* (Supreme Ct.), 3 N. Y. Supp. 667; *In re Larson*, 31 Hun (N. Y.) 539.

In *People v. Governor's etc. House of Refuge*, 18 How. Pr. (N. Y.) 409, it was held that the managers of such an institution were not bound by State limits in providing for children committed to them under the statute. Therefore, when, on *habeas corpus*, the managers return that the child has been placed by them at employment with a person residing out of the State, where he still remains, it is a sufficient excuse for the non-production of such child. The court, by JAMES, J., said: "There is nothing in the act limiting the employment of such children to the premises of said institution, or their binding out to persons residing within the State. Such a construction would greatly circumscribe the institution in its efforts to care for the well being of those committed to its charge, without benefiting anyone. The statute wisely gives to the board of managers a broad discretion in the matter, leaving to their determination the kind of employment and instruction, the persons with whom, and the place where it shall be given; and I can see no neces-

PARI DELICTO.—In criminal law is a similar offence or crime, equal in guilt. A person who is *in pari delicto* with another differs from one *particeps criminis* in this, that the former term always includes the latter, but the latter does not always include the former.¹

PARISH.—(See also COUNTIES, vol. 4, p. 343; RELIGIOUS SOCIETIES).—1. A circuit of ground committed to the charge of one parson or vicar, or other minister having the cure of souls therein,—whence parochial.²

2. In *Louisiana*, a division of the State known elsewhere as a county.³

sity for its being limited to this city or this State. So long as the future well being of the child is considered, if a suitable person can be found out of the State who will take charge of it, I see no legal objection to this selection."

A home which places a child in a family under a written contract, giving them the right to reclaim the child, can take it back if the contract is broken or the home becomes unsuitable. *Milligan v. State*, 97 Ind. 355.

Works Consulted in the Preparation of this Article.—Schouler, *Domestic Relations* (4th ed.); Reeve, *Domestic Relations* (4th ed.); Eversley, *Domestic Relations* (Eng.); Field, *Law of Infants*; Simpson, *Law of Infants* (Eng.) (2nd ed.); Custody of Infants, Hochheimer (a most valuable book, and one to be consulted on any question relating to custody); Wood, *Master and Servant* (2nd ed.); Hurd on *Habeas Corpus* (2nd ed.); Church on *Habeas Corpus*; May on *Insurance* (3rd ed.); Wharton on *Contracts*; *Rapalje Law of Witnesses*; Cooley on *Torts* (2nd ed.); Shearman & Redfield on *Negligence* (4th ed.); Sutherland on *Damages*; 30 Cent. Law Journal 53; Notes to American Reports and Decisions.

1. See Bouvier's L. Dict., citing 8 East 381, 382.

2. And. L. Dict. A precinct or parish is a corporation established solely for the purpose of maintaining public worship, and its powers are limited to that object. *Milford v. Godfrey*, 1 Pick. (Mass.) 97.

Parochia, or parish, signifies, in a church sense, a competent number of Christians dwelling near together, and having one bishop, pastor, etc., or more set over them. *Baker v. Fales*, 16 Mass. 409.

Church and parish are by the Episcopal denomination of Christians, used indiscriminately and in the same sense as society. *Ayers v. Weed*, 16 Conn. 299.

Parish Church.—The expression parish church has various significations. It is applied sometimes to a select body of Christians, forming a local spiritual association; and sometimes to the building in which the public worship of inhabitants of a parish is celebrated; but the true legal notion of a parochial church, is a consecrated place, having attached to it the right of burial, and the administration of the sacraments. *Pawlet v. Clark*, 9 Cranch (U. S.) 326.

3. And. L. Dict. The word "parish" in U. S. Rev. Stats., § 2011, governing the appointment of supervisors of elections by a circuit court, is synonymous with word "county." *In re Supervisors of Election*, 28 Fed. Rep. 840

PARKS AND PUBLIC SQUARES—See also DEDICATION, vol. 5, p. 395; EMINENT DOMAIN, vol. 6, p. 509.

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| <p>I. Definition, 407.
 1. <i>Parks</i>, 407.
 2. <i>Public Squares</i>, 407.</p> <p>II. Dedication of Land for Parks and Public Squares, 407.
 1. <i>Generally</i>, 407.
 2. <i>Acceptance</i>, 411.</p> <p>III. Condemnation, 412.</p> <p>IV. Assessments for Cost and Expense of Construction, 414.</p> <p>V. Assessment of Park Property for Public Improvements, 414.</p> | <p>VI. Connecting Parks with Streets and Other Parks, 415.</p> <p>VII. Control of Park Property, 415.</p> <p>VIII. Lease of Parks and Squares, 415.</p> <p>IX. Uses and Purposes of Public Squares, 416.
 1. <i>Generally</i>, 416.
 2. <i>For Assembly Purposes</i>, 416.</p> <p>X. Personal Injuries in Parks and Adjoining Streets, 416.</p> <p>XI. Sale of Land Devoted to Parks and Squares, 417.</p> <p>XII. Discontinuance, 418.</p> |
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I. DEFINITION—1. **Park**.—A park is a piece of ground in a city or village set apart for ornament, or to afford the benefit of air, exercise or amusement.¹

2. **Public Square**.—The phrase “public square,” in its popular import, refers almost exclusively to ground occupied by the court house and owned by the county;² but the word “square,” as a term of dedication, indicates a public use, either for purposes of free passage or to be ornamented for grounds of pleasure, amusement, ornament, and health.³

II. DEDICATION OF LAND FOR PARKS AND PUBLIC SQUARES—(See also DEDICATION, vol. 5, p. 395.)—1. **Generally**.—The dedication of land for a public use need not be evidenced by writing. It may be manifested by acts and declarations; but such acts and declarations of the landowner must be unmistakable in their purpose and decisive in their character, indicating an intent to dedicate the land to public use, and unless such is the case no dedication exists.⁴ The doctrine of dedication extends and is applied to

1. *Perrin v. New York Central R. Co.*, 36 N. Y. 120; *People v. Green*, 52 How. Pr. (N. Y.) 304.

“A place for the resort of the public for recreation, air and light.” *Price v. Plainfield*, 40 N. J. L. 612.

In the English law, the term “park” meant an enclosure over one’s grounds. See 2 Black. Com. 38.

2. *Westfall v. Hunt*, 8 Ind. 175; *Longsport v. Dunn*, 8 Ind. 378.

In *Baird v. Rice*, 63 Pa. St. 489, READ, J., gives the history of the public squares of Philadelphia and states the nature of the uses for which they were dedicated by Penn.

3. *Trustees of Methodist Episcopal Church v. Mayor etc. of Hoboken*, 33 N. J. L. 13; 97 Am. Dec. 696.

4. *Baker v. Vanderburg*, 99 Mo. 378.

See *Brink v. Collier*, 56 Mo. 160; *Landis v. Hamilton*, 77 Mo. 556; *Washburn on Easements* (3rd ed.), 186; 2 *Dillon Mun. Corp.* (3rd ed.), § 638.

A setting apart, or dedication to public use, of any part of a town, need not be by deed, nor need it be evidenced by the use of it having been continued for any particular length of time. It is sufficient, if there be an unequivocal act or declaration of the proprietor, showing the intention of dedication, and that others have acted in reference to, and upon the faith of such manifestation of intention. *Oswald v. Grenet*, 22 Tex. 94.

No particular form is required to constitute a dedication. It is purely a question of intention. *Maywood Co. v. Maywood*, 118 Ill. 61; *McNeil v. Hicks*, 34 La. Ann. 1090; *Trustees of*

parks and public squares as much as to highways.¹ If one owning lands lays out a town thereon and makes and exhibits a map or plan thereof with spaces marked public squares, parks, etc., and sells lots with clear reference to such map or plan (though unrecorded), the purchasers of lots in such town acquire as appurtenant thereto every easement, privilege and advantage which the map or plan represents as a part of the town. Upon the sale of lots with such reference to the map or plan, the dedication of the places marked public squares, parks, etc., becomes irrevocable,² and the landowner whose premises front

Dover v. Fox, 9 B. Mon. (Ky.) 201; *Cincinnati v. White*, 6 Pet. (U. S.) 431; *Barclay v. Howell*, 6 Pet. (U. S.) 728. The assent of the owner, and the use of the premises for the purposes intended by the appropriation, are sufficient. *Morgan v. Chicago etc. R. Co.*, 96 U. S. 716.

1. *Commonwealth v. Rush*, 14 Pa. St. 186; *Abbott v. Cottage City*, 143 Mass. 521; 58 Am. Rep. 143; *Commonwealth v. Fisk*, 8 Met. (Mass.) 238; *Cincinnati v. White*, 6 Pet. (U. S.) 431; *Mayor etc. of New Orleans v. United States*, 10 Pet. (U. S.) 662; *Watertown v. Cowen*, 4 Paige (N. Y.) 510; *Cady v. Conger*, 19 N. Y. 256; *Rowan v. Portland*, 8 B. Mon. (Ky.) 232; *Trustees of Methodist Episcopal Church v. Mayor etc. of Hoboken*, 33 N. J. L. 15; 97 Am. Dec. 696; *Princeville v. Auten*, 77 Ill. 325; *Abbott v. Mills*, 3 Vt. 521; 23 Am. Dec. 222; *State v. Wilkinson*, 2 Vt. 480; 21 Am. Dec. 560.

2. *Carter v. Portland*, 4 Oregon 340; *Commonwealth v. Rush*, 14 Pa. St. 186; *Commonwealth v. Bowman*, 3 Pa. St. 202; *Alton v. Illinois Transp. Co.*, 12 Ill. 38, 60.

Land marked "public square," on a plat duly executed and acknowledged by the proprietor, is thereby dedicated to public use. *Price v. Breckenridge*, 77 Mo. 447; *Doe v. Attica*, 7 Ind. 641; *Williams v. Smith*, 22 Wis. 594.

Where one of the blocks on a town plat was marked "public square," an explanatory memorandum attached thereto declaring said block to be "public property for the purpose of furnishing a site for the court house, should the town be selected for the county seat," while upon the back of the plat existed a writing in the form of a deed by which the grantor forever quit-claimed to the county for public uses, this block, together with

the streets and alleys indicated, "according to the within plat or plan of said town, which shall be and remain the property of said county for the purposes aforesaid forever." It was held that the block in question was dedicated to general public uses, and not simply to use as a court-house square; and that the erection of a public school building upon it was a legitimate use. *Reid v. Board of Education*, 73 Mo. 295.

Where a plot shows a lot marked "public ground" it constitutes a dedication to the public. *Lebanon v. Warren Co.*, 9 Ohio 80.

It has furthermore been held in *Illinois*, that where a plat of a town duly recorded, contained a block marked "public grounds," and there is no incorporation of the town, the power of directing what public use shall be made of such ground devolves upon the legislature as the representative of the whole people. *Chicago etc. R. Co. v. Joliet*, 79 Ill. 25. And see *Maywood Co. v. Maywood*, 118 Ill. 61; 13 Am. & Eng. Corp. Cas. 505; *Reid v. Board of Education*, 73 Mo. 295.

And it was held in a *Missouri* case, where a county which had received a conveyance of land for a county seat, laid out a town, and caused a plat of the same to be filed in the recorder's office, showing the streets, alleys, blocks and lots, one block on the plat being marked "public lots," which was for many years subsequently used as a public square and court house site, that the county, by making and filing the plat of the town, and marking said block "public lots," had dedicated the land to public uses. *Rutherford v. Taylor*, 38 Mo. 315.

But it has been held that a deed stating that land is conveyed to a town as a "meeting house green," where nothing therein goes to show that the

thereon may enjoin the use of it for a different purpose.¹ Where

conveyance was made upon the condition that the same was to be used for such a purpose, will not be construed as a dedication of the land to the use in question. *State v. Woodward*, 23 Vt. 92.

Proprietors of land in laying out and platting a village, left a square blank thereon, without any designation of its purpose, except that it was not divided into lots, and there was no allusion made to it in their certificate, it was held that such square could not be looked upon as being dedicated to a public use. *Princeville v. Auten*, 77 Ill. 325.

A plat of land which recites "that this park is reserved from public use and title kept in the proprietor," the same statement being in effect repeated in the acknowledgment, shows on its face that the park is not dedicated to public use. *Baker v. Vandenburg*, 99 Mo. 378.

In *Pella v. Scholte*, 24 Iowa 283; 95 Am. Dec. 725, the words on a plat "garden square" were held not necessarily to imply dedication, nor do the words "Spencer Square" or "Coliseum" used to designate a square of ground for a particular object, divest the owner of title, or make them *loci publici*. *Livaudais v. Municipality No. 2*, 16 La. 509, *Xiques v. Bujac*, 7 La. Ann. 490; *Cox v. Mayor etc of Griffin*, 18 Ga. 728.

1. *Oswald v. Grenet*, 22 Tex. 94; *Cady v. Conger*, 19 N. Y. 256, *Tulk v. Moxhay*, 11 Beav. 571, *Watertown v. Cowen*, 4 Paige (N. Y.) 510; *Fisher v. Beard*, 32 Iowa 346; *Warren v. Mayor etc. of Lyon City*, 22 Iowa 351, *Cooper v. Alden*, Har. Ch. (Mich.) 72, *Lamar Co. v. Clements*, 49 Tex. 347; *Carter v. Portland*, 4 Oregon 339, *Hills v. Miller*, 3 Paige (N. Y.) 254; 24 Am. Dec. 218, *Huber v. Gazley*, 18 Ohio 18, *Rutherford v. Taylor*, 38 Mo. 315; *Harris Co. v. Taylor*, 58 Tex. 690.

The defendants sold certain lots to complainant and others, adjoining a park of about twenty acres, laid out and dedicated by them, the deeds thereof conferring on the lot-owners "the free use and enjoyment of the park in common with other lots at Sea Girt, and a passageway therein for foot passengers only, forever." Afterwards the complainant was by deed given "the full right and privilege to

have and use a carriageway . . . and from the rear of the park . . . into and through the park. The complainant has built upon and graded and improved his lots. Held, that on his application the defendants should be perpetually enjoined from opening a highway across the park and from destroying the trees and shrubbery therein, and from laying it out into building lots and selling them. *Morris v. Sea Girt Land Improvement Co.*, 38 N. J. Eq. 304.

Where the owners of certain lands dedicate a portion to public uses as parks, esplanades or otherwise, and, after such dedication, sell and convey lots in the remaining portion, facing on such public grounds, to others, who erect lasting and valuable improvements thereon, and which lots are enhanced in value by reason of facing on such public grounds, a trust is created therein which may be enforced in equity by those lot-owners. *Franklin Co. v. Lathrop*, 9 Kan. 309.

In *Fisher v. Beard*, 32 Iowa 352, MILLER, J., said: "The law is well settled that when the owner of lands lays out a town thereon and sells lots to purchasers with reference to the plat thereof, the purchasers of such lots acquire, as appurtenant thereto, a vested right in and to the use of adjacent grounds, designated as public grounds on such plat to the full extent such designation imports, which right cannot be divested by the owner making the dedication nor by the town in its corporate capacity." *Citing* *Leffler v. Burlington*, 18 Iowa 361; *Livingston v. Mayor of N. Y.*, 8 Wend. (N. Y.) 106; *Dubuque v. Maloney*, 9 Iowa 450; 74 Am. Dec. 358; *Wyman v. Mayor of N. Y.*, 11 Wend. (N. Y.) 487, *Cincinnati v. White*, 6 Pet. (U. S.) 431, *Barclay v. Howell*, 6 Pet. (U. S.) 431; *Rowan v. Portland*, 8 B. Mon. (Ky.) 232, *Watertown v. Cowen*, 4 Paige (N. Y.) 510, *State v. Wilkinson*, 2 Vt. 480, 21 Am. Dec. 560.

An owner of land may, in the act of dedication, declare the specific public use to which he limits the donation, and it will remain subject to such use; but, of course, when the dedication is completed, the owner cannot thereafter revoke it, or restrict or change the uses to which it was made. Trust-

a dedication of a park or public square, designated by metes and bounds, is made by a city and private individuals acquire the lands adjoining and surrounding it with reference to the boundaries thereof, the lands so dedicated for public use are out of commerce, and are not subject to individual or private ownership. Any attempt to revoke the dedication, as by sale of the land, may be enjoined by an adjoining lot-owner;¹ nor can such corporation use the park for any purpose, although such purpose be public, inconsistent with the original dedication.² The

tees of Methodist Episcopal Church v. Mayor etc. of Hoboken, 33 N. J. L. 14; 97 Am. Dec. 696. Where a block of land was dedicated as a site for county buildings, with the proviso in the deed (which was duly recorded), that in case the county seat should ever be removed the same should revert to the grantor, it was held that no person who subsequently purchased and improved lots looking upon such block was entitled to damages upon the erection of private buildings upon the same, it having reverted to the original owner under the condition aforesaid. Daniels v. Wilson, 27 Wis. 492. And, furthermore, where the owners of a town site, mark on one of the blocks on the town plat "Court-House," the declarations of such owners to the effect that the block was intended for a court-house square, and was not expected to be used for jail purposes, are admissible in a contest between the owners of lots fronting on such blocks, and the county in which the town is situate, in which suit the owners seek to prevent the erection of a jail thereon. Harris Co. v. Taylor, 58 Tex. 690.

A property owner and tax payer, whose property does not abut upon a public square, cannot maintain a suit to enjoin the city from erecting a public building on the same, except it be shown that he would suffer special injury therefrom. San Antonio v. Stromberg, 70 Tex. 366.

Ejectment.—Where the proprietors of a town set apart a piece of undivided land for the use of the public as a public common, and it is afterwards used by the public without interruption for a number of years, the public acquire an easement upon the land, and any proprietor of an undivided share of land in the town may maintain ejectment against anyone who is in the exclusive possession of any part of the land so set apart, and recover

subject to such easement. Pomeroy v. Mills, 3 Vt. 279; 23 Am. Dec. 207.

Evidence of Use for Other Purposes.—

The mere removal of a county site to another town is not sufficient evidence of the intention of the county and town to abandon a public square adjoining it, or to devote it to any other county and town purpose. Miller v. Tunica Co., 67 Miss. 651; 29 Am. & Eng. Corp. Cas. 84.

1. Miami Co. v. Wilgus, 42 Kan. 457; Cummings v. St. Louis, 90 Mo. 259. See Pomeroy v. Mills, 3 Vt. 279; 23 Am. Dec. 207; Hoadley v. San Francisco, 50 Cal. 265; Macon v. Franklin, 12 Ga. 239; State v. Woodward, 23 Vt. 92; Baton Rouge v. Bird, 21 La. Ann. 244; Spring Garden v. Northern Liberties, 1 Whart. (Pa.) 25; Attorney General v. Goderich, 5 Grant Ch. (Pa.) 402; McChesney v. People, 99 Ill. 216; Mowry v. Providence, 10 R. I. 52; Mayor etc. of Bayonne v. Ford, 43 N. J. L. 293; Maywood Co. v. Maywood, 118 Ill. 61; 13 Am. & Eng. Corp. Cas. 505; Trustees of Methodist Episcopal Church v. Mayor etc. of Hoboken, 33 N. J. L. 14; 97 Am. Dec. 696; Franklin Co. v. Lathrop, 9 Kan. 453; Leffler v. Burlington, 18 Iowa 361.

2. Commonwealth v. Alburger, 1 Whart. (Pa.) 469; Dummer v. Jersey City, 20 N. J. Eq. 86; Harris Co. v. Taylor, 58 Tex. 690; Simplot v. Dubuque, 49 Iowa 630; Wellington et al. Petitioners, 16 Pick. (Mass.) 87; Lebanon v. Warren Co., 9 Ohio 80; State v. Trask, 6 Vt. 355; 27 Am. Dec. 554; State v. Atkinson, 24 Vt. 448; Campbell Co. v. Newport, 12 B. Mon. (Ky.) 538; Lamar Co. v. Clements, 49 Tex. 347; Huber v. Gazley, 18 Ohio 18; Ried v. Board of Education, 73 Mo. 295; Riggs v. Board of Education, 27 Mich. 262; Daniels v. Wilson, 27 Wis. 492; Williams v. First Presbyterian Soc., 1 Ohio St. 478.

In Crawford v. Mobile etc. R. Co.,

erection of private dwelling houses or other private structures thereon are public and indictable nuisances and cannot be justified by any title or authority derived from a city corporation.¹ If a grant be made to the inhabitants of a town, of a public square, without defining its location, the inhabitants may select a location for it, but such election must be made within a reasonable time.² The dedication of a public park on the water front of a bay does not carry the park into the bay, except to the extent of accretions thereto.³

2. Acceptance.—An acceptance will be presumed if the gift is beneficial, and user is evidence that it is beneficial.⁴ And it is likewise held in some States that no acceptance is necessary in order to vest the right in the public.⁵ And the silence of the proprietors of a piece of ground set apart by them for a public square, while people are buying and building

67 Ga. 405, it was *held*, where a statute provided for laying out a town and dedicated a tract of land as a common for the advancement of its interest and its commercial prosperity, that the town could lawfully grant a part of the common for a railroad depot. *Compare*, *Barney v. Keokuk*, 94 U. S. 324.

1. *State v. Atkinson*, 24 Vt. 448; *Pomeroy v. Mills*, 3 Vt. 279; 23 Am. Dec. 207; *Commonwealth v. Rush*, 14 Pa. St. 186; *Hutchinson v. Pratt*, 11 Vt. 402, 423; *People v. Carpenter*, 1 Mich. 273; *Columbus v. Jaques*, 30 Ga. 506; *Mayor etc. of New Orleans v. United States*, 10 Pet. (U. S.) 662, 725, 735; *Cooper v. Alden*, Harr. Ch. (Mich.) 72; *State v. Mayor etc. of Mobile*, 5 Port. (Ala.) 279; 30 Am. Dec. 564; *State v. Woodward*, 23 Vt. 92; *Lincoln v. Boston*, 148 Mass. 580.

In *Pennsylvania* it has been held that under circumstances, the corporate authorities may authorize the use of the square for public buildings, but the right to erect county buildings thereon rests on the usage which has acquired the consistence of law. *Commonwealth v. Bowman*, 3 Pa. St. 203.

2. *Rung v. Shoneberger*, 2 Watts (Pa.) 23; 26 Am. Dec. 95.

3. *Ruge v. Apalachicola Oyster etc. Co.*, 25 Fla. 656.

4. *Guthrie v. New Haven*, 31 Conn. 308. See *Holdane v. Coldspring*, 21 N. Y. 474; *Green v. Chelsea*, 24 Pick. (Mass.) 71; *People v. Jones*, 6 Mich. 176.

5. *Trustees of Methodist Episcopal Church v. Mayor etc. of Hoboken*, 33 N. J. L. 21; 97 Am. Dec. 696.

In *Smith v. White* the facts were as follows: The owner of certain lands in the village of Grand Rapids platted the same, and had the plat recorded in 1849. A space at the intersection of two streets meeting at an acute angle was marked on the plat "Common." In 1862 the Common Council of Grand Rapids adopted a resolution declaring that they found that this strip had been dedicated and belonged to the public, and directing the city marshal to take and hold it, cause it to be surveyed and staked out as the property of the city, and protect the rights of the city in it. Some years later the space was fenced in, and slight improvements were made on it by the marshal's directions for the benefit of the city, no objections being made by the original owner till a year afterwards. It was held that the resolution of 1862, and the acts done under it, constituted a sufficient acceptance on the part of the city. But we find it laid down in *Illinois* that where land in a village is dedicated to the public by the proprietor, before the village is incorporated, the acceptance of the dedication by the public is indicated by the actual use of the ground for the purposes intended. If the village is afterward incorporated, its acceptance is shown by its demand of the possession of the ground and for a conveyance of the title; and its failure to improve the same, after refusal of the original proprietor to yield its control, is not an evidence of non-acceptance. *Maywood Co. v. Maywood*, 118 Ill. 61; 13 Am. & Eng. Corp. Cas. 505. It was held in a *Michigan* case, that sales

facing such square, and using it as a public common, will be considered an acquiescence of such proprietors in the dedication.¹ But where a map is relied upon as proof of the dedication of a piece of ground as a public square, it must be shown that the grantors either made or recognized the map as correct, and assented to it.²

III. CONDEMNATION.—The legislature may authorize the condemnation of private property for the purpose of using the same for a public park, on the ground that the public health, convenience, and welfare will be thereby promoted.³ It may also authorize the purchase of lands outside the boundaries of a city for the purpose of securing such means of recreation and health,⁴ when likely to be overtaken and surrounded by the city's growth.⁵ So private property for a public square in a city may be taken on compensation being made. The mode of compensation, whether by tax upon the whole city or upon those specially benefited, is a

of lots bounded upon streets surrounding a space marked on the plat as a public square, have no tendency to prove an acceptance by the public of the square as devoted to public uses, or an estoppel in favor of the public. Purchasers of such lots must be presumed to understand the conditions upon which such spaces are dedicated to the public. Nor would such purchasers have any individual right of entry upon, or occupancy of, them. The employment of such spaces for purposes of amusement, such as circus performances and ball playing, or for political meetings, or agricultural fairs, has no tendency to prove an acceptance by the public. *Baker v. Johnston*, 21 Mich. 321.

1. *Abbott v. Mills*, 2 Vt. 521; 23 Am. Dec. 222.

2. *Leland v. Portland*, 2 Oregon 46.

To entitle a town plat to be recorded, or constitute a statutory dedication, the acknowledgment of the plat required by the statute is necessary. *Winona v. Huff*, 11 Minn. 119. And since the record of a town plat under the statute indicates the existence of the original map, it, of course, is the best evidence to prove the contents of the record, when it is lost; and until its non-production is satisfactorily explained, parol evidence of the contents of the record is inadmissible. *Winona v. Huff*, 11 Minn. 121.

3. 2 Dillon on Mun. Corp., § 598; *Brooklyn Park Commrs. v. Armstrong*, 45 N. Y. 234; 6 Am. Rep. 70. See *Owners of Ground v. Mayor etc. of Albany*, 15 Wend. (N. Y.) 374; St.

Louis County Court v. Griswold, 58 Mo. 175; *Matter of Commrs. of Central Park*, 63 Barb. (N. Y.) 282; *Matter of Central Park Extension*, 16 Abb. Pr. (N. Y.) 56; *People v. Williams*, 51 Ill. 63; *Smith v. Utica (Supreme Ct.)*, 6 N. Y. Supp. 792.

The legislature may confer such power upon a board of park commissioners, as it is a quasi municipal corporation. *West Chicago Park Commrs. v. Western Union Tel. Co.*, 103 Ill. 33.

The city of San Francisco, as successor of the Pueblo of that name, had the right to take Pueblo lands in the possession of others, for public squares, without making compensation therefor. *Hoadley v. San Francisco*, 70 Cal. 320.

Demolition of Structures on Land Taken for Parks.—A legislature has power to order the demolition of structures on land taken for parks upon making just compensation. *Webb v. Mayor etc. of N. Y.*, 64 How. Pr. (N. Y.) 10. See *Swift v. Canavan*, 52 Cal. 417.

Establishing Park Over Railroad Property.—A park may be laid out so as to embrace property devoted to railroad uses, but the use cannot be interfered with without express authority. *Matter of Commrs. of Central Park*, 63 Barb. (N. Y.) 282.

4. *In re Mayor etc. of N. Y.*, 99 N. Y. 569; 34 Hun (N. Y.) 44; *St. Louis County Court v. Griswold*, 58 Mo. 175; *Mayor etc. of Detroit v. Park Commrs.*, 44 Mich. 602.

5. *In re Mayor etc. of N. Y.*, 99 N. Y. 569; 34 Hun (N. Y.) 44.

matter of legislative regulation.¹ Since public necessity is the basis of the right of eminent domain, some have said that property could not be compulsorily acquired against the owner's consent when wanted merely for ornamental purposes, but it would be an extreme case where the use was chiefly for ornament and was not at the same time useful in a degree that would support a legislative act authorizing the taking of it.² The authority to determine the question of necessity of taking private property for public parks, is in the State or in the tribunals to whom the State has delegated the power. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the legislature may in its discretion prescribe.³ But where lands are thus taken, every requirement of the statute having a semblance of benefit to the owner, must be strictly complied with.⁴ The legislature may confer upon the city the right to purchase the fee, if the city should so select.⁵ The assessment of damages and confirmation by the court does not vest the park commissioners with title to the land before possession is taken. The owner has a vested right in the compensation only when the parties seeking condemnation acquire a vested right in the property.⁶ If appeal is taken, and a re-appraisement is had by a new commission appointed by the court, the value of the property must be assessed with reference to its condition and value at the date of the filing of the original report by the commission appointed by the city council, and the land owner is entitled to interest on this award from the date of the filing of such original report.⁷

1. *Dillon on Mun. Corp.*, § 643, *citing* Owners of Ground *v.* Mayor etc. of Albany, 15 Wend. (N. Y.) 374; *Bouton v. Brooklyn*, 15 Barb. (N. Y.) 375.

2. *Dillon on Mun. Corp.*, § 599.

3. *Holt v. Somerville*, 127 Mass. 410. See *People v. Smith*, 21 N. Y. 595; *Cooley's Const. Lim.* 538.

4. *In re Rochester* (Supreme Ct.), 10 N. Y. Supp. 436. See *Sharpe v. Spear*, 4 Hill (N. Y.) 76; *Newell v. Wheeler*, 48 N. Y. 486; *Sharpe v. Johnson*, 4 Hill (N. Y.) 92.

Thus, where a statute provided that before land could be taken by the city for park purposes, the common council shall at its next regular meeting, after a map of the land has been taken, and has been filed as required by § 3 "by legislature declare that the city intends to take the land," it was held mandatory. *In re Rochester* (Supreme Ct.), 10 N. Y. Supp. 436.

5. *Holt v. Somerville*, 127 Mass. 414; *Brooklyn v. Copeland*, 106 N. Y. 496; *People v. Common Council of Detroit*,

28 Mich. 230; 15 Am. Rep. 202; *Clark v. Providence* (R. I. 1888), 15 Atl. Rep. 763.

The city may hold and own lands for a public park as an individual may for a pleasure ground and cause them to be beautified and improved as such, and it may hold the same in its public capacity as an agent of the government, and subject to the unrestricted control of the State, but as a corporate individual having rights of its own, which it is at liberty to enjoy undisturbed by the State, and in the enjoyment of which the constitution will protect its people. *Mayor of Detroit v. Park Commrs.*, 44 Mich. 604.

6. *Beveridge v. West Chicago Park Commrs.*, 7 Ill. App. 460.

In *Pennsylvania*, the land-owner may recover the damages assessed or agreed on immediately upon confirmation of the report relating to damages, either under statute, or by common-law action of debt. *Misky v. Philadelphia*, 68 Pa. St. 48.

7. *Minneapolis v. Wilkin*, 30 Minn.

IV. ASSESSMENTS FOR COST AND EXPENSE OF CONSTRUCTION.—Where a statute empowers a board of park commissioners to locate and lay out a public park, to take such lands as the board deem advisable therefor, and assess upon any real estate in the city which, in the opinion of the board, should receive any benefit and advantage from such location and laying out, beyond the general advantages to all real estate in the city, “a proportional share of such location and laying out,” the entire amount so assessed upon any real estate, not to exceed one-half of the amount adjudged by the board to be the whole benefit received by it, authorizes an assessment only for expenses either actually paid or incurred, and not for estimated expenses.¹ So where a similar statute gives to any person abutting on any street or highway and liable to assessment for betterments, a right to surrender his estate “at any time before the estimate of damages is made,” no surrender can be made of an estate not abutting on the park, and an estate separated from the park by a country road is not an abutting estate.² Nor can a legislature authorize the assessment upon lands outside the city for any portion of the expense of acquiring title to lands for the park, or of constructing the same.³ Where a statute creates a board of park commissioners for a city, with power to select needful land, to acquire the same by purchase, and to require the common council to provide money to pay therefor, *mandamus* will not issue to compel the common council to raise the money, because the legislature cannot compel a municipal corporation to contract a debt for local purposes against its will.⁴ Objections to the confirmation of assessments for benefits must be made before the park commissioners or in the circuit court, or the owner will be deemed to have waived his right in that regard and cannot afterwards interpose such objections.⁵

V. ASSESSMENT OF PARK PROPERTY FOR PUBLIC IMPROVEMENTS.—The city parks have the same value as property as other lands, and should bear a *pro rata* assessment for public improvements.⁶

145; *Miskey v. Philadelphia*, 68 Pa. St. 48. Compare *Philadelphia v. Gilmarlin*, 71 Pa. St. 140.

Upon the trial of an issue as to the value of lands taken for a public park, evidence as to the price paid for lands adjoining the park or within its immediate vicinity on sales made after its boundaries had been made out is inadmissible. *Parker v. South Park Comms.*, 117 U. S. 379.

In *Cook v. South Park Comms.*, 61 Ill. 115, it is also held that the value of the land must be estimated at the date of the condemnation. And see *Re Munson*, 29 Hun (N. Y.) 325.

1. *Foster v. Boston Park Comms.*, 131 Mass. 235.

2. *Holt v. Somerville*, 127 Mass. 408.

A lot opposite a park, and with a street intervening, is not an abutting lot thereon. *Green v. New York Central etc. R. Co.*, 12 Abb. N. Cas. (N. Y.) 124; *Williams v. Boston Water Power Co.*, 134 Mass. 406; *Perrin v. New York Central R. Co.*, 40 Barb. (N. Y.) 65; 36 N. Y. 120.

3. *Matter of Assessment of Lands in Flatbush*, 60 N. Y. 398.

4. *People v. Detroit*, 28 Mich. 228; 15 Am. Rep. 202.

5. *Le Moyne v. Chicago Park Comms.*, 116 Ill. 41.

6. *Matter of Church Street*, 49 Barb. (N. Y.) 455.

A city owning a public park bounded

VI. CONNECTING PARKS WITH STREETS AND OTHER PARKS.—Under the statute which empowers park commissioners “to connect any public park with any park of any incorporated city by selecting and taking any connecting street or streets leading to such park,” the commissioners, after selecting and taking such street, may afterwards take an additional street for the same purpose, though such additional street is parallel to the other and only four blocks from it, since the power is not necessarily exhausted by a single selection.¹ Where a statute is general and has no specific reference to any particular park commissioners, and is limited only to the effect that the parks whereof they are commissioners shall have been established in two or more towns contiguous to each other, it is not required that two sets of commissioners shall constitute a new and single board for the purpose of connecting their several parks. Each set of commissioners acts within its own district. If the park sought to be connected lies in several districts, it may require co-operative action to complete the connection, but in such case the jurisdiction of each of the commissioners must terminate with the boundary of their respective districts.²

VII. CONTROL OF PARK PROPERTY.—Title to the lands of public parks is vested in municipalities by the legislature.³ Where a statute provides that the recording with the register of maps and plats of cities and towns and additions shall be sufficient to vest in the county the fee of parcels expressed or intended for public uses within the county in trust for the uses therein expressed or intended, and for no other purpose, and gives to cities of the third class control of the streets, avenues, alleys, market-places, etc., not mentioning parks, such city has control of ground platted and dedicated for a public park, and the county commissioners cannot bring ejectment to recover possession.⁴

VIII. LEASE OF PARKS AND SQUARES.—A lease of a city park to the mayor and a provision for an annual sum to be paid him to keep the park in repair, is void.⁵ So the legislature cannot authorize the lease of a public square held by the municipal corporation in trust for the use of the inhabitants and to apply

by streets for the improvement of which an assessment is being made, must contribute to the necessary expense thereof, in common with the private owners thereby benefited. *Scammon v. Chicago*, 42 Ill. 192.

1. *West Chicago Park Commrs. v. McMullen* (Ill. 1890), 25 N. E. Rep. 676.

2. *West Chicago Park Commrs. v. Western Union Tel. Co.*, 103 Ill. 33.

3. *Clark v. Providence* (R. I. 1888), 15 Atl. Rep. 763; *Brooklyn v. Copeland*, 106 N. Y. 496; *Riggs v. Board of Ed-*

ucation, 27 Mich. 262; *Brooklyn Park Commrs. v. Armstrong*, 3 Lans. (N. Y.) 429; *Lincoln v. Boston*, 148 Mass. 580.

4. *Hurd v. Harvey Co.*, 40 Kan. 92.

5. *Macon v. Huff*, 60 Ga. 221. But after such contract has been ratified by a subsequent mayor and council, and large sums expended by the contractor in fencing, draining, and ornamenting the park, a court of chancery will not set aside the contract without compelling the city to do equity. *Macon v. Huff*, 60 Ga. 221.

the avails to the improvement of a landing.¹

IX. USES AND PURPOSES OF PUBLIC SQUARES—1. **Generally.**—The use and the beneficial purposes of a public square or common in the village or city, where no special limitation or use is prescribed by the terms of the dedication, are entirely different from those of a public highway. Such a place thus dedicated to the public may be improved and ornamented for pleasure grounds and amusements for recreation and health, or it may be used for public buildings and places for the transaction of the public business of the people of the village or city, or it may be used both for purposes of pleasure and business. But a public highway comprehends the rights of all individuals in the community, whether upon foot, horseback, or in any kind of a vehicle, to pass and repass, together with the right of the public to do all the acts necessary to improve it and keep it in repair, and it cannot be enclosed; but a public square may be enclosed, notwithstanding it has remained open many years.²

2. **For Assembly Purposes.**—The control of squares and other public grounds, is in the municipality within whose jurisdiction they are situated, and it is not unreasonable that persons desiring to use the grounds for meetings should be required to get permits from the municipal authorities. So ordinances forbidding preaching, lecturing, etc., in a park or public square are not unreasonable and invalid. Their purpose is to preserve the public peace and to protect public grounds from injury, and they are calculated to effect these ends without violating the just rights of any citizen.³

X. PERSONAL INJURIES IN PARKS AND ADJOINING STREETS.—A city is not bound to keep its parks in safe condition, and is not answerable for defects in the paths which cross them.⁴ So it is

1. *Le Clercq v. Gallipolis*, 7 Ohio, pt. 1, 218; 28 Am. Dec. 641.

2. *Seguns v. Ireland*, 58 Tex. 183; *Langley v. Gallipolis*, 2 Ohio St. 107. See *Baker v. Johnston*, 21 Mich. 319; *Hutchinson v. Pratt*, 11 Vt. 402; *Leftwich v. Plaquemine*, 14 La. Ann. 152.

Compare Commonwealth v. Bowman, 3 Pa. St. 206, in which GIBSON, C. J., said: "A public square is as much a highway as if it were a street, neither the county nor the public can block it up to the prejudice of the public or an individual."

So in *Portland v. Whittle*, 3 Oregon 126, it is held that if a street runs through a public square, the council of the city cannot direct it to be fenced up, unless specially authorized.

Where a city by ordinance had granted to a street railway company a right of way over streets and public

squares, it was enjoined at the suit of the company from enclosing the square. *Springfield R. Co. v. Springfield*, 85 Mo. 674.

3. *Commonwealth v. Davis*, 140 Mass. 485.

4. *Lincoln v. Boston*, 148 Mass. 580; *Steele v. Boston*, 128 Mass. 583; *Veal v. Boston*, 135 Mass. 187; *Oliver v. Worcester*, 102 Mass. 489; *Clark v. Waltham*, 128 Mass. 567.

In *Steele v. Boston*, 128 Mass. 584, the court by MORTON, J., said: "The city holds the common for the public benefit, and not for its emolument or as a source of revenue, and has constructed and kept in repair these paths as a part of the common for the comfort and recreation of the public, and not as a part of its system of highways and streets. It is not liable under the statutes for any defect or want of repair in them."

not liable for injuries occasioned to a person by reason of his horse becoming frightened while being driven along an adjoining street, by the firing of cannon on the common, under a license granted in pursuance of a city ordinance.¹

XI. SALE OF LAND DEVOTED TO PARKS AND SQUARES.—When lands, held by a municipality for public use, are not subject to any special trust, the legislature may authorize a municipal corporation to sell and dispose of the same or to apply them to uses different from those to which they are devoted, but, in the absence of such an authority, the municipality has no implied power to do so.² If the title to lands has been acquired by condemnation proceedings, the legislature may authorize a sale thereof, if the fee is vested in the city, although the title of the city may be deemed to have been impressed with a trust to hold the lands for the uses for which they were condemned.³ If, however, the lands have been dedicated by private individuals for a public park or square, the legislature has no authority to authorize any diversion from the use to which they were originally dedicated.⁴ Nor has a county any inherent right to appropriate the exclusive use of a public square in a town not dedicated expressly to it, but to the public or citizens generally. It has no more right than an individual to prevent or disturb the enjoyment of the inhabitants in any public grounds dedicated to their use.⁵

When lands are dedicated to the public for particular purposes, they may be improved and controlled for such purposes, but the

1. *Lincoln v. Boston*, 148 Mass. 580.

2. *Lincoln v. Boston*, 148 Mass. 580; *Kreigh v. Chicago*, 86 Ill. 407; *Payne v. Treadwell*, 16 Cal. 230, *Alton v. Illinois Transp. Co.*, 12 Ill. 38; *Quincy v. Jones*, 76 Ill. 231; 20 Am. Rep. 243; *Bucker v. Augusta*, 1 A. K. Marsh. (Ky.) 9; *Police Jury v. Foulhouze*, 30 La. Ann., pt. 1, 64; *Alves v. Henderson*, 16 B. Mon. (Ky.) 131, *De Armas v. Mayor etc. of New Orleans*, 5 La. 132; *Mayor etc. v. Hopkins*, 13 La. 326; *McNeil v. Hicks*, 34 La. Ann. 1090.

3. *Brooklyn Park Commrs. v. Armstrong*, 45 N. Y. 234; 6 Am. Rep. 70.

4. *Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540; *Warren v. Mayor of Lyons City*, 22 Iowa 351; *Le Clercq v. Town of Gallipolis*, 7 Ohio, pt. 1, 218; 28 Am. Dec. 641.

The trustees of a town were about to open up a public park and run streets through it. The original owner of the land had designated four acres as a park upon the plat of the town. By statute, the effect of the plat was to vest the title of the land in the cor-

poration for the uses and purposes expressed upon it. The court enjoined the trustees from running the streets through the park, and held that the park should ever remain public and in the condition in which it was donated. *Price v. Thompson*, 48 Mo. 361. Land dedicated for use as a public square cannot be appropriated by a railroad company for the purpose of constructing its tracks. *Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540. And when land has been dedicated to use as a court house square, the legislature cannot authorize the municipality to sell it and apply the proceeds to the erection of a court house. *Franklin Co. v. Lathrop*, 9 Kan. 453.

In *Indiana*, although land be set aside for the public, the public may acquire a highway across such land by dedication or by using it for twenty years. The county authorities may make such a dedication. *Greene Co. v. Huff*, 91 Ind. 333.

5. *Princeville v. Auten*, 77 Ill. 326; *McCullough v. Board of Education*, 51 Cal. 418.

PARKS AND PUBLIC SQUARES—PAROL.

city cannot appropriate to itself the exclusive use thereof.¹ But where land is described on a recorded plat simply as "public grounds," there is an unrestricted dedication to public use. In such case the use is indefinite and may vary according to circumstances. As between the municipal corporation holding the title to the ground and the general public, the legislature may direct the particular public uses to which the land shall be put. Accordingly the legislature may authorize the construction of a railroad through it, the appropriation of property to the construction or use of a railroad being an application thereof to the public use.²

XII. DISCONTINUANCE.—Where a legislature has taken private property for the construction of a park and vested the title in a municipal corporation, it may afterwards authorize the discontinuance of the park or a sale by the corporation of any part of the land originally taken.³

PARLOR CARS.—See SLEEPING CARS.

PAROCHIAL CHURCH.—The true legal notion of a parochial church is a consecrated place, having attached to it the rights of burial, and the administration of the sacraments.⁴

PAROL.—This word literally signifies verbal, in contra-distinction from that which is written. Thus, a parol agreement signified an agreement by word of mouth, in contra-distinction from a written agreement; but at the present day it signifies an agreement by word of mouth, or by writing under hand only, in contra-distinction from an agreement by deed, *i. e.*, by writing under hand and seal. The pleadings in an action were also denominated the parol, because they were formerly conducted *viva voce* in court, and were not mere written allegations as at present.⁵

PAROL AGREEMENTS.—See VERBAL AGREEMENTS.

1. *Alton v. Illinois Transp. Co.*, 12 Ill. 38.

2. *Chicago etc. R. Co. v. Joliet*, 79 Ill. 25.

The general authority, however, to lay out and construct railroads and highways, does not authorize a location through a public park. *Matter of New York etc. R. Co.*, 20 Hun (N.Y.) 201; *Wellington et al. Petitioners*, 16 Pick. (Mass.) 87; *Matter of Boston etc. R. Co.*, 53 N. Y. 574.

3. *Brooklyn Park Commrs. v. Armstrong*, 3 Lans. (N.Y.) 429; *Hinchman v. Detroit*, 9 Mich. 103; *Mowry v. Providence* (R. I. 1889), 16 Atl. Rep. 511; *Clark v. Providence* (R. I. 1888), 15 Atl. Rep. 763. See *Riggs v. Board of Education*, 27 Mich. 262; *Crawford v. Mobile etc. R. Co.*, 67 Ga. 405;

Brooklyn v. Copeland, 106 N. Y. 496. A statute authorizing a city to fill in a cove or basin which is subject to the ebb and flow of the tide and to discontinue a park connected therewith, is not as disturbing the peoples' rights of fishery, and not a violation of a clause in the constitution providing that "the people shall continue to enjoy and freely exercise all the rights of fishery and the privileges of the shore, to which they had been heretofore entitled under the charter and usages of this State, but no new right is intended to be granted by this declaration. *Clark v. Providence* (R. I. 1888), 15 Atl. Rep. 763.

4. *Town of Pawlet v. Clark*, 9 Cranch (U. S.) 326.

5. See Brown's L. Dict.

PAROL EVIDENCE—(See also ABBREVIATIONS, vol. 1, p. 15; AMBIGUITY, vol. 1, p. 525; BILLS AND NOTES, vol. 2, p. 313; BILLS OF LADING, vol. 2, p. 223; ESCROW, vol. 6, p. 857; EVIDENCE, vol. 7, p. 42; EXPERT AND OPINION EVIDENCE, vol. 7, p. 490; FRAUDULENT CONVEYANCES, vol. 8, p. 748 FRAUDULENT SALES, vol. 8, p. 786; INTERPRETATION, vol. 11, p. 507; MISTAKE, vol. 15, p. 625; USAGE AND CUSTOM; WILLS; WRITTEN INSTRUMENTS).

- I. Definition, 419.
- II. General Rule that Parol Evidence Inadmissible to Contradict, Alter, Add to or Vary Written Instruments, 420.
- III. Exceptions to General Rule, 432.
 1. *Written Instruments a Simple Memorandum* (See also MEMORANDUM), 432.
 2. *Receipts*, 432.
 3. *Written Instruments Intrinsically Incomplete*, 435.
 4. *Evidence to Prove Condition Precedent*, 436.
 5. *Evidence Impeaching Validity of Written Instrument*, 437.
 6. *Evidence Proving Real Consideration*, 438.
 7. *Evidence Connecting and Explaining Contemporaneous Writings*, 442.
 8. *Evidence Proving Contemporaneous Parol Agreements*, 443.
 9. *Evidence Annexing a Condition to Conveyance Absolute on its Face* (See also *infra*, this title, Evidence to Prove Deed Absolute on its Face a Mortgage), 445.
 10. *Evidence Establishing a Trust*, 446.
 11. *Evidence to Prove Usage and Custom* (See also USAGES AND CUSTOMS), 447.
 12. *Evidence to Prove Subsequent Agreements Generally*, 447.
 13. *Evidence to Prove Extension*, 449.
 14. *Evidence to Prove Waiver or Discharge* (See also WAIVER), 449.
- IV. Parol Evidence to Aid the Interpretation of Documents (See also INTERPRETATION), 450.
 1. *Explaining Illegible Writing*, 450.
 2. *Explaining Abbreviations* (See also ABBREVIATIONS), 450.
 3. *Explaining Meaning of Terms*, 450.
 4. *Explaining Circumstances of the Case*, 452.
 5. *Explaining Ambiguities* (See also AMBIGUITY), 452.
 6. *Subsequent Acts and Declarations of Parties as Showing Their Understanding of Agreement*, 453.
 7. *Evidence to Rebut an Equity*, 453.
- V. Rule Excluding Parol Evidence Applies Only in Suits Between the Parties, 453.
- VI. Parol Evidence to Prove Deed Absolute on Its Face a Mortgage, 454.
 1. *General Principles*, 454.
 2. *Parties*, 463.
 - (a) *Who May be Parties*, 463.
 - (b) *Obligation of the Parties*, 464.
 - (c) *Rights of Third Parties*, 465.
 - (1) *Creditors*, 465.
 - (2) *Bona Fide Purchasers*, 465.
 3. *Evidence*, 465.
 - (a) *Sufficiency of Evidence*, 465.
 - (b) *Circumstances Attending the Transaction*, 466.
 - (c) *Burden of Proof*, 467.

I. DEFINITION.—Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry, are called parol or oral evidence.¹

1. Stephen on Evidence (Chase's Am. ed.) p. 3.

II. GENERAL RULE, THAT PAROL EVIDENCE IS INADMISSIBLE TO CONTRADICT, ALTER, ADD TO, OR VARY WRITTEN INSTRUMENTS.—When a judgment of court or other judicial or official proceeding, or a contract or grant, or any other disposition of property or rights, has been reduced to the form of a document or series of documents, the contents of such document cannot be contradicted, altered, added to, or varied by oral or parol evidence.¹ And, generally, where a written agreement is made by parties all previous conversations and verbal agreements are

1. *Ware v. Cowles*, 24 Ala. 446; s. c., 60 Am. Dec. 482; *Brantley v. West*, 27 Ala. 542; *Glendale Mfg. Co. v. Protection etc. Co.* 21 Conn. 19; *Griswold v. Scott*, 13 Ga. 210; *Freeman v. Bass*, 34 Ga. 355; s. c., 89 Am. Dec. 255; *Railsback v. Liberty etc. Turnpike Co.*, 2 Ind. 656; *Harper v. Pound*, 10 Ind. 32; *Shreveport v. Le Rosen*, 18 La. Ann. 577; *Potter v. Sewall*, 54 Me. 142; *Criss v. Withers*, 26 Md. 553; *Watson v. Boylston*, 5 Mass. 411; *Storer v. Freeman*, 6 Mass. 435; s. c., 4 Am. Dec. 155; *Child v. Wells*, 13 Pick. (Mass.) 121; *Joseph v. Bigelow*, 4 Cush. (Mass.) 82; *Myrick v. Dame*, 9 Cush. (Mass.) 248; *Goodell v. Smith*, 8 Cush. (Mass.) 592; *Winslow v. Driskell*, 9 Gray (Mass.) 363; *Seckler v. Fox*, 51 Mich. 92; *Lowry v. Harris*, 12 Minn. 255; *Husk v. McQuade*, 52 Mo. 388; *Wheeler v. Morse*, 20 N. H. 220; *Conant v. Dewey*, 21 N. H. 353; *Bromley v. Elliot*, 38 N. H. 287; s. c., 75 Am. Dec. 182; *Miles v. Culver*, 8 Barb. (N. Y.) 205; *Carter v. Hamilton*, 11 Barb. (N. Y.) 147; *Clark v. New York L. Ins. etc. Co.*, 7 Lans. (N. Y.) 323; *Beauford v. Patterson*, 12 Daly (N. Y.) 251; *LaFarge v. Rickert*, 5 Wend. (N. Y.) 187; *Patton v. Alexander*, 7 Jones (N. Car.) 603; *Trammell v. Pilgrim*, 20 Tex. 158; *Caldwell v. Fulton*, 31 Pa. St. 475; s. c., 72 Am. Dec. 760; *Miller v. Fichthorn*, 31 Pa. St. 252; *Collins v. Baumgardner*, 52 Pa. St. 461; *Bond v. Clark*, 35 Vt. 577.

The rule as to contradicting or varying a written instrument by parol proof, obtains with the same force in equity as at law. *Ware v. Cowles*, 24 Ala. 446; s. c., 60 Am. Dec. 482.

See also *Selden v. Myers*, 20 How. (U. S.) 506; *Gilpins v. Consequa*, Pet. (C. C.) 85; *Van Ness v. Mayor etc. of Washington*, 4 Pet. (U. S.) 232; *Shankland v. Mayor etc. of Washington*, 5 Pet. (U. S.) 390; *O'Harra v. Hall*, 4 Dall. (U. S.) 340; *Randall v. Phillips*, 3 Mason (U. S.) 378; *Findley v. Bank*

of U. S., 2 McLean (U. S.) 44; *Kemble v. Lull*, 3 McLean (U. S.) 272; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; *Smallwood v. Worthington*, 2 Cranch (C. C.) 431; *McCulloch v. Girard*, 4 Wash. (U. S.) 289; *United States v. Thompson*, 1 Gall. (U. S.) 388; *Bennet v. Hubbard*, Minor (Ala.) 270; *Duff v. Ivy*, 3 Stew. (Ala.) 140; *Barringer v. Sneed*, 3 Stew. (Ala.) 201; *Kennedy v. Kennedy*, 2 Ala. 571; *Hair v. La Bronse*, 10 Ala. 548; *West v. Kelly*, 19 Ala. 353; s. c., 54 Am. Dec. 192; *Richardson v. Comstock*, 21 Ark. 69; *Lumard v. Vischer*, 2 Cal. 37; *Ruiz v. Norton*, 4 Cal. 359; *Baker v. Dunham*, 2 Day (Conn.) 137; *Beckley v. Munson*, 22 Conn. 299; *Rogers v. Atkinson*, 1 Ga. 12; *Wynn v. Cox*, 5 Ga. 373; *Fitzgerald v. Adams*, 9 Ga. 471; *Abrams v. Pomeroy*, 13 Ill. 133; *Harlow v. Boswell*, 15 Ill. 56; *Robinson v. Magarity*, 28 Ill. 423; *Sinard v. Patterson*, 3 Blackf. (Ind.) 353; *Russell v. Branham*, 8 Blackf. (Ind.) 277; *Lett v. Homer*, 5 Blackf. (Ind.) 296; *Madison etc. Plank Road Co. v. Stevenson*, 6 Ind. 379; *Irwin v. Ivers*, 7 Ind. 308; *Oiler v. Bodkey*, 17 Ind. 600; *Fankboner v. Fankboner*, 20 Ind. 62; *Davis v. Liberty etc. Gravel Road Co.*, 84 Ind. 36; *Warren v. Crew*, 22 Iowa 315; *Mussel v. Tama Co.*, 73 Iowa 101; *McConnell v. Dunlap*, Hard (Ky.) 41; *Lemaster v. Burkhart*, 2 Bibb (Ky.) 2; *Marvin v. Lewis*, 1 A. K. Marsh. (Ky.) 102; *Kelly v. Watkins*, 7 J. J. Marsh. (Ky.) 363; *Barthet v. Estebene*, 5 La. Ann. 315; *Theurer v. Schmidt*, 10 La. Ann. 125; *Lazare v. Peytarin*, 12 La. Ann. 684; *Halsey v. Sandidge*, 27 La. Ann. 198; *Vial v. Moll*, 37 La. Ann. 203; *Eveleth v. Wilson*, 15 Me. 109; *Peterson v. Grover*, 20 Me. 363; *Wesley v. Thomas*, 6 Har. & J. (Md.) 24; *Young v. Frost*, 5 Gill (Md.) 287; *Berry v. Matthews*, 13 Md. 537; *Leonard v. Smith*, 11 Met. (Mass.) 330; *Wright v. Smith*, 16 Gray (Mass.) 499; *Perkins v. Young*, 16 Gray

(Mass.) 389; *Wemple v. Knopf*, 15 Minn. 440; s. c., 1 Am. Rep. 147; *McCormick Harvesting-Machine Co. v. Wilson*, 39 Minn. 467; *Elliott v. Connell*, 5 Smed. & M. (Miss.) 91; *Cocke v. Bailey*, 42 Miss. 81; *Kerr v. Kuykendall*, 44 Miss. 137; *Peers v. Davis*, 29 Mo. 184; *Society for Establishing Useful Manufactures v. Haight*, 1 N. J. Eq. 393; *Speer v. Wentfield*, 10 N. J. Eq. 107; *Huffman v. Hummer*, 17 N. J. Eq. 269; *Woodruff v. Frost*, 2 N. J. L. 322; *Perrine v. Cheeseman*, 11 N. J. L. 174; s. c., 19 Am. Dec. 588; *Rogers v. Colt*, 21 N. J. L. 704; *Spencer v. Tilden*, 5 Cow. (N. Y.) 144; *Troy Iron and Nail Factory v. Winslow*, 45 Barb. (N. Y.) 231; *Norton v. Woodruff*, 2 N. Y. 153; *Jarvis v. Palmer*, 11 Paige (N. Y.) 650; *Lowber v. Le Roy*, 2 Sandf. (N. Y.) 202; *Richards v. Millard*, 1 Thomp. & C. (N. Y.) 247; *Douglass v. Peele*, Clark Ch. (N. Y.) 563; *Carter v. McNeely*, 1 Ired. (N. Car.) 448; *Ward v. Ledbetter*, 1 Dev. & B. Eq. (N. Car.) 496; *Parker v. Vrick*, 2 Dev. & B. Eq. (N. Car.) 195; *Donaldson v. Benton*, 4 Dev. & B. (N. Car.) 435; *Chamness v. Crutchfield*, 2 Ired. Eq. (N. Car.) 148; *Hoxie v. Hodges*, 1 Oregon 251; *Heilner v. Imbrie*, 6 S. & R. (Pa.) 401; *Sennett v. Johnson*, 9 Pa. St. 335; *Albert v. Queigler*, 29 Pa. St. 50; *Kirk v. Hartman*, 63 Pa. St. 97; *McDowall v. Beckley*, 2 Mill Const. (S. Car.) 365; *Falkoner v. Garrison*, 1 McCord (S. Car.) 209; *Smith v. Tunno*, 1 McCord Eq. (S. Car.) 443; *Gibson v. Watts*, 1 McCord Eq. (S. Car.) 490; *King v. Colding*, 1 McMull. (S. Car.) 133; *Price v. Allen*, 9 Humph. (Tenn.) 703; *Bond v. Jackson*, *Cooke* (Tenn.) 500; *Phillips v. Keener*, 2 Overt. (Tenn.) 329; *Donley v. Bush*, 44 Tex. 1; *Huff v. State*, 23 Tex. App. 291; *Jones v. Webber*, 1 D. Chip. (Vt.) 215; *Bradley v. Bently*, 8 Vt. 243; *Pingry v. Watkins*, 17 Vt. 379; *Wood v. Shurtleff*, 46 Vt. 325; *Brandon Mfg. Co. v. Morse*, 48 Vt. 322; *Reed v. Jones*, 8 Wis. 392.

Court Records.—*Roche v. Beldam*, 119 Ill. 320; *Driggs v. Morgan*, 2 La. Ann. 151; *Armstrong v. St. Louis*, 69 Mo. 309; s. c., 33 Am. Rep. 499; *Williams v. Huson*, 54 Ga. 28; *Hay v. Bruere*, 6 N. J. L. 212; *Brooks v. Claiborne Co.*, 8 Baxt. (Tenn.) 43; *Dugger v. Taylor*, 46 Ala. 320; *Royce v. Burt*, 42 Barb. (N. Y.) 339; *Murrah v. State*, 51 Miss. 652; *Rogers v. Moor*, 2 Root. (Conn.) 159; *May v. Jameson*, 11 Ark. 368; *Burgess v. Lloyd*, 7 Md. 178; *Wallace v. Coil*, 24 N. J. L. 600; *Davis v. Tallcot*, 12 N. Y. 184; *Hoagland v. Schnorr*, 17 Ohio St. 30; *Davis v. Messenger*, Ohio St. 231; *Ney v. Dubuque etc. R. Co.*, 20 Iowa 347. *Compare* *Kendig's Appeal*, 82 Pa. St. 68; *Wilson v. Wilson*, 45 Cal. 399; *Quinn v. Commonwealth*, 20 Gratt. (Va.) 138; *Eddy v. Wilson*, 43 Vt. 362; *Holliday v. Harvey*, 39 Tex. 670; *Chicago v. McGraw*, 75 Ill. 566; *Scott v. Sanders*, 6 J. J. Marsh. (Ky.) 506; *Riley v. Pettis*, 96 Mo. 318; *Weil v. Levi*, 40 La. Ann. 135; *Monk v. Corbin*, 58 Iowa 503; *United States v. Walsh*, 22 Fed. Rep. 644; *State v. Clemons*, 9 Iowa 534; *Commonwealth v. Slocum*, 14 Gray (Mass.) 395.

The entry in a court of record into which a recognizance is returnable that the principal made default cannot be contradicted by parol evidence. *Commonwealth v. Slocum*, 14 Gray (Mass.) 395. Nor can an official record entry, which is void for uncertainty, be explained by extrinsic evidence. *Porter v. Byrne*, 10 Ind. 146.

Parol evidence will not be admitted to show that the name of a party as given in the record was not the true name, but that another was the real party. *Morris v. State*, 101 Ind. 560; *Woodyard v. Threlkeld*, 1 A. K. Marsh. (Ky.) Nor to show that a judgment revived by a *sci. fa.* in favor of A, B and C is the same as a judgment recovered against the same defendant by A, B, C and D. *Sheftall v. Clay*, T. U. P. Charl. (Ga.) 227. Nor to contradict the date. *Wiley v. Southerland*, 41 Ill. 25. Nor to change the effect of an entry. *Ellis v. Madison*, 13 Me. 312. Nor to control the import of a judgment. *Legg v. Legg*, 8 Mass. 99.

So parol evidence is inadmissible to prove an allegation of a plea in abatement, that, after an appeal had been taken, the writ had been altered without leave of court. *Levant v. Rogers*, 32 Me. 159.

The same rule applies where the evidence is effaced, to show that the judgment was entered by a judge in chambers before the court convened, as ground for vacating a judgment and quashing an execution. *Richardson v. Beldam* (Ill.), 10 N. E. Rep. 191.

A bill of exceptions cannot be varied by extrinsic evidence. *Thompson v. Probert*, 2 Bush (Ky.) 144.

Parol evidence to supply the omission of the record of the presentment of an indictment to the grand jury, is inadmissible. *State v. Glover*, 3 Greene (Iowa) 249.

When a marshal's return is made a part of the record it cannot be impeached by a party to that record in a subsequent suit. *Vogler v. Spargh*, 4 Biss. (U. S.) 288; *Gillespie v. Splahn*, 1 Wilson (Ind.) 228.

The record of the proceedings of a police jury cannot be contradicted by parol. *State v. Simmons* (La. 1888), 5 So. Rep. 29.

Where it plainly appeared that a probate court had jurisdiction, it was held that its record could not be impeached by parol evidence in a collateral proceeding in another court. *Lamothe v. Lippott*, 40 Mo. 142; *McFarlane v. Randle*, 41 Miss. 411.

But evidence not inconsistent with the record may be allowed to explain and give point and direction to it. *Thomason v. Odum*, 31 Ala. 108; *Evans v. Billingsley*, 32 Ala. 395; *Carr v. Emory College*, 32 Ga. 557; *Lewis v. Wilder*, 4 La. Ann. 574; *Eastman v. Cooper*, 15 Pick. (Mass.) 276; s. c., 26 Am. Dec. 600; *Royce v. Burt*, 42 Barb. (N. Y.) 655; *Stark v. Fuller*, 42 Pa. St. 320; *Schnitzel's Appeal*, 49 id. 23; *Foster v. Wells*, 4 Tex. 101.

It is only in a clear case and where to refuse would give effect and sanction to a fraud that a record can be changed or varied by parol. *Clawson v. Eichbaum*, 2 Grant (Pa.) Cas. 130.

But an official entry on a record, void for uncertainty, cannot be explained by intrinsic evidence. *Porter v. Burne*, 10 Ind. 146; s. c., 71 Am. Dec. 305.

Awards by Arbitrators.—Parol evidence is not admissible to prove that an award upon which judgment has been rendered, was founded upon matters not pleaded. *Jones v. Perkins*, 54 Me. 393. Nor is it open to modification according to what was the "understanding" of the arbitrators. *Scott v. Green*, 89 N. Car. 278; *Ruckman v. Ransom*, 35 N. J. L. 565. See also **ARBITRATION**.

Justice's Records.—The general rule was applied in *Dolloff v. Hartwell*, 38 Me. 54; *Smith v. Compton*, 20 Barb. (N. Y.) 262; *Zimmerman v. Zimmerman*, 15 Ill. 84; *Holden v. Barrows*, 39 Me. 135; *Kelley v. Dresser*, 11 Allen (Mass.) 31; *M'Lean v. Hugain*, 13 Johns. (N. Y.) 184; *Long v. Weaver*, 7 Jones L. (N. Car.) 626; *Gardner v. Davis*, 15 Pa. St. 41; *Eastman v. Waterman*, 26 Vt. 494.

In *Morton v. Edwin*, 19 Vt. 77, it was held that the certificate of a justice of the peace, of the time when an execution and return of levy upon real

estate was recorded in his office, was but *prima facie* evidence; and that parol evidence was admissible to show the true time when such record was made.

But in *May v. Hammond*, 146 Mass. 439, it was held that the oral testimony of a magistrate was inadmissible to contradict his record.

Town Records.—The general rule applies to town records with respect to matters regularly within the jurisdiction of the town or its officers when the entry is made in pursuance of law. *Crommett v. Pearson*, 18 Me. 344; *Wood v. Mansell*, 3 Blackf. (Ind.) 125; *Blaisdell v. Briggs*, 23 Me. 123; *Saxton v. Nimms*, 14 Mass. 315; *Thayer v. Stearns*, 1 Pick. (Mass.) 109; *Howlett v. Holland*, 6 Gray (Mass.) 418.

Official Records and Writings Generally.—The records of a clerk of proprietors of common lands, in Vermont, cannot be contradicted or added to by parol. *Britton v. Lawrence*, 1 D. Chip. (Vt.) 103; *Williams v. Ingell*, 21 Pick. (Mass.) 288.

Upon a *scire facias* on a recognizance, the evidence of the recorder is inadmissible to prove that the recognizance sued on and recorded by him was not taken and acknowledged before him. Such testimony would contradict a solemn record. *McMicken v. Commonwealth*, 58 Pa. St. 213.

Where the law requires the return of an officer to be in writing, the whole of the return must be in writing, and parol evidence will not be admitted to contradict or explain it. *Purington v. Loring*, 7 Mass. 388; *Wilson v. Loring*, 7 Mass. 392; *Wellington v. Gale*, 13 Mass. 483.

The receipt of a county treasurer, acknowledging the redemption of land sold for taxes, is written and documentary evidence, and cannot be destroyed by parol evidence. *Halsey v. Blood*, 29 Pa. St. 319.

Deeds.—The rule applies to a deed as an entirety and to its several parts. *Jackson v. Sternberg*, 20 Johns. (N. Y.) 49; *Tobin v. Gregg*, 34 Pa. St. 446; *Kelley v. Saltmarsh*, 146 Mass. 585; *Lowdermilk v. Bostick*, 98 N. Car. 299; *Harrison v. Hahn*, 95 N. Car. 28; *In re Young's Estate*, 3 Md. Ch. 461; *Logan v. Bond*, 13 Ga. 192; *Wilkinson v. Wilkinson*, 2 Dev. Eq. (N. Car.) 376; *McTeer v. Sheppard*, 1 Bay (S. Car.) 461; *Sage v. Jones*, 47 Ind. 122; *Marshall v. Dean*, 4 J. J. Marsh. (Ky.) 583; *Doe v. Swails*, 3 Ind. 329; *Lincoln v. Parsons*, 1 Allen (Mass.) 388; *Dickinson v.*

Dickinson, 2 Murph. (N. Car.) 279; Snyder v. Snyder, 6 Binn. (Pa.) 483; s. c., 6 Am. Rep. 493; Atkinson v. Scott, 1 Bay (S. Car.) 307; Milling v. Crankfield, 1 McCord L. (S. Car.) 258; Kimball v. Morrell, 4 Me. 368; Spurrer v. Parker, 16 B. Mon. (Ky.) 274; New Jersey Zinc Co. v. New Jersey Franklinite Co., 13 N. J. Eq. 322; Hall v. Eaton, 139 Mass. 217.

And evidence is not admissible to show that the land conveyed did not contain the quantity of acres expressed in the deed. Howes v. Barker, 3 Johns. (N. Y.) 506; s. c., 3 Am. Dec. 526. Or to contradict the certificate of acknowledgment in a deed. Greene v. Godfrey, 44 Me. 25. Or to vary or contradict a plan referred to in a deed and made a part of it. Renwick v. Renwick, 9 Rich. L. (S. Car.) 50. See also ACKNOWLEDGMENTS, vol. 1, p. 138.

Parol evidence is inadmissible to insert a reservation or limitation. Lear v. Durgin, 64 N. H. 618; State v. Mayor etc. of Nashville, 2 Tenn. Ch. 755; Rathbun v. Rathbun, 6 Barb. (N. Y.) 98; Noble v. Bosworth, 19 Pick. (Mass.) 314; Swick v. Sears, 1 Hill (N. Y.) 17. Or to insert a condition. Miller v. Fletcher, 27 Gratt. (Va.) 403; s. c., 21 Am. Rep. 356; Warren v. Miller, 38 Me. 108. Or to enlarge or diminish the extent of the grant. Holcomb v. Mooney, 13 Oregon 503. Unless where monuments of boundary were erected at the execution of the deed. Reed v. Shenck, 2 Dev. L. (N. Car.) 415; Massengill v. Boyles, 4 Humph. (Tenn.) 205.

The description of land in a deed which seems certain and without ambiguity, for anything appearing on the face of the deed, is not rendered uncertain by extrinsic facts, and parol evidence is not admissible to contradict such description. Bratton v. Clawson, 3 Strobb. L. (S. Car.) 127; Claremont v. Carleton, 2 N. H. 369; s. c., 9 Am. Dec. 88; Gregory v. Griffin, 1 Pa. St. 208.

A deed purported to convey lot nine, block twenty-eight. There was no such lot in existence. Held, that parol evidence was inadmissible to show that lot twenty-eight, block nine, was meant. Ritchie v. Pease, 114 Ill. 353.

Evidence that a grantor, about the time of executing a deed of land bounded on a way, built a wall and established bounds at the edge of the way, is inadmissible to prove that the way did not pass by the deed. Fisher v. Smith, 9 Gray (Mass.) 441.

A grant of a right of way across land does not authorize the grantee to enter at one place, go partly across, and come out at another place on the same side of the lot; and parol evidence to show that such was the intention of the grant is inadmissible. Comstock v. Van Deusen, 5 Pick. (Mass.) 163; Jordan v. Otis, 38 Me. 429; Farrar v. Hinch, 20 Ill. 646.

It has been held in *Pennsylvania*, Backenstoss v. Stahler, 33 Pa. St. 251; s. c., 75 Am. Dec. 592; Harbold v. Kuster, 44 Pa. St. 392; *North Carolina*, Flint v. Conrad, Phill. L. (N. Car.) 190; s. c., 93 Am. Dec. 588, and *Vermont*, Merrill v. Blodgett, 34 Vt. 480, that it may be shown by parol that the growing crops were reserved, though there is no exception in the deed. But this is contrary to the weight of authority. Gibbins v. Dillingham, 10 Ark. 9; s. c., 50 Am. Dec. 233; Smith v. Price, 39 Ill. 28; s. c., 89 Am. Dec. 284; Melvaine v. Harris, 20 Mo. 457; s. c., 44 Am. Dec. 196; Winterwort v. Light, 46 Barb. (N. Y.) 278.

In *Indiana*, it is held that evidence of a parol reservation of the crop at the time of the sale of the land is admissible. (Overruling Chapman v. Long, 10 Ind. 465); Harvey v. Million, 67 Ind. 90. But these growing crops are by construction of statute treated as personal property and therefore are not conveyed by a deed to the realty. 2 Rev. Stat. 1876, pp. 505, 510.

Parol evidence is inadmissible to control the covenants. Johnson v. Walter, 60 Iowa 315.

See also Brooks v. Maltbie, 2 Stew. & P. (Ala.) 96; Phillips v. Costley, 40 Ala. 486; Young America Engine Co. No. 6 v. Sacramento, 47 Cal. 594; Aguirre v. Alexander, 58 Cal. 21; Hanby v. Tucker, 23 Ga. 132; s. c., 68 Am. Dec. 514; Sawyer v. Vories, 44 Ga. 662; Smith v. Odom, 63 Ga. 499; Emor v. Thompson, 46 Ill. 214; Winn v. Murehead, 52 Iowa 64; Pride v. Lunt, 19 Me. 115; Whitmore v. Learned, 70 Me. 276; Morrill v. Robinson, 71 Me. 24; Goodrich v. Longley, 4 Gray (Mass.) 379; Warren v. Cogswell, 10 Gray (Mass.) 76; Stowell v. Buswell, 135 Mass. 340; Beers v. Beers, 22 Mich. 42; Caldwell v. Layton, 44 Mo. 220; King v. Fink, 51 Mo. 209; Dean v. Erskine, 18 N. H. 81; Proctor v. Gilson, 49 N. H. 62; Todd v. Philhower, 24 N. J. L. 796; Jackson v. Roberts, 11 Wend. (N. Y.) 422; Kenny v. Aitken, 9 Daly (N. Y.) 500; Jackson v. Hart,

12 Johns. (N. Y.) 77; s. c., 7 Am. Dec. 280; Jackson v. Foster, 12 Johns. (N. Y.) 488; Greenvault v. Davis, 4 Hill (N. Y.) 643; Taylor v. Baldwin, 10 Barb. (N. Y.) 582; Herring v. Wiggs, Term (N. Car.) 24; Wade v. Pelliter, 71 N. Car. 74; Bonham v. Craig, 80 N. Car. 224; Johnston v. Haines, 2 Ohio 55; Duff v. Wynkoop, 74 Pa. St. 300; Ryan v. Goodwyn, 1 McMull. Eq. (S. Car.) 451; Norwood v. Byrd, 1 Rich. (S. Car.) 135; s. c., 42 Am. Dec. 406; Pratt v. Phillips, 1 Sneed (Tenn.) 543; s. c., 60 Am. Dec. 162; Bigham v. Bigham, 57 Tex. 238; Butler v. Gale, 27 Vt. 739.

Mortgages.—If a deed clearly appears upon its face to be a mortgage, parol evidence is not admissible to show that it was a conditional sale only. Wing v. Cooper, 37 Vt. 169.

In the absence of fraud or mistake, parol evidence is not admissible to contradict the settled legal construction of a mortgage as to the extent and nature of the agreement, or as to any unwritten understanding between the parties, at or prior to its execution, that the mortgage should take possession of or remove timber from the premises before foreclosure. Berthold v. Fox, 13 Minn. 501; s. c., 97 Am. Dec. 243. *Held* inadmissible in following cases of mortgages: Adair v. Adair, 5 Mich. 204; Hunt v. Bloomer, 5 Duer (N. Y.) 202; Townsend v. Empire Stone Dressing Co., 6 Duer (N. Y.) 208; Union Nat. Bank v. International Bank, 22 Ill. App. 652; Jones v. Phelps, 5 Mich. 218; Whitney v. Lowell, 33 Me. 318; Dyar v. Walton, (Ga. 1887) 7 S. E. Rep. 220; 1886, Baltes v. Ripp, 1 Abb. App. Dec. (N. Y.) 78; Junge v. Bowman, 72 Iowa 648; Babcock v. Pettibone, 12 Blatchf. (U. S.) 354; Sinclair v. Jackson, 8 Cow. (N. Y.) 543; Lindsay v. Garvin, 31 S. Car. 259; Van Evera v. Davis, 51 Iowa 637; Taylor v. Trulock, 55 Iowa 448; Chambers v. Chalmers, 4 Gill & J. (Md.) 420; s. c., 23 Am. Dec. 572; Clark v. Houghton, 12 Gray (Mass.) 38; Barker v. Buel, 5 Cush. (Mass.) 519; Carlton v. Vineland Wine Co., 33 N. J. Eq. 466; Selchow v. Stymus, 26 Hun (N. Y.) 145; Albright v. Lafayette Building & Sav. Assoc., 102 Pa. St. 411; Crawford v. Bonner, 53 Tex. 194.

Contracts to Sell and Other Writings Affecting the Title to Real Estate.—Parol evidence held inadmissible in the following cases under this head: Nickelson v. Reves, 94 N. Car. 559; Wade v.

Percy, 24 La. Ann. 173; Ryan v. Hall, 13 Met. (Mass.) 520; McCormick v. Huse, 66 Ill. 315; Snyder v. Neefus, 53 Barb. (N. Y.) 63; Ware v. Cowles, 24 Ala. 446; Carskaddon v. Kennedy, 40 N. J. Eq. 259; Baltimore Permanent Building etc. Soc. v. Smith, 54 Md. 187; s. c., 39 Am. Rep. 374; Hubbard v. Marshall, 50 Wis. 322; Lane v. Sharpe, 4 Ill. 566; Vanderkarr v. Thompson, 19 Mich. 82; Fitzgerald v. Clarke, 6 Gray (Mass.) 393; Russell v. Schurmier, 9 Minn. 28; Lloyd v. Farrell, 48 Pa. St. 73; Champion v. White, 5 Cow. (N. Y.) 509; Elder v. Elder, 10 Me. 80; s. c., 25 Am. Dec. 205; Wier v. Dougherty, 27 Pa. St. 182; Church of the Advent v. Farrow, 7 Rich. Eq. (S. C.) 378; Smith v. Garrett, 29 Tex. 48; Ripley v. Paige, 12 Vt. 353.

Stipulations as to boundaries or quantity in a contract for sale of land cannot be affected by parol. Dozier v. Duffee, 1 Ala. 320; Harbold v. Kuster, 44 Pa. St. 392; Carskaddon v. Kennedy, 40 N. J. Eq. 259.

The time of payment or conveyance cannot be postponed, shortened or otherwise qualified. Ware v. Cowles, 24 Ala. 446; Moore v. Pendleton, 16 Ind. 481; M'Curtie v. Stevens, 13 Wend. (N. Y.) 527. Nor can parties be added or subtracted. Wynn v. Flannagan, 25 Tex. 778.

A contract for the sale of lands signed by A and B, by C as their agent, A having really no interest in the lands, and not having authorized C to sign such a contract, cannot be turned into the separate contract of B by parol evidence. Snyder v. Neefus, 53 Barb. (N. Y.) 63. Nor can the legal effect be varied. Whitney v. Slayton, 40 Me. 224; Musselman v. Stoner, 31 Pa. St. 265.

Leases.—Where the terms of a written lease are clearly expressed, parol evidence is inadmissible to vary them. Welch v. Horton, 73 Iowa 250; Randolph v. Helps, 9 Colo. 29; Tracy v. Union Iron Works, 29 Mo. App. 342. Nor can a parol contemporaneous agreement be shown as an additional consideration for the execution of a lease. Howard v. Thomas, 12 Ohio St. 201. Or to establish an understanding at the time that other boundaries than those set out in the lease were meant. Krapp v. Marlboro, 29 Vt. 282. Or that rent should be paid in a manner different from that specified. Pickett v. Ferguson, 45 Ark. 177; s. c., 55 Am. Rep. 545. See

also Keegan *v.* Kinnaire, 12 Ill. App. 484; Stevens *v.* Haskell, 70 Me. 202; Hovey *v.* Newton, 7 Pick. (Mass.) 29; Naumberg *v.* Young, 44 N. J. L. 331; s. c., 43 Am. Rep. 380; Cronin *v.* Epstein, 2 N. Y. Supp. 709; Monroe *v.* Berens, 67 Pa. St. 459; Brigham *v.* Rogers, 17 Mass. 571; Fargis *v.* Walton, 51 N. Y. Super. Ct. 32; Sientes *v.* Odier, 17 La. Ann. 153; Scholz *v.* Dankert, 69 Wis. 416.

Powell *v.* Thompson, 80 Ala. 51; Williams *v.* Kent, 67 Md. 350; Hindman *v.* Edgar (Oregon, 1888), 17 P. 862; Carpenter *v.* Shanklin, 7 Blackf. (Ind.) 308; Pickett *v.* Ferguson, 45 Ark. 177; s. c., 55 Am. Rep. 545; Illinois Cent. R. Co. *v.* Baltimore etc. R. Co., 23 Ill. App. 531; Knapp *v.* Marlboro, 29 Vt. 282; Snowhill *v.* Reed, 49 N. J. L. 292; Williams *v.* Kent, 67 Md. 350.

Bills of Sale of, and Contracts to Sell Personal Property.—Where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and parol evidence is inadmissible to vary it. McClure *v.* Jeffrey, 8 Ind. 79; S. P. Davis *v.* Moody, 15 Ga. 175; Marshall *v.* Cox, 7 J. J. Marsh. (Ky.) 133; Boner *v.* Mahle, 3 La. Ann. 600; Batturs *v.* Sellers, 6 Har. & J. (Md.) 249; Peaslee *v.* Strinford, 1 N. Chip. (Vt.) 173; Belcher *v.* Mulhall, 57 Tex. 17; Harrell *v.* Durrance, 9 Fla. 490; Proctor *v.* Cole, 66 Ind. 576; Robinson *v.* McNeill, 51 Ill. 225; Brewster *v.* Potruff, 55 Mich. 129; Cushing *v.* Rice, 46 Me. 303; s. c., 71 Am. Dec. 579; Picard *v.* McCormick, 11 Mich. 68; Woodcock *v.* Farrell, 1 Metc. (Ky.) 437; Epping *v.* Mockler, 55 Ga. 376; Exhaust Ventilator Co. *v.* Chicago etc. R. Co., 69 Wis. 454; Rennell *v.* Kimball, 5 Allen (Mass.) 356.

Parol evidence is admissible to prove any reservation or limitation. McGehee *v.* Rump, 37 Ala. 651; Feusier *v.* Sneath, 3 Nev. 120; Hayworth *v.* Worthington, 5 Blackf. (Ind.) 361; s. c., 35 Am. Dec. 126; Hazard *v.* Loring, 10 Cush. (Mass.) 267; Howard *v.* Odell, 1 Allen (Mass.) 85; Blanchard *v.* Fearring, 4 Allen (Mass.) 118; Newton *v.* Fay, 10 Allen (Mass.) 505; Champlin *v.* Butler, 18 Johns. (N. Y.) 169; Owen *v.* Sharp, 12 Leigh (Va.) 427; Harper *v.* Ross, 10 Allen (Mass.) 332; Holcombe *v.* Munson, 103 N. Y. 682; M'Coy *v.* Moss, 5 Port. (Ala.) 88. Or any condition. Reynolds *v.* Robinson, 37

Hun (N. Y.) 561; Trumbo *v.* Curtright, 1 A. K. Marsh. (Ky.) 582; McClenney *v.* Floyd, 10 Tex. 159; Sanborn *v.* Chittenden, 27 Vt. 171; Davis *v.* Robinson, 71 Iowa 618; Englehorn *v.* Reitlinger, 55 N. Y. Super. Ct. 485; Daly *v.* W. W. Kimball Co. 67 Iowa 132. Or enlargement. Jolliffe *v.* Collins, 21 Mo. 338; Wren *v.* Wardlaw, Minor (Ala.) 363; s. c., 12 Am. Dec. 60; Adams *v.* Garrett, 12 Ala. 229; Machir *v.* M'Dowell, 4 Bibb (Ky.) 473; Brady *v.* Cassidy, 104 N. Y. 147; Thompson *v.* Libby, 34 Minn. 374; Etheridge *v.* Palin, 72 N. Car. 213; Smith *v.* Gibbs, 44 N. H. 335; Angomar *v.* Wilson, 12 La. Ann. 857; O'Reer *v.* Strong, 13 Ill. 688; Osborn *v.* Hendrickson, 7 Cal. 282; Mayer *v.* Dean, 54 N. Y. Super. Ct. 315; Eighmie *v.* Taylor, 98 N. Y. 288; Drake *v.* Dodsworth, 4 Kan. 159; Doyle *v.* Dixon, 12 Allen (Mass.) 576; Johnson *v.* Powers, 65 Cal. 179; Exhaust Ventilator Co. *v.* Chicago etc. R. Co., 69 Wis. 454; McCloskey *v.* McCormick, 37 Ill. 66; Smith *v.* Dallas, 35 Ind. 255.

Assignments.—Fitz *v.* Comey, 118 Mass. 100; Pattison *v.* Hull, 9 Cow. (N. Y.) 747; Osgood *v.* Davis, 18 Me. 146; s. c., 36 Am. Dec. 708; Howard *v.* Howard, 3 Met. (Mass.) 548; Moore *v.* Voss, 1 Cranch (C. C.) 179; Taylor *v.* Sayre, 24 N. J. L. 647; Whiting *v.* Gould, 2 Wis. 552.

It cannot be shown that other property than that mentioned was intended. Gilmore *v.* Bangs, 55 Ga. 403; Driscoll *v.* Fiske, 21 Pick. (Mass.) 503. Or that an assignment absolute on its face was only of a moiety. Durgin *v.* Ireland, 14 N. Y. 322. Nor can the rights of the parties with reference to the property assigned be qualified or enlarged. White *v.* Boyce, 21 Fed. Rep. 228; Fuller *v.* Hapgood, 39 Vt. 617; Arnold *v.* Bailey, 24 S. Car. 493; Dixon *v.* Clayville, 44 Md. 573; Hancock's Appeal, 34 Pa. St. 155.

Bonds.—The surety on an administrator's bond cannot prove by the judge who accepted it or any other witness, that it was signed on condition that others, who never signed it, were to be his co-sureties. Taylor *v.* Jones, 3 La. Ann. 619.

A appeared on the face of the bond as surety. *Held*, that plaintiff could not show by parol that A was in fact the principal. Coots *v.* Farnsworth, 61 Mich. 497.

Though professing upon its face to be a literal transcript of a parol agree-

ment, all parol evidence of the first agreement would be inadmissible. *Worthington v. Bullitt*, 6 Md. 172.

If a bond is not good on its face, parol evidence cannot make it so, and it ought not to be admitted. *Darby v. Hunt*, 2 Treadw. Const. (S. Car.) 740.

Nor can it be shown that the obligor in a bond signed the instrument merely as a means of inducing the wife of the obligee to convey land to a third party, with the understanding that it should be cancelled when this was accomplished. *Hendrickson v. Evans*, 25 Pa. St. 441.

Or that a bond absolute on its face was intended as indemnity merely. *Howell v. Hooks*, 2 Dev. Eq. (N. Car.) 258. See *Todd v. Rivers*, 1 Desaus. (S. Car.) 155; *Mercer v. Blain*, 6 Litt. (Ky.) 412.

It was held that it could not be shown that the name of C was inserted in a bond by mistake, instead of the name of A. *Coleman v. Crumpler*, 2 Dev. (N. Car.) L. 508; *Barnett v. Barnett*, 83 Va. 504; *Richardson v. Godwin*, 6 Jones Eq. (N. Car.) 229; *Yeager v. Yeager* (Pa. 1887), 8 Atl. Rep. 579; *Walters v. Walters*, 11 Ired. L. (N. Car.) 145; *Sawyer v. Hammatt*, 12 Me. (3 Fairf.) 391; *Applegate v. Burlington etc. R. Co.*, 41 Iowa 214; *McGovney v. State*, 20 Ohio 93; *Lane's App.*, 112 Pa. St. 499; *Bond v. Haas*, 2 Dall. (U. S.) 133; *Geddy v. Stainback*, 1 Dev. & B. Eq. (N. Car.) 475; *Cook v. Ambrose*, Add. (Pa.) 323; *Stewards of Methodist Episcopal Church v. Town*, 49 Vt. 29; *Woodward v. M'Gaugh*, 8 Mo. 161; *Chetwood v. Brittan*, 5 N. J. Eq. (1 Hals.) 628; *Towner v. Lucas*, 13 Gratt. (Va.) 705.

Covenants.—*Dana v. Boyd*, 2 J. J. Marsh. (Ky.) 587; *Simanovich v. Wood*, 145 Mass. 180; *Bever v. North*, 107 Ind. 544.

A verbal agreement between the parties made at the time of delivery of a deed containing covenants, or previous thereto, that one of them should be released from the covenants cannot be shown to defeat a recovery for breach of those covenants. *Wadsworth v. Warren*, 79 U. S. 307. In *McCombs v. McKennan*, 2 W. & S. (Pa.) 216; s. c., Am. Dec. 505; *Lyon v. Miller*, 24 Pa. St. 392.

Policies of Insurance.—*Finney v. Bedford Commercial Ins. Co.*, 8 Met. (Mass.) 348; s. c., 41 Am. Dec. 515; *Mutual Ben. L. Ins. Co. v. Ruse*, 8 Ga. 536; *Birmingham v. Empire Ins. Co.*,

42 Barb. (N. Y.) 457; *Porter v. Sandidge*, 32 La. Ann. 449; *Russell v. Russell*, 64 Ala. 500; *Lewis v. Thatcher*, 15 Mass. 431.

An insurance company cannot contradict the receipt of the premium contained in the policy for the purpose of avoiding it. *Illinois etc. Ins. Co. v. Wolf*, 37 Ill. 354.

Parol evidence was held inadmissible to show, either that a different rate had been agreed on, or that, by the custom of New York in cases of re-insurance, the re-insuring company usually made an abatement from the agreed rate. *St. Nicholas Ins. Co. v. Mercantile etc. Ins. Co.*, 5 Bosw. (N. Y.) 238.

Evidence of verbal representations, made by the person applying for the insurance, at the time of application, as to the present and future uses of the building, but not expressed or embodied in the policy, is not admissible. *Mayor etc. of N. Y. v. Brooklyn F. Ins. Co.*, 3 Abb. App. Dec. (N. Y.) 251; *Orient Mut. Ins. Co. v. Wright*, 1 Wall. (U. S.) 456.

Parol evidence that a material enlargement was contemplated by the parties when the insurance was made, is not admissible. *Frost's Detroit Lumber etc. Works v. Millers' etc. Ins. Co.*, 37 Minn. 300.

All oral negotiations concerning the renewal of a policy to be issued must be deemed merged in the policy when issued. *Giddings v. Phoenix Ins. Co.*, 90 Mo. 272.

If a life insurance policy contains the condition that it shall become void if the annual premiums shall not be paid on the day when they severally become due, or if the notes given in payment of premiums shall not be paid at maturity, it cannot be proved that the insurance company orally agreed, at the time of receiving the premium notes, that the policy should not become void on the nonpayment of the notes alone at maturity, but at the instance and election of the company. *Thompson v. Knickerbocker L. Ins. Co.*, 104 U. S. 252.

Charter Parties.—Parol evidence inadmissible to vary the amount stipulated in the contract for carriage. *The Eli Whitney*, 1 Blatchf. (U. S.) 360; *The Augustine Kobbe*, 37 Fed. Rep. 696; *The Hermitage*, 4 Blatchf. (U. S.) 474.

In the earlier cases harsh and oppressive stipulations were not infrequently rejected or explained away by extrinsic

evidence and the effect of doing so was to practically make a new contract. At present charter parties are construed as other written contracts, clear and unambiguous stipulations being given their obvious meaning and effect. *Stodhard v. Lee*, 3 B. & S. 364. See also *CHARTER PARTY*, vol. 3, p. 143.

Parol evidence of representations of carrying capacity made at the time of signing the contract are inadmissible. Any such stipulations not found in the written contract must be considered as having been waived. *Baker v. Ward*, 3 Ben. (U. S.) 499.

Shipping Articles.—In the absence of fraud where the shipping articles specify the wages of the mate of a vessel, he cannot give parol evidence of an agreement to allow him other compensation. *Veacock v. McCall, Gilp.* (U. S.) 329; *The Quintero*, 1 Low. 38; *Thompson v. Ship Oakland*, 4 Law Rep. 349.

For a full exposition of the law governing subscriptions to corporate stock, see *MUNICIPAL SECURITIES*, vol. 15, p. 1204; *RAILROADS*; *STOCK*.

Negotiable Instruments.—It is a firmly settled principle of law that parol evidence of oral agreements alleged to have been made at the time of the drawing, making or endorsing a bill or note cannot be permitted to vary, qualify, add to or subtract from the absolute terms of the written contract. *Parsons on Notes and Bills* 501; *McClintic v. Cory*, 22 Ind. 170; *Hilb v. Peyton*, 22 Gratt. (Va.) 550; *Garten v. Chandler*, 2 Bibb (Ky.) 246; *Burnes v. Scott*, 117 U. S. 582; *Davis v. England*, 141 Mass. 587; *Specht v. Howard*, 16 Wall. (U. S.) 564; *Forsyth v. Kimball*, 91 U. S. 291; *Campbell v. Tate*, 7 Lans. (N. Y.) 370; *Calhoun v. Davis*, 2 Ind. 532; *Foy v. Blackstone*, 31 Ill. 538; s. c., 83 Am. Dec. 246; *Tucker v. Talbott*, 15 Ind. 114; *Williams v. Beazley*, 3 J. J. Marsh. (Ky.) 577; *Cole v. Hundley*, 8 Smed. & M. (Miss.) 473; *Bartow v. Wilkins*, 1 Mo. 74; *Anspach v. Bast*, 52 Pa. St. 356; *Daniel v. Ray*, 1 Hill L. (S. Car.) 32; *Brown v. Wiley*, 20 How. (U. S.) 442; *Clark v. Hart*, 49 Ala. 86; *Bradley v. Anderson*, 5 Vt. 152; *Harris v. Caston*, 2 Bailey L. (S. Car.) 342; *Goddard v. Hill*, 33 Me. 582.

Parol evidence is not admissible to prove a time of payment different from that specified in a note. *Borden v. Peavy*, 20 Ark. 293; *Brown v. Wiley*, 20 How. (U. S.) 442; *Cowles v. Townsend*, 31 Ala. 133; *Joyner v. Turner*, 19

Ark. 690; *Eaton v. Emerson*, 14 Me. 335; *Inge v. Hance*, 29 No. 399; *Campbell v. Upshaw*, 7 Humph. (Tenn.) 185; s. c., 46 Am. Dec. 75.

An agreement, made at the time of indorsing, to waive demand and notice cannot be shown by parol. *Barry v. Morse*, 3 N. H. 132.

Where a promissory note is absolute in its terms, parol evidence is inadmissible to prove that the note was originally given on a condition which had failed, although the same evidence would prove that a written agreement to the same effect has been executed, and has been lost by accident. *Rose v. Learned*, 14 Mass. 154.

Parol evidence is inadmissible to prove that a guarantee indorsed on a note was at the time it was made accepted by the payee in full satisfaction. *Smith v. Stevens*, 3 Ind. 332. Or that a note written otherwise should have been written payable in depreciated bank notes. *Baugh v. Ramsey*, 4 T. B. Mon. (Ky.) 155. Or any other mode of payment than it imports on its face. *Fields v. Stunston*, 1 Coldw. (Tenn.) 40. Or that it was only a memorandum which the maker was not to pay at all except in the character of collecting agent. *McClanaghan v. Hines*, 2 Strobb. L. (S. Car.) 22. Or that the validity of the note depends upon a condition which has not been complied with. *Warren Academy v. Starrett*, 15 Me. 443. Or that the payee of a draft agreed not to hold the drawer accountable. *Fairfield v. Hancock*, 34 Me. 93. Or that the notes were given on a condition that the principal should not be called for while the interest was punctually paid. *Trustees of the Church v. Stetson*, 5 Pick. (Mass.) 506. Or, in an action on a post-dated check, that payment was not to be demanded at maturity. *Hill v. Gaw*, 4 Pa. St. 493. Or that when the note was given the payee agreed to receive payment in certain real estate, the value of which was not specified. *Woodin v. Foster*, 16 Barb. (N. Y.) 146. Or that payment was to be made in lumber instead of money. *Lang v. Johnson*, 24 N. H. 302. Or that a draft payable generally was intended to be paid at a bank. *Patten v. Newell*, 30 Ga. 271; *McLaren v. Marine Bank of Georgia*, 52 Ga. 131. Or that the defendant was not to be liable to pay the notes until he should have received sufficient to do so from a certain source. *Lewis v. Jones*, 7 Bosw. (N. Y.) 366. Or that a

note payable to a corporation was made to show an apparent amount of funds to enable the corporation to obtain a grant from the State, and that it was agreed at the time that it should be given up after payment of interest for a few years. *Warren Academy v. Starrett*, 15 Me. 443. Or that payment of a check was to be in the notes of a bank which had failed. *Peck v. Thomas*, 13 Smed. & M. (Miss.) 11. Or that a note payable "in the notes of the chartered banks of Mississippi at par" were payable in a particular issue of such funds. *Smith v. Elder*, 7 Smed. & M. (Miss.) 507. It cannot be shown by parole evidence that the time of payment was to have been extended, whether the note be subject to the law governing mercantile paper or not. *Skillean v. Richmond*, 48 Barb. (N. Y.) 428. Nor can it be shown as a defense that it was agreed between maker and payee that if a suit was compromised the note which was to be given for services rendered as an attorney in the suit should be void, and that the suit was compromised. *Dale v. Pope*, 4 Litt. (Ky.) 166. Or that there was a mistake in fixing the amount in the note. *McDuffie v. Magoon*, 26 Vt. 518. Or that one signing as surety assumed only a limited liability. *Norton v. Coons*, 6 N. Y. 33. Or that notes which do not correspond with the security were antedated with intent to bring them within it. *Ohio L. Ins. etc. Co. v. Winn*, 4 Md. Ch. 253. Or that on the non-payment of an instalment the whole should be due. *Blakemore v. Wood*, 3 Sneed (Tenn.) 470. Or that property for which the note was given was to be sold and applied to payment thereof, and that by plaintiff's laches in this respect the money had been lost to the defendant. *Ellis v. Hamilton*, 4 Sneed (Tenn.) 512. Or that one signing as surety for the maker was surety for his co-surety only. *Gosserand v. Lacour*, 8 La. Ann. 75. Or that the note was given for money received by way of advancement from a father to his son (the defendant), there being no ambiguity in the note itself. *Porter v. Porter*, 51 Me. 376; *Fennell v. Henry*, 70 Ala. 484; s. c., 45 Am. Rep. 88. Parol evidence is not admissible to show that promissory notes were drawn to relieve other notes of the same amount where the last mentioned notes are not produced, and no legal account given of them. *Wilmer v. Harris*, 5 Har. & J. (Md.) 1.

In an action on a promissory note it cannot be shown by parol that defendant took plaintiff's property at his request to sell and dispose of as if it were his own, and sold it to another party, taking his note therefor, which note he had not collected and could not collect, and that he gave to the plaintiff the note in suit upon an oral agreement that the note which defendant had given to plaintiff was not to be paid unless the defendant should collect the note taken from the third party. *Underwood v. Simonds*, 12 Met. (Mass.) 275. And a note in the usual form cannot be shown by parol to have been intended as a receipt. *Billings v. Billings*, 10 Cush. (Mass.) 178; *Dickson v. Harris*, 60 Iowa 727.

Parol evidence is not admissible to show that the consideration for a note payable absolutely was conditional upon the sale of a horse, and that the horse had not been sold. *Allen v. Furbish*, 4 Gray (Mass.) 504; s. c., 64 Am. Dec. 67. Or that credit was to be given in pursuance of an agreement made at the time of making the note for the value of certain peltries which had not been ascertained. *Featherston v. Wilson*, 4 Ark. 154. Or that the note was given for interest in a patent and that there was a verbal agreement that the maker should pay no money on the note except as realized from sales. *De Long v. Lee*, 73 Iowa 53. Or that postponement of payment was agreed upon at the time of executing the note. *Doss v. Peterson*, 82 Ala. 253, 644. Or that the giving of the note was conditioned upon its being used for a certain purpose, and it had not been used for that purpose. *Wislizenus v. O'Fallon*, 91 Mo. 184. That the note was given as an advancement from father to son and should perform only the office of a receipt. *Mason v. Mason*, 72 Iowa 457, following *Dickson v. Harris*, 60 Iowa 727. Or to show that a written contract given to the maker by the payee might be surrendered in discharge of the note. *McEwan v. Ortman*, 34 Mich. 325. Or that a note unconditional in form was in fact subject to a condition. *Holzworth v. Koch*, 26 Ohio St. 33. Or that a note made payable at the "branch bank at Montgomery" should be void if sent to the bank. *Montgomery R. Co. v. Hurst*, 9 Ala. 513. Or that a note payable in "good, well-finished ploughs" should be paid in ploughs of an improved pattern. *Gilman v. Moore*, 14 Vt. 457. Or that a note payable abso-

lutely might be discharged by the return of a horse for the price of which the note had been given. *Isaacs v. Elkins*, 11 Vt. 679. Or that upon part payment the time should be extended, or that a payment in excess of interest due should be considered a payment upon interest account. *Halliday v. Hart*, 30 N. Y. 474. Or to fix a future time for payment of due-bill payable immediately. *Van Allen v. Allen*, 1 Hilt. (N. Y.) 524. Or that a promissory note given for a release of the payee's interest in his father's estate was given upon a condition that if the interests of other heirs of the estate could not be obtained in a specific manner, both the note and release should be void. *Ely v. Kilborn*, 5 Den. (N. Y.) 514. Or to annex a condition that a note was not to be paid until after the maker's death. *Graves v. Clark*, 6 Blackf. (Ind.) 183. Or that a surety signed only upon a condition that the plaintiff should promptly collect the note when due. *Thompson v. Hall*, 45 Barb. (N. Y.) 214; *Farmer v. Perry*, 70 Iowa 358; 1875, *Holzworth v. Koch*, 26 Ohio St. 33. Or that a note given for "money due on a policy" was induced by fraudulent promise to surrender the note if defendant should become dissatisfied with the contract. *Henderson v. Thompson*, 52 Ga. 149. See also *Foy v. Blackstone*, 31 Ill. 538; s. c., 83 Am. Dec. 246; *Cunningham v. Wardwell*, 12 Me. 466; *Tower v. Richardson*, 6 Allen (Mass.) 351; *Swank v. Nickols*, 24 Ind. 199; *Schurmeier v. Johnson*, 10 Minn. 319; *Myers v. Sunderland*, 4 Greene (Iowa) 567; *Boody v. McKenney*, 23 Me. 517; *Adams v. Wilson*, 12 Met. (Mass.) 138; s. c., 45 Am. Dec. 240; *Currier v. Hale*, 8 Allen (Mass.) 47; *Jones v. Jeffries*, 17 Mo. 577; *Smith v. Thomas*, 29 Mo. 307; *Erwin v. Saunders*, 1 Cow. (N. Y.) 249; *Farnham v. Ingham*, 5 Vt. 514; *Hatch v. Hyde*, 14 Vt. 25; s. c., 39 Am. Dec. 203; *Allen v. Turnham*, 83 Ala. 323; *Haley v. Evans*, 60 Ga. 157; *Bunting v. Heilman*, 74 Ind. 344; *Clute v. Frasier*, 58 Iowa 268; *Van Vetchen v. Smith*, 59 Iowa 173; *Barnstable Sav. Bank v. Ballou*, 119 Mass. 487. Bill of exchange.—*Cocke v. Blackburn*, 58 Miss. 537. Note.—*Mayse v. Biggs*, 3 Head (Tenn.) 36; *Ragsdale v. Gossett*, 2 Lea (Tenn.) 729; *Carter v. Hamilton*, 11 Barb. (N. Y.) 147; *Willse v. Whitaker*, 22 Hun (N. Y.) 242; *Bookstaver v. Jayne*, 3 Thomp. & C. (N. Y.) 397; *Bender v. Montgomery*, 8 Lea (Tenn.) 586; *Knox v. Clifford*, 38 Wis. 651; s.

c., 20 Am. Rep. 28; *Alsop v. Goodwin*, 1 Root (Conn.) 196; *Ferris v. Ludlow*, 7 Ind. 517; *Self v. King*, 28 Tex. 552.

The rule is as applicable to the indorsement and acceptance as to the body of a note or bill.

Indorsements.—*Woodward v. Foster*, 18 Gratt. (Va.) 200; *Halliday v. Hart*, 30 N. Y. 474; *Sands v. Wood*, 1 Iowa 263; *Crocker v. Getchell*, 23 Me. 392; *Dupuy v. Gray*, Minor (Ala.) 357; *Hightower v. Ivy*, 2 Port. (Ala.) 308; *Holt v. Moore*, 5 Ala. 521; *Bartlett v. Lee*, 33 Ga. 401; *Campbell v. Robbins*, 29 Ind. 271; *Prescott Bank v. Caverly*, 7 Gray (Mass.) 217; s. c., 66 Am. Dec. 473; *Kern v. Van Phul*, 7 Minn. 426; 82 Am. Dec. 105; *Bank of Albion v. Smith*, 27 Barb. (N. Y.) 489; *Buckley v. Bentley*, 48 Barb. (N. Y.) 283. Or bond. *Carlton v. Fellows*, 13 Ala. 437; *Knoblauch v. Crossman*, 38 Minn. 352; *Buckley v. Bentley*, 42 Barb. (N. Y.) 646; *Cake v. Pottsville Bank*, 116 Pa. St. 261; *Thompson v. McKee*, 5 Dak. 172; *Bartlett v. Hawley*, 120 Mass. 92; *Jones v. Albee*, 70 Ill. 34.

Acceptances.—*Heaverin v. Donnell*, 7 Smed. & M. (Miss.) 244; *Mason v. Graff*, 35 Pa. St. 448; *Meyer v. Beardsley*, 30 N. J. L. 236; and *Kaufman v. Barringer*, 20 La. Ann. 419. See also note on INDORSEMENT OF NEGOTIABLE INSTRUMENTS, on page 427 of this article.

Contracts—Generally.—*Pierce v. Walker*, 23 Iowa 424; *Knowlton v. Keenan*, 146 Mass. 86; *Bofinger v. Tuyen*, 120 U. S. 198.

Frost v. Brigham, 139 Mass. 43; *Bunce v. Beck*, 43 Mo. 266; *Moody v. McCowan*, 39 Ala. 586; *Kennedy v. Erie etc. Plank Road Co.*, 25 Pa. St. 224; *Burch v. Augusta etc. R. Co.*, 80 Ga. 296; *Van Buren v. Digges*, 11 How. (U. S.) 461; *Walker v. Manning*, 6 Iowa 519; *Conner v. Lewis*, 16 Me. 268; *Paddock v. Bartlett*, 68 Iowa 16; *Herrick v. Noble*, 27 Vt. 1; *Hall v. Gardner*, 1 Mass. 172; *Hartford Bridge Co. v. Granger*, 4 Conn. 142; *Marquis v. Lauretson*, 76 Iowa 23; *Blair v. Williams*, 7 Blackf. (Ind.) 132; *Clinton v. Brown*, 41 Barb. (N. Y.) 226; *Parker v. Morrill*, 98 N. Car. 232; 1875, *Taft v. Schwamb*, 80 Ill. 289; *Hakes v. Hotchkiss*, 23 Vt. 231; *Barrett v. Wheeler*, 71 Iowa 662; *Bowman v. Tagg* (Pa. 1887), 8 Atl. Rep. 384; *Gilbert v. Moline Plough Co.*, 119 U. S. 491; *Mallon v. Story*, 2 E. D. Smith (N. Y.) 331.

Releases.—An absolute unambiguous release is not susceptible of parol explanation with a view to altering its legal construction and effect. *Neidig v. Whiteford*, 29 Md. 178; *Leddy v. Barney*, 139 Mass. 394; *Drake v. Starks*, 45 Conn. 96; *Brady v. Read*, 94 N. Y. 631; *Fordice v. Scribner*, 108 Ind. 85; *Mc-Crea v. Purmort*, 16 Wend. (N. Y.) 465; s. c., 30 Am. Dec. 103; *Carter v. Bellamy*, Kirby (Conn.) 291; *Morgan v. Morgan*, 5 La. Ann. 230; *Turnipseed v. McMath*, 13 Ala. 44; *Deland v. Amesbury etc. Mfg. Co.*, 7 Pick. (Mass.) 244; *Rice v. Woods*, 21 Pick. (Mass.) 30; *Wood v. Young*, 5 Wend. (N. Y.) 620; *Pierson v. Hooker*, 3 Johns. (N. Y.) 68; *Van Brunt v. Van Brunt*, 3 Edw. Ch. (N. Y.) 14.

Though general words of release may be limited by a particular recital in the same release, yet where there is no such limitation in the instrument itself, extrinsic evidence cannot be offered for that purpose. *Hoes v. Van Hoesen*, 1 Barb. Ch. (N. Y.) 379.

Wills.—SEE WILLS.

Miscellaneous Documents.—Receipts containing contract.—*Fay v. Gray*, 124 Mass. 500; *Carpenter v. Jamison*, 6 Mo. App. 216. Warehouse receipts.—*Leonard v. Dunton*, 51 Ill. 482; *Stewart v. Phoenix Ins. Co.*, 9 Lea (Tenn.) 104; *Guaranties.*—*Van Brunt v. Day*, 17 Hun (N. Y.) 166; *Lazear v. Union Bank*, 52 Md. 78; s. c., 36 Am. Rep. 355; *Buchtel v. Mason Lumber Co.*, 1 Flip. (U. S.) 640. Tax roll.—*Case v. Dean*, 16 Mich. 12. Assessment rolls.—*Gilbert v. New Haven*, 40 Conn. 102. Confessions of prisoner.—*State v. Grove*, Mart. (N. Car.) 43; *Wright v. State*, 50 Miss. 332; *Cicero v. State*, 54 Ga. 156. Statutes.—*Annapolis v. Harwood*, 32 Md. 471. Powers of attorney.—*McFarland v. Boston etc. R. Co.*, 115 Mass. 63. Money orders.—*Kimball v. Bryan*, 56 Iowa. 632. Discharges.—*Wade v. Howard*, 6 Pick. (Mass.) 492. Military discharges.—*Fitchburg v. Lunenburg*, 102 Mass. 358. Results of election.—*Bovee v. McClean*, 24 Wis. 225. Licenses.—*Ives v. Williams*, 50 Mich. 100. Marriage certificates.—*Edwards v. Edwards*, 25 La. Ann. 202. Town plats.—*Orton v. Harvey*, 23 Wis. 99; *State Historical Assoc. v. Lincoln*, 14 Neb. 336. Official writings.—*People v. Hagar*, 52 Cal. 171.

The following cases also serve to illustrate the general rule stated in the text:

Alabama—*Griel v. Lomax*, 86 Ala.

132; *Ricketts v. Birmingham St. R. Co.*, 85 Ala. 600; *Lakeside Land Co. v. Dromgoole* (Ala. 1890), 7 So. Rep. 444. *California*—*Miller v. Butterfield*, 79 Cal. 62; *Mowry v. Heney* (Cal. 1891), 25 Pac. Rep. 17.

Colorado—*Neuman v. Breifurst*, 9 Col. 228; *Cross v. Kistler* (Col. 1890), 23 Pac. Rep. 903.

Florida—*Meinhardt v. Mode*, 22 Fla. 279.

Georgia—*Polhill v. Brown*, 84 Ga. 338; *DeLoach v. Smith*, 83 Ga. 665; *Patterson v. Ramspeck* (Ga. 1888), 10 S. E. Rep. 390; *Leonard v. Peeples*, 30 Ga. 61.

Idaho—*Dulaney v. Burke* (Idaho 1890), 23 Pac. Rep. 915.

Illinois—*Hoes v. Van Alstyne*, 20 Ill. 201; *Flower v. Brumbach*, 30 Ill. App. 294; *affd.* 131 Ill. 646; *Graham v. Eisner*, 28 Ill. App. 269; *Dillman v. Nadelhoffer*, 28 Ill. App. 168.

Indiana—*Conant v. Nat. State Bank*, 121 Ind. 323; *Miller v. Indianapolis*, 123 Ind. 196; *Bailey v. Briant*, 117 Ind. 362; *Jackson v. Patterson*, 59 Ind. 237; *Stockton v. Stockton*, 59 Ind. 574; *Coapstick v. Bosworth*, 121 Ind. 6; *Goudy v. Gordon*, 122 Ind. 533; *Davis v. Stout* (Ind. 1890), 25 N. E. Rep. 862.

Iowa—*Hunt v. Gray*, 76 Iowa 268.

Louisiana—*Herbert v. Lege*, 29 La. Ann. 511; *Succession of Guillory*, 29 La. Ann. 495; *Janney v. Ober*, 28 La. Ann. 281; *Newell v. Shaffett*, 28 La. Ann. 235; *Weinberger v. Merchants' Mut. Ins. Co.*, 41 La. Ann. 31; *Johnson v. Planner*, 42 La. Ann. 7; *Dohan v. Dohan* (La. 1890), 7 So. Rep. 569.

Massachusetts—*Stillings v. Tinnis*, (Mass. 1890), 25 N. E. Rep. 50; *Chemical Electric Light etc. Co. v. Howard*, 150 Mass. 495; *Colt v. Cone*, 107 Mass. 285; *Phillbrook v. Eabon*, 134 Mass. 398; *Harper v. Ross*, 10 Allen (Mass.) 337.

Maryland—*Scott v. Amoss* (Md. 1890), 20 Atl. Rep. 724.

Maine—*Shaw v. Wilshire*, 65 Me. 485.

Michigan—*Pittman v. Burr*, 79 Mich. 537; *Coots v. Farnsworth*, 61 Mich. 497; *Lynch v. Kirby*, 36 Mich. 238; *Jennings v. Moore* (Mich. 1890), 47 N. W. Rep. 127; *Whitney v. Hall* (Mich. 1890), 47 N. W. Rep. 127.

Minnesota—*Hills v. Rix*, 43 Minn. 543; *Bruns v. Schreiber*, 43 Minn. 468; *Kessler v. Smith*, 42 Minn. 494; *Masonic Temple Assoc. v. Channell*, 43 Minn. 353; *State v. McGonigle*, 101 Mo. 353; *McGonigle v. State*, 13 S. W.

merged therein.¹ A writing evidencing the whole of an agree-

Rep. 761; St. Paul etc. R. Co. v. St. Paul etc. Co. (Minn. 1890) 46 N. W. Rep. 566; Tarbell v. Farmers' Mut. El. Co. (Minn. 1890), 47 N. W. Rep. 152.

Missouri—James T. Hair Co. v. Walmsley, 32 Mo. App. 115; Armstrong v. St. Louis, 3 Mo. App. 100.

Montana—Fisher v. Briscoe (Mont. 1891), 25 Pac. Rep. 30.

New York—Gordon v. Niemann, 118 N. Y. 152; Mott v. Richtmeyer, 57 N. Y. 49; Cram v. Union Bank, 1 Abb. App. Dec. (N. Y.) 461; American Surety Co. v. Thurber (N. Y. 1890), 23 N. E. Rep. 1129; Genet v. Delaware etc. Canal Co., 4 N. Y. Supp. 880; s. c., 56 N. Y. Super. Ct. 27; Williams v. Aylesworth, 7 N. Y. Supp. 111; Isaacs v. Jacobs, 7 N. Y. Supp. 66; Sprague v. Bartholdi Hotel Co., 3 N. Y. Supp. 828; s. c., 56 N. Y. Super. Ct. 608; Burnell v. Empire Laundry Machinery Co., 5 N. Y. Supp. 591; Bopp v. Atkins, 10 N. Y. Supp. 539; Walsh v. Brown, 4 N. Y. Supp. 79; Routledge v. Worthington Co., 3 N. Y. Supp. 819; Caulkins v. Hellman, 14 Hun (N. Y.) 330; Mayer v. Dean, 54 N. Y. Super. Ct. 315.

Nebraska—Dodge v. Kiene (Neb. 1889), 44 N. W. 191; Watson v. Roode (Neb. 1890), 46 N. W. Rep. 491.

North Carolina—Merchants' etc. Nat. Bank v. McElwee (N. Car. 1889), 10 S. E. Rep. 295; Moffitt v. Maness, 102 N. Car. 457; Egerton v. Jones, 102 N. Car. 278; Fortiscue v. Crawford, 105 N. Car. 29; Henderson v. McBee, 79 N. Car. 219.

North Dakota—Northwestern Fuel Co. v. Bruns (N. Dak. 1890), 45 N. W. 699.

New Hampshire—Gale v. Sulloway, 62 N. H. 57; Franklin Falls Pump Co. v. Franklin (N. H. 1890), 20 Atl. Rep. 333.

Pennsylvania—Coughenour v. Suhre, 71 Pa. St. 462; Hauer v. Patterson, 84 Pa. St. 274; Express Pub. Co. v. Aldine Press, 126 Pa. St. 347; s. c., 24 W. N. C. (Pa.) 165; Conrow v. Conrow, 24 W. N. C. (Pa.) 339.

South Carolina—Charles v. Byrd, 29 S. Car. 544; Lindsay v. Garvin, 31 S. Car. 259.

South Dakota—Brown v. Bon Homme County (S. Dak. 1890), 46 N. W. Rep. 173.

Texas—Lanius v. Shuler, 77 Tex. 24; Roberts v. Johnson, 48 Tex. 133;

Tryon v. Rankin, 9 Tex. 595; Hoffron v. Cunningham, 76 Tex. 312.

Wisconsin—Best v. Sinz, 63 Wis. 243.

1. Low v. Studabaker, 110 Ind. 57; Beach v. Steele, 12 N. H. 82; French v. Turner, 15 Ind. 59; Smith v. Higbee, 12 Vt. 113; Cole v. Spann, 13 Ala. 537; Dean v. Mason, 4 Conn. 428; Logan v. Bond, 13 Ga. 192; Savercool v. Farwell, 17 Mich. 308; Herndon v. Henderson, 41 Miss. 584; Cox v. Bennet, 13 N. J. L. 165; State v. Stites, 13 N. J. L. 172; Mead v. Steger, 5 Port. (Ala.) 498; Walker v. Engler, 30 Mo. 130; Parkhurst v. Van Cortlandt, 1 Johns. Ch. (N. Y.) 274; Crosier v. Acer, 7 Paige (N. Y.) 137; Chadwick v. Perkins, 3 Me. 399; Gooch v. Conner, 8 Mo. 391; Vaughn v. Lynn, 9 Mo. 870; Beard v. White, 1 Ala. 436; Booth v. Hoskins, 75 Cal. 271; Low v. Studebaker, 110 Ind. 57; Schreiber v. Butler, 84 Ind. 576; McClelland v. James, 33 Iowa 571; Mann v. Independent School Dist., 52 Iowa 130; Mast v. Pearce, 58 Iowa 579; s. c., 43 Am. Rep. 125; Hanger v. Evins, 38 Ark. 334; Palmer v. Albee, 50 Iowa 429; Bryan v. Brazil, 52 Iowa 350; Miller v. Edgerton, 38 Kan. 36; Aultman v. Brown, 39 Minn. 323; Brenner v. Luth, 28 Kan. 581; Lawrence v. McGuire, 21 Kan. 552; Hunting v. Emmart, 55 Md. 265; Dutton v. Gerrish, 9 Cush. (Mass.) 89; s. c., 55 Am. Dec. 45; Keller v. Webb, 126 Mass. 393; Spence v. Bowen, 41 Mich. 149; Winona v. Thompson, 24 Minn. 199; Helmricks v. Gehrke, 56 Mo. 79; Meekins v. Newberry, 101 N. Car. 17; Fitts v. Brown, 20 N. H. 393; Hale v. Handy, 26 N. H. 206; Hodgdon v. Waldron, 9 N. H. 66; Milton v. Hudson River Steamboat Co., 4 Lans. (N. Y.) 76; Munsell v. Flood, 45 N. Y. Super. Ct. 460; Thorp v. Ross, 4 Abb. App. Dec. (N. Y.) 416; Fox v. Foster, 4 Pa. St. 119; Watsontown Car. Mfg. Co. v. Elmsport Lumber Co., 99 Pa. St. 605; Boehl v. Wadgyar, 54 Tex. 589; Roundtree v. Gilroy, 57 Tex. 176; Schultz v. Coon, 51 Wis. 416; s. c., 37 Am. Rep. 839; Wiener v. Whipple, 53 Wis. 298; s. c., 40 Am. Rep. 775; Hei v. Heller, 53 Wis. 415; Chandler v. Thompson, 30 Fed. Rep. 38; Craig v. Baptist Education Soc., 7 B. Mon. (Ky.) 73; Davison v. Davenport Gas Light etc. Co., 24 Iowa 419; Cook v. Durham, 61 Wis. 15; Thompson v. Stewart, 60 Iowa 223; Whitehead v.

ment between the parties, which has been delivered, accepted, and business transacted under it, although not signed, has the same force and effect as if it had been signed by the parties, as to being varied by parol.¹ The rule, when applicable, excludes evidence which would vary any obligation implied by law from the terms of a written contract, as well as that which would directly vary its terms.²

The application of the general rule as to the admissibility of parol evidence to explain whether the party signing a written instrument did so as principal or agent, is treated under another article.³

III. EXCEPTIONS TO GENERAL RULE—1. Written Instruments a Simple Memorandum—(See also MEMORANDUM, vol. 15, p. 262).—Parol evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, or other disposition of property.⁴

2. Receipts.—A receipt is always subject to be explained, varied or controlled by parol evidence,⁵ even after the death of the

Lane, 72 Ala. 39; 1877, *Oliver v. Shoemaker*, 35 Mich. 464; *Cuthbert v. Bowie*, 10 Ala. 163.

1. *Farmer v. Gregory*, 78 Ky. 475.

2. *La Farge v. Rickert*, 5 Wend. (N. Y.) 187; *Thorp v. Ross*, 4 Abb. App. Dec. (N. Y.) 416; *Parsons v. Woodward*, 73 Ala. 348.

In a case where the law prescribed what should be the duration of a lease, it was held that in absence of any express agreement fixing the term, the court should not receive evidence of usage to fix the term. *Jackson v. Beling*, 22 La. Ann. 377. See **BILLS AND NOTES**, vol. 2, p. 389.

3. See **AGENCY**, vol. 1, p. 385, *et seq.*

4. *McCulloch v. Girard*, 4 Wash. (U. S.) 289; *Deshon v. Merchants' Ins. Co.*, 11 Met. (Mass.) 199; *Glenn v. Rogers*, 3 Md. 312; *Stephen. Dig. of the Law of Evidence*, p. 164.

An ordinary bill of parcels is not such a memorandum of contract as will exclude parol proof of a warrantee. *Atwater v. Clancy*, 197 Mass. 369.

Parol evidence is admissible to establish the terms of a sale, although a memorandum of sale has been given. *Perrine v. Cooley*, 39 N. J. L. 449; *Greenl. Ev.* (14th ed.) 88. See also *Linsley v. Lovely*, 26 Vt. 123; *Wentworth v. Buhler*, 3 E. D. Smith (N. Y.) 305; *Keene v. Meade*, 3 Pet. (U. S.) 7; *Robinson v. Mulder*, 81 Mich. 75; *Weisinger v. Bank of Gallatin*, 10 Lea (Tenn.) 330.

But parol evidence is not admissible to vary a memorandum. "B takes C's Ohio and Miss. for \$5,100 and odd dollars to be end. on C's note on date" of sale; there being no dispute as to the specific note or stock meant, or the meaning of the abbreviations. 1871, *Colt v. Cone*, 107 Mass. 285. See also *Millet v. Marston*, 62 Me. 477.

5. *The Lady Franklin*, 8 Wall. (U. S.) 325; *Harris v. Johnston*, 3 Cranch (U. S.) 311; *Maryland Ins. Co. v. Ruden*, 6 Cranch (U. S.) 338; *The Joseph Grant*, 1 Biss. (U. S.) 193; *Knox v. The Minetta*, 1 Crabbe (U. S.) 534; *The Henry, Blatchf. & H.* (U. S.) 465; *Pleasants v. Pemberton*, 2 Dall. (U. S.) 196; *Beebe v. Moore*, 3 McLean (U. S.) 387; *Goodrich v. Norris*, Abb. Adm. 196; *Butler v. The Arrow*, 1 Newb. Adm. 59; *Shaw v. Thompson*, Olc. Adm. 144; *The Ship Martha*, Olc. Adm. 140; *New England Mortgage Security Co. v. Gay*, 33 Fed. Rep. 636; *Connell v. Vanderwerken*, 1 Mackey (D. C.) 242; *Wiggins v. Pryor*, 3 Port. (Ala.) 430; *Saunders v. Hendrix*, 5 Ala. 224; *Peltus v. Roberts*, 6 Ala. 811; *Hogan v. Reynolds*, 8 Ala. 59; *McKeagg v. Calahan*, 13 Ala. 828; *Oakley v. State*, 40 Ala. 392; *Trowbridge v. Sanger*, 4 Ark. 179; *Hawley v. Bader*, 15 Cal. 44; *Calhoun v. Richardson*, 30 Conn. 210; *King v. Mitchell*, 30 Ga. 164; *Dunagan v. Dunagan*, 38 Ga. 554; *Illinois etc. R. Co. v. Cowles*, 32 Ill. 116; *White v. Merrill*, 32 Ill. 511; *Carr*

person to whom it was given;¹ but this is true only so far as it is such in fact as well as in name. But though a paper purports to be a receipt, still if it in fact contains a complete contract between the parties, to that extent it cannot be varied and contradicted by parol evidence.²

v. Miner, 42 Ill. 179; *Deford v. Leinour*, 1 Ind. 532; *Porter v. Chicago etc. R. Co.*, 20 Iowa 73; *Ellicott v. Barnes*, 31 Kan. 170; *Baugh v. Brassfield*, 5 J. J. Marsh. (Ky.) 79; *Knox v. Barbee*, 3 Bibb (Ky.) 526; *Byrne v. Schwing*, 6 B. Mon. (Ky.) 199; *Akin v. Drummond*, 2 La. Ann. 92; *Fletcher v. Fletcher*, 5 La. Ann. 408; *Bass v. Balph*, 5 La. Ann. 235; *Succession of Bozant*, 6 La. Ann. 589; *Municipality No. 1 v. Wheeler*, 10 La. Ann. 745; *Bringier v. Gordon*, 14 La. Ann. 272; *Dunn v. Pipes*, 20 La. Ann. 276; *Richardson v. Beede*, 43 Me. 161; *Grant v. Frost*, 80 Me. 202; *Cramer v. Shriner*, 18 Md. 140; *Brooks v. White*, 2 Met. (Mass.) 283; s. c., 57 Am. Dec. 95; *Baker v. Briggs*, 8 Pick. (Mass.) 122; s. c., 19 Am. Dec. 311; *Gerrish v. Washburn*, 9 Pick. (Mass.) 338; *Badger v. Jones*, 12 Pick. (Mass.) 371; *Corlies v. Howe*, 11 Gray (Mass.) 125; s. c., 71 Am. Dec. 693; *Dunham v. Barnes*, 9 Allen (Mass.) 352; *Rowe v. Wright*, 12 Mich. 287; *Bell v. Utley*, 17 Mich. 508; *Hart v. Gould*, 62 Mich. 262; *Sears v. Wempmer*, 27 Minn. 351; *Williams v. State*, 12 Smed. & M. (Miss.) 58; *Huston v. Becknor*, 4 Mo. 39; *Wetherford v. Farrar*, 18 Mo. 474; *Wallace v. Wilson*, 30 Mo. 335; *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343; *Blanchard v. Putnam*, 16 N. H. 48; *Pendexter v. Carleton*, 16 N. H. 482; *Edgerly v. Emerson*, 23 N. H. 555; s. c., 55 Am. Dec. 207; *Furbush v. Goodwin*, 25 N. H. 425; *Bird v. Davis*, 14 N. J. Eq. 467; *Swain v. Frazier*, 35 N. J. Eq. 326; *State v. McDonald*, 43 N. J. L. 591; *House v. Low*, 2 Johns. (N. Y.) 378; *McKinstry v. Pearsall*, 3 Johns. (N. Y.) 319; *Tobey v. Barber*, 5 Johns. (N. Y.) 68; s. c., 4 Am. Dec. 326; *Johnson v. Weed*, 9 Johns. (N. Y.) 310, s. c., 6 Am. Dec. 279; *Southwick v. Hayden*, 7 Cow. (N. Y.) 374; *Higby v. New York etc. R. Co.*, 3 Bosw. (N. Y.) 497; *Secor v. Lord*, 9 Bosw. (N. Y.) 163; *Sheldon v. Pick*, 13 Barb. (N. Y.) 317; *Colburn v. Lansing*, 46 Barb. (N. Y.) 37; *Wadsworth v. Allcott*, 6 N. Y. 64; *Scovill v. Griffith*, 12 N. Y. 509; *Filkins v. Whyland*, 24 N. Y. 338; *Buswell v. Pioneer*, 37 N. Y. 312; *De*

Lavellette v. Wendt, 75 N. Y. 579; *Jones v. Patterson*, 1 W. & S. (Pa.) 321; *Dutton v. Tilden*, 13 Pa. St. 46; *Cozens v. Pooser*, 1 Spear. (S. Car.) 325; *Pool v. Chase*, 46 Tex. 207; *Giddings v. Munson*, 4 Vt. 308; *Nye v. Kellum*, 18 Vt. 594; *Street v. Hall*, 29 Vt. 165; *King v. Woodbridge*, 34 Vt. 565; *Hitt v. Slocum*, 37 Vt. 524; *McLane v. Johnson*, 59 Vt. 237; *Ballston Spa. Bank v. Marine Bank*, 16 Wis. 120; *Hill v. Durand*, 58 Wis. 160; *Gilchrist v. Brande*, 58 Wis. 184; *Chapman v. Sutton*, 68 Wis. 657.

The principle was applied where, on a settlement, a guardian gave the executor of his late ward his note for a sum admitted to be due, but which was in fact more than he owed, and took a receipt as for so much money in full. *Heath v. Steele*, 9 S. Car. 86. To recital in partnership articles. *Lowe v. Thompson*, 86 Ind. 503. To certificate of deposit. *Keen v. Beckman*, 66 Iowa 672. To tax receipts. *Rand v. Scofield*, 43 Ill. 167; *Elston v. Kennicott*, 52 Ill. 272; *Hammond v. Hannin*, 21 Mich. 374. To a receipt for the premium recited in an insurance policy. *Texas Mut. L. Ins. v. Davidge*, 51 Tex. 244. To a receipt entered by a judgment plaintiff or his assignee, upon a record of the judgment, of a part or all of the judgment. *Lapping v. Duffy*, 65 Ind. 229; *Dunn v. Pipes*, 20 La. Ann. 276.

An instrument acknowledging the receipt of a sum of money in part payment of a certain lot described and signed by defendant, is a receipt only, and not a contract for the sale of land, and hence subject to be explained or supplemented by evidence *aliunde*. *McKinney v. Harvie*, 38 Minn. 18.

1. *Brice v. Hamilton*, 12 S. Car. 32.

2. *Alcorn v. Morgan*, 77 Ind. 184; *Goodwin v. Goodwin*, 59 N. H. 548; *Thompson v. Williams*, 30 Kan. 114; *Marks v. Cass County Mill etc. Co.*, 43 Iowa 146; *Carpenter v. Jamison*, 75 Mo. 285; *Stone v. Vance*, 6 Ohio 246; *Dale v. Evans*, 14 Ind. 288; *Henry v. Henry*, 11 Ind. 286; *James v. Bligh*, 11 Allen (Mass.) 4; *Sencerbox v. McGrade*, 6 Minn. 484; *Wykoff v. Irvine*, 6 Minn. 496; s. c., Am. Dec. 461; *Coon*

The acknowledgment in a deed of conveyance of land of the receipt of the purchase money is but a receipt for money, and is subject to be contradicted, explained, or varied by extrinsic evidence.¹ Where the question is upon the receipt itself, by whom signed, or what are its contents, the receipt must be produced.² A bill of lading partakes of the nature of a receipt and a contract; and so far as it partakes of the nature of a receipt, it may be explained or contradicted;³ but to the extent that it defines the liabilities of the parties, it is subject to the same rules as other written contracts.⁴ The acknowledgment in a bill of

v. Knap, 8 N. Y. 402; *s. c.*, 59 Am. Dec. 502; *Brown v. Brooks*, 7 Jones L. (N. Car.) 93; *Capps v. Holt*, 5 Jones Eq. (N. Car.) 153; *Harrison v. Juneau Bank*, 17 Wis. 340; *Young v. Cook*, 15 La. Ann. 126.

A receipt for deeds as escrows, stating the purposes for which they were received, was given by the person to whom they were delivered. It was held that parol evidence was inadmissible to vary such receipt. *Graves v. Dudley* 20 N. Y. 76.

Parol evidence is not admissible to enlarge or diminish the quantity of articles receipted for, unless fraud or mistake is proved. *Querry v. White*, 1 Bibb. (Ky.) 271.

Or to contradict a condition or defeasance of a receipt given for goods attached. *Curtis v. Wakefield*, 15 Pick. (Mass.) 437; *Scott v. Whittemore*, 27 N. H. 309; *Wakefield v. Stedman*, 12 Pick. (Mass.) 562; *Bursley v. Hamilton*, 15 Pick. (Mass.) 40; *s. c.*, 25 Am. Dec. 423.

A receipt in full cannot be invalidated by parol except on account of mistake or fraud. *Sessions v. Gilbert*, 1 Vt. 75.

Where a party having received bodily and other injuries by a defect in a highway signed a receipt "in full for all demands for damages sustained on the highway," it was held that he could not show by parol that it was agreed that, if it should turn out that his personal injuries were material, he should be paid more. *Squires v. Amherst*, 145 Mass. 192.

1. The same is true of recitals in other instruments.

Elder v. Hood, 38 Ill. 533; *Vaugine v. Taylor*, 18 Ark. 65; *Coles v. Soulsby*, 21 Cal. 47; *Millard v. Hathaway*, 27 Cal. 119; *Callaway v. Hearn*, 1 Houst. (Del.) 607; *Bratt v. Bratt*, 21 Md. 578; *Harris v. Harris*, 2 Harr. (Del.) 354; *Ayers v. McConnell*, 15

Ill. 230; *Kimball v. Walker*, 30 Ill. 482; *Hall v. Perry*, 3 Greene (Iowa) 579; *Burbank v. Gould*, 15 Me. 118; *Bassett v. Bassett*, 55 Me. 127; *Elysville Co. v. Okisko Co.*, 1 Md. Ch. 392; *Spalding v. Brent*, 3 Md. Ch. 411; *Lingan v. Henderson*, 1 Bland (Md.) 236; *Davenport v. Mason*, 15 Mass. 85; *Wilkinson v. Scott*, 17 Mass. 249; *Clapp v. Tirrell*, 20 Pick. (Mass.) 247; *Speer v. Speer*, 14 N. J. Eq. 240; *Herbert v. Scofield*, 9 N. J. Eq. 492; *Shepard v. Little*, 14 Johns. (N. Y.) 210; *Whitbeck v. Whitbeck*, 9 Cow. (N. Y.) 266; *s. c.*, 18 Am. Dec. 503; *Baker v. Connell*, 1 Daly (N. Y.) 469; *Wesson v. Stevens*, 2 Ired. Eq. (N. C.) 557; *DeLoach v. Turner*, 6 Rich. L. (S. Car.) 117; *Gibson v. Fifer*, 21 Tex. 260; *White v. Miller*, 22 Vt. 380; *Newman v. Shelly*, 36 La. Ann. 100; *Cooper v. Finke*, 38 Minn. 2.

2. *Humphries v. M'Craw*, 5 Ark. 61; *Zube v. Weber*, 67 Mich. 52.

3. *Steamboat Missouri v. Webb*, 9 Mo. 193; *Blade v. Chicago etc. R. Co.*, 10 Wis. 4; *Wayland v. Mosely*, 5 Ala. 430; *s. c.*, 39 Am. Dec. 335; *Hedricks v. Steamship Morning Star*, 18 La. Ann. 353; *S. P. O'Brien v. Gilchrist*, 34 Me. 554; *s. c.*, 56 Am. Dec. 676; *Wood v. Perry*, *Wright* (Ohio) 240; *Baltimore etc. Steamboat Co. v. Brown*, 54 Pa. St. 77; *Meyer v. Peck*, 28 N. Y. 590; *Bradstreet v. Heron*, 1 Abb. Adm. 209; *Baxter v. Leland*, 1 Abb. Adm. 348; *Ellis v. Willard*, 9 N. Y. 529; *The Martha, Olc. Adm.* 170; *Nelson v. Woodruff*, 1 Black (U. S.) 166; *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339; *Portland Bank v. Stubbs*, 6 Mass. 422; *s. c.*, 4 Am. Dec. 151; *The Henry, Blatchf. & H. Adm.* 465; *The Tuskar*, 1 Sprague (U. S.) 71; *Sutton v. Kettell*, 1 Sprague (U. S.) 309; *Baker v. Mich. etc. R. Co.*, 42 Ill. 7; *Glass v. Goldsmith*, 22 Wis. 488.

4. *Chapin v. Siger*, 4 McLean (U. S.) 378.

lading that the goods are in good order cannot be overthrown, except by very clear evidence.¹

3. Written Instruments Intrinsically Incomplete.—Parol evidence may be introduced to supply matter omitted from a writing where it is apparent from the writing itself that it does not contain the whole transaction.² The rule applies to court rec-

1. *Bond v. Frost*, 6 La. Ann. 801.

2. *Brown v. Bowen*, 90 Mo. 184; *Manning v. Jones*, Busb. L. (N. Car.) 368; *Crane v. Elizabeth Library Assoc.*, 29 N. J. L. 302; *Houghton v. Carpenter*, 40 Vt. 588; *Barclay v. Hopkins*, 59 Ga. 562; *Unger v. Jacobs*, 7 Hun (N. Y.) 220; *Briggs v. Munchon*, 56 Mo. 467; *Miller v. Fichthorn*, 31 Pa. St. 252; *Kieth v. Kerr*, 17 Ind. 284; *Taylor v. Gallard*, 3 Greene (Iowa) 2; *The Alida*, 1 Abb. Adm. 173; *S. P. Sheffield v. Page*, 1 Sprague (U. S.) 285; *Moss v. Green*, 41 Mo. 389; *Webster v. Hodgkins*, 25 N. H. 128; *Sale v. Darragh*, 2 Hilt. (N. Y.) 184; *Cobb v. Wallace*, 5 Coldw. (Tenn.) 539; s. c., 98 Am. Dec. 435; *Winn v. Chamberlain*, 32 Vt. 318; *Lash v. Parlin*, 78 Mo. 391; *Mobile Marine Dock etc. Co. v. McMillan*, 31 Ala. 711; *Stone v. Wilson*, 3 Brev. L. (S. Car.) 228; *Cassidy v. Begoden*, 38 N. Y. Super. Ct. 180; *Elliott v. Connell*, 5 Smed. & M. (Miss.) 91.

Where a bond or note fails to designate the place of payment, parol evidence is admissible to show that it was, by agreement between the parties, to be paid at a place different from that of the contract. *Moore v. Davidson*, 18 Ala. 209; *Brent v. Bank of the Metropolis*, 1 Pet. (U. S.) 92.

The defendant made this note: "Good for three hundred dollars. January 15, 1829." *Held*, that the plaintiff might show, by parol, that it was delivered to, and was intended to acknowledge a liability to, him, but could not introduce parol evidence to show it was understood between the parties that there was no present indebtedness, or that it should be payable at a future date, so as to postpone the time when the statute of limitations began to operate. *Nicholas v. Krebs*, 11 Ala. 230.

Such evidence admitted to show mode of payment agreed upon and to show the kind of stone to be used in the erection of a building, no specification in respect thereto being in the contract. *Centenary Methodist Episcopal Church v. Clime*, 116 Pa. St. 146. To supply mention of notice omitted from

a surveyor's certificate. *Holmes v. Anderson*, 59 Tex. 481. To show how much of an old wall was to be taken down in the case of a re-building contract, no mention with respect to the old walls being made therein. *Donlin v. Daegling*, 80 Ill., 608; *Buckmaster v. Jacobs*, 27 La. Ann. 626; *Western v. Pollard*, 16 B. Mon. (Ky.) 315. To show the railroad company with which a contract for carriage of goods was made which contained only the signature of an agent. *Goddard v. Mallory*, 52 Barb. (N. Y.) 87. In the case of a written contract for the sale of goods at "cost price or current rates;" to show an actual agreement as to price. *Sharp v. Radebaugh*, 70 Ind. 547. To show the number of passengers agreed upon to be carried by a steamer, no mention of its capacity being made in the charter-party. *Harriman v. First Bryan Baptist Church*, 63 Ga. 186; s. c., 36 Am. Rep. 116. Where it was not intended that the written contract should state the whole agreement between the parties. *Hawkins v. Lee*, 8 Lea (Tenn.) 42. Where the writing was a mere bill of parcels. *Irwin v. Thompson*, 27 Kan. 643. To show the date and make more certain the stipulations. *Perry v. Smith*, 34 Tex. 277. To show the date of payment agreed upon, no date being fixed in the contract. *Hartsell v. Myers*, 57 Miss. 135. Where a written contract showed that a certain price was to be paid for putting into a building a patent screw elevator, and at the conclusion of the same the contractor also agreed to put in certain heating apparatus, for which no price was named. *Sharkey v. Miller*, 69 Ill. 560. Where a note given by the buyer to a seller indicated that it was to be the purchase price of goods sold and delivered; to prove the contract of sale. *Kemp v. Byne*, 54 Ga. 527. Where a mortgage did not contain a promise to pay the amount to secure which it was given, and no bond or other personal obligation was given in writing therefor, to prove a parol promise to pay the mortgage debt. *Tonkin v. Baum*, 114 Pa. St. 414. See generally

ords¹ as well as to other written instruments. Obvious omissions of the place or time of delivery,² or other matters,³ as well as verbal agreements referred to, but not embodied in the writing,⁴ may be supplied and established by parol. But it must appear that there was an omission. If the agreement is capable of a reasonable construction as it reads there is no occasion for the introduction of parol evidence.⁵ Parol evidence is not admissible to give effect to a written instrument which is void for uncertainty.⁶ The same rule as to the admissibility of parol evidence to supply omissions, with its limitation, has been applied in one instance, where from accident a word or figure in a written instrument was so obliterated as to be unintelligible.⁷

4. Evidence to Prove Condition Precedent.—Parol evidence may be given to prove the existence of any separate parol agreement, constituting a condition precedent to the attaching of any obligation under a written instrument.⁸

Mauran v. Bullus, 16 Pet. (U. S.) 528; *The Warrington, Blatchf. & H. Adm.* 325; *Wickham v. Bight, Gilp.* (U. S.) 452; *Miles v. Caldwell*, 2 Wall. (U. S.) 35; *Wescot v. Bradford*, 4 Wash. (U. S.) 492; *The Alida, Abb. Adm.* 173; *Accounts for Removing Cherokees*, 3 Op. Atty. Gen. 731. The last case was where a contract had been made for removing Cherokee Indians, to prove the number to be subsisted and removed, no number being specified. *Hannah v. Shirley*, 7 Oregon 115.

1. *Gelstrop v. Moore*, 26 Miss. 206; s. c., 49 Am. Dec. 454; *Moore v. State*, 3 Heisk. (Tenn.) 493, where, by the death of a presiding judge parol evidence was admitted to verify an entry left unauthenticated. *Blair v. Hamilton*, 32 Cal. 49; *Jolley v. Foltz*, 34 Cal. 321; *State v. Womack*, 17 Tex. 237; *Temple v. Marshall*, 11 La. Ann. 641.

2. *Allen v. Comstock*, 17 Ga. 554; *Orguerre v. Luling*, 1 Hilt. (N. Y.) 383; *Musselman v. Stoner*, 31 Pa. St. 265. As to place. *Camden Iron Works v. Fox*, 34 Fed. Rep. 200; *Smith v. Halligan*, 1 N. Y. Supp. 820*. As to time. *Johnston v. McRary*, 5 Jones L. (N. Car.) 369.

3. *McCreary v. McCreary*, 5 Gill & J. (Md.) 147; *Keough v. McNitt*, 6 Minn. 513; *Ruggles v. Swanwick*, 6 Minn. 526; *Ball v. Benjamin*, 73 Ill. 39; *Montelius v. Atherton*, 6 Colo. 224; *Pinney v. Thompson*, 3 Iowa 74. Evidence received to show, what did not appear by the writing, from what tract the timber was to be cut.

A contract to use stone in a building did not specify the kind of stone. It

was held that parol evidence of the kind verbally agreed on was admissible. *Centenary Church v. Clime*, 116 Pa. St. 146.

4. *Ruggles v. Swanwick*, 6 Minn. 526.

5. *Looney v. Rankin*, 15 Oregon 617.

See also, as illustrating the general doctrine, *McCormick Harvesting Machine Co. v. Snell*, 23 Ill. App. 79; *Handwerk v. Oswood*, 23 Ill. App. 282; *Louisville etc. R. Co. v. Reynolds*, 118 Ind. 170; *Dana v. Taylor*, 150 Mass. 25; *Peabody v. Bement* (Mich. 1889), 44 N. W. Rep. 416; *Dorman v. Wilson*, 39 N. J. L. 474; *Smith v. Sergeant*, 67 Barb. (N. Y.) 243; *Routledge v. Worthington Co.*, 119 N. Y. 592; *Haag v. Hillemeier*, 120 N. Y. 651; *Appeal of Real Estate Title Ins. etc. Co.*, 125 Pa. St. 549; *East Line etc. R. Co. v. Scott*, 71 Tex. 703; *Union Pac. R. Co. v. Durant*, 95 U. S. 576.

6. *McGuire v. Stevens*, 42 Miss. 724; s. c., 2 Am. Dec. 649; *Woollam v. Hearne*, 2 White & Tudor's Leading Cas. in Eq. 589; 3 Starkie Ev. 1000.

7. *Walrath v. Whittekind*, 26 Kan. 482, where, in a contract, words and figures had been accidentally blurred with ink and rendered unintelligible, parol evidence was admitted to supply them.

8. *Stephen on Evidence* (Chase's Am. ed.), p. 163; *Juilliard v. Chaffee*, 92 N. Y. 529, 535; *Wilson v. Powers*, 131 Mass. 539; *Ottawa etc. R. Co. v. Hall*, 1 Bradw. (Ill.) 612; *Wendlinger v. Smith*, 75 Va. 309; *Westman v. Krumweide*, 30 Minn. 313; *Michels v. Olmstead*, 14 Fed. Rep. 219; *Pierce v. Tidwell*, 81 Ala. 299; *Coffman v. Coffman*, 79 Vt. 504; *Cuthrell v. Cuthrell*,

5. Evidence Impeaching Validity of Written Instrument.—Parol evidence may be given of any matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto.¹ For this purpose parol evidence is admissible to show fraud practised upon a party to the instrument, at or prior to its execution, and materially affecting his rights,² or upon a third party similarly affected by the

101 Ind. 375; *Black v. Shreve*, 13 N. J. Eq. 455; *Robinson v. Evans*, 3 S. Car. 335; *Benton v. Martin*, 52 N. Y. 570; *Seymour v. Cowing*, 4 Abb. App. Dec. (N. Y.) 200; *Watkins v. Bowers*, 119 Mass. 383; *Faunce v. State Mut. L. Assoc. Co.*, 101 Mass. 279; *Sweet v. Stevens*, 7 R. I. 375; *Butler v. Smith*, 35 Miss. 457; *Goff v. Bankston*, 35 Miss. 518; *Goddard v. Cutts*, 11 Me. 440; *Jordan v. Loftin*, 13 Ala. 547; *Pym v. Campbell*, 6 El. & Bl. 370; *Davis v. Jones*, 17 C. B. 625; *Bell v. Ingestre*, 12 Q. B. 317; *Wallis v. Littell*, 11 C. B., N. S. 369; *Story on Prom. Notes*, § 57, note (7th ed.). Compare *Henshaw v. Dutton*, 59 Mo. 139; *Hubble v. Murphy*, 1 Duv. (Ky.) 278; *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 5; s. c., 63 Am. Dec. 522; *Badcock v. Steadman*, 1 Root (Conn.) 87; *Field v. Biddle*, 2 Dall. (U. S.) 171; *Chester v. Bank of Kingston*, 16 N. Y. 336.

Some of the cases limit this rule to instruments not under seal, but others apply it to deeds as well. *Bruckett v. Barney*, 28 N. Y. 333. See also *Es-crow*, vol. 6, p. 858.

1. *Davis v. Stern*, 15 La. Ann. 177; *Farrell v. Bean*, 10 Md. 217; *Stannard v. McCarty*, 1 Morr. (Iowa) 169; *Brewster v. Davis*, 56 Tex. 478; *Gatling v. Newell*, 9 Ind. 572; *Holbrook v. Burt*, 22 Pick. (Mass.) 546; *Waddell v. Glassell*, 18 Ala. 561; *Bottomley v. United States*, 1 Story (U. S.) 135; *Townsend v. Cowles*, 31 Ala. 428; *Lunday v. Thomas*, 26 Ga. 538; *Pierce v. Wilson*, 34 Ala. 596; *Hamilton v. Conyers*, 28 Ga. 276; *Hunt v. Carr*, 3 Greene (Iowa) 581; *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Bartle v. Vos-bury*, 2 Grant Cas. (Pa.) 277; *Baltimore etc. Steamboat Co. v. Brown*, 54 Pa. St. 77; *Starke v. Littlepage*, 4 Rand. (Va.) 368; *Carpenter v. Simmons*, 1 Robt. (N. Y.) 361; *Kostenbader v. Peters*, 80 Pa. St. 438; *Van Buskirk v. Day*, 32 Ill. 260; *Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84; *Van Syckel v. Dalrymple*, 32 N. J. Eq.

233, 826; *Snyder v. Jennings*, 15 Neb. 372; *Sherman v. Binck*, 93 U. S. 209; *Delvin v. Gibbs*, 4 Cranch (C. C.) 626; *Mason v. Russell*, 1 Tex. 721; *Bowman v. Torr*, 3 Iowa 571; *Williams v. Donaldson*, 8 Iowa 109; *Corbin v. Sistrunk*, 19 Ala. 203; *Allen v. Portland Stage Co.*, 8 Me. 20; *Succession of Fletcher*, 11 La. Ann. 59; *Smith v. Ward*, 2 Root (Conn.) 374; 1 Am. Dec. 80. Not a real act. *Succession of Lerude*, 11 La. Ann. 386; *Grayson v. Brooks*, 64 Miss. 410.

2. *New Jersey Mut. L. Ins. Co. v. Baker*, 94 U. S. 610; *Bottomley v. U. S.*, 1 Story (U. S.) 135; *Wharton v. Douglass*, 76 Pa. St. 273; *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall (U. S.) 222; *American L. Ins. Co. v. Mahone*, 21 Wall. (U. S.) 152; *McKesson v. Sherman*, 51 Wis. 303.

Record.—*Lowry v. McMillan*, 8 Pa. St. 157; s. c., 49 Am. Dec. 501; *Stell v. Glass*, 1 Ga. 475. Deed.—*Cooper v. Finke*, 38 Minn. 2; *Westbrooks v. Jeffers*, 33 Tex. 86; *Willis v. Kern*, 21 La. Ann. 749. Land patent.—*Bell v. Hearne*, 10 La. Ann. 515. Mortgage.—*Succession of Harkins*, 2 La. Ann. 923; *Cox v. King*, 20 La. Ann. 209. Lease.—*Sharp v. Mayor etc. of N. Y.*, 40 Barb. (N. Y.) 256. Release.—*Martin v. Righter*, 10 N. J. Eq. 510; *Jamison v. Ludlow*, 3 La. Ann. 492. Bond.—*McCulloch v. McKee*, 16 Pa. St. 289; *Thompson v. Bell*, 37 Ala. 438. Note.—*Officer v. Howe*, 32 Iowa 142. Assignment.—*Russell v. Tuttle*, 2 Root (Conn.) 22. Entry in attorney-generals' record of foreign insurance companies.—*Thorne v. Travellers' Ins. Co.*, 80 Pa. St. 15; s. c., 21 Am. Rep. 89. Officer's return.—*Commonwealth v. Bullard*, 9 Mass. 270. Contracts.—*Mallory v. Leach*, 35 Vt. 156; s. c., 82 Am. Dec. 625; *Lazare v. Jacques*, 15 La. Ann. 599; *Rohrabacher v. Ware*, 37 Iowa 85; *Plant v. Condit*, 22 Ark. 454; *Hicks v. Stevens*, 121 Ill. 186; *Gross v. Drager*, 66 Wis. 150; *Baldwin v. Burrows*, 95 Ind. 81; *Childs v. Dobbins*, 61 Iowa 109;

fraud;¹ but the fraud must relate to or be found in the execution of the instrument.² In order to render parol evidence of fraud admissible, there must be evidence of fraud other than that found in the mere difference between the parol and written terms.³ Such evidence is not admissible to affect the title of a *bona fide* purchaser without notice of the fraud.⁴ See FRAUD, vol. 8, p. 635; FRAUDULENT CONVEYANCES, vol. 8, p. 748; FRAUDULENT SALES, vol. 8, p. 786.

Parol evidence is also admissible for the same reason to show want or failure of consideration,⁵ or illegality⁶ or immorality⁷ of consideration, or that its object and purpose was illegal,⁸ or to show mistake, or that the instrument was not executed⁹ or acknowledged¹⁰ as required by law, or was never delivered,¹¹ or was only delivered as an escrow,¹² or subject to a condition,¹³ or to show the incapacity of a party.¹⁴

6. Evidence Proving Real Consideration.—The admission of parol evidence to show a consideration different from, or additional to, that expressed, constitutes another exception to the rule that the terms of a written instrument cannot be varied by parol evidence.

Depue v. Sergeant, 21 W. Va. 326; *Anderson v. Snyder*, 21 W. Va. 632; *Prentiss v. Russ*, 16 Me. 30; *Lull v. Cass*, 43 N. H. 62; *Harrell v. Hill*, 19 Ark. 102; *Koop v. Handy*, 41 Barb. (N. Y.) 454.

1. Where land is sold under judgment confessed by the husband, the wife may show that the judgment was fraudulently confessed by the husband, for the purpose of destroying her title, and that the purchaser had notice of her title and of the fraud. *Id.* *Mitchell v. Kintzer*, 5 Pa. St. 216; s. c., 47 Am. Dec. 408.

The right of third parties to prove fraud in instruments often arises in case of assignments by creditors and conveyances in prospect of insolvency. See TITLES.

2. *Mitchell v. Universal Ins. Co.*, 54 Ga. 289.

3. *Thorne v. Warflein*, 100 Pa. St. 519.

4. *Heeter v. Glasgow*, 79 Pa. St. 79; s. c., 21 Am. Rep. 46.

5. *Andrews v. Andrews*, 12 Ind. 348; *Estabrook v. Smith*, 6 Gray (Mass.) 572; s. c., 66 Am. Dec. 443; *Groesbeck v. Seeley*, 13 Mich. 329. Deeds.—See also *Collier v. Mahan*, 21 Ind. 110; *Aurora*, 21 Ind. 492; *Egan v. Bowker*, 5 Allen (Mass.) 449; *Slade v. Halstead*, 7 Cow. (N. Y.) 322; *Corbin v. Sis-trunk*, 19 Ala. 203; *Waymack v. Heilman*, 26 Ark. 449; *Meyer v. Casey*, 57 Miss. 615; *Fleming v. Ervins*, 6 W.

Va. 215; *Clark v. Houghton*, 12 Gray (Mass.) 38.

6. *Chamberlain v. McClurg*, 8 W. & S. (Pa.) 31; *Fenwick v. Ratcliffe*, 6 T. B. Mon. (Ky.) 154; *Newsome v. Thigh-en*, 30 Miss. 414. Usury.—*Cassard v. Hinman*, 6 Bosw. (N. Y.) 8.

7. Gambling contract.—*Lazare v. Jacques*, 15 La. Ann. 599; *Succession of Fletcher*, 11 La. Ann. 59.

8. *Martin v. Clarke*, 8 R. I. 389; s. c., 5 Am. Rep. 586; *Beadles v. McElrath*, 85 Ky. 230; *Russell v. DeGrand*, 15 Mass. 35; *Dram v. Edwards*, 48 Ga. 142; *Clarke v. Foss*, 7 Biss. (U. S.) 540; *New England Mortgage Security Co. v. Gay*, 33 Fed. Rep. 636.

See MISTAKE, Subtit. Parol Evidence, vol. 15, p. 649, *et. seq.*

9. *Hanson v. Michelson*, 19 Wis. 498; *Page v. Sheffield*, 2 Curt. (U. S.) 377.

10. *Tatum v. Goforth*, 9 Iowa 247; *Edgerton v. Jones*, 10 Minn. 427.

11. *Leppoc v. National Union Bank*, 32 Md. 136; *Thomas v. Beebe*, 25 N. Y. 244.

12. *Craufurd v. State*, 6 Har. & J. (Md.) 231; *Veall v. Poole*, 27 Md. 645.

13. *Wilson v. Powers*, 131 Mass. 539; *Michels v. Olmstead*, 14 Fed. Rep. 219; *McIntosh v. Summers*, 1 Cranch (C. C.) 41; *Armstrong v. Monill*, 14 Wall. (U. S.) 120.

14. *Leblanc v. Boucherau*, 16 La. Ann. 11. See CONTRACTS, vol. 3, p. 862.

There is some conflict of authority as to the extent to which inquiry can be made into the consideration. To the extent of defeating the legal operation of the instrument according to the purpose therein designated, parol evidence of an additional or different consideration is not admissible, but it is generally received in cases where it would not have that effect. In other words, the exception is not allowed to override the rule, only to qualify it.¹

1. *Tutwiler v. Munford*, 68 Ala. 124; *Mason v. Buchanan*, 62 Ala. 110; *Mead v. Steger*, 5 Port. (Ala.) 498, *Long v. Davis*, 18 Ala. 801, *Johnson v. Boyles*, 26 Ala. 576; *Hair v. Little*, 28 Ala. 236, *Toulman v. Austin*, 5 Stew. & P. (Ala.) 410. To nearly same effect, *Eckles v. Carter*, 26 Ala. 563; *Thomas v. Barker*, 37 Ala. 392; *Murphy v. Branch Bank*, 16 Ala. 90; *Splawn v. Martin*, 17 Ark. 146; *Rhine v. Ellen*, 36 Cal. 362, *Stufflebeem v. Arnold*, 57 Cal. 11, *Lockwood v. Canfield*, 20 Cal. 126, *De Merle v. Mathews*, 26 Cal. 455; *Hendrick v. Crowley*, 31 Cal. 471; *Bennett v. Solomon*, 6 Cal. 134, *Mann v. Smyser*, 76 Ill. 365; *Gage v. Lewis*, 68 Ill. 604, *Hannah v. Wadsworth*, 1 Root (Conn.) 458, *Pettibone v. Roberts*, 2 Root (Conn.) 258; *Edgerton v. Edgerton*, 8 Conn. 6, *King v. Woodruff*, 23 Conn. 56; 60 Am. Dec. 625; *Norris v. Ham*, R. M. Charlt. (Ga.) 267; *Lufburrow v. Henderson*, 30 Ga. 482; *Smith v. Brooks*, 18 Ga. 440; *Knight v. Knight*, 28 Ga. 165; *Booth v. Hynes*, 54 Ill. 363, *Great Western Ins. Co. v. Rees*, 29 Ill. 272; *Kinzie v. Penrose*, 3 Ill. 515, *Sidders v. Riley*, 22 Ill. 109, *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246; *Bragg v. Stanford*, 82 Ind. 234, *Singer Mfg. Co. v. Forsythe*, 108 Ind. 334, *McDill v. Gunn*, 43 Ind. 315, *McMahan v. Stewart*, 23 Ind. 590, *Brown v. Summers*, 91 Ind. 151; *Rockhill v. Spraggs*, 9 Ind. 30, 68 Am. Dec. 607, *Lamb v. Donovan*, 19 Ind. 40; *Jones v. Jones*, 12 Ind. 389, *Thornburgh v. Newcastle etc. R. Co.*, 14 Ind. 499, *Swafford v. Whipple*, 3 Greene (Iowa) 261, 54 Am. Dec. 498, *Lawton v. Buckingham*, 15 Iowa 22, *Jackson v. Miller*, 32 La. Ann. 432; *Miller v. Edgerton*, 38 Kan. 36; *Trumbo v. Curtwright*, 1 A. K. Marsh. (Ky.) 582, *Hickman v. McCurdy*, 7 J. J. Marsh. (Ky.) 555, *Carneal v. May*, 2 A. K. Marsh. (Ky.) 587; *Steadman v. Guthrie*, 4 Metc. (Ky.) 147, *Dougherty v. Goggin*, 1 J. J. Marsh. (Ky.) 373, *Klein v. Dinkgrave*, 4 La. Ann. 540, *Ely v. Wolcott*, 4 Allen (Mass.) 506; *Griswold v. Messenger*, 6 Pick. (Mass.) 517; *Metzner v. Baldwin*, 11 Minn. 150; *Paget v. Cook*, 1 Allen (Mass.) 522; *Clapp v. Tirrell*, 20 Pick. (Mass.) 247; *Clark v. Perry*, 4 How. (Miss.) 285; *Marsh v. Lisle*, 34 Miss. 173; *Dobyns v. Rice*, 22 Mo. App. 448; *Cross v. Rowe*, 22 N. H. 77; *Den v. Shotwell*, 23 N. J. L. 465; *Morris Canal etc. Co. v. Ryerson*, 27 N. J. L. 457; *Moses v. Hatfield*, 27 S. Car. 324; *Buckner v. Ruth*, 13 Rich. (S. Car.) 157; *Curry v. Lyles*, 2 Hill (S. Car.) 404; *Bank of U. S. v. Brown*, *Riley Eq.* (S. Car.) 131; *Henderson v. Dodd*, 1 Bailey Eq. (S. Car.) 138; *Emery v. Chase*, 5 Me. 232; *Brown v. Lunt*, 37 Me. 423; *Emmons v. Littlefield*, 13 Me. 233; *Warren v. Walker*, 23 Me. 453; *Abbott v. Marshall*, 48 Me. 44; *Bailey v. Cornell*, 66 Mich. 107; *Dean v. Adams*, 44 Mich. 117; *Clagett v. Hall*, 9 Gill & J. (Md.) 80; *Hurn v. Soper*, 6 Harr. & J. (Md.) 276, *Dayton v. Warren*, 10 Minn. 233; *Kumler v. Fergusson*, 7 Minn. 442, *Leach v. Shelby*, 58 Miss. 681, *Buckels v. Cunningham*, 6 Smed. & M. (Miss.) 358; *McConnell v. Brayner*, 63 Mo. 461, *Aull Sav. Bank v. Aull*, 80 Mo. 199; *Guinotte v. Chouteau*, 34 Mo. 154, *Landman v. Ingram*, 49 Mo. 212; *Nedvidek v. Meyer*, 46 Mo. 600, *Rabsuhl v. Lack*, 35 Mo. 316, *Foster v. Reynolds*, 38 Mo. 553, *Stackpole v. Robbins*, 47 Barb. (N. Y.) 212, *Maigley v. Hauer*, 7 Johns. (N. Y.) 341, *McKinster v. Babcock*, 37 Barb. (N. Y.) 265, *Mains v. Haight*, 14 Barb. (N. Y.) 76, *Frink v. Green*, 5 Barb. (N. Y.) 455, *Rosbore v. Peck*, 48 Barb. (N. Y.) 92, *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.) 370, 7 Am. Dec. 484, *Wheeler v. Billings*, 38 N. Y. 263, *McKinster v. Babcock*, 26 N. Y. 378, *Hutchins v. Hebbard*, 34 N. Y. 24, *Bell v. Shibley*, 33 Barb. (N. Y.) 610; *Chesson v. Pettijohn*, 6 Ired. (N. Car.) 121, *Terry v. Danville etc. R. Co.*, 91 N. Car. 236, *Nichols v. Bell*, 1 Jones (N. Car.) 32, *Wade v. Carter*, 76 N.

Car. 171, *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431, *Morse v. Shattuck*, 4 N. H. 229; 17 Am. Dec. 419, *Pomeroy v. Bailey*, 43 N. H. 118, *Perry v. Central etc. R. Co.*, 5 Coldw. (Tenn.) 138, *Steele v. Worthington*, 2 Ohio 182, *Bethel v. Woodworth*, 11 Ohio St. 393; *Hill v. McDowell*, 14 Pa. St. 175, *Miller v. Bagwell*, 3 McCord (S. Car.) 562, *Duval v. Bibb*, 4 Hen. & M. (Va.) 113, *Platt v. Hedge*, 8 Iowa 386, *Childs v. Shower*, 18 Iowa 261, *Putman v. Halley*, 24 Iowa 42, *Gelpcke v. Blake*, 19 Iowa 263, *Heysham v. Dettre*, 89 Pa. St. 506, *Taylor v. Preston*, 79 Pa. St. 436; *Holmes's Appeal*, 79 Pa. St. 279; *Hayden v. Mentzer*, 10 S. & R. (Pa.) 329, *Strawbridge v. Cartledge*, 7 W. & S. (Pa.) 394, *Buckley's Appeal*, 48 Pa. St. 491, 88 Am. Dec. 468, *Galway's Appeal*, 34 Pa. St. 242; *Jack v. Dougherty*, 3 Watts (Pa.) 151, *White v. Weeks*, 1 P. & W. (Pa.) 486, *Bowser v. Cravener*, 56 Pa. St. 132, *Cake v. Pottsville Bank*, 116 Pa. St. 264, *Hedley v. Briggs*, 2 R. I. 489; *Fort v. Orndoff*, 7 Heisk. (Tenn.) 167, *Hicks v. Morris*, 57 Tex. 658; *Taylor v. Merrill*, 64 Tex. 494; *Stiles v. Giddens*, 21 Tex. 783, *Wheeler v. Friend*, 22 Tex. 683, *Wrightsmen v. Bowyer*, 24 Gratt. (Va.) 433; *Marks v. Spencer*, 81 Va. 751, *Pierce v. Brew*, 43 Vt. 292, *Halbrook v. Halbrook*, 30 Vt. 432; *Wood v. Beach*, 7 Vt. 522, *Wait v. Wait*, 28 Vt. 350, *Kickland v. Menasha Wooden Ware Co.*, 68 Wis. 34, 60 Am. Rep. 831; *Frey v. Vanderhoof*, 15 Wis. 397, *Lafitte v. Steadcross*, 12 Fed. Rep. 519; *Wooster v. Simonson*, 20 Fed. Rep. 316, *Rutland etc. R. Co. v. Crocker*, 4 Blatchf. (U. S.) 179; *Shaw v. Thompson*, Olc. Adm. 144, *Corcoran v. Hodges*, 2 Cranch (C. C.) 452; *Bissell v. Farmers' etc. Bank*, 5 McLean (U. S.) 495; *Jones v. Guaranty etc. Co.*, 101 U. S. 622, *Pomeroy v. Manin*, 2 Paine (U. S.) 476, *Baldwin v. Rapple*, 4 Ben. (U. S.) 443; *De Wolf v. Rabaud*, 1 Pet. (U. S.) 476; *Rabaud v. De Wolf*, 1 Paine (U. S.) 580, *Clark v. Burnham*, 2 Story (U. S.) 1, *Munro v. Robertson*, 2 Cranch (C. C.) 262, *Fraley v. Bentley*, 1 Dak. 25.

The reasons for the restriction upon the admission of parol evidence to contradict and add to that expressed in the instrument, are clearly advanced in *Hendrick v. Crowley*, 31 Cal. 472, where the court, by SANDERSON, J., said: "The exception always loses its governing force when it comes in conflict

with the rule which it qualifies, and must yield to its higher claims. Hence the consideration cannot be contradicted or shown to be different from that expressed when thereby the legal operation of the instrument to pass the entire interest according to the purpose therein designated would be defeated," *citing*, *Cole v. Soulsby*, 21 Cal. 51; *Hign v. Peck*, 30 Cal. 280.

In *McCrea v. Purmort*, 16 Wend. (N. Y.) 473, 30 Am. Dec. 103, JUSTICE COWAN thus expounds the true rule on this subject: "A party is estopped by his deed. He is not permitted to contradict it. So far as the deed is intended to pass a right, or to be the exclusive evidence of a contract, it concludes the parties to it. But the principle goes no further. A deed is not conclusive evidence of everything it may contain. For instance, it is not the only evidence of the date of its execution, nor is its omission of a consideration conclusive evidence that none passed, nor is its acknowledgment of a particular consideration an objection to other proof of other and consistent considerations."

Where the consideration of a deed is stated in general terms, the true consideration may be shown by parol, and therefore it may be shown that the grantee verbally agreed, as part of the consideration, to pay an existing incumbrance. *Hays v. Peck*, 107 Ind. 389.

A deed reciting payment of a consideration, may be shown to have been given as an advancement. *Gordon v. Gordon*, 1 Metc. (Ky.) 285.

The law in *Maryland* as declared by the courts seems to have undergone a marked change. The early decisions are conclusive to show that parol proof is inadmissible to vary the consideration stated in deeds, and thereby either to alter their character or to maintain them when impeached for fraud, by showing considerations differing from those mentioned in them, though evidence of the same kind of consideration varying only in amount from that expressed, may be offered. *Sewell v. Baxten*, 2 Md. Ch. 447. See also *Boyce v. Wilson*, 32 Md. 122.

In a later case, parol evidence was held to be admissible to show that part of the consideration of a written contract for the sale of a house and store, was a promise by the vendor not to go into business again. *Fusting v. Sullivan*, 41 Md. 162.

While the courts of most, if not all the States profess to conform to the spirit of this principle, yet some of them appear to entirely disregard it in practice and not to have fixed any definite bounds to the admission of evidence to prove consideration additional to and different from that stipulated for in the instrument, whether sealed or unsealed. In some instances the courts have been influenced by peculiar equitable views, and in some States statutory provisions exist on the subject.¹

The form in which the question presents itself before the court often determines whether the impeaching evidence shall be received or rejected. Where the validity of the instrument is directly in issue, as in actions to rescind on the ground of fraud, illegality or failure of consideration,² all limitations upon the

In *Tennessee*, the rule against the admission of extrinsic evidence in such cases is very vigorous. In an action upon a written contract for the delivery of iron, it was held that a parol agreement that its price should be four cents per pound could not properly be given in evidence to bind the parties; it could only be considered as evidence of the value. *Ross v. Carter*, 1 Humph. (Tenn.) 415.

Parol evidence has been held admissible to show that the consideration for a deed was in fact lands given in exchange and of the value named, although the consideration named in the deed is money. *Miller v. McCoy*, 50 Mo. 214.

Or that the sum expressed in a deed to be the consideration for the conveyance, and which was received by the grantor, was in fact received by him as the consideration for the conveyance and also as payment of a debt then due to him from the grantee. *Harwood v. Harwood*, 22 Vt. 507. Or in what manner the consideration of a conveyance was agreed to be paid. *Seaman v. Hasbrouck*, 35 Barb. (N. Y.) 151. Or where an order was to pay "\$1,700 lawful money of the United States, and \$500 in an order on W & T" that the order was to be for sashes, blinds, etc., and not for money. *Hinne-mann v. Rosenback*, 39 N. Y. 98.

1. In *Alabama*, where the consideration expressed in a deed to a railroad company was "one dollar" and "the benefits which will arise to the grantor from the ownership by the grantee of the property hereby conveyed," it was held that the grantor was not estopped from showing, as an additional consideration, that the grantee verbally agreed to grade a certain lot, and to remove a portion of a warehouse thereon.

Mobile etc. R. Co. v. Wilkinson, 72 Ala. 286; *Winne v. Whisenant*, 37 Ala. 46; *Steed v. Hinson*, 76 Ala. 298; *Simonton v. Steel*, 1 Ala. 357; *Cowan v. Cooper*, 41 Ala. 187; *Pique v. Arendale*, 71 Ala. 91.

In *Louisiana*, a married woman may show, by parol, that a notarial act of sale to defendant, by her and her husband, was in fact a disguised donation to the latter. *Thibodeaux v. Herpin*, 5 La. Ann. 578; 6 La. Ann. 673. See *Turner v. Lewis*, 6 La. Ann. 774; *Campbell v. Short*, 35 La. Ann. 447; *Dickson v. Ford*, 38 La. Ann. 736.

In *Massachusetts*, where a deed stated the consideration to be \$2,000, it was held, in an action by grantor against grantee for that amount, that the grantee might show that the deed was given on a different consideration: viz., on a promise to do something which was done accordingly. *Twomey v. Crowley*, 137 Mass. 184. See *Old Colony R. Co. v. Evans*, 6 Gray (Mass.) 25; 66 Am. Dec. 394; *Drury v. Tremont Imp. Co.*, 13 Allen (Mass.) 168.

In *Mississippi*, *Matlock v. Livingstone*, 9 Smed. & M. (Miss.) 489.

In *Michigan*, where the contract states the consideration, it may be shown that by parol it was agreed that additional things should be done. *Walter A. Wood Mowing and Reaping Mach. Co. v. Gaertner*, 55 Mich. 453.

In *Ohio*, parol evidence is admissible to show a consideration for the sale of land in addition to that named in the deed. *Vail v. McMillan*, 17 Ohio St. 617; *Whitney v. Denton*, 1 Cin. (Ohio) 417.

2. *Clinton v. Estes*, 20 Ark. 216; *Cunningham v. Dwyer*, 23 Md. 219; *Deakins v. Alley*, 9 Lea (Tenn.) 494.

inquiry into the consideration are removed; but they are generally observed and enforced when such matter is set up collaterally as a defense to defeat the legal effect of the writing,¹ or where the action is for specific performance.² Where the action is collateral to the expressed purpose of the written instrument, as in a personal action by the grantor in a deed to recover the purchase money from the grantee, the real consideration may be shown by the latter to be different from that expressed.³

If a deed is impeached for fraud by disproving the consideration named in it, a different consideration changing its character cannot be set up. But if the consideration is not disproved, parol evidence of the same kind of consideration, differing only in amount, is admissible to rebut any imputation of fraud that might be attempted to be cast upon the deed.⁴ If a failure of the consideration expressed on the face of an instrument is shown, a different consideration may be proved.⁵

7. Evidence Connecting and Explaining Contemporaneous Writings.—When two papers are executed as parts of the same transaction, they should be read and construed together; and if when taken together they do not show upon their face that they were parts of the same transaction, such fact may be shown by parol; any inconsistencies may be explained in the same way.⁶ If

1. *Meads v. Lansing*, Hopk. Ch. (N. Y.) 124; *Gardner v. Lightfoot*, 71 Iowa 577; *Purinton v. Northern Ill. R. Co.*, 46 Ill. 297.

Parol proof is inadmissible to show a valuable consideration for a deed expressed on its face to be for love and affection, in order to sustain it against creditors. *Ellinger v. Crowl*, 17 Md. 361; *S. P. Harrison v. Castner*, 11 Ohio St. 339. On the same principle where a sum of money is the consideration named in a deed, evidence tending to show that the deed was made in consideration of love and affection is inadmissible. *Christopher v. Christopher*, 64 Md. 583; *Noyes v. Hall*, 28 Vt. 645.

2. *Purinton v. Northern Ill. R. Co.*, 46 Ill. 297; *Hilton v. Homans*, 23 Me. 136.

3. *Rhine v. Ellen*, 36 Cal. 362; *Coles v. Soulsby*, 21 Cal. 47; *McCrea v. Purmort*, 16 Wend. (N. Y.) 465; 30 Am. Dec. 103. See also *Wilkinson v. Scott*, 17 Mass. 257; *Morse v. Shattuck*, 4 N. H. 229; 17 Am. Dec. 419; *Belden v. Seymour*, 8 Conn. 311; *Shepard v. Little*, 14 Johns. (N. Y.) 210; *Bowen v. Bell*, 20 Johns. (N. Y.) 338; 11 Am. Dec. 286.

4. *In re Young's Estate*, 3 Md. Ch. 461; *Hall v. Knappenberger* (Mo. 1888), 6 S. W. Rep. 381. Compare

Pope v. Chafee, 14 Rich. Eq. (S. Car.) 69.

5. *Dorsey v. Hagard*, 5 Mo. 420; *Miller v. Fichthorn*, 31 Pa. St. 252.

See also as illustrating the general doctrine of this subdivision of the article: *Mobile Sav. Bank v. McDonnell* (Ala. 1891), 8 So. Rep. 137; *Fechheimer v. Trounstine* (Colo. 1890), 24 Pac. Rep. 882; *Wolf v. Fletemeyer*, 83 Ill. 418; *Martin v. Stubbings*, 27 Ill. App. 121; affirmed, 126 Ill. 387; *Howell v. Moores*, 127 Ill. 67; *Diven v. Johnson*, 117 Ind. 512; *First Nat. Bank v. Snyder* (Iowa. 1890), 44 N. W. Rep. 356; *Louisville Banking Co. v. Leonard* (Ky. 1890), 13 S. W. Rep. 521; *Rankin v. Wallace* (Ky. 1890), 14 S. W. Rep. 79; *Macomb v. Wilkinson* (Mich. 1890), 47 N. W. Rep. 336; *Arms v. Arms*, 113 N. Y. 646; *Finlayson v. Finlayson*, 17 Oregon 347; *Goodwin v. Fox*, 129 U. S. 601; *Bruce v. Slemph*, 82 Va. 352; *Halpin v. Stone* (Wis. 1890), 47 N. W. Rep. 177.

6. *Myers v. Munson*, 65 Iowa 423; *Lee v. Methodist Episcopal Church*, 52 Barb. (N. Y.) 116; *Brent v. Richards*, 2 Gratt. (Va.) 542; *Bradley v. Pike*, 34 Vt. 215; *Tuley v. Barton*, 79 Va. 387; *Clapp v. Forster*, 67 Iowa 49.

A variance between a levy indorsed

the contemporaneous writings when put together clearly indicate that some of the specifications have been omitted, extrinsic evidence is admissible to explain them and establish omitted parts.¹ But a complete agreement effected by several distinct instruments cannot be varied or controlled by evidence of contemporaneous parol agreements.²

8. Evidence Proving Contemporaneous Parol Agreements.—An independent agreement founded on a distinct consideration may be proven by parol, although made contemporaneously with a written contract,³ as may also a contemporaneous, collateral, substantive agreement relating to the same subject-matter as the written contract and forming part of the consideration thereof,⁴ and a contemporaneous parol contract of which the agreement evidenced by the written contract is the consideration,⁵ provided

on an execution, and the description of the property in the deed, may be explained by parol evidence. *Mathew v. Thompson*, 3 Ohio 272.

Illustrations of the Principles of the Text.—Land described differently in different instruments. *Stewart v. Chadwick*, 8 Iowa 463. Two promissory notes to show that one was given in payment of the other. *Gilbert v. Duncan*, 29 N. J. L. 133; *Duncan v. Gilbert*, 29 N. J. L. 521. A written but unsigned agreement between the parties to an executed chattel mortgage, drawn up by the same attorney at the same time; to show the understanding of the parties in regard to a loan and share of profits. *Eager v. Crawford*, 76 N. Y. 97. In the case of two contradictory letters written by the same party; to show under what information one of them was written. *Cullen v. Bimm*, 37 Ohio St. 236. Agent's bond for the faithful performance of duties in connection with a written contract of agency executed shortly after the execution of the bond. *Singer Mfg. Co. v. Hester*, 2 McCrary (U. S.) 417. Contradictory copies of a contract of sale of hop poles in matter of description. *Hill v. Miller*, 76 N. Y. 32. Measurer's bill and bill of lading with reference to the amount of coal in a cargo. *Manchester v. Milne*, 1 Abb. Adm. 115; *Manning v. Hoover*, 1 Abb. Adm. 188. Bill of lading and instructions given by charterer's agent. *Cobb v. Blanchard*, 11 Allen (Mass.) 409. Mortgage and promissory notes contradictory in regard to the rate of interest. *Payson v. Lamson*, 134 Mass. 593; 45 Am. Rep. 348. Memorandum at bottom of written contract to show that it was to form part of the con-

tract. *Varzen v. McGregor*, 23 Cal. 339.

1. *Maxted v. Seymour*, 56 Mich. 129; *Holt v. Pie*, 120 Pa. St. 425; *Allen v. Sowerby*, 37 Md. 410; *Beirne v. Rosser*, 26 Gratt. (Va.) 500; *Deery v. Cray*, 10 Wall. (U. S.) 263; *Trask v. Jones*, 5 Bosw. (N. Y.) 62; *Wilson v. Tucker*, 10 R. I. 578; *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334.

2. *Hull v. Adams*, 1 Hill (N. Y.) 601; *Meyers v. Munson*, 65 Iowa 423; *Looney v. Rankin*, 15 Oregon, 617; *Johnson v. Pierce*, 16 Ohio St. 472; *Issett v. Lucas*, 17 Iowa 503; 85 Am. Dec. 572.

Where, in reply to the obligee's letter setting forth his contract, the obligor signs an answer written by his amanuensis, the latter cannot testify that something different was intended from that expressed. *Williams v. Hood*, 11 La. Ann. 113. See also *Chesley v. Holmes*, 40 Me. 536; *Rowan v. Sharp's Rifle Mfg. Co.*, 31 Conn. 1.

3. *Buzzell v. Willard*, 44 Vt. 44; *Babcock v. Deford*, 14 Kan. 408; *Polk v. Anderson*, 16 Kan. 243; *Whitney v. Shippen*, 89 Pa. St. 22; *Malone v. Dougherty*, 79 Pa. St. 46; *Lawrence v. Miller*, 86 N. Y. 131; *Lytle v. Bass*, 7 Coldw. (Tenn.) 303; *Lamphire v. Slaughter*, 61 How. Pr. (N. Y.) 36.

Where two distinct contracts, for service on two distinct voyages are made at the same time, and only one is reduced to writing, the other may be proved by parol. *Page v. Sheffield*, 2 Curt. (U. S.) 377.

4. *Weaver v. Fletcher*, 27 Ark. 510; *Basshor v. Forbes*, 36 Md. 154.

5. *Weaver v. Wood*, 9 Pa. St. 220.

Instances.—Parol agreement in connection with bill of sale for a transfer

such oral agreement is not inconsistent with or contradictory to the terms of the writing,¹ and provided also that from the cir-

of the earnings of the property for a specified time. *Stillman v. Tuttle*, 45 Barb. (N. Y.) 171. Contract of agent for compensation in connection with the contract of sale of land by an agent. *Huckabee v. Shepherd*, 75 Ala. 342. Parol agreement of landlord to repair distinct from a contract of renting. *Vandegrift v. Abbott*, 75 Ala. 487. Contract for occupancy by the grantor collateral to a deed of the premises. *Willis v. Hulbert*, 117 Mass. 151. Parol warranty in connection with sale of personality. *Hersom v. Henderson*, 21 N. H. 224; 53 Am. Dec. 185; *Hahn v. Doolittle*, 18 Wis. 196; *Collette v. Weed*, 68 Wis. 428; *Brigg v. Hilton*, 99 N. Y. 517. To rebuild collateral to a lease. *Cumming v. Barber*, 99 N. Car. 332. Verbal agreement collateral to the giving of a check. *Barclay v. Pursley*, 110 Pa. St. 13. Agreement not to carry on the same business in the written sale of a grocery. *Pierce v. Woodward*, 6 Pick. (Mass.) 206. Agreement to pay debts in connection with deed and bond to support, between father and son. *Stafford v. Stafford*, 27 Pa. St. 144. Agreement between original parties to a judgment upon a *scire facias* to revive the judgment. *Sankey v. Reed*, 12 Pa. St. 95. That the mortgagor should retain possession under a chattel mortgage. *Pierce v. Stevens*, 30 Me. 184. Agreement of husband under a deed to him to hold a share for his wife. *Mitchell v. Kintzer*, 5 Pa. St. 216; 47 Am. Dec. 408. For free occupancy by grantor under a deed containing covenants. *Hersey v. Verrill*, 39 Me. 271. For free ingress and egress after delivery of possession of realty conveyed by deed. *Parsons v. Camp*, 11 Conn. 525. Modification of a contract of sale of a colliery. *Chalfant v. Williams*, 35 Pa. St. 212. Agreement of indemnity in connection with an indorsement by the president of a corporation. *Williams v. Hagar*, 50 Me. 9. Agreement for compensation of broker under a charter-party silent on the subject. *Weber v. Kingsland*, 8 Bosw. (N. Y.) 415. Assumption of mechanics' lien under sale of property without covenants of title in the deed. *Alford v. Cobb*, 35 Hun (N. Y.) 651. Oral agreement before the execution of a lease for tenancy at will, the lease containing the words, "For the term of

one year, with privilege of two years more at lessee's option." *Atlantic Nat. Bank v. Demmon*, 139 Mass. 420. Not to engage in a rival business in the same city in connection with a lease. *Welz v. Rhodius*, 87 Ind. 1; 44 Am. Rep. 747. To return drafts and receive credit therefor upon the happening of a contingency. *Collingwood v. Merchants' Bank*, 15 Neb. 118. That a mortgagor might sell the property as though there were no mortgage. *Perry v. Dow*, 56 Vt. 569. Parol agreement in connection with a chattel mortgage. *Reynolds v. Hassam*, 56 Vt. 449. Modification of a written agreement to lay a floor. *Graffam v. Pierce*, 143 Mass. 386. An agreement to pay over the proceeds of insurance to heirs. *Catland v. Hoyt*, 78 Me. 355. An agreement to secure an agent's commissions by a mortgage on land which he was authorized in writing to sell. *Magill v. Stoddard*, 70 Wis. 75. To show an agreement, that demand on a note should be made at a particular place where the note is payable. *McKee v. Boswell*, 33 Mo. 567. To show that at the time a promissory note was given by A to B for money lent, an agreement was made to pay a certain sum as extra interest, and that all the payments made by A were for the extra interest, and not upon the note. *Rohan v. Hanson*, 11 Cush. (Mass.) 44. To show that the indorser of an overdue note, agreed with the indorsee at the time of transfer, that no suit should be brought against the maker for a certain time. *Friend v. Beebe*, 3 Greene (Iowa) 279. To prove an agreement to receive, in part payment, a debt due from another person. *Murchie v. Cook*, 1 Ala. 41. On the part of the maker; to show that there was an agreement between him and the payee that the said note should be substituted for a note upon which the maker of this note was surety, and to show a breach of such agreement. *Rawlings v. Fisher*, 24 Ind. 52. To prove an agreement on the assignment of negotiable paper, to waive demand and notice. *Dick v. Martin*, 7 Humph. (Tenn.) 263.

1. *New Albany etc. R. Co. v. Slaughter*, 10 Ind. 218; *Skinner v. Hendrick*, 1 Root (Conn.) 253; 1 Am. Dec. 43; *Bryan v. Wash*, 7 Ill.

cumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.¹ Parol evidence of the terms of the contract is admissible where the instrument is executed in part performance only of a verbal contract.²

9. Evidence Annexing a Condition to Conveyance Absolute on Its Face — (See also *infra*, this title, *Evidence to Prove Deed Absolute on Its Face a Mortgage*). — In equity, parol evidence may generally be given to show that any instrument, although purporting on its face to be absolute, was intended by the parties merely as a security, or subject to other condition.³ But such evidence is inadmissible at law, if the instrument is free from ambiguity, where there has been no fraud or mistake in its

557, *Timms v. Shannon*, 19 Md. 296; 81 Am. Dec. 632; *Dodge v. Nichols*, 5 Allen (Mass.) 548; *Stine v. Sherk*, 1 W. & S. (Pa.) 195; *Vermont etc. R. Co. v. Hills*, 23 Vt. 681; *Caldwell v. May*, 1 Stew. (Ala.) 425; *Downie v. White*, 12 Wis. 176; 78 Am. Dec. 731; *Cincinnati etc. R. Co. v. Pearce*, 28 Ind. 502; *Gelpcke v. Blake*, 15 Iowa 387; 83 Am. Dec. 418; *Jack v. Naber*, 15 Iowa 450; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425; 7 Am. Dec. 499; *Blair v. Buttolph*, 72 Iowa 31; *Tibbits v. Percy*, 24 Barb. (N. Y.) 39; *Jungerman v. Bovee*, 19 Cal. 354; *Cook v. Combs*, 39 N. H. 592; 75 Am. Dec. 241; *Gilbert v. Bulkley*, 5 Conn. 262; 13 Am. Dec. 571; *Melton v. Watkins*, 24 Ala. 433; 60 Am. Dec. 481; *Wells v. Groesbeck*, 22 Tex. 429; *Barrett v. Wheeler*, 71 Iowa 662; *Holley v. Younge*, 27 Ala. 203; *Austin v. Sawyer*, 9 Cow. (N. Y.) 39; *Lothrop v. Foster*, 51 Me. 367; *Snyder v. Koons*, 20 Ind. 389; *Frost v. Blanchard*, 97 Mass. 155; *Pierrepoint v. Barnard*, 5 Barb. (N. Y.) 364; *Fulton v. Hood*, 34 Pa. St. 365; 75 Am. Dec. 664; *Kimball v. Bradford*, 9 Gray (Mass.) 243; *MacLeod v. Skiles*, 81 Mo. 595; 51 Am. Rep. 254; *Trentman v. Fletcher*, 100 Ind. 105; *Daggett v. Johnson*, 49 Vt. 345; *Bishop v. Dillard*, 49 Ark. 285; *Sanford v. Howard*, 29 Ala. 684; 68 Am. Dec. 101.

1. *Stephen on Evidence* (Chase's Am. ed.), p. 163.

2. *Birks v. Gillett*, 13 Ill. App. 369.

3. *Brownlee v. Martin*, 21 S. Car. 392; *Dow v. Chamberlin*, 5 McLean (U. S.) 281; *Armory v. Lawrence*, 3 Cliff. (U. S.) 523; *Howland v. Blake*, 7 Biss. (U. S.) 40; *Andrews v. Hyde*, 3 Cliff. (U. S.) 516; *Bentley v. Phelps*,

2 Woodb. & M. (U. S.) 426; *Peugh v. Davis*, 96 U. S. 332; *Brick v. Brick*, 98 U. S. 514; *Wyman v. Babcock*, 2 Curt. (U. S.) 386; *Babcock v. Wyman*, 19 How. (U. S.) 289; *Jenkins v. Einstein*, 3 Biss. (U. S.) 128; *Russell v. Southard*, 12 How. (U. S.) 139; *Morgan v. Shinn*, 15 Wall. (U. S.) 105; *Taylor v. Luther*, 2 Sumn. (U. S.) 228; *Corcoran v. Dougherty*, 4 Cranch (C. C.) 205.

Application of Principles to:
Mortgages.—*Gilchrist v. Cunningham*, 8 Wend. (N. Y.) 641; *Bigelow v. Capen*, 145 Mass. 270; *Brainerd v. Brainerd*, 15 Conn. 575; *Smith v. Boruff*, 75 Ind. 412; *Harrington v. Samples*, 36 Minn. 200. Notes.—*Walker v. Clay*, 21 Ala. 797; *McFarland v. Sikes*, 54 Conn. 250; *Bissenger v. Guiteman*, 6 Heisk. (Tenn.) 277; *Daggett v. Gage*, 41 Ill. 465; *Barlow v. Flemming*, 6 Ala. 146; *Crosman v. Fuller*, 17 Pick. (Mass.) 171.
Assignments.—*Adams v. Hull*, 2 Den. (N. Y.) 306; *Ginz v. Stumph*, 73 Ind. 209; *Rice v. Troup*, 62 Miss. 186; *Randall v. Turner*, 17 Ohio St. 262; *Rhodes v. Farmer*, 17 How. (U. S.) 464; *Summers v. United States Ins. etc. Co.*, 13 La. Ann. 504; *Marsh v. McNair*, 90 N. Y. 174; *Reeve v. Dennett*, 137 Mass. 315; *Callender v. Drabelle*, 73 Iowa 317; *Fullwood v. Blanding*, 26 S. Car. 312; *Hill v. Goodrich*, 39 Mich. 439; *Hylar v. Nolan*, 45 Mich. 357; *Wood v. Matthews*, 73 Mo. 477.
Contracts of Sale.—*Hildreth v. O'Brien*, 10 Allen (Mass.) 104; *Morrison v. Morrison*, 6 W. & S. (Pa.) 516; *Reynolds v. Robinson*, 110 N. Y. 654; *Seavey v. Walker*, 108 Ind. 78; *Votaw v. Diehl*, 62 Iowa 676; *Field v. Beeler*, 3 Bibb (Ky.) 18; *Ferguson v. Sutphen*, 8 Ill. 547; *Singer Sewing Mach. Co. v. Holcomb*, 40 Iowa 33; *Booth v. Robinson*, 55 Md. 419. **Subscriptions.**—*Bull v. Tal-*

execution.¹ Parol evidence is inadmissible either in equity or at law to prove a condition which, being allowed to prevail, would entirely change the character and purpose of the instrument after it has become operative.² On the same principle no condition contradictory to an express condition can be superadded by parol.³ A distinction must, however, be observed between cases where the evidence is offered to prove a condition precedent to the taking effect of the instrument and a condition subsequent to defeat its operation or to divest title upon the happening of the condition. In the former case, as has already been stated, such evidence is admissible, even at law, for it tends to show that the writing never in fact became operative or valid as a contract or conveyance.⁴

10. Evidence Establishing a Trust.—Parol evidence to prove the circumstances under which land is purchased by one person, and a deed taken to himself, for the benefit of another, is admissible to show an implied or resulting trust, though the deed be on its face absolute,⁵ even after the grantee's death;⁶ but not according to the weight of authority to establish active or express trusts.⁷ There are authorities, however, to the effect that active trusts may be attached by parol evidence to conveyances absolute in form.⁸ It is held in numerous cases that a trust can only be

cot, 2 Root (Conn.) 119; 1 Am. Dec. 62; *Sourse v. Marshall*, 23 Ind. 194. Land Contracts.—*Wendlinger v. Smith*, 75 Va. 309; 40 Am. Rep. 727. Other Contracts.—*Butler v. Smith*, 35 Miss. 457; *Watson v. James*, 15 La. Ann. 386; *Morrison v. Lovejoy*, 6 Minn. 319. Defeasance.—*Walker v. McDonald*, 49 Tex. 458. Checks.—*Sweet v. Stevens*, 7 R. I. 375. Orders.—*Hymers v. Druhe*, 5 Mo. App. 580. Acceptance of Draft.—*Ferguson v. Davis*, 65 Mich. 677. Certificates of Shares of Stock.—*Brick v. Brick*, 98 U. S. 574; *Burgess v. Seligman*, 107 U. S. 20. Release.—*Purcell v. Burns*, 39 Conn. 429. See also **CONDITIONAL SALES**, vol. 3, pp. 428, 429, and cases cited.

1. *Anthony v. Atkinson*, 2 Sweeny (N. Y.) 228.

2. *Hutchins v. Hutchins*, 98 N. Y. 56; *Allen v. Bryson*, 67 Iowa 591; 56 Am. Rep. 358; *Stewart v. Murray*, 13 Minn. 426.

3. Thus, where it was provided, by a composition deed between a debtor and his creditors, that the deed should not be binding until all the creditors had signed it, the debtor was not allowed to set up by parol an understanding, at the time of the execution of the deed, that a certain class of creditors was intended to be excluded. *Acker v. Phoenix*, 4 Paige (N. Y.) 305.

4. See **EXCEPTION**, vol. 7, p. 113. See also, as illustrating the general doctrine of this subdivision of the article, *McPherson v. Weston* (Cal. 1890), 24 Pac. Rep. 733; *Osborne v. Taylor* (Conn.), 20 Atl. Rep. 605; *Brook v. Latimer* (Kan. 1890), 24 Pac. Rep. 946; *Hazzard v. Duke*, 64 Ind. 220; *Wood v. Matthews*, 73 Mo. 477; *Johnson v. Huston*, 17 Mo. 58; *Kelly v. Ferguson*, 46 How. Pr. (N. Y.) 411; *Van Pelt v. Otter*, 2 Sweeny (N. Y.) 202; *Matthews v. Sheehan*, 69 N. Y. 585; *Greenawalt v. Kohne*, 85 Pa. St. 369; *Solenberger v. Gilbert* (Va. 1890), 11 S. E. Rep. 789; *Sayre v. King*, 17 W. Va. 562; *Ottawa etc. R. Co. v. Hall*, 1 Ill. App. 612.

5. *Church v. Sterling*, 16 Conn. 388; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9; *Borst v. Nalle*, 28 Gratt. (Va.) 423; *Leakey v. Gunter*, 25 Tex. 400; *Jackson v. Mills*, 13 Johns. (N. Y.) 463; *Scoby v. Blanchard*, 3 N. H. 170; *Rank v. Grote*, 110 N. Y. 12; *Scruggs v. Russell*, *McCahon* (Kan.) 39; *Powell v. Monson etc. Mfg. Co.*, 3 Mason (U. S.) 347; *Brison v. Brison*, 75 Cal. 525.

6. *Richardson v. Taylor*, 45 Ark. 472.

7. *Ellis v. Higgins*, 32 Me. 34; *Hutchinson v. Tindall*, 3 N. J. Eq. 357; *Movan v. Hays*, 1 Johns. (N. Y.) 339; *St. John v. Benedict*, 6 Johns. (N. Y.) 111.

8. *Reeves v. Bass*, 39 Lea. (Tenn.)

established in favor of a third party, and that a grantor or mortgagor cannot prove by parol that his deed or mortgage was made in trust for the use and benefit of himself,¹ though the authorities are conflicting.² The same rule applies to other dispositive instruments as to those affecting real estate.³ Evidence in all cases under this exception will be received with caution, and the trust must be clearly and conclusively shown.⁴

11. Evidence to Prove Usage and Custom.—(See also USAGES AND CUSTOMS).—Parol evidence is admissible to prove any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description, unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract.⁵

12. Evidence to Prove Subsequent Agreements, Generally.—A new and distinct agreement on a new consideration may be established by parol evidence, whether it be a substitute for the old or in addition to or beyond it.⁶ But a written subsisting

618; *Barker v. Prentiss*, 6 Mass. 430, indorsement of note; *Locket v. Child*, 11 Ala. 640; *Brown v. Isbell*, 11 Ala. 1009, assignment of mortgage.

1. *Whyte v. Arthur*, 17 N. J. Eq. 521; *Elliot v. Morris*, 1 Harp. Eq. (S. Car.) 281; *Lawson v. Lawson*, 117 Ill. 98; *Gerry v. Stimson*, 60 Me. 186.

2. *Walcot v. Ronalds*, 2 Robt. (N. Y.) 617; *Lapham v. Whipple*, 8 Met. (Mass.) 59; 41 Am. Dec. 487; *Morrall v. Watterson*, 7 Kan. 199; *Cipperly v. Cipperly*, 4 Thomp. & C. (N. Y.) 342.

3. Parol evidence was held admissible to show that a written transfer of claims, made in terms to one of two joint tenants, was intended for the joint benefit of both. *Stone v. Aldrich*, 43 N. H. 52. That a written lease purporting on its face to be made by an administrator in his own name was made for the benefit of the estate. *Russell v. Erwin*, 41 Ala. 292. To affix the character of a trust to a promissory note payable to the party claimed to be a trustee. *Catlin v. Burchard*, 13 Mich. 110.

4. *Boyd v. M'Lean*, 1 Johns. Ch. (N. Y.) 582.

5. *Stephen on Evidence* (Chase's Am. ed.), p. 164.

6. *Heatherly v. Record*, 12 Tex. 49; *Marshall v. Baker*, 19 Me. 402; *Creamer v. Stephenson*, 15 Md. 211; *McKinstry v. Runk*, 12 N. J. Eq. 60; *Cobb v. O'Neal*, 2 Sneed (Tenn.) 438; *Perry v. Central etc. R. Co.*, 5 Coldw. (Tenn.) 138; *Janney v. Brown*, 36 La. Ann. 118; *Shepherd v. Wysong*, 3 W. Va. 46; *Rogers v. Atkinson*, 1 Ga. 12; *Atwell v.*

Miller, 11 Md. 348; 69 Am. Dec. 206; *Piatt v. United States*, 22 Wall. (U. S.) 496; *Leeds v. Fassman*, 17 La. Ann. 32; 1 Greenl. on Ev. (14th ed.), § 303.

Changing the terms of a building contract. *Monroe v. Perkins*, 9 Pick. (Mass.) 298; *Rand v. Mather*, 11 Cush. (Mass.) 1; 59 Am. Dec. 131; *Latimore v. Harsen*, 14 Johns. (N. Y.) 330. Altering the terms of a shipping contract. *White v. Parkin*, 12 East 578; *Brigham v. Rogers*, 17 Mass. 573; *Sturdy v. Arnaud*, 3 T. R. 599; *Schack v. Anthony*, 1 M. & S. 573, 575; *Foster v. Allanson*, 2 T. R. 479; *Burns v. Miller*, 4 Taunt. 745; *Heard v. Wadham*, 1 East 630; *Richardson v. Hooper*, 13 Pick. (Mass.) 446; *Marshall v. Baker*, 19 Me. 402; *Brock v. Sturdivant*, 12 Me. 81; *Vicary v. Moore*, 2 Watts (Pa.) 456, 457; 27 Am. Dec. 323; *Delacroix v. Bulkley*, 13 Wend. (N. Y.) 71; *Thompson v. Locke*, 65 Iowa 429; *Cartright v. Clopton*, 25 Ga. 85.

In *Flanders v. Fay*, 40 Vt. 316. So under a written lease it was held that a subsequent parol agreement, on sufficient consideration, to alter or repair, may be proved. *Post v. Vetter*, 2 E. D. Smith (N. Y.) 248. Or to improve. *McDonald v. Sewart*, 18 La. Ann. 90.

Principle applied to allow proof of an agreement for independent compensation to that stipulated for in a written contract of employment. *Richardson v. Hooper*, 13 Pick. (Mass.) 446. In the case of an oral agreement to reduce the rate of interest on a debt secured by mortgage,

contract cannot be resisted by parol evidence of a different verbal agreement, subsequently made, without consideration.¹

Where the new agreement takes the place of an old contract, of whose loss the evidence raises a presumption, parol evidence is admissible, not only to establish the new agreement but to prove the terms of the original for the purpose of making the former intelligible.²

Where a contract within the Statute of Frauds has been reduced to writing, evidence cannot be given of a subsequent parol modification of some of the terms of the written instrument in connection with the writing so modified.³

and to change the times of payment. *Sharp v. Wyckoff*, 39 N. J. Eq. 376. Sale subsequent to a quitclaim. *Austin v. Sawyer*, 9 Cow. (N. Y.) 39. Fixing time of delivery of articles mentioned in bill of sale. *Orquerre v. Luling*, 1 Hilt. (N. Y.) 383. Giving mortgagor in a chattel mortgage verbal authority to sell. *Walker v. Camp*, 63 Iowa 627. Altering the time and manner of payment under a contract of employment. *Holmes v. Doane*, 9 Cush. (Mass.) 135. On the trial of an action to recover the price of a machine, that the machine was furnished under an oral contract in a different tenor from that of the written contract, on which plaintiff relied. *Esterly v. Eppelsheimer*, 73 Iowa 260. To prove a place of delivery agreed upon, and the appointment of an agent to receive payment on a written contract. *Cummings v. Putnam*, 19 N. H. 569. To prove an agreement to surrender notes previously executed. *Hubbell v. Ream*, 31 Iowa 289. Improvements other than those specified in a lease. *Danforth v. McIntyre*, 11 Ill. App. 417. Agreement to take bank notes on a contract for the payment in "lawful currency of New Jersey." *M'Eowen v. Rose*, 5 N. J. L. 582. Permission by mortgagee to mortgagor to sell personal property. *Walker v. Camp*, 63 Iowa 627. To carry away a wheat crop not mentioned in a quitclaim deed previously executed. *Austin v. Sawyer*, 9 Cow. (N. Y.) 39. An oral agreement to reduce the rate of interest on a mortgage from seven to six per cent., and to pay it semi-annually instead of annually, made after the mortgage became due, is admissible. *Sharp v. Wyckoff*, 39 N. J. Eq. 376. Release from the payment of rent under a lease and written contract providing for a surrender of the same. *Hope v. Balen*, 58 N. Y. 380.

1. *Randolph v. Perry*, 2 Port. (Ala.) 376.

2. *Walker v. Wilmington etc. R. Co.*, 26 S. Car. 80. But it is generally necessary to produce the written contract in order to prove and interpret the oral. *Goss v. Lord Nugent*, 27 E. C. L. 36.

3. *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425; *Whittier v. Dana*, 10 Allen (Mass.) 326; *Dana v. Hancock*, 30 Vt. 616; *Bryan v. Hunt*, 4 Sneed (Tenn.) 543; s. c., 70 Am. Dec. 262; *Rogers v. Atkinson*, 1 Ga. 12; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68; 24 Am. Dec. 121; *Parteriche v. Powlet*, 2 Atk. 383; *Jordan v. Sawkins*, 1 Ves. Jr. 402; *Noble v. Ward*, L. R., 1 Exch. 117. *Low v. Treadwell*, 12 Me. 441, and *Grafton Bank v. Woodward*, 5 N. H. 99; 20 Am. Dec. 566; *Hill v. Blake*, 97 N. Y. 216; *Jamison v. Ludlow*, 3 La. Ann. 492; *Norton v. Donner*, 33 Vt. 26; *Stead v. Dauber*, 37 E. C. L. 57; *Marshall v. Lynn*, 6 M. & W. 109; *Emmett v. Deuhurst*, 21 L. J., Ch. 497; *Goss v. Lord Nugent*, 27 E. C. L. 58; *Keating v. Price*, 1 Johns. Cas. (N. Y.) 22; *Adler v. Friedman*, 16 Cal. 138; *Sherwin v. Rutland etc. R. Co.*, 24 Vt. 347; *Bailey v. Johnson*, 9 Cow. (N. Y.) 114; *Erwin v. Saunders*, 1 Cow. (N. Y.) 249; *Keating v. Price*, 1 Johns. Cas. (N. Y.) 22; 1 Am. Dec. 92; *Marsh v. Bellew*, 45 Wis. 39, contains a valuable discussion of this subject.

In *Hill v. Blake*, 97 N. Y. 216, the action was on a contract for the delivery of iron and within the Statute of Frauds. It was held that a subsequent agreement provided for a different time and manner of delivery, and could not be shown by parol. The court said: "It of course cannot be doubted that the omission to furnish iron shipped in December or January authorized the defendants to rescind the contract, and

Where a defendant verbally agrees to do two or more things, one of which is without and the others within the Statute of Frauds, and an oral variation was made in respect of a particular which might, if standing alone, be good by parol, it is held that an action to recover upon that part only which has been so varied by parol, the other part having been severed therefrom by being performed, may be sustained.¹ The reason for this distinction is that when the part in respect of which the oral variation is made has ceased to be a part of a contract, required by the statute to be in writing, the case ceases to be within the statute, and the rule of the common law intervenes allowing subsequent variation of a contract reduced to writing to be established by parol evidence.² (See also CONTRACT, vol. 3, p. 892.)

13. Evidence to Prove Extension.—Oral evidence is admissible to show a subsequent agreement made before the breach of the contract extending the time of performance,³ whether such contract be sealed⁴ or unsealed, or within⁵ or without the Statute of Frauds.

14. Evidence to Prove Waiver or Discharge.—(See also WAIVER).—Parol evidence is admissible to prove a valid parol, waiver or discharge of a written contract.⁶

It is immaterial that the original agreement is required by the Statute of Frauds to be in writing, provided the contract of waiver be not repugnant to the statute.⁷

if the above views are correct, the verbal arrangement subsequently made related to the thing sold or contracted for, and is not binding upon the defendants. To admit it would vary by parol the substance of a contract valid only because in writing, and this cannot be done without a violation of the statute. I do not think it necessary to inquire whether the mere time of performance might be waived by parol, for that is not the question. The only one before us relates to a substantial matter, one affecting the identity of the thing sold, and without mention of which there could have been no contract, and which, although agreed upon, would have been invalid if not in writing. *Citing Welsh v. Gossler*, 89 N. Y. 540.

1. *Nagley v. Jeffers*, 28 Ohio St. 90.

2. *Browne Stat. of Frauds* (4th Am. ed.) 421; *Harvey v. Graham*, 5 Ad. & E. 74.

3. *Emerson v. Slater*, 21 How. (U. S.) 28; *Stearns v. Hall*, 9 Cush. (Mass.) 31; *Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 180. See also *Dixon v. Cook*, 47 Miss. 220.

Principle applied to promissory note in hands of assignee with notice. *Peck*

v. Beckwith, 10 Ohio St. 497. To mortgage. *Kane v. Cortesy*, 100 N. Y. 132. To arbitration bond sustaining a parol agreement to extend time for delivering the award. *Goldsborough v. McWilliams*, 2 Cranch (C. C.) 401.

4. *Branch v. Wilson*, 12 Fla. 543.

5. *Stearns v. Hall*, 9 Cush. (Mass.) 31; *Reed v. Chambers*, 6 Gill & J. (Md.) 490. But see *Stowell v. Robinson*, 32 E. C. L. 928.

6. *Medomak Bank v. Curtis*, 24 Me. 36; *Sessions v. Peay*, 21 Ark. 100; *Leathe v. Bullard*, 8 Gray (Mass.) 545; *Whitcher v. Shattuck*, 3 Allen (Mass.) 319; *Marsh v. Bellew*, 45 Wis. 39; *Parker v. Syracuse*, 31 N. Y. 376; *Davis v. Goodrich*, 45 Vt. 56; *Hemenway v. Bassett*, 13 Gray (Mass.) 378; *Stephen v. Green Hill Cemetery Co.*, 1 Houst. (Del.) 26; *Page v. Einstein*, 7 Jones (N. Car.) 147; *Harrington v. Samples*, 36 Minn. 200; *Arnold v. Arnold*, 20 Iowa 273; *Tucker v. Tucker* (Ind. 1887), 13 N. E. Rep. 710; *Howard v. Howard*, 3 Met. (Mass.) 548; *Estes v. Fry*, 94 Mo. 266; *Daniel v. Johnson*, 29 Ga. 207. See also CONTRACTS, vol. 3, pp. 889-893.

7. *Buel v. Miller*, 4 N. H. 196; *Leathe v. Bullard*, 8 Gray (Mass.) 545.

IV. PAROL EVIDENCE TO AID THE INTERPRETATION OF DOCUMENTS—(See also INTERPRETATION, vol. 11, p. 507)—**1. Explaining Illegible Writing.**—If the characters in a writing are difficult to be deciphered, the testimony of expert witnesses may be introduced to declare what the characters are.¹

2. Explaining Abbreviations.²—See also ABBREVIATIONS, vol. 1, p. 15.

3. Explaining Meaning of Terms.—Where a written instrument, complete in itself, contains a word, letter or figure which it is impossible or difficult for the court to construe without the aid of extrinsic evidence,³ or terms are used that require explanation

1. *Goblet v. Beechey*, 3 Sim. 24; *Masters v. Masters*, 1 P. Wms. 425; *Norman v. Morrell*, 4 Ves. 769; 1 Greenleaf on Evidence, § 280.

2. See ABBREVIATIONS, vol. 1, p. 17; AMBIGUITY, vol. 1, p. 545.

3. *United States v. Hodgman*, 13 Pet. (U. S.) 176; *Gray v. Harper*, 1 Story (U. S.) 574; *Barry v. Koombe*, 1 Pet. (U. S.) 640; *Rivers v. Duke*, 105 U. S. 132; *The Confederate Note Case*, 19 Wall. (U. S.) 548; *Catlett v. Pacific Ins. Co.*, 1 Paine (U. S.) 594; *Drake v. Goree*, 22 Ala. 409; *Cowles v. Garrett*, 30 Ala. 341; *Birchfield v. Castleman*, Add. (Pa.) 181; *Waterman v. Johnson*, 13 Pick. (Mass.) 261; *Baron v. Placide*, 7 La. Ann. 229; *Way v. Lowery*, 72 Ga. 63; *Ganson v. Madigan*, 15 Wis. 144; 82 Am. Dec. 659; *Robinson v. White*, 42 Me. 209.

Rule applied to a letter showing that the word "unsettled" was used in the sense of "unpaid." *Auzerias v. Naglee*, 74 Cal. 60. To "farm" or "homestead farm" in a lease. *Locke v. Rowell*, 47 N. H. 46. To the word "product" in an instrument promising to pay the product of hogs received. *Stewart v. Smith*, 28 Ill. 397. To ambiguous words in the language of a deed as to the place of support, where support for life was secured by conditional deed. *Young v. Young*, 59 Vt. 342. To the words "Care of R. R. Agt. Callahan" in a receipt given by a railroad company for goods. *Savannah etc. R. Co. v. Collins*, 77 Ga. 376. To a guarantee in the sale of an engine that the saving of fuel should "be equal to that claimed for the Corliss." *Wickes v. Swift Electric Light Co.*, 70 Mich. 322. To the word "proposition" in a letter to a woman concerning an abortion. *Lamb v. State*, 66 Md. 285. To words "Wolfe houses" in a bill of sale. *Claffey v. Hartford F. Ins. Co.*, 68 Cal.

169. To "consigned, 6 mo." in a bill of parcels. *George v. Joy*, 19 N. H. 544. To memorandum on a promissory note containing the words "to be paid for when started." *Lockhard v. Avery*, 8 Ala. 502. To the words "for the purpose of building a Catholic chapel" in a subscription. *O'Hear v. De Goesbriand*, 33 Vt. 593. To the words "for nine hundred and seventy-five pounds of tobacco of good merchantable quality at one dollar per pound" in an order. *Crofoot v. Truax*, 27 Ind. 72. To the term "homestead" in a will of property in *Iowa*, made before there was any statute or definition of the word. *Hopkins v. Grimes*, 14 Iowa 73. To the words "I collect for 5 per cent. when not litigated—10 per cent., when litigated, on the amount recovered" constituting a memorandum added by an attorney to his receipt. *Gunn v. Clendenin*, 68 Ala. 294. To the words "in a good and substantial manner, as flood dams should be built in such streams, cribbed, sparred," etc., in a contract to build a dam. *Quigley v. De Haas*, 98 Pa. St. 292. To the words "his crop of flax" in a contract of sale. *Goodrich v. Stevens*, 5 Lans. (N. Y.) 230. To a written agreement to pay the plaintiff a certain sum for inserting a business card in "his advertising chart" when it should be "published." *Stoops v. Smith*, 100 Mass. 63; 1 Am. Rep. 85. The words "entitled to all the privileges of a course of study" in a certificate of admission to a collegiate institution. *Iron City Commercial College v. Kerr*, 3 Brewst. (Pa.) 196.

Where a part of mortgaged land was set off as a homestead, without regard to the mortgage, the other part being left to pay the mortgage debt, and all parties acquiesced in this arrangement. Afterwards this last part was sold

to those unfamiliar with the business to which they pertain,¹ parol evidence is admissible in explanation of the meaning of such terms. Where an instrument relates to the scientific or mechanic arts, or contains words of a technical or local signification, the opinions of experts may be resorted to to explain such words, whether their use give rise to an ambiguity or not.² (See also *AMBIGUITY*, vol. I, p. 543.)

But parol evidence will not be received to show that parties to a writing placed upon a term or phrase having a popular signification among scientific men,³ or a well understood meaning among business men,⁴ a limited meaning, thereby controlling the whole effect of the instrument. Nor will evidence that the parties used a term in general use, having a well understood and definite meaning, in a sense different from that usually attached to it.⁵

"subject to the mortgage," and it was expressed as so sold in the deed of conveyance. It was held that parol evidence was admissible to show whether the words "subject to the mortgage" meant that the part sold should pay the whole of the mortgage debt, or that it should only contribute, with the part set off as a homestead, to the payment. *Merrill v. Cooper*, 36 Vt. 314.

Smith v. Aikin, 75 Ala. 209.

1. *Elliott v. Secor*, 60 Mo. 163. Rule applied to "good breeder." used in a warranty of a jack. *Connable v. Clark*, 26 Mo. App. 192.

"Bought 150 tons madder 12½, 6 ms" in a memorandum sale. *Dana v. Fiedler*, 12 N. Y. 40; 62 Am. Dec. 130. "On margin" in a broker's contract. *Hatch v. Douglas*, 48 Conn. 116; 40 Am. Rep. 154. "Cold storage" in receipt. *Behrman v. Lind*, 47 Hun (N. Y.) 530. "Good, merchantable, shipping hay," in written contract. *Fitch v. Carpenter*, 43 Barb. (N. Y.) 40. "Four dollars an order" in a contract to canvass for books. *Newhall v. Appleton*, 49 N. Y. Super. Ct. 238. "Good custom cowhide" in a contract of sale of boots. *Wait v. Fairbanks*, *Brayt*. (Vt.) 77. "Water nine and one-half feet" in memorandum. *Rhoades v. Castner*, 12 Allen (Mass.) 130.

2. *Stroud v. Frith*, 11 Barb. (N. Y.) 300; *Myers v. Walker*, 24 Ill. 134; *Brown v. Brooks*, 25 Pa. St. 210; *Prather v. Ross*, 17 Ind. 495; *Taylor v. Sototingo*, 6 La. Ann. 154; *Williams v. Woods*, 16 Md. 220; *Carey v. Bright*, 58 Pa. St. 70; *Hart v. Hammett*, 18 Vt. 127; *Myers v. Tirbals*, 72 Cal. 278; *Reynolds v. Jourdan*, 6 Cal. 109; *New*

Jersey etc. Co. v. Boston etc. Co., 15 N. J. Eq. 418; *Branns v. Stearns*, 1 Oregon 367.

3. *Hartwell v. Camman*, 10 N. J. Eq. 128; 64 Am. Dec. 440.

4. *Galena Ins. Co. v. Kupfer*, 28 Ill. 332; *Kemble v. Lull*, 3 McLean (U. S.) 272; *Moran v. Prather*, 23 Wall. (U. S.) 492; *Aspden's Estate*, 2 Wall. Jr. (C. C.) 368; *Marc v. Kupfer*, 34 Ill. 287; *Ehle v. Chittenango Bank*, 24 N. Y. 548; *Sexton v. Windell*, 23 Gratt. (Va.) 534; *Brawley v. United States*, 96 U. S. 168.

5. The following words and phrases have been held to be of such well known signification as not to admit of parol evidence to explain them or qualify their meaning: "Present and future" (indebtedness). *Swain v. Granger's Union*, 69 Cal. 176. "Solid rock." *Fruin v. Crystal R. Co.*, 89 Mo. 397. "Lower" and "south." *Farley v. Deslonde*, 69 Tex. 458. "Current bank notes." *Osgood v. McConnell*, 32 Ill. 74. "Plows and cultivators." *Gilbert v. Moline Plow Co.*, 119 U. S. 491. "More or less." *Shickle v. Chouteau*, etc. *Iron Co.*, 84 Mo. 161. "Oil in the tanks." *Weisenberger v. Harmony etc. Ins. Co.*, 56 Pa. St. 442. "Ship timber." *Pillsbury v. Locke*, 33 N. H. 96; 66 Am. Dec. 711. "A reasonable time." *Jenkins v. Lykes*, 19 Fla. 148; 45 Am. Rep. 19. "Lumber." *Williams v. Stevens' Point Lumber Co.*, 72 Wis. 487.

In an action to recover damages for unskillful performance of a building contract, evidence is inadmissible to show that the price agreed to be paid is a suitable price for a "rough job." *Crow v. Becker*, 5 Robt. (N. Y.) 262.

When parol evidence is admissible under this exception, the testimony must be confined to the meaning of the words in dispute, and witnesses will not be permitted to place a construction upon the instrument.¹

4. Explaining Circumstances of the Case.—In order to ascertain the relation of the words of a document to facts, extrinsic evidence may be given of any fact to which it refers, or may probably have been intended to refer, or which identifies any person or thing mentioned in it. Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and in order to do this the court must put itself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter.²

5. Explaining Ambiguities.³—See also *AMBIGUITY*, vol. 1, p. 525.

1. *Arthur v. Roberts*, 60 Barb. (N. Y.) 580; *Reynolds v. Jourdan*, 6 Cal. 109; *Powell v. State*, 84 Ala. 444; *Sanford v. Rawlings*, 43 Ill. 92; *Cabot v. Winsor*, 1 Allen (Mass.) 546; *State v. Lefavre*, 53 Mo. 470.

2. See also *INTERPRETATION*, vol. 11, p. 512. *Monnett v. Monnett*, 46 Ohio St. 30; *Wilson v. Troup*, 2 Cow. (N. Y.) 195; 14 Am. Dec. 458; *Atwood v. Gillett*, 2 Dougl. (Mich.) 206; *Tibbs v. Morris*, 44 Barb. (N. Y.) 138; *Holmes v. Crossett*, 33 Vt. 116; *Phelps v. Bostwick*, 22 Barb. (N. Y.) 314; *Spencer v. Babcock*, 22 Barb. (N. Y.) 326; *King v. Merriman*, 38 Minn. 47; *Hughes v. Wilkinson*, 35 Ala. 453; *Webster v. Atkinson*, 4 N. H. 21; *Truett v. Chapin*, 4 Hawks (N. Car.) 178.

Wills and Testamentary Devises.—*Rogers v. French*, 19 Ga. 216; *May v. May*, 28 Ala. 141; *Nolan v. Bolton*, 25 Ga. 352; *Wootton v. Redd*, 12 Gratt. (Va.) 196; *Dunlap v. Dunlap*, 4 Desaus. (S. Car.) 305.

Deed.—*Gowdy v. Cordts*, 40 Hun (N. Y.) 469.

Release.—*Rowe v. Rand*, 111 Ind. 206.

Other Instruments.—*Winner v. Hoyt*, 66 Wis. 227; 57 Am. Rep. 257; *Steffens v. Collins*, 6 Bosw. (N. Y.) 223; *Ingraham v. Little*, 21 Ga. 420.

Parol testimony was admitted as explaining situation of parties and surrounding circumstances: In an action to recover damages for the erection of a mill dam, which overflowed plaintiff's lands; to explain the meaning of the words "down the east bank of said creek to the ford below the mill, thence with the centre of the creek to the section line." *Jenkins v. Cooper*, 50 Ala. 419; *Swayne v. Vance*, 28 Ark. 282. Of the

circumstances surrounding the grantor to interpret words of a deed. *Clements v. Pearce*, 63 Ala. 284. Circumstances, in view of which a will was made. *Eberts v. Eberts*, 42 Mich. 404. Or attending the execution of a paper. *Foster v. McGraw*, 64 Pa. St. 464. To explain written communications not entirely intelligible, by showing situation of the writers. *Field v. Munson*, 47 N. Y. 221. To show the sense in which equivocal words in a written contract were used. *North American Ins. Co. v. Throop*, 22 Mich. 146. To show the object of parties in the execution of a written instrument. *Brick v. Brick*, 98 U. S. 514. To ascertain what real estate, other than a specified farm, upon which a residuary clause in a will could operate. *Tuxbury v. French*, 41 Mich. 7. On a distribution contest under the *Alabama Rev. Code*, § 1907, to show that particular property, given or loaned by a decedent to a distributee, was not intended as an advancement. *Clements v. Hood*, 57 Ala. 459. Where a written contract did not suggest what the meaning of the parties was, and the language was susceptible of more than one meaning. *Phelps v. Clasen*, 1 Woolw. (U. S.) 204. When the effect of an indorsement was doubtful, to show the intent with which it was made. *Dibble v. Duncan*, 2 McLean (U. S.) 553. To show the application of a deed and what person or persons were intended. *Friedman v. Goodwin*, McAll. (U. S.) 142. See also *Babcock v. Deford*, 14 Kan. 408; *Polk v. Anderson*, 16 Kan. 243; *Fisher v. Abeel*, 66 Barb. (N. Y.) 381; *Chamberlain v. Black*, 64 Me. 40; *Cavazos v. Trevino*, 6 Wall. (U. S.) 773.

3. See *AMBIGUITY*, vol. 1, p. 525, et seq.

6. Subsequent Acts and Declarations of Parties as Showing Their Understanding of Agreement.—Where the language of an instrument is equivocal, ambiguous or insufficient, subsequent acts or declarations of the parties, showing the construction put upon the words of the description by them, may be resorted to.¹ But, where the language of a written instrument has a fixed and ascertained meaning, the acts of the parties under the contract cannot be received in evidence with a view to its construction.² Nor can a party to a contract, by proving what he said or wrote to a third person after the contract was entered into, show either what it means or what he understood it to mean.³

7. Evidence to Rebut an Equity.—The meaning of this is that where a certain presumption would, in general, be deduced by a court of equity from the nature of an act, such presumption may be repelled by extrinsic evidence, showing the intention to be otherwise. The simplest instance of this occurs where two legacies, of which the terms and the expressed motives exactly coincide, are presumed not to have been intended as cumulative. In such case to rebut the presumption, which makes one of these legacies inoperative, parol evidence will be received.⁴

V. RULE EXCLUDING PAROL EVIDENCE APPLIES ONLY IN SUITS BETWEEN THE PARTIES.—The rule against contradicting the tenor of a written instrument by parol applies only to parties and privies. It has no application to strangers,⁵ nor is a party to an instrument

1. *Linney v. Wood*, 66 Tex. 22.

A defective description of boundary may be supplemented by evidence of the practical construction put by the parties upon the description. *Kingsland v. Mayor etc. of N. Y.*, 45 Hun (N. Y.) 198.

It may be shown from subsequent acts of the parties to a contract to build a railroad for a certain sum per mile of road, that side tracks were not considered computable as road, but were included in the general allowance. *Barber v. Troy etc. R. Co.*, 27 Vt. 766.

A written contract being so worded as to be open to either of two interpretations, parol evidence of the circumstances and the conduct of the parties is admissible on the question of construction. *Jenkinson v. Monroe*, 61 Mich. 454; *Lovejoy v. Lovett*, 124 Mass. 270.

See also *Douglas v. Reynolds*, 7 Pet. (U. S.) 113; *Wiggin v. Goodwin*, 63 Me. 389; *Smith v. Richards*, 16 Me. 200; *Meade v. Giefoyle*, 64 Wis. 18; *Truett v. Adams*, 66 Cal. 218; *Webster v. Enfield*, 10 Ill. 298; *Coates v. Saugston*, 5 Md. 121; *Davis v. Talcott*, 14 Barb. (N. Y.) 611.

2. *Miller v. Dunlap*, 22 Mo. App. 97;

Giles v. Comstock, 4 N. Y. 270; 53 Am. Dec. 374, *Michael v. St. Louis Mut. F. Ins. Co.*, 17 Mo. App. 23.

3. *Hill v. John P. King. Mfg. Co.*, 79 Ga. 105.

See also as illustrating the general doctrine of this subdivision of the article: *Georgia R. etc. Co. v. Smith* (Ga.), 10 S. E. Rep. 235; *Hostetter v. Auman*, 119 Ind. 7; *Stanley v. Pickhardt*, 6 N. Y. Supp. 930; *Northford Rivet Co. v. Blackman Mfg. Co.*, 44 Conn. 183; *Schofield v. Jones* (Ga. 1890), 11 S. E. Rep. 1032; *Dowling v. Salliotte* (Mich. 1890), 47 N. W. Rep. 225; *Barclay v. Pursley* (Pa. 1885), 20 Atl. Rep. 411; *Twitty v. Houser*, 7 S. Car. 153; *Bacon v. Dodge* (Vt. 1890), 20 Atl. Rep. 197.

4. *Greenleaf on Evidence* (9th ed.), vol. 1, § 296. See also *King v. Ruckman*, 21 N. J. Eq. 599; *Hatch v. Kimball*, 16 Me. 146; *Sims v. Sims*, 10 N. J. Eq. 158; *Rhodes v. Farmer*, 17 How. (U. S.) 464; *Long v. Dooley*, 4 Hayw. (Tenn.) 128; 9 Am. Dec. 754. The evidence received to rebut a legal presumption. *Walton v. Coulson*, 1 McLean (U. S.) 120. See also *Jones v. Duff*, 47 Hun (N. Y.) 170.

5. *Blake v. Hall*, 19 La. Ann. 49;

estopped from contradicting it when it is offered in evidence in a suit to which a stranger to the instrument is a party.¹ Sureties are third parties with respect to their mutual relations and within the principle of this exception.²

VI. PAROL EVIDENCE TO PROVE DEED ABSOLUTE ON ITS FACE A MORTGAGE—1. General Principles.—It is a doctrine universally accepted at the present day that, in equity, parol evidence may be received to show a deed absolute on its face, or from which a clause of defeasance has been omitted, to be in fact a mortgage.

The question of admissibility commonly arises in suits to redeem from the operation of an absolute deed as from a mortgage, and sometimes, but less frequently, where the evidence is offered in support of an equitable defense in an ejectment, in those States where equitable defenses are allowed. The growth of the doctrine is comparatively recent, and there has been considerable diversity of view as to the principles on which it rests. The English decisions appear to limit its application to cases wherein the defeasance has been omitted by accident or fraud,³ or where there has been a defeasance verbal instead of written,⁴ or where it appears from circumstances, or from the payment of interest by the grantee, that the parties contemplated a mortgage instead of an absolute conveyance.⁵

New Berlin *v.* Overseers of the Poor, 10 Johns. (N. Y.) 229; Burns *v.* Thompson, 91 Ind. 146; Hussman *v.* Wilke, 50 Cal. 250, Smith *v.* Moynihan, 44 Cal. 53; McMaster *v.* Insurance Co. of North America, 55 N. Y. 222; 14 Am. Rep. 239; Philipps *v.* Preston, 5 How. (U. S.) 278; Lowell Mfg. Co. *v.* Safeguard F. Ins. Co., 88 N. Y. 591; Brown *v.* Thurber 77 N. Y. 613; 58 How. Pr. (N. Y.) 95; McArthur *v.* Soule, 66 Barb. (N. Y.) 423; Bareda *v.* Silsbee, 21 How. (U. S.) 146; Woodman *v.* Eastman, 10 N. H. 359; Edgerly *v.* Emerson, 23 N. H. 555; 55 Am. Dec. 207; Furbush *v.* Goodwin, 25 N. H. 425; Reynolds *v.* Magness, 2 Ired. (N. Car.) 26; Kinney *v.* People, 4 Ill. 357; The Phebe, 1 Ware (U. S.) 263; Strader *v.* Lambeth, 6 B. Mon. (Ky.) 589; Myers *v.* Peeks, 2 Ala. 648; Peck *v.* Vandenberg, 30 Cal. 11; Johnston *v.* Taylor, 4 Dev. (N. Car.) 355; Russell *v.* Carr, 38 Ga. 459; Silsbury *v.* Blumb, 26 Ill. 287; Needles *v.* Hanifan, 11 Ill. App. 303; Robertson *v.* Maclin, 3 Hayw. (Tenn.) 71; Shearer *v.* Babson, 1 Allen (Mass.) 486; Norton *v.* Keogh, 42 Hun (N. Y.) 611; Taylor *v.* Baldwin, 10 Barb. (N. Y.) 582; Master-son *v.* Boyce, 29 Hun (N. Y.) 456; Stowell *v.* Eldred, 39 Wis. 614; Pool *v.* Cummings, 20 Ala. 563; Cunningham *v.* Milner, 56 Ala. 522; California Bank *v.* White, 14 Nev. 373; Fant *v.*

Sprig, 50 Md. 551; Smith *v.* Conrad, 15 La. Ann. 579; Finley *v.* Bogan, 20 La. Ann. 443; Pailhes *v.* Thielen, 1 La. Ann. 34; Van Eman *v.* Stanchfield, 10 Minn. 255; Talbot *v.* Welkins, 31 Ark. 411; Pim *v.* Wait, 32 Fed. Rep. 741.

1. Venable *v.* Thompson, 11 Ala. 147.

2. Thomas *v.* Truscott, 53 Barb. (N. Y.) 200.

3. Maxwell *v.* Mountacute, Prec. Ch. 526; Card *v.* Jaffray, 2 Sch. & Lef. 374; England *v.* Codrington, 1 Eden 169; Dixon *v.* Parker, 2 Ves. 219, per Lord Hardwicke; Irnham *v.* Child, 1 Bro. (C. C.) 92; Portmore *v.* Morris, 2 Bro. (C. C.) 219; Lincoln *v.* Wright, 4 De G. & J. 16, cited in 1 Jones on Mortgages, § 285, n. 1.

4. Manlove *v.* Bale, 2 Vern. 84; Lincoln *v.* Wright, 4 De G. & J. 16; Whitfield *v.* Parfit, 15 Jur. 852.

5. Allenby *v.* Dalton, 5 L. J., K. B. 312, Cripps *v.* Jee, 4 Bro. (C. C.) 472; Sevier *v.* Greenway, 19 Ves. 413.

In Story's Eq. Jur., § 1018, the grounds of the doctrine are stated, in general terms, to rest on "fraud, accident and mistake." In 4 Kent Com. 142, 143, it is said that "Parol evidence is admissible in equity to show that an absolute deed was intended as a mortgage, and that the defeasance was omitted or destroyed by fraud, surprise or mistake."

In the *United States*, the decisions while harmonious in their recognition of the doctrine, are not harmonious as to the extent of its application, or as to the precise grounds on which it rests. The Federal courts apply it with more liberality than the courts of some of the States, and go to the full extent of affording relief, even in the absence of proof of express deceit or fraudulent purpose at the time of taking the deed, and although the instrument of defeasance be omitted by design upon the mutual confidence between the parties.¹

In *Massachusetts*, the doctrine is not limited to cases of fraud, accident or mistake, but is extended, as in the Federal courts, to cases wherein, in the circumstances, the intention to create a mortgage is shown, and where it would be inequitable to refuse to give effect to such intention.²

And this is the view which at the present day is accepted in most of the States, the tendency of recent years having been in this direction, though most of the earlier American cases appear to place the admission of the evidence on the ground of fraud, accident, or mistake. The rule announced by the Federal courts and by the *Massachusetts* court seems to be recognized in *Arkan-*

1. In *Russel v. Southard*, 12 How. (U. S.) 139, it is declared to be the doctrine of the court, "that, when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as payment of purchase money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage." The conclusion of the court was, "that the transaction was in substance a loan of money upon security of the farm, and, being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage."

In *Peugh v. Davis*, 96 U. S. 332, the court also declares that, as the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible.

Other decisions of the Federal courts declaring the same doctrine are. *Conway v. Alexander*, 7 Cranch (U. S.) 238; *Hughes v. Edwards*, 9 Wheat (U. S.) 489; *Sprigg v. Bank of Mount Pleasant*, 14 Pet. (U. S.) 201; *Morris v. Nixon*, 1 How. (U. S.) 118; *Babcock v. Wyman*, 19 How. (U. S.) 299; *Amory v. Lawrence*, 3 Cliff. (U. S.) 523; *Taylor v. Luther*, 2 Sumn. (U. S.) 232; *Jenkins v. Eldredge*, 3 Story (U. S.)

181, *Flagg v. Mann*, 2 Sumn. (U. S.) 486, *Bentley v. Phelps*, 2 Woodb. & M. (U. S.) 426,

2. *Massachusetts*.—It was not until 1872, in the case of *Campbell v. Dearborn*, 109 Mass. 130, that this was adjudged. The suit was in equity to compel a re-conveyance of land, on the ground that the plaintiff's conveyance of it to the defendant, though in form absolute, was in substance a mortgage. It appeared that plaintiff held A's bond for a conveyance upon the payment of a certain sum at a certain time, and that, not having the money, plaintiff applied to defendant, who advanced it to A, and took from A with plaintiff's knowledge and consent a deed in form absolute but, that plaintiff supposed that defendant was actuated solely from considerations of friendship, and was to convey the land to plaintiff on being repaid the amount advanced to A. Beyond such fraud as might be implied from these facts, there was no actual fraud. The court inferred that the land was worth much more than the amount advanced, and upon a review of the authorities, and in the light of principle, adjudged that plaintiff was entitled to the relief sought, and that neither the Statute of Frauds nor the rule rendering parol evidence inadmissible to control or vary the terms of a written contract, stood in the way of granting the relief, and did not deem that the intention of de-

sas,¹ California,² Florida,³ Illinois,⁴

fendant to hold the land as his own was material, in view of the proved expectation of plaintiff and the facts of the case. The same doctrine has been recognized in *Newton v. Fay*, 10 Allen (Mass.) 505; *Glass v. Hulbert*, 102 Mass. 24; *Pond v. Eddy*, 113 Mass. 149; *McDonough v. Squire*, 111 Mass. 217; *McDonough v. O'Neil*, 113 Mass. 92; *Cullen v. Carey*, 146 Mass. 50, *Hassam v. Barrett*, 115 Mass. 256.

1. **Arkansas.**—As in *Anthony v. Anthony*, 23 Ark. 479. In the earlier cases of *Blakemore v. Byrnside*, 7 Ark. 505, and *Jordan v. Fenno*, 13 Ark. 593, the ground of admission was stated to be fraud or mistake. In support of the general doctrine of admissibility see *Johnson v. Clark*, 5 Ark. 321, *Scott v. Henry*, 13 Ark. 112, *McCarron v. Cassidy*, 18 Ark. 34, *Farris v. King*, 27 Ark. 404, *Harman v. May*, 40 Ark. 146.

2. **California.**—*Montgomery v. Spect*, 55 Cal. 352, *Husheon v. Husheon*, 71 Cal. 407, *Arnot v. Baird* (Cal. 1886), 12 Pac. Rep. 386. And see generally, *Pierce v. Robinson*, 13 Cal. 116, *Johnson v. Sherman*, 15 Cal. 287, *Lodge v. Turman*, 24 Cal. 385, *Hopper v. Jones*, 29 Cal. 18, *Gay v. Hamilton*, 33 Cal. 686; *Jackson v. Lodge*, 36 Cal. 28; *Raynn v. Lyons*, 37 Cal. 452; *Vance v. Lincoln*, 38 Cal. 586; *Farmer v. Grose*, 42 Cal. 169; *Kuhn v. Rump*, 46 Cal. 299; *Booth v. Hoskins*, 75 Cal. 271.

3. **Florida.**—See *Chaires v. Brady*, 10 Fla. 133, *Matthews v. Porter*, 16 Fla. 466; *Lindsay v. Matthews*, 17 Fla. 577, *Franklin v. Ayer*, 22 Fla. 654; *First Nat. Bank v. Ashmead*, 23 Fla. 379.

4. **Illinois.**—In *Illinois*, the statute declares that a deed of land, though absolute in form, shall be deemed a mortgage if given by way of security.

In *Sutphen v. Cushman*, 35 Ill. 186, the court by BECKWITH, J. said: "The conveyance purports to convey an absolute estate to the grantee, and it must be taken as the exponent of the rights of the parties, unless some equity is shown not founded on the mere allegation of a contemporaneous understanding inconsistent with the terms of the deed, but independently both of the deed itself and of the understanding with which it was executed. The right to redeem lands conveyed cannot be established by simply proving that such was the understanding on which the deed was executed, because equity, as well as

the law, will seek for the understanding of the parties in the deed itself. The right must be one paramount to, and independent of, the terms of the deed, as well as of the understanding between the parties at the time it was executed. Parol evidence is admissible so far as it conduces to show the relations between the parties, or to show any other fact or circumstance of a nature to control the deed, and to establish such an equity as would give a right of redemption, and no further. In the application of this rule, parol evidence is received to establish the fact that a debt existed, or money was loaned on account of which the conveyance was made, for such facts will, in a court of equity, control the operation of the deed. So, too, in regard to any other fact or circumstance having the same operation. From some expressions of opinion in cases hitherto decided by this court, it has been supposed that a more enlarged rule has been adopted in this State, but a careful examination of them will show that this court has never departed from the rule we now enunciate."

Again, in *Ruckman v. Alwood*, 71 Ill. 155, the opinion, after referring to the earlier *Illinois* cases, said: "It will be perceived that in none of these cases did the court attempt to range the jurisdiction to turn an absolute deed into a mortgage by parol evidence, under any specific head of equity, such as fraud, accident, or mistake, but the rule seems to have grown into recognition as an independent head of equity. Still it must have its foundation in this, that where the transaction is shown to have been meant as a security for a loan, the deed will have the character of a mortgage, without other proof of fraud than is implied in showing that a conveyance, taken for the mutual benefit of both parties, has been appropriated solely to the use of the grantee."

See also *Purviance v. Holt*, 8 Ill. 495, *Ferguson v. Sutphen*, 8 Ill. 570, *Miller v. Thomas*, 14 Ill. 428, *Williams v. Bishop*, 15 Ill. 553; 18 Ill. 101, *Tillson v. Moulton*, 23 Ill. 600, *De Wolf v. Strader*, 26 Ill. 225; *Shaver v. Woodward*, 28 Ill. 277, *Preschbaker v. Feaman*, 32 Ill. 475, *Reigard v. McNeil*, 38 Ill. 400, *Lindauer v. Cummings*, 57 Ill. 195, *Smith v. Cremer*, 71 Ill. 185, *Knowles v. Knowles*, 86 Ill. 1; *Hancock v. Harper*, 86 Ill. 445, *Darst v. Murphy*, 119

Indiana,¹ *Kansas*,² *Maine*,³ *Michigan*,⁴ *Minnesota*,⁵ *Mississippi*,⁶

Ill. 343; *Klock v. Walter*, 70 Ill. 416, *Remington v. Campbell*, 60 Ill. 516, *Wilson v. McDowell*, 78 Ill. 514; *Dwen v. Blake*, 44 Ill. 135, *Heald v. Wright*, 75 Ill. 17, *Taintor v. Keys*, 43 Ill. 332; *Price v. Kearns*, 59 Ill. 276; *Alwood v. Mansfield*, 59 Ill. 496; *Shays v. Norton*, 48 Ill. 100, *Christie v. Hale*, 46 Ill. 117, 120, *Hunter v. Hatch*, 45 Ill. 178; *Pitts v. Cable*, 44 Ill. 103; *Parmelee v. Lawrence*, 44 Ill. 405; *Ewart v. Walling*, 42 Ill. 453; *Silsbe v. Lucas*, 36 Ill. 462, *Sutphen v. Cushman*, 35 Ill. 186, *Roberts v. Richard*, 36 Ill. 339, *Snyder v. Griswold*, 37 Ill. 216, *Ennor v. Thompson*, 46 Ill. 214, *Weider v. Clark*, 27 Ill. 251; *Maxfield v. Patchen*, 26 Ill. 39; *Davis v. Hopkins*, 15 Ill. 519, *Coates v. Woodworth*, 13 Ill. 654; *Magnusson v. Johnson*, 73 Ill. 156, *Strong v. Shea*, 83 Ill. 575; *Westlake v. Horton*, 85 Ill. 228, *Sharp v. Smitherman*, 85 Ill. 153, *Clark v. Finlon*, 90 Ill. 245; *Bartling v. Brasuhn*, 102 Ill. 441, *Union Mut. L. Ins. Co. v. White*, 106 Ill. 67; *Beauss v. Ford*, 108 Ill. 16; *Bailey v. Bailey*, 115 Ill. 551; *Wynkoop v. Cowing*, 21 Ill. 570, *Williams v. Bishop*, 15 Ill. 553; 18 Ill. 101, *Smith v. Sackett*, 15 Ill. 528; *Davis v. Hopkins*, 15 Ill. 519, *Helm v. Boyd*, 124 Ill. 370; *Bentley v. O'Bryan*, 111 Ill. 53; *Workman v. Greening*, 115 Ill. 477.

1. *Indiana*.—As to the general admissibility of the evidence there is no question.

Blair v. Bass, 4 Blackf. (Ind.) 539, *Connwell v. Evill*, 4 Blackf. (Ind.) 67, *Hayworth v. Worthington*, 5 Blackf. (Ind.) 361, *Smith v. Parks*, 22 Ind. 59, *Crane v. Buchanan*, 29 Ind. 570, *Horn v. Burnett*, 2 Blackf. (Ind.) 101; *St. John v. Freeman*, 1 Ind. 84; *Heath v. Williams*, 30 Ind. 495; *Davis v. Stonestreet*, 4 Ind. 101, *Smith v. Parks*, 22 Ind. 59; *Harbison v. Lemon*, 3 Blackf. (Ind.) 51, *Cross v. Hepnor*, 7 Ind. 359, *Graham v. Graham*, 55 Ind. 23, *Butcher v. Stultz*, 60 Ind. 170. These cases appear to indicate that the admission was limited to cases of fraud, accident, or mistake.

In *Beatty v. Brummett*, 94 Ind. 76, and *Smith v. Brand*, 64 Ind. 427, however, it has been held that, even in the absence of either of these elements, the evidence was admissible to prove the deed a mortgage.

To the point that the proof must be convincing, see *Conwell v. Evill*, 4 Blackf.

(Ind.) 67, *Fox v. Fraser*, 92 Ind. 565, *Herron v. Herron*, 91 Ind. 278; *Parker v. Hubble*, 75 Ind. 580; *Landers v. Beck*, 92 Ind. 49; *Lucas v. Hendrix*, 92 Ind. 54; *Cox v. Ratcliffe*, 105 Ind. 374, *Rogers v. Beach*, 115 Ind. 413, *Voss v. Eller*, 109 Ind. 260.

2. *Kansas*.—*Moore v. Wade*, 8 Kan. 380, *Glynn v. Home Building Assoc.*, 22 Kan. 746; *McDonald v. Kellogg*, 30 Kan. 170, *Bennett v. Wolverton*, 24 Kan. 284; *Butts v. Privett*, 36 Kan. 711.

3. *Maine*.—"It is denied that this court has the power to declare that an absolute deed shall be deemed to be a mortgage, allowing an equitable mortgagee the right to redeem. At law it has no such power. Nor, when the court had a limited jurisdiction in equity, was the doctrine admitted. It was always understood, however, that, in a case like the present, if instead of a demurrer, an answer was filed admitting the facts alleged, the court had the power to apply the remedy. *Thomaston Bank v. Stimpson*, 21 Me. 195, *Whitney v. Batchelder*, 32 Me. 313; *Howe v. Russell*, 36 Me. 115, *Richardson v. Woodbury*, 43 Me. 206. But since the act of 1874 conferred general chancery powers upon the court, it has full and complete jurisdiction in such cases. *Rowell v. Jewett*, 69 Me. 293; *Stinchfield v. Millikin*, 71 Me. 567. See also *Knapp v. Bailey*, 79 Me. 195, *Reed v. Reed*, 75 Me. 264.

4. *Michigan*.—See *Swetland v. Swetland*, 3 Mich. 482; *Swadsworth v. Loranger*, Har Ch. (Mich.) 113; *Fulmer v. Parrish*, 3 Mich. 211; *Emerson v. Atwater*, 7 Mich. 12, *Barber v. Milner*, 43 Mich. 248, *Tilden v. Streeter*, 45 Mich. 533, *Hurst v. Beaver*, 50 Mich. 612.

5. *McLane v. White*, 5 Minn. 178, *Belote v. Morrison*, 8 Minn. 87, *Phoenix v. Gardner*, 13 Minn. 430; *Holton v. Meighen*, 15 Minn. 69, *Weide v. Gehl*, 21 Minn. 449; *Marshal v. Thompson*, 39 Minn. 137.

Though the earlier cases appear to admit the evidence on the ground of fraud, mistake and surprise, the more liberal doctrine was recognized to its full extent in *Madigan v. Mead*, 31 Minn. 94.

6. *Watson v. Dickens*, 12 Smed & M. (Miss.) 608, *Prewett v. Dobbs*, 13 Smed. & M. (Miss.) 431; *Vasser v. Vasser*, 23 Miss. 378; *Anding v. Davis*,

Nebraska,¹ *Nevada*,² *New Jersey*,³ *New York*,⁴

38 Miss. 574, *Littlewort v. Davis*, 50 Miss. 403; *Freeman v. Wilson*, 51 Miss. 329; *Klein v. McNamara*, 54 Miss. 90, *Soggins v. Heard*, 31 Miss. 426; *Weathersly v. Weathersly*, 40 Miss. 462. Here the evidence is received to explain the transaction, the conduct of the parties, and the attending circumstances.

1. *Nebraska*.—In *Schade v. Bessinger*, 3 Neb. 140, the court said that the rule whereunder a formal conveyance may be shown by extrinsic evidence to be a mortgage "seems to be founded on the principle that in such case the proof raises an equity which does not contradict the writing or affect its validity, but simply varies its import so far as to show the true intention and object of the parties without a written defeasance, and establish the trust purpose for which the deed was executed. But to thus vary the legal import of such absolute deed, and especially when fraud, accident, mistake, or surprise is not alleged, the evidence in reference to the understanding and intention of the parties, at the time of the execution of the writing, must be clear, certain, and conclusive, before a court of chancery will determine such writing to be a mortgage security only." See also *Wilson v. Richards*, 1 Neb. 342; *Dervin v. Jennings*, 4 Neb. 97; *Eisaman v. Gallagher*, 24 Neb. 79.

2. *Nevada*.—*Carlyon v. Lannier*, 4 Nev. 650; *Saunders v. Stewart*, 7 Nev. 200; *Cookes v. Cullbertson*, 9 Nev. 199. And see *Bingham v. Thompson*, 4 Nev. 224; *Pierce v. Traver*, 13 Nev. 526.

3. *New Jersey*.—*Crane v. Bonnell*, 2 N. J. Eq. 264; *Lokerson v. Stillwell*, 13 N. J. Eq. 357; *Vandegrift v. Herbert*, 18 N. J. Eq. 466; *Condit v. Tichenor*, 19 N. J. Eq. 43; *Phillips v. Hulsizer*, 20 N. J. Eq. 308; *Budd v. Van Orden*, 33 N. J. Eq. 143; *Sweet v. Parker*, 22 N. J. Eq. 453; *Crane v. Decamp*, 21 N. J. Eq. 414; *Youle v. Richards*, 1 N. J. Eq. 534; *Frink v. Adams*, 36 N. J. Eq. 485.

In *Sweet v. Parker*, 22 N. J. Eq. 453, DODD, V. C., said: "Any means of proof may be used to show it to be the latter, the declaration of the parties; the relations subsisting between them, the possession of the premises retained by the complainant; the value of the property compared with the money paid; the understanding that the sums

advanced should be repaid; and the payment of interest meanwhile on the amount. The distinction between parol evidence to vary a written instrument and parol evidence showing facts which control its operation is employed to reconcile the allowance of such proofs with the Statute of Frauds and the general rule of common law. Deeds absolute on their face have been frequently decreed to be mortgages by this court, and the grantors allowed to redeem."

4. *New York*.—In the earlier cases, fraud or mistake was assigned as the ground of admission. *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; *Swart v. Service*, 21 Wend. (N. Y.) 36; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425; *Strong v. Stewart*, 4 Johns. Ch. (N. Y.) 167; *Marks v. Pell*, 1 Johns. Ch. (N. Y.) 594; *Taylor v. Baldwin*, 10 Barb. (N. Y.) 582; *Webb v. Rice*, 6 Hill (N. Y.) 219. But in *Brown v. Clifford*, 7 Lans. (N. Y.) 46, the court declared that the evidence was admissible, although there was neither fraud nor mistake, and so in *Horn v. Keteltas*, 46 N. Y. 605. And see on the general subject, *Slee v. Manhattan Co.*, 1 Paige (N. Y.) 48; *Whittick v. Kane*, 1 Paige (N. Y.) 202; *Van Buren v. Olmstead*, 5 Paige (N. Y.) 9; *McIntyre v. Humphries*, Hoffm. Ch. (N. Y.) 30; *Clark v. Henry*, 2 Cow. (N. Y.) 324; *Ring v. Franklin*, 2 Hall (N. Y.) 1; *Walter v. Cronly*, 14 Wend. (N. Y.) 63; *Champlin v. Butler*, 18 Johns. (N. Y.) 169; *Gilchrist v. Cunningham*, 8 Wend. (N. Y.) 641; *McBurney v. Wellman*, 42 Barb. (N. Y.) 390; *Barrett v. Carter*, 3 Lans. (N. Y.) 68; *Brown v. Clifford*, 7 Lans. (N. Y.) 46; *Erwin v. Curtis*, 43 Hun (N. Y.) 292; *Bowery Nat. Bank v. Duncan*, 12 Hun (N. Y.) 405; *Hodges v. Tennessee F. Ins. Co.*, 8 N. Y. 416; *Despard v. Walbridge*, 15 N. Y. 378; *Simon v. Schmidt*, 41 Hun (N. Y.) 318; *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 119; *Marks v. Pell*, 1 Johns. Ch. (N. Y.) 594; *McIntyre v. Humphries*, Hoffm. Ch. (N. Y.) 31; *Sturtevant v. Sturtevant*, 20 N. Y. 39; *Van Dusen v. Worrell*, 4 Abb. App. Dec. (N. Y.) 473; *Stoddard v. Whiting*, 46 N. Y. 627; *Carr v. Carr*, 52 N. Y. 251; 4 Lans. (N. Y.) 314; *Meehan v. Forrester*, 52 N. Y. 277; *Loomis v. Loomis*, 60 Barb. (N. Y.) 22; *Feidler v. Darrin*, 50 N. Y. 437; *Odell v. Montross*, 68 N. Y. 499.

Oregon,¹ *Pennsylvania*,² *Tennessee*,³ *Virginia*⁴ and *West Virginia*,⁵ at least in the more recent decisions, though not in all of the earlier ones; while in *Alabama*,⁶ *Connecticut*,⁷

1. *Oregon*.—*Hurford v. Harned*, 6 *Oregon* 362; *Stephens v. Allen*, 11 *Oregon* 188; *Albany etc. Co. v. Crawford*, 11 *Oregon* 243.

2. *Pennsylvania*.—*Kunkle v. Wolfersberger*, 6 *Watts* (Pa.) 126; *Todd v. Campbell*, 32 Pa. St. 250; *Kellum v. Smith*, 33 Pa. St. 158; *DeFrance v. DeFrance*, 43 Pa. St. 385; *Rhines v. Baird* 41 Pa. St. 256; *Kenton v. Vandergrift*, 42 Pa. St. 339; *Odenbaugh v. Bradford*, 67 Pa. St. 96; *Plumer v. Guthrie*, 76 Pa. St. 441; *Pearson v. Sharp*, 115 Pa. St. 254. And see *Paige v. Wheeler*, 92 Pa. St. 282; *Kellum v. Smith*, 33 Pa. St. 158; *Kerr v. Gilmore*, 6 *Watts* (Pa.) 405; *Kelly v. Thompson*, 7 *Watts* (Pa.) 401; *Jaques v. Weeks*, 7 *Watts* (Pa.) 261; *Friedley v. Hamilton*, 17 S. & R. (Pa.) 70; *Manufacturers' etc. Bank v. Bank of Pennsylvania*, 7 W. & S. (Pa.) 335; *Cole v. Bolard*, 22 Pa. St. 431; *Houser v. Lamont*, 55 Pa. St. 311; *Guthrie v. Kahle*, 46 Pa. St. 331; *Harper's Appeal*, 64 Pa. St. 315; 7 *Phila.* (Pa.) 276; *McClurkan v. Thompson*, 69 Pa. St. 305; *Fessler's Appeal*, 75 Pa. St. 483; *Stewart's Appeal*, 98 Pa. St. 337; *Umbenhower v. Miller*, 101 Pa. St. 71; *Huoncker v. Merkey*, 102 Pa. St. 462; *Hartley's Appeal*, 103 Pa. St. 23; *Pancake v. Cauffman*, 114 Pa. St. 113; *Lance's Appeal*, 112 Pa. St. 456; *Logue's Appeal*, 104 Pa. St. 136; *Nicolls v. McDonald*, 101 Pa. St. 514; *Baisch v. Oakeley*, 68 Pa. St. 92; *Kinports v. Boynton*, 120 Pa. St. 306.

3. *Tennessee*.—*Overton v. Bigelow*, 3 *Yerg.* (Tenn.) 513; *Lane v. Dickerson*, 10 *Yerg.* (Tenn.) 373; *Nickson v. Toney*, 3 *Head* (Tenn.) 655; *Nichols v. Cabe*, 3 *Head* (Tenn.) 92; *Ruggles v. Williams*, 1 *Head* (Tenn.) 141; *Hinson v. Partee*, 11 *Humph.* (Tenn.) 587; *Ballard v. Jones*, 6 *Humph.* (Tenn.) 455; *Brown v. Wright*, 4 *Yerg.* (Tenn.) 57; *Yarborough v. Newell*, 10 *Yerg.* (Tenn.) 376; *Guinn v. Locke*, 1 *Head* (Tenn.) 110; *Jones v. Jones*, 1 *Head* (Tenn.) 105; *Leech v. Hillsman*, 8 *Lea* (Tenn.) 747; *Robinsons v. Lincoln Sav. Bank*, 85 *Tenn.* 363; *Haynes v. Swann*, 6 *Heisk.* (Tenn.) 560; *Hickman v. Quinn*, 6 *Yerg.* (Tenn.) 96; *Hammonds v. Hopkins*, 3 *Yerg.* (Tenn.) 525.

4. *Virginia*.—In *Virginia*, the intention of the parties may be shown and the circumstances of the transaction

examined. *Ross v. Norvell*, 1 *Wash* (Va.) 14; *Snavelly v. Pickle*, 29 *Gratt.* (Va.) 27; *Town v. Lucas*, 13 *Gratt.* (Va.) 705; *Bank of U. S. v. Carrington*, 7 *Leigh* (Va.) 566; *Phelps v. Seely*, 22 *Gratt.* (Va.) 573; *Thompson v. Davenport*, 1 *Wash.* (Va.) 125; *King v. Newman*, 2 *Munf.* (Va.) 40; *Breckenridge v. Auld*, 1 *Rob.* (Va.) 148; *Dabney v. Green*, 4 *Hen. & M.* (Va.) 101; *Chapman v. Turner*, 1 *Call* (Va.) 280; *Robertson v. Campbell*, 2 *Call* (Va.) 421; *Pennington v. Hanby*, 4 *Munf.* (Va.) 140; *Bird v. Wilkinson*, 4 *Leigh* (Va.) 266; *Edwards v. Wall*, 79 *Va.* 321.

5. *West Virginia*.—In *West Virginia* the rule is the same as in *Virginia*. *Klinck v. Price*, 4 *W. Va.* 4, citing the above cases in *Virginia*. *Troll v. Carter*, 15 *W. Va.* 567; *Davis v. Demming*, 12 *W. Va.* 246; *Hoffman v. Ryan*, 21 *W. Va.* 415; *Vangilder v. Hoffman*, 22 *W. Va.* 1; *Matheney v. Sandford*, 26 *W. Va.* 386; *Lawrence v. Du Bois*, 16 *W. Va.* 443; *Kerr v. Hill*, 27 *W. Va.* 576.

6. *Alabama*.—The *Alabama* cases, while admitting the evidence—*Phillips v. Croft*, 42 *Ala.* 477; *Parks v. Parks*, 66 *Ala.* 326; *Knaus v. Dreher*, 84 *Ala.* 319; *Turner v. Wilkinson*, 72 *Ala.* 361; *Cosby v. Buchanan*, 81 *Ala.* 574; *Bragg v. Massie*, 38 *Ala.* 89; *Jones v. Trawick*, 31 *Ala.* 253; *Parish v. Gates*, 29 *Ala.* 254; *Kennedy v. Kennedy*, 2 *Ala.* 571; *Sledge v. Clopton*, 6 *Ala.* 589; *Turnipseed v. Cunningham*, 16 *Ala.* 501—seem to ground its admission on fraud, accident or mistake. *English v. Lane*, 1 *Port* (Ala.) 328; *West v. Hendrix*, 28 *Ala.* 226; *Wells v. Morrow*, 38 *Ala.* 125; *Brantley v. West*, 27 *Ala.* 542; *Locke v. Palmer*, 26 *Ala.* 312; *Bryan v. Cowart*, 21 *Ala.* 92; *Crews v. Threadgill*, 35 *Ala.* 334; *Bishop v. Bishop*, 13 *Ala.* 475.

7. *Connecticut*.—See *Washburn v. Merrills*, 1 *Day* (Conn.) 139; *Brainerd v. Brainerd*, 15 *Conn.* 575; *Bacon v. Brown*, 19 *Conn.* 29; *Collins v. Tillou*, 26 *Conn.* 368; *Daniels v. Alvord*, 2 *Root* (Conn.) 196; *Jarvis v. Woodruff*, 22 *Conn.* 548; *Mills v. Mills*, 26 *Conn.* 213; *French v. Burns*, 35 *Conn.* 359, to the point that evidence is admissible to show fraud or mistake in the omission of the defeasance.

In *Osgood v. Thompson Bank*, 30

Kentucky,¹ *Maryland*,² *North Carolina*,³ *Rhode Island*⁴ and *South Carolina*⁵ the earlier doctrine still appears to obtain, though even in these States it is by no means clear that, should occasion arise, it would not be extended.

In *Colorado* the statute regulates the subject in providing that a deed may be proved a mortgage by parol evidence.⁶ In *Georgia*, on the other hand, the statute provides that a deed absolute in form and supported by possession, shall not be shown by parol evidence to be a mortgage, unless fraud in procuring the deed is charged.⁷

In *New Hampshire*, the statute declares that no written conveyance of land shall be defeated, nor estate incumbered, by an agreement not inserted therein, stating the amount secured or the thing to be done.⁸ In *Missouri*,⁹ *Wisconsin*,¹⁰ *Iowa*¹¹ and *Ver-*

Conn. 27, the opinion seemed to intimate that it was an open question whether in *Connecticut* parol evidence was admissible to show a deed absolute in form to be a mortgage.

1. *Kentucky*.—In *Kentucky*, the evidence is received upon the ground of fraud or mistake. *Skinner v. Miller* 5 Litt. (Ky.) 84; *Murphy v. Trigg*, 1 Mon. (Ky.) 72; *Lindley v. Sharp*, 7 Mon. (Ky.) 248; *Stapp v. Phelps*, 7 Dana (Ky.) 296; *Cook v. Colyer*, 2 B. Mon. (Ky.) 71; *Blanchard v. Kenton*, 4 Bibb (Ky.) 451.

2. *Maryland*.—In *Maryland* the rule is similar to that of *Kentucky*. *Bank of Westminster v. Whyte*, 1 Md. Ch. 536; *Farrell v. Bean*, 10 Md. 217; *Artz v. Grive*, 21 Md. 456; *Baugh v. Merryman*, 32 Md. 185; *Bend v. Susquehanna Bridge etc. Co.*, 6 Har. & J. (Md.) 128; *Dougherty v. McColgan*, 6 Gill & J. (Md.) 275; *Price v. Gover*, 40 Md. 102; *Cochrane v. Price* (Md. 1887), 8 Atl. Rep. 361; *Thompson v. Banks*, 2 Md. Ch. 430; 3 Md. Ch. 138; *Brogden v. Walker*, 2 Har. & J. (Md.) 283; *Watkins v. Stockett*, 6 Har. & J. (Md.) 435.

3. *Streater v. Jones*, 3 Hawks (N. Car.) 123; *Brothers v. Harrill*, 2 Jones' Eq. (N. Car.) 209; *Sellers v. Stalcup*, 7 Ired. Eq. (N. Car.) 13; *McDonald v. McLeod*, 1 Ired. Eq. (N. Car.) 221; *Steel v. Black*, 3 Jones' Eq. (N. Car.) 427; *Cook v. Gudger*, 2 Jones' Eq. (N. Car.) 172; *Glisson v. Hill*, 2 Jones' Eq. (N. Car.) 256; *Elliot v. Maxwell*, 7 Ired. Eq. (N. Car.) 246; *Blackwell v. Overby*, 6 Ired. Eq. (N. Car.) 38; *M'Laurin v. Wright*, 2 Ired. Eq. (N. Car.) 94.

4. *Rhode Island*.—*Nichols v. Reynolds*, 1 R. I. 30.

5. *South Carolina*.—*Arnold v. Mattison*, 3 Rich. Eq. (S. Car.) 153; *Walker v. Walker*, 17 S. Car. 329; *Carter v. Evans*, 17 S. Car. 458; *Nesbitt v. Cavender*, 27 S. Car. 1.

6. *Colorado*.—*Colorado Civ. Code* 1877, § 243.

7. *Georgia*.—*Georgia Code* 1882, § 3809. And see *Spence v. Steadman*, 49 Ga. 133; *Kieft v. Catchings*, 64 Ga. 773; *Hall v. Waller*, 66 Ga. 483; *Thaxton v. Roberts*, 66 Ga. 704; *Broach v. Smith*, 75 Ga. 159; *McLaren v. Clark*, 80 Ga. 423; *Broach v. Barfield*, 57 Ga. 601; *Carter v. Gunn*, 64 Ga. 651.

8. *New Hampshire*.—See *Bassett v. Bassett*, 10 N. H. 64; *Boody v. Davis*, 20 N. H. 140; *Lund v. Lund*, 1 N. H. 39; *Runlett v. Otis*, 2 N. H. 167; *Porter v. Nelson*, 4 N. H. 130; *Clark v. Hobbs*, 11 N. H. 122; *Tift v. Walker*, 10 N. H. 150.

9. *Missouri*.—*Hogel v. Lindell*, 10 Mo. 483; *Johnson v. Huston*, 17 Mo. 58; *Wilson v. Drumite*, 21 Mo. 325; *Tibeau v. Tibeau*, 22 Mo. 77; *Slowey v. McMurray*, 27 Mo. 113; *Quick v. Turner*, 26 Mo. App. 29; *O'Neill v. Capelle*, 62 Mo. 202; *Schradski v. Albright*, 93 Mo. 42.

10. *Wisconsin*.—*Wilcox v. Bates*, 26 Wis. 465. And see *Plato v. Roe*, 14 Wis. 453; *Sweet v. Mitchell*, 15 Wis. 641; *Spencer v. Fredendall*, 15 Wis. 666; *Butler v. Butler*, 46 Wis. 430; *McCormick v. Herndon*, 67 Wis. 648; *Starks v. Redfield*, 52 Wis. 349; *Schriber v. Le Clair*, 66 Wis. 579; *Rockwell v. Humphry*, 57 Wis. 410.

11. *Iowa*.—*Roberts v. McMahan*, 4 Greene (Iowa) 34; *Johnson v. Smith*, 39 Iowa 549; *Berberick v. Fritz*, 39 Iowa 700.

The earliest case in point of time,

*mont*¹ the ground of admission seems to be that the contention of the grantee that a deed absolute in form should be treated as an absolute deed in fact rather than a mortgage in itself, constitutes a fraud such as equity should relieve against. while in *Ohio*² and in *Texas*³ the evidence seems to be admitted on the ground that the transaction constitutes a trust, where it appears that the intention was that the deed should be given as security.

There are a few cases in this country wherein such evidence has been held admissible at law, but these cases are not in accord with the weight of authority and on principle it is difficult to sustain them, except where it is admitted in support of an equitable defense to an ejectment, or except where, under the codes, the line of demarkation between actions at law and suits in equity

wherein it was held that parol evidence should be received in equity to show a deed absolute in form to be in fact a mortgage, and that in such a case relief should be granted on equitable conditions, is that of *Trucks v. Lindsey*, 18 Iowa 504, *COLE, J.*, saying that the evidence was received, not to vary the written instrument, but "to establish facts and circumstances independent of the deed itself, and to which facts and circumstances in connection with the deed, rules of equity inseparably attach the right of redemption."

And see, on questions of the burden of proof, and the sufficiency and quantity of evidence required, *Zuver v. Lyons*, 40 Iowa 510; *Corbit v. Smith*, 7 Iowa 60, *Hyatt v. Cochran*, 37 Iowa 309; *Crawford v. Taylor*, 42 Iowa 260; *Gardner v. Weston*, 18 Iowa 533; *Green v. Turner*, 38 Iowa 112; *Wilson v. Patrick*, 34 Iowa 362; *Key v. McCleary*, 25 Iowa 191; *Childs v. Griswold*, 19 Iowa 362; *Sunderland v. Sunderland*, 19 Iowa 325; *Cooper v. Skeel*, 14 Iowa 578; *Atkins v. Faulkner*, 11 Iowa 326; *Noel v. Noel*, 1 Iowa 423; *Holliday v. Arthur*, 25 Iowa 19; *Woodworth v. Carmen*, 43 Iowa 504, *Knight v. McCord*, 63 Iowa 429; *Ensminger v. Ensminger*, 75 Iowa 89; *Kibby v. Harsh*, 61 Iowa 196. And see *Burdick v. Wentworth*, 42 Iowa 440, to the point that, since the revision of 1860 of the *Iowa* statutes allowing an equitable defense to be interposed to an action at law, the facts relied upon to show the deed a mortgage may be set up, as formerly they could have been in an independent suit.

1. *Vermont*.—*Wright v. Bates*, 13 Vt. 341; *Graham v. Stevens*, 34 Vt. 166.

If the grantee has parted with his title the case stands otherwise than

where the title remains in the original grantee. *Conner v. Chase*, 15 Vt. 764; *Crosby v. Leavitt*, 50 Vt. 239. If the grantor continues in possession notwithstanding the deed this is adverted to by the *Vermont* court as a circumstance entitled to considerable weight. See generally, *Campbell v. Worthington*, 6 Vt. 448; *Baxter v. Willey*, 9 Vt. 276. *Wright v. Bates*, 13 Vt. 341; *Mott v. Harrington*, 12 Vt. 199. *Conner v. Chase*, 15 Vt. 764; *Hyndman v. Hyndman*, 19 Vt. 9, *Bigelow v. Topliff*, 25 Vt. 273; *Wing v. Cooper*, 37 Vt. 169; *Rich v. Doane*, 35 Vt. 124, *Hills v. Loomis*, 42 Vt. 562.

2. *Ohio*.—*Miami Exporting Co. v. Bank of U. S.*, *Wright (Ohio)* 252. And see *Miller v. Stokely*, 5 Ohio St. 194; *Stall v. Cincinnati*, 16 Ohio St. 169; *Cotterell v. Long*, 20 Ohio 464.

3. *Texas*.—*Mead v. Randolph*, 8 Tex. 191, *Grooms v. Rust*, 27 Tex. 231; *Moreland v. Barnhart*, 44 Tex. 275.

Nor need fraud, mistake, or surprise be charged, to warrant the introduction of parol evidence. *Carter v. Carter*, 5 Tex. 93. *Mead v. Randolph*, 8 Tex. 191. And see, generally, in support of the doctrine that the evidence is admissible, *Stampers v. Johnson*, 3 Tex. 1, *Carter v. Carter*, 5 Tex. 93, *Mead v. Randolph*, 8 Tex. 191, *Miller v. Thatcher*, 9 Tex. 482; *McClenny v. Floyd*, 10 Tex. 159, *Hannay v. Thompson*, 14 Tex. 142; *Cuney v. Dupree*, 21 Tex. 211; *Grooms v. Rust*, 27 Tex. 231, *Ruffier v. Womack*, 30 Tex. 332; *Gibbs v. Penny*, 43 Tex. 560; *Loving v. Milliken*, 59 Tex. 423; *Calhoun v. Lumpkin*, 60 Tex. 185; *Ullmann v. Jasper*, 70 Tex. 446; *Markham v. Carothers*, 47 Tex. 21; *Hughes v. Delaney*, 44 Tex. 529; *Pierce v. Fort*, 60 Tex. 464; *Miller v. Yturria*, 69 Tex. 549.

has become obscured.¹ The Statute of Frauds is not a barrier to the reception of such evidence. Though it has been earnestly contended to the contrary, this is now settled.² Nor is the

1. Parol Evidence Inadmissible in Actions at Law.—As sustaining this doctrine, see *Jones v. Trawick*, 31 Ala. 253; *Bragg v. Massie*, 38 Ala. 89; *Parish v. Gates*, 29 Ala. 254; *Reading v. Weston*, 8 Conn. 117; *Benton v. Jones*, 8 Conn. 186; *Brainerd v. Brainerd*, 15 Conn. 575; *Moore v. Wade*, 8 Kan. 380; *Stinchfield v. Milliken*, 71 Me. 567; *Flint v. Sheldon*, 13 Mass. 443; *Newton v. Fay*, 10 Allen (Mass.) 505. *McClane v. White*, 5 Minn. 178; *Watson v. Dickens*, 12 Smed. & M. (Miss.) 608; *Hogel v. Lindell*, 10 Mo. 483.

The foregoing are only a few of the very many cases supporting this doctrine:

In *New York* it was held in *Webb v. Rice*, 1 Hill (N. Y.) 606, that a parol defeasance could be set up and proved in an action at law. This decision was overruled in *Webb v. Rice*, 6 Hill (N. Y.) 219. After the adoption of the code, the evidence was admitted in an ejectment, but as an equitable defense. *Despard v. Walbridge*, 15 N. Y. 374; *Horn v. Keteltas*, 46 N. Y. 605. In a later case, *Carr v. Carr*, 52 N. Y. 251, the evidence was admitted to support a legal defense, but it would seem as though the apparent inconsistency might have arisen through the failure of the court to bear in mind the distinction between legal and equitable defenses. The earlier cases of *Roach v. Cosine*, 9 Wend. (N. Y.) 227, *Walton v. Cronly*, 14 Wend. (N. Y.) 63, and *Swart v. Service*, 21 Wend. (N. Y.) 36, are in line with the case of *Webb v. Rice*, 1 Hill (N. Y.) 606, and are, therefore, overruled by *Webb v. Rice*, 6 Hill (N. Y.) 219.

In *Illinois*, *Tillson v. Moulton*, 23 Ill. 600, is cited as authority for the doctrine that parol evidence is admissible in an action at law, but the language used by the court seems to go beyond the earlier decisions of *Coates v. Woodworth*, 13 Ill. 654; *Miller v. Thomas*, 14 Ill. 428, and the later cases of *Sutphen v. Cushman*, 35 Ill. 186 and *Smith v. Cremer*, 71 Ill. 185, do not appear to support the doctrine announced in *Tillson v. Moulton*, though that case is not expressly overruled nor its authority impugned by the language used by the court in the later cases.

Moreover, the declaration of the court in *Tillson v. Moulton*, 23 Ill. 600,

does not appear to be essential to the decision of the case, which was a suit in equity to foreclose a mortgage.

In *Wisconsin* the evidence is admissible at law. *Kent v. Agard*, 24 Wis. 378; *Brinkman v. Jones*, 44 Wis. 498.

And so in *California* *Johnson v. Sherman*, 15 Cal. 287; *Jackson v. Lodge*, 36 Cal. 28, in which latter case, however, there was a dissent in which the authorities are reviewed at length.

Fuller v. Parrish, 3 Mich. 211, may be cited in support of the doctrine that the evidence is admissible at law; but here, too, there was a dissent, and the case is an old one. In *Smith v. Parks*, 22 Ind. 59, the court adverts to the fact that all distinction between actions at law and suits in equity has been abolished, and, therefore, concludes that there is no reason why the evidence should not be received in support of a defense which, under the earlier procedure, would constitute a legal, not an equitable, defense.

2. In *Walker v. Walker*, 2 Atk. 98. LORD HARDWICKE said that the question had nothing to do with the Statute of Frauds. In *Campbell v. Dearborn*, 109 Mass. 130, the court by WELLS, J., said: "We do not regard the Statute of Frauds as interposing any insuperable obstacle to the granting of relief in such a case, because relief, if granted, is attained by setting aside the deed, and parol evidence is availed of to establish the equitable grounds for impeaching that instrument, and not for the purpose of setting up some other or different contract to be substituted in its place. If proper grounds exist and are shown for defeating the deed, the equities between the parties will be adjusted according to the nature of the transaction and the facts and circumstances of the case; among which may be included the real agreement. It does not violate the Statute of Frauds to admit parol evidence of the real agreement, as an element in the proof of fraud or other vice in the transaction, which is relied on to defeat the written instrument."

The admission of parol evidence does not conflict with the Statute of Frauds when it proves other written papers making the deed a mortgage, or adduces independent facts, which show the

reception of such evidence opposed to the rule that parol evidence is inadmissible to vary, add to, or contradict that which is written, as it is received, not for any of these purposes, but to establish the fact of an inherent fault in the transaction, or its consideration, such as to afford ground for defeating the apparent effect of that which is written by restricting or defeating its operation;¹ or, in other words, the evidence is received to establish facts and circumstances, to which, in connection with the deed, the right of redemption incident to a mortgage attaches by operation of law.²

The rule allowing parol evidence to be admitted to show a deed absolute on its face to be in fact a mortgage, is held to apply only to parol agreements made at the time of the execution and delivery of the conveyance.

The fact having been established that a deed absolute on its face is in fact a mortgage, the maxim "once a mortgage always a mortgage" is held to apply, and no lapse of time short of that which would bar the action will preclude the admission of parol evidence. The delay, however, will be considered upon the primary question of mortgage or no mortgage.

2. Parties—(a) WHO MAY BE PARTIES.—In order to establish that a conveyance, absolute on its face, was intended as a mortgage, and to give it effect as such, it is not material that the conveyance should have been made by the debtor, or by him in

face of the deed to contain a mistake or a fraud, or not the whole truth. *Bentley v. Phelps*, 2 Woodb. & M. (U. S.) 426. And see in support of the text, *Sewell v. Price*, 32 Ala. 97; *Moore v. Wade*, 8 Kan. 380; *Newton v. Fay*, 10 Allen (Mass.) 505; *Klein v. McNamara*, 54 Miss. 90; *O'Neill v. Capelle*, 62 Mo. 202; *Carr v. Carr*, 52 N. Y. 251; *McBarney v. Wellman*, 42 Barb. (N. Y.) 390; *Taylor v. Luther*, 2 Sumn. (U. S.) 238; *Lincoln v. Wright*, 4 De G. & J. 16; *Reigard v. McNeil*, 38 Ill. 400.

1. **WELLS, J.**, in *Campbell v. Dearborn*, 109 Mass. 130, *citing*, in illustration of the principle, 1 Greenl. on Ev., § 284; *Perry on Trusts*, § 226; *Stackpole v. Arnold*, 11 Mass. 27; *Fletcher v. Willard*, 14 Pick. (Mass.) 464.

In *Pierce v. Robinson*, 13 Cal. 116, the court by **FIELD, J.**, said: "Whether the instrument, it not being apparent on its face, is to be regarded as a mortgage, depends upon the circumstances under which it was made, and the relations subsisting between the parties. Evidence of these circumstances and relations is admitted, not for the purpose of contradicting or varying the deed, but to establish an

equity superior to its terms. The rule which refuses the admission of parol evidence, to contradict or vary written instruments is directed to the language employed by the parties. That language cannot be qualified but must be left to speak for itself. The rule does not exclude an inquiry into the objects and purposes of the parties in executing the instruments." This case overruled *Lee v. Evans*, 8 Cal. 424, and *Low v. Henry*, 9 Cal. 538, in which earlier case it was held that, in the absence of fraud, accident, or mistake in the creation of the instrument, such evidence was inadmissible.

2. In *Peugh v. Davis*, 96 U. S. 332, **FIELD, J.**, again stated the doctrine thus: "The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face.

whom the equity of redemption is claimed to exist,¹ but the party claiming the rights of a mortgagor must show that he had some right, legal or equitable, when the transfer was made;² nor is it necessary that the grantee should be in fact the creditor whose debt is secured.³

(b) OBLIGATIONS OF THE PARTIES.—The right to show a deed absolute on its face to be in fact a mortgage, by parol evidence, being purely equitable, a party seeking the assistance of the court

The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice."

And see, as tending to support the text, *Saunders v. Stewart*, 7 Nev. 200; *Sweet v. Parker*, 22 N. J. Eq. 453; *Lindsay v. Matthews*, 17 Fla. 575; *First Nat. Bank v. Ashmead*, 23 Fla. 379; *Trucks v. Lindsey*, 18 Iowa 504; *Reigand v. McNeil*, 38 Ill. 400; *Schade v. Bessinger*, 3 Neb. 140; *Stampers v. Johnson*, 3 Tex. 1; *Pond v. Eddy*, 113 Mass. 149; *Anding v. Davis*, 38 Miss. 574; *Horn v. Keteltas*, 46 N. Y. 605.

Barrett v. Carter, 3 Lans. (N. Y.) 68; *Sturtevant v. Sturtevant*, 20 N. Y. 40; *contra*, *Ring v. Franklin*, 2 Hall (N. Y.) 1; *Ginz v. Stumph*, 73 Ind. 209; *Booth v. Robinson*, 55 Md. 419; *Hylar v. Nolan*, 45 Mich. 357; *Hill v. Goodrich*, 39 Mich. 439; *Wood v. Matthews*, 73 Mo. 477; *Brewster v. Davis*, 56 Tex. 478; *Richardson v. Johnson*, 41 Wis. 100; *Brick v. Brick*, 98 U. S. 514.

It matters not how often the defendant was willing to let complainant have the shares, unless the agreement was contemporaneous with, or anterior to, the sale, or based upon some new and valid consideration, it could have no effect towards clothing complainant with any title. *Nickson v. Toney*, 3 Head (Tenn.) 655; *Anding v. Davis*, 38 Mich. 574; *Odenbough v. Bradford*, 67 Pa. St. 96. *Compare* *Maxfield v. Patchen*, 29 Ill. 39; *Schradski v. Albright*, 93 Mo. 42.

1. *Carr v. Carr*, 52 N. Y. 251; *Stoddard v. Whiting*, 46 N. Y. 627; *McBurney v. Wellman*, 42 Barb. (N. Y.) 390; *Brown v. Lynch*, 1 Paige (N. Y.) 147; *Ryan v. Dox*, 34 N. Y. 307; *Lindsay v. Matthews*, 17 Fla. 575; *Strong v. Shea*, 83 Ill. 575; *Hardin v. Eames*, 5 Ill. App. 153; *Rector v. Shirk*, 92 Ind. 31; *Beatty v. Brummatt*, 94 Ind. 76; *Stinchfield v. Milliken*, 71 Me. 567;

Fisk v. Stewart, 24 Minn. 97; *Sweet v. Mitchell*, 15 Wis. 641; *Wright v. Shumway*, 1 Biss. (U. S.) 23.

A S agreed to purchase certain real estate, but was unable to pay the purchase money at the time, for taking title, and procured W to advance part of the purchase money and give a mortgage on the land for the balance, W taking the title as security for the advance and other debts of A S to him. Subsequently A S sold his right to another. *Held*, that W was the mortgagee, and that the assignee of A S could redeem, and that the facts necessary to show the absolute conveyance to W to be a mortgage could be shown by parol. *Stoddard v. Whiting*, 46 N. Y. 627.

2. *Caprez v. Trover*, 96 Ill. 456, it was held that A could not maintain a suit in equity and support the same by parol evidence, to show that a deed, absolute in form, executed by B to C, should be deemed a mortgage in order to permit A to enforce a right to demand a conveyance from C under a parol agreement between himself and C. And to the same effect is *Stephenson v. Thompson*, 13 Ill. 186.

"I take it that an agreement of defeasance is essential to the constitution of every mortgage. It may be a part of the mortgage instrument, or a separate writing, or it may rest in parol, but it must exist somewhere, and be susceptible of proof, else it never can reduce the terms of an absolute conveyance down to a mortgage. And in all our cases an agreement will be found to exist, which bound the grantee to reconvey to the grantor, when a certain sum of money should be paid, or some other condition be performed. That is the condition and circumstance which makes the mortgage." *Pennsylvania etc. Ins. Co. v. Austin*, 42 Pa. St. 257.

3. *First Nat. Bank v. Ashmead*, 23 Fla. 379.

must himself do equity and fulfill all the obligations which would rest upon him as a mortgagor—for example, tendering the full amount due with interest.¹

(c) RIGHTS OF THIRD PARTIES—(1) *Creditors*.—A creditor, in support of his claim against the grantor in a deed, may show by parol that the conveyance, though absolute on its face, is in fact a mortgage.²

(2) *Bona Fide Purchasers*.—Where property has been conveyed absolutely, it cannot be shown subsequently by parol that the transfer was intended to be a mortgage, if a third party has purchased from the grantee without notice of the agreement between the original parties;³ but a subsequent purchaser with notice that the transfer was intended as a mortgage stands in the place of the equitable mortgagee.⁴

3. *Evidence*—(a) SUFFICIENCY OF EVIDENCE.—In order that a conveyance absolute on its face may be shown by parol to be in fact a mortgage, the proof must be clear and convincing.⁵

1. *Cowing v. Rogers*, 34 Cal. 648; *Heacock v. Swartwout*, 23 Ill. 291; *White v. Lucas*, 46 Iowa 319; *Westfall v. Westfall*, 16 Hun (N. Y.) 541; *Kenton v. Vandergrift*, 42 Pa. St. 339.

Fraud Upon Creditors.—A voluntary conveyance of land absolute in form made by a debtor to one's creditor in order to defraud other creditors will not be deemed an equitable mortgage by proof of a subsequent oral agreement between the grantor and the grantee, whereby the latter agreed to reconvey on payment of the amount due him. *Hassam v. Barrett*, 115 Mass. 256.

2. *Tyler v. Strang*, 21 Barb. (N. Y.) 108; *Van Buren v. Olmsted*, 5 Paige (N. Y.) 9; *De Wolf v. Strader*, 26 Ill. 225; *Allen v. Kemp*, 29 Iowa 452; *Judge v. Reese*, 24 N. J. Eq. 387.

It was not denied by the counsel for the plaintiff that parol evidence, to show that an absolute deed was intended as a mortgage, was admissible between the original parties to the contract; but it was contended that it was not admissible as between one of those parties and a third person. I do not find that any such distinction is taken in any of the cases. Third persons, who are strangers to the contract, are not to be prejudiced by such parol defeasances. If they deal with the mortgagor as absolute owner, upon the strength of his title, ignorant of the secret defeasance, it cannot be set up against them. But where no faith or confidence has been reposed upon the strength of the absolute deed, and third persons have not been misled by the form of the transac-

tion, it is not perceived why its real character should not be permitted to be proved and have its full legal operation. Nor do the cases recognize any distinction between a formal mortgagee of a term, and an individual holding the lease by an absolute assignment, but subject to a separate defeasance either written or parol. *Walton v. Cronly*, 14 Wend. (N. Y.) 63.

3. *Miller v. Thomas*, 14 Ill. 428; *Maxfield v. Patchen*, 29 Ill. 39; *Crane v. Buchanan*, 29 Ind. 570; *Baughner v. Merryman*, 32 Md. 185; *Digby v. Jones*, 67 Mo. 104; *Whittick v. Kane*, 1 Paige (N. Y.) 202; *Rhines v. Baird*, 41 Pa. St. 256.

4. *Amory v. Lawrence*, 3 Cliff. (U. S.) 523; *Vattier v. Hinds*, 7 Pet. (U. S.) 253; *Everett v. Stone*, 3 Story (U. S.) 446; *Taylor v. Luther*, 2 Sumn. (U. S.) 228; *French v. Burns*, 35 Conn. 359; *Smith v. Knoebel*, 82 Ill. 392; *Shaver v. Woodward*, 28 Ill. 277; *Smith v. Parks*, 22 Ind. 59; *Graham v. Graham*, 55 Ind. 23; *Hall v. Savill*, 3 Greene (Iowa) 37; *Emerson v. Atwater*, 7 Mich. 12; *Wadsworth v. Loranger*, Harr. Ch. (Mich.) 113; *Streeter v. Jones*, 2 Hawks (N. Car.) 423; *Williams v. Thorn*, 11 Paige (N. Y.) 459.

5. *Price v. Karnes*, 59 Ill. 276; *Dwen v. Blake*, 44 Ill. 132; *Taintor v. Keys*, 43 Ill. 332; *Remington v. Campbell*, 60 Ill. 516; *Smith v. Cremer*, 71 Ill. 185; *Magnusson v. Johnson*, 73 Ill. 156; *Wilson v. McDowell*, 78 Ill. 514; *Sharp v. Smitherman*, 85 Ill. 153; *Hancock v. Harper*, 86 Ill. 445; *Woodworth v. Carman*, 43 Iowa 504; *Irwin v. Curtis*,

(b) CIRCUMSTANCES ATTENDING THE TRANSACTION.—In determining whether the transfer was intended as a mortgage, the courts lay considerable stress upon the attendant circumstances, and although it is impossible to state generally what circumstances will be held sufficient to establish a transfer intended as a mortgage, we may enumerate a few of those which have been held by the courts, either singly or in combination with others to be convincing as follows: Inadequacy of consideration; the existence of a debt due from the grantor to the grantee at the time of the transfer; retention by the grantee of the evidence of the debt

43 Hun (N. Y.) 292; Rhines v. Baird, 41 Pa. St. 256; Plumer v. Guthrie, 76 Pa. St. 441; Nixon v. Toney, 3 Head (Tenn.) 655; Haynes v. Swan, 6 Heisk. (Tenn.) 560; Snavelly v. Pickle, 29 Gratt. (Va.) 27.

The proof must be convincing beyond a reasonable doubt. Tilden v. Streeter, 45 Mich. 533.

"In considering the nature and sufficiency of the evidence required to convert a deed, absolute on its face, into a mortgage, we should never lose sight of the rules and practice of the court of equity at the time it was established by that court that parol evidence could be received for that purpose. . . . The same and no less convincing proofs were required than are necessary to authorize the reformation of a written contract on the ground of mistake. If the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy." Kent v. Lasley, 24 Wis. 654.

Loose Declarations.—The proof by which the complainant undertakes to establish this consists, for the most part, of the loose declarations of E in regard to his intentions. This is a dangerous species of evidence upon which to disturb the title to land; it is extremely liable to be misunderstood or perverted, and the allowance of it, for that purpose, does not accord with the policy of the law requiring written evidence to attest the ownership of real property. The kind of parol evidence which is properly receivable to show an absolute deed to be a mortgage, is that of facts and circumstances of such a nature as, in a court of equity, will control the operation of the deed, and not of loose declarations of parties

touching their intentions or understanding. It has been held that evidence of such declarations, alone, is insufficient proof to show an absolute deed to be a mortgage. Sutphen v. Cushman, 35 Ill. 186; Bryan v. Cowart, 21 Ala. 92; Freeman v. Baldwin, 13 Ala. 246; Brantley v. West, 27 Ala. 542; Chapman v. Hughes, 14 Ala. 218; Jenison v. Graves, 2 Blackf. (Ind.) 440; Elliot v. Armstrong, 2 Blackf. (Ind.) 198; Aborn v. Burnett, 2 Blackf. (Ind.) 101; Conwell v. Evill, 4 Blackf. (Ind.) 67; Corbit v. Smith, 7 Iowa 60; Cooper v. Skeel, 14 Iowa 578; Noel v. Noel, 1 Iowa 423; Zuver v. Lyons, 40 Iowa 510; Vanmeter v. McFadden, 8 B. Mon. (Ky.) 438; DeFrance v. De France, 34 Pa. St. 385.

More Than One Witness.—"The trust must be shown with clearness and certainty, and in some cases it has been held that it must be shown by the testimony of more than one witness, unless his testimony be confirmed by corroborating circumstances." Moreland v. Barnhart, 44 Tex. 275.

Testimony of Husband and Wife.—The positive testimony of a husband and wife that a conveyance of land of the latter is a mere security for a loan of money is not sufficient to overcome the equally positive testimony of the grantee that the transfer was an actual sale, he being corroborated by the absolute form of the deed, the husband and wife being identified in interest, and the proof showing absence of any written evidence of indebtedness, or of any fixed time of payment, or rate of interest, or any annual rental value of the property. Knowles v. Knowles, 86 Ill. 1.

Facts Dehors the Deed.—The intention must be established by proof not merely of declarations, but of facts *dehors* the deed inconsistent with the idea of an absolute purchase. Glisson v. Hill, 2 Jones' Eq. (N. Car.) 256; Todd v. Campbell, 32 Pa. St. 250.

After the transfer; continued possession of the grantor after transfer; the fact that the transaction originated in the application for a loan by the grantor; that the grantor was in pressing need at the time; that the grantee accounted for the rents and profits after the transfer; payment of interest on the debt.¹

(c) **BURDEN OF PROOF.**—The burden of proof is upon the party who seeks to establish that the absolute conveyance is in fact a mortgage.²

PARS.—A part; a party.

Ex parte, or Ex-parte.—From a (one) party; on behalf of one side.³

Inter Partes.—Between parties; as, a paper executed, or a transaction had by or between two acting persons.

Opposed to an act or transaction by one person only, as in the cases of a bill of sale, a promissory note, a will, a deed-poll.⁴

PART.—A portion; share.

Possession by the grantor after the execution of the deed is a fact *dehors* the declarations of the defendant. Steel v. Black, 3 Jones' Eq. (N. Car.) 27; Sellers v. Stalcup, 7 Ired. Eq. (N. Car.) 13.

Lapse of Time.—"Where a bill was filed for an account and for a reconveyance thirty years after the deed alleged to be a mortgage was given, during all which time the defendant had been in possession, parol evidence of the mere confession of the defendant, made seventeen years after the deed, that it was taken as security for a debt, was held insufficient." Marks v. Pell, 1 Johns. Ch. (N. Y.) 544; McIntyre v. Humphreys, Hoff. Ch. (N. Y.) 30.

1. Loake v. Palmer, 26 Ala. 312; Parish v. Gates, 29 Ala. 254; Crew v. Threadgill, 35 Ala. 334; Wells v. Morrow, 38 Ala. 125; Turner v. Wilkinson, 2 Ala. 361; Montgomery v. Spect, 55 Cal. 352; Farmer v. Grose, 42 Cal. 169; Daubenspeck v. Platt, 22 Cal. 330; Cutphen v. Cushman, 35 Ill. 186; Ennor v. Thompson, 46 Ill. 214; Westlake v. Morton, 85 Ill. 228; Strong v. Shea, 83 Ill. 575; Davis v. Stonestreet, 4 Ind. 61; St. John v. Freeman, 1 Ind. 84; Vilson v. Patrick, 34 Iowa 362; Richardson v. Barrick, 16 Iowa 407; Skinner v. Miller, 5 Litt. (Ky.) 84; Stinchfield v. Milliken, 71 Me. 567; Thompson v. Banks, 2 Md. Ch. 430; Campbell v. Dearborn, 109 Mass. 130; Hassam v. Barrett, 115 Mass. 256; Eaton v. Green,

22 Pick. (Mass.) 526; Klein v. McNamara, 54 Miss. 90; Freeman v. Wilson, 51 Miss. 329; O'Neill v. Capelle, 62 Mo. 202; Budd v. Van Orden, 33 N. J. Eq. 143; Robinson v. Cropsey, 2 Edw. Ch. (N. Y.) 138; Streater v. Jones, 3 Hawks (N. Car.) 423; Steel v. Black, 3 Jones' Eq. (N. Car.) 427; Sellers v. Stalcup, 7 Ired. Eq. (N. Car.) 13; Kemp v. Earp, 7 Ired. Eq. (N. Car.) 167; Rhines v. Baird, 41 Pa. St. 256; Overton v. Bigelow, 3 Yerg. (Tenn.) 513; Stampers v. Johnson, 3 Tex. 1; Ruffiner v. Womack, 30 Tex. 332; Gibbs v. Penny, 43 Tex. 560; Graham v. Stevens, 44 Vt. 166; Rich v. Doane, 35 Vt. 124; Wright v. Bates, 13 Vt. 341; Pennington v. Hanby, 4 Munf. (Va.) 140; Snavely v. Pickle, 29 Gratt. (Va.) 27; Edwards v. Wall, 79 Va. 321; Lawrence v. Du Bois, 16 W. Va. 443; Davis v. Demming, 12 W. Va. 246; Hoffman v. Ryan, 21 W. Va. 415; Vangilder v. Hoffman, 22 W. Va. 1; Matheney v. Sandford, 26 W. Va. 386; Kerr v. Hill, 27 W. Va. 576.

2. Knowles v. Knowles, 86 Ill. 1; Fifield v. Gaston, 12 Iowa 218; Hyatt v. Cochran, 37 Iowa 309; Gardner v. Weston, 18 Iowa 533; Childs v. Griswold, 19 Iowa 362; Sunderland v. Sunderland, 19 Iowa 325; Plumer v. Guthrie, 76 Pa. St. 441.

3. See Anderson's L. Dict., tit. *Pars.* See also *Ex PARTE*, vol. 7, p. 487.

4. See Anderson's L. Dict., tit. *Pars.*

Bouvier says that the terms part and counterpart were formerly in use for the two copies, interchanged, of a written covenant. In modern practice, part is not much in use in this sense; the two papers are indifferently called counterparts. If occasion arises for distinguishing them, the terms original and duplicate are more usual designations.

In some connections, part seems equivalent to partial; as in the phrases part owner, part performance; unless such phrases are to be explained as inversions, for sake of conciseness or emphasis—of owner of part, performance of part.¹

Miscellaneous uses of the word are cited in the note 2.

1. "A portion, share, or purpart. One of two duplicate originals of a conveyance or covenant, the other being called 'counterpart.' Also in composition, partial or incomplete; as part payment, part performance." Black's L. Dict.

"A share: a purpart. This word is also used in contradistinction to counterpart: covenants were formerly made in a script and rescript, or part and counterpart." Bouvier's L. Dict.

An enactment authorizing the purchase of any railroad partly completed, was held not to include a railroad wholly completed; but wherefrom the rails have been removed by an order of court. *McCandless' Appeal*, 70 Pa. St. 210.

Part is interchangeable with "portion," in an indictment for larceny of "part of an outstanding crop," under the *Alabama Rev. Code*, § 3706. *Holly v. State*, 54 Ala. 238.

Where the testator bequeathed the residue of his estate to be divided between a son and two daughters, the son to have half a part and the daughters the remainder, held that the word "part" meant share, and that the son therefore took one-sixth. *Fulford v. Hancock*, 1 Busb. Eq. (N. Car.) 55.

"Part" may appropriately apply to an undivided part. *Vrooman v. Weed*, 2 Barb. (N. Y.) 330.

Where a town council is empowered to improve a street "or part of a street" they may improve one side. *State v. Fetter*, 12 Wis. 566.

Part of a Mine.—"Part of a mine," within the Coal Mines Regulation act, 1872 (35 & 36 Vict., ch. 76, which enacts that gunpowder, or other explosive or inflammable substances, shall not be used in a mine underground during three months after any inflammable gas

has been found in any such mine, except when the persons ordinarily employed in the mine are out of the mine, "or out of the part of the mine where it is used"), means "a part having a separate system of ventilation, which, by the terms of the statute, is a separate mine." Per DAY, J., *Wales v. Thomas*, 16 Q. B. Div. 340.

Part of the Goods.—See STATUTE OF FRAUDS, vol. 8, p. 735.

Parts of a Dollar.—Under the laws of the *United States* authorizing foreign coin to pass current at certain rates for each dollar and parts of a dollar, the phrase parts of a dollar is to be construed in reference to the division of a dollar as established in the coinage of the *United States*, and a twenty-cent piece is not within the act. *United States v. Gardner*, 10 Pet. (U. S.) 618.

Part Owner.—See OWNER; SHIPPING.

Part Payment.—See FRAUDS, STATUTE OF, vol. 8, p. 736; LIMITATION OF ACTIONS, vol. 13, p. 748; PAYMENT.

Part Performance.—See ASSUMPSIT, vol. 1, p. 882; CONTRACTS, vol. 3, p. 823; FRAUDS, STATUTE OF, vol. 8, p. 848; SPECIFIC PERFORMANCE.

2. **Certainty of Description.**—The assessment of a tax upon a "part of a lot," or "one acre of a lot," without quantity or location, in the one case, or without location in the other, is too vague and indefinite to authorize a sale of any part or in any place. *Massie v. Long*, 2 Ohio 287. But a deed conveying "a certain part of a stream of water," and mentioning the two *termini* of the "part," is not void for uncertainty, and passes the whole stream between those *termini*. *Bullen v. Runnels*, 2 N. H. 255; 9 Am. Dec. 55.

In a Will.—The testator having appointed two residuary legatees of his

PARTAKER.—See note 1.

PARTIAL LOSS.—See FIRE INSURANCE, vol. 7, p. 1002; MARINE INSURANCE, vol. 14, p. 402.

PARTICEPS CRIMINIS—(See also ACCESSORY, vol. 1, p. 61; PARI DELICTO).—A partner in crime, an accomplice, an accessory.²

PARTICIPATE.—See note 3.

PARTICULAR.—(See also BILL OF PARTICULARS).—See note 4, for several technical phrases in which this word occurs.

estate, to take in equal parts, and added to the residuary clause "when one of the above named deceases, the others surviving are to draw their part," he then altered this provision by drawing a line through the words "the other surviving," and writing above them "my grandson Joseph Logan." One of the residuary legatees dying, the grandson received his part, and upon the death of the other, claimed his share also. It was held that by the use of the word "part" the grandson was precluded from receiving the whole. *Logan's Appeal*, 39 Pa. St. 237.

Parts Beyond the Seas.—See BEYOND THE SEAS, vol. 2, p. 188.

1. Devise "that M shall be partaker of the whole estate, provided she leave an issue, male or female," with the further provision that the issue, male or female, from the body of M, shall be "next partaker." Upon the construction of this will, the court by PENNINGTON, J., says: "The word 'partaker' in the last clause, coupled with the word 'next,' shows the sense in which the testator used the word; it was the same as to say, shall be taker of my estate." *Emans v. Emans*, 3 N. J. L. 522.

2. *Bouv. L. Dict.*; *And. L. Dict.*; *Abb. L. Dict.*

3. Where beneficiaries are to "participate" in a trust property, and there is no direction as to the shares to be taken, they take as tenants in common, in equal shares and proportions. *Liddard v. Liddard*, 28 Beav. 266. In *Robertson v. Fraser*, 6 Ch. 696, *HATHERLEY, L. C.*, said: "The word 'participate' clearly implied a sharing or division, and a tenancy in common was the natural consequence."

4. "If a condition of sale provide compensation for any mistake in the description of the lots or for any error

or mis-statement in 'this particular,' the latter words will be construed 'in these particulars,' so as to embrace an error in the particulars." *Sug. Vendors & Purchasers* 15; *citing White v. Cuddon*, 8 Cl. & F. 766; 4 Y. & C. Ex. 25; *Sug. Real Prop. Law* 591.

Particular Average.—Particular average is the damage or loss, short of total, falling directly upon a particular property. General average is the liability or claim falling upon that property from the loss of or damage to something else. *Bargett v. Orient Mut. Ins. Co.*, 3 Bosw. (N. Y.) 285, 395. See GENERAL AVERAGE, vol. 8, p. 1293; MARINE INSURANCE, vol. 14, p. 402; SHIPPING.

Particular Custom.—See USAGE AND CUSTOM.

Particular Estate.—See ESTATE, vol. 6, p. 897; REMAINDERS.

Particular Lien.—A right which a person has to retain property in respect of money or labor expended on such particular property. *Bouv. Law Dict.* See also LIENS, vol. 13, p. 574.

Particular malice is ill will, grudge, a desire to be revenged on a particular person. *Brooks v. Jones*, 11 Ired. (N. Car.) 261.

Particular Services.—It is provided in the *Indiana* constitution of 1851, art. 1, § 13, that "no man's particular services shall be demanded without just compensation." *Held*, that the professional fee of an expert is included in such provision. *Buchman v. State*, 59 Ind. 13; 26 Am. Rep. 75; *Dills v. State*, 59 Ind. 15. And under such a provision in the *Oregon* constitution it was held that the services of witnesses are not "particular services." *Daly v. Multnomah Co.*, 14 Oregon, 20.

Particulars, Bill of.—See BILL OF PARTICULARS, vol. 2, p. 244.

PARTIES TO ACTIONS—(See list of cross-references in the notes¹ and also those incorporated in the body of the following analysis).

I. Definition, 471.

II. Persons Who Can Sue and be Sued, 474.

1. *Generally, 474.*

2. *Particular Persons, 476.*

(1) *Sovereigns and Sovereign States* (See also STATES), 476.

(2) *Ambassadors and Consuls* (See also AMBASSADORS; CONSULS), 476.

(3) *Counties, Townships, Towns* (See also COUNTIES; TOWNSHIPS; TOWNS), 476.

(4) *Corporations* (See also CORPORATIONS), 481.

(5) *Unincorporated Societies* (See also SOCIETIES AND CLUBS), 483.

(6) *Partnership* (See also PARTNERSHIP), 483.

(7) *Assignees in Bankruptcy and Insolvency Receivers* (See also BANKRUPTCY; INSOLVENCY; RECEIVERS), 483.

(8) *Bailees, Assignees, etc.* (See also BAILMENTS; CARRIERS OF GOODS; COMMISSION MERCHANTS, ETC.), 483.

(9) *Executors and Adminis-*

trators; Trustees (See also EXECUTORS AND ADMINISTRATORS; TRUSTEES), 484.

(10) *Heirs, Devisees, etc.* (See also EXECUTORS AND ADMINISTRATORS; LEGACIES AND DEVISES), 484.

(11) *Persons Under Disabilities* (See also HUSBAND AND WIFE; INFANTS; LUNATICS; MARRIED WOMEN), 484.

(12) *Principal and Agent* (See also AGENCY), 484.

(13) *Tenants in Common and Joint Tenants* (See also JOINT TENANTS), 484.

(14) *Landlord and Tenant* (See also LANDLORD AND TENANT), 484.

(15) *Alien Friends and Alien Enemies* (See also ALIENS), 484.

(16) *Indians* (See also INDIANS), 486.

(17) *Felons, 487.*

III. Parties Must be Real, Not Fictitious, 488.

IV. Descriptive Personæ (See also NAME), 493.

V. Same Person Cannot be Both Plaintiff and Defendant, 497.

1. Note as to Cross-references.—There are many forms of action and various legal proceedings in which the proper parties to the action have been specified under other titles in this work, in addition to those given in the body of the above analysis, and the following references should be examined: ACTIONS, vol. 1, p. 178; AUDITA QUERELA, vol. 1, p. 1004; BILL OF DISCOVERY, vol. 2, p. 203; BILL IN EQUITY, vol. 2, p. 216; BILL OF REVIEW, vol. 2, p. 263; BILL OF REVIVOR, vol. 2, p. 272; CARRIERS OF GOODS, vol. 2, p. 902; CORPORATIONS, vol. 4, p. 280; COVENANTS, vol. 4, p. 463; CREDITOR'S BILLS, vol. 4, p. 578; DEATH, vol. 5, p. 125; DEBT, vol. 5, p. 177; DETINUE, vol. 5, p. 654; DIVORCE, vol. 5, p. 766; EJECTMENT, vol. 6, pp. 205 & 241, *et seq.*; EMINENT DOMAIN, vol. 6, p. 608; EQUITY PLEAD-

INGS, vol. 6, p. 724; ERROR, WRIT OF, vol. 6, p. 817; FORCIBLE ENTRY AND DETAINER, vol. 8, p. 129, *et seq.*; INJUNCTIONS, vol. 10, p. 777; INTERPLEADER, vol. 11, p. 496; JUDGMENTS, vol. 12, p. 82, *et seq.*; LIS PENDENS, vol. 13, p. 900; LOST PAPERS, vol. 13, p. 1083; MISTAKE, vol. 15, p. 681; MOTIONS, vol. 15, p. 891.

In addition to these specific cross-references it will be observed that the question of who are and who are not proper parties to actions, will arise in a large number of titles to which specific reference cannot be given, and in which the fact that certain persons are or are not proper parties is determined by the correct solution to collateral legal questions. See for example, LIBEL AND SLANDER; LIMITATIONS; MALICIOUS PROSECUTION; MANDAMUS, etc.

- VI. Party Must Have Interest and Capacity to Sue and be Sued, 500.
- VII. Party Having Legal Title Must Sue, 505.
- VIII. Right to Use Name of Legal or Co-plaintiff, 508.
1. *Legal Plaintiff*, 508.
 2. *Co-plaintiff*, 511.
- IX. Nominal and Use Plaintiffs, 512.
- X. Right to Sue in Special Cases, 515.
1. *Civil Action for Damages in Case of Public Wrong*, 515.
 2. *Actions for Fines and Penalties* (See also PENALTIES AND PENAL ACTIONS), 518.
- XI. Right to Sue Depending on Privity, 518.
1. *Generally*, 518.
 2. *Obligee in Written Contract*, 521.
 - (1) *Insurance Policies*, 522.
 - (2) *Bonds*, 526.
 3. *Third Parties*, 528.
 4. *Assignees*, 531.
 5. *Partial Assignments*, 534.
 6. *Assignment by Contractors*, 536.
 7. *Statutory Modification of the Law as to Assignments*, 537.
 8. *Real Party in Interest*, 542.
 9. *Trustee of an Express Trust*, 552.
 10. *Law of Louisiana and Texas*, 554.
 11. *Defenses Pleadable in Actions by Assignees* (See also ASSIGNMENT; FIRE INSURANCE; INSURANCE; LIFE INSURANCE, ETC.), 554.
 12. *Assignments Pendente Lite*, 554.
 13. *Privity in Actions Ex Delicto*, 559.
- XII. Joinder of Parties (See also JOINDER), 561.
1. *Actions Ex Contractu*, 561.
 - (1) *Plaintiffs*, 561.
 - (2) *Defendants*, 573.
 - (3) *Statutory Modifications of the Law as to Joinder*, 582.
 - (4) *Code Provisions*, 585.
 - (5) *Code Provisions Construed*, 587.
 - (a) *Plaintiffs*, 587.
 - (b) *Defendants*, 590.
 - (c) *Unwilling Plaintiff Made a Defendant*, 592.
 - (d) *One May Sue for Benefit of Many*, 593.
 - (e) *Bringing in of New Parties*, 595.
 - (6) *Law of Texas*, 598.
 2. *Actions Ex Delicto*, 599.
 - (1) *Plaintiffs*, 599.
 - (2) *Defendants*, 602.
- XIII. Defect of Parties, 605.
1. *Misnomer*, 605.
 2. *Misjoinder*, 607.
 3. *Nonjoinder*, 608.
 4. *Code Provisions as to Defect of Parties*, 611.
- XIV. Amendment of Parties, 616.
- XV. Substitution of Parties (See also *infra*, this title, INTERVENTION), 628.
- XVI. Intervention (See also INTERPLEADER), 633.
- XVII. Necessary and Proper Parties Distinguished, 649.
- XVIII. Competency of Parties as Witnesses (See also WITNESSES), 657.
- XIX. Conflict of Laws as to Parties (See also CONFLICT OF LAWS), 658.
- XX. Parties to Actions in Equity (See also EQUITY PLEADING), 659.
- XXI. Parties to Actions in Criminal Procedure (See also CRIMINAL PROCEDURE), 659.
- XXII. Parties to Actions in Appellate Court (See also APPEAL; CERTIORARI; ERROR, WRIT OF), 659.

I. DEFINITION.—There are two necessary parties to an action, viz: the person who seeks to establish a right in himself, commonly called the plaintiff, and the person upon whom he seeks to impose a corresponding duty or liability, commonly called the defendant. In attachment proceedings there is still a third party,

commonly called the garnishee.¹ Ordinarily a party must appear on the record as such,² but the term "party" is not always thus

1. Definition.—In Bouvier's Law Dictionary, tit. Parties, it is said that "The person who seeks a remedy in chancery by suit, commonly called the plaintiff or complainant, and the person against whom the remedy is sought, usually denominated the defendant, are the parties to a suit in equity." No definition is there given of parties to actions generally, since at law a judgment only determines the existence of a right, and has not necessarily anything to do with the remedy to enforce it. (See Black on Judgments, § 1.) The definition in the text is suggested.

There must be a plaintiff to an action. When, therefore, a sole plaintiff is allowed to withdraw as a party, the action is at an end, and the court may not determine the rights of the defendants as between themselves. *Ryan v. Tomlinson*, 31 Cal. 11.

But if a third party has been allowed to intervene and an issue is raised between such third party, and both the plaintiff and the defendant, the subsequent nonsuiting of the plaintiff on defendant's motion does not defeat the action so far as affects the issues raised by the intervention. *Poehlmann v. Kennedy*, 48 Cal. 201.

In proceeding to assess damages for the establishment of a road, the remonstrants become plaintiffs, and the petitioners for the road, defendants. But the county is not defendant. *Deaton v. Polk*, 9 Iowa 594.

2. Party Appearing on Record.—The record must show that a person is a party to a suit. Mere knowledge of the pendency of the action and employment of counsel is insufficient to make one a party. *Williams v. Bankhead*, 19 Wall. (U. S.) 570; *McPike v. Wells*, 54 Miss. 136; *Davis v. Higgins*, 91 N. Car. 382.

In deciding who are parties to a suit, a court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may prompt his action, and she may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view. *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738, 755; *Davis v. Gray*, 16 Wall. (U. S.) 203.

"The word party means a plaintiff

or defendant in an action, and embraces any person who has a right and seeks to become a party to an action.

The word "plaintiff" embraces a defendant who demands a set-off or counter-claim; the word "defendant" embraces a plaintiff against whom such demand is made." Code of *Kentucky*, § 732, pts. 35, 36.

It is a rule which admits of no exception, that in all cases where jurisdiction depends on the party, it is a party named in the record. *Governor of Georgia v. Juan Madrazo*, 1 Pet. (U. S.) 122.

A "party" to an action within the meaning of the code of procedure, is one who is named plaintiff or defendant, and appears on the record as such. *Woods v. DeFiganieri*, 16 Abb. Pr. (N. Y.) 1; 1 Robt. (N. Y.) 607.

The phrase "a party to the proceeding," used in a statute, embraces only such persons as are parties in a legal sense, and who have been made or have become such in some mode prescribed or recognized by law, so that they are bound by the proceeding. *Robinson v. Vanderberg Co.*, 37 Ind. 333; *Marshall v. Drayton*, 2 Nott. & M. (S. Car.) 25.

A statutory provision that certain persons shall be notified of a proceeding does not make them parties to the proceedings unless they appear and participate therein. So decided in case of the notice to widow and next of kin of the probate of a will. *Clemens v. Patterson*, 38 Ala. 721; *Leslie v. Sims*, 39 Ala. 161.

After the record of an attachment suit, the clerk entered that "the following cases are filed as claims under said attachment." Held, that the parties to the following cases did not thereby become parties to the attachment suit. *Sturgis v. Rogers*, 26 Ind. 1.

Where a person applies to be made a party to a suit in equity, and an order is made that the cause stand over, with liberty to the complainant to amend his bill by adding proper parties, if he should be so advised, such order does not make the applicant a party to the bill, nor create a *lis pendens* as to him prior to his being made a party. *Bigelow v. Stringfellow*, 25 Fla. 366. Compare *Kille v. Ege*, 82 Pa. St. 102.

onstrued.¹ A party may be an artificial person,² a single individual, or a number,³ and the term has received a special con-

If in a suit against defendants alleged to be partners trading under firm name of A. B. Company, said A. B. Company answers setting up fact of incorporation, and alleging title to property in suit, such corporation is not thereby made a party to the suit, and a judgment against it is error. *Rousseau v. Hall*, 55 Cal. 164.

"To find the parties plaintiff the complaint may be looked into, and those are relators who appear therein to be entitled to maintain the action upon the cause of action retort. *Warrenton v. Arrington*, 101 N. Car. 109.

A judgment against the defendants without naming them is a valid judgment against all who are really defendants to the suit; and this is to be ascertained by reference to the process, pleadings and proceedings in the case; and the omission of the clerk to state the names of one of the defendants in the margin of the entry of the verdict and judgment, can have no effect in determining who are properly the defendants. *Wilson v. Nance*, 11 Humph. (Tenn.) 189.

An order or decree in a cause against or referring to "defendants" in general terms embraces all defendants, whether named therein or not. *Robertson v. Winchester*, 85 Tenn. 171.

If a party is made defendant, the plaintiff cannot subsequently allege that such party is not a proper party to the suit and therefore should not be heard. *Renner v. Ross*, 111 Ind. 269.

1. Parties Not Appearing as Such in the Record.—A qualified voter of a city who appears before the municipal authorities of such city some time after the filing of a petition for license to retail liquor but before final action thereon and objects to the issuance of such license, thereby becomes connected with the proceedings sufficiently to enable him to prosecute a writ of *certiorari* to have the same reviewed. *McCreary v. Rhodes*, 63 Miss. 308.

Parties interested in the subject matter in litigation, but who were not made parties to the suit, joined with the parties to the suit in a written agreement under the statute to arbitrate, and the district court affirming, on motion, the award rendered, adjudicated their respective interests. *Held*,

that having become, without objection, parties to the agreement to arbitrate, they were afterwards properly regarded as parties to the suit. *Shultz v. Lempert*, 55 Tex. 273.

A party who has appeared to question the effect of the want of a revenue stamp on the notice, and to cross-examine the witnesses of the plaintiff, and has also entered bail to stay execution, cannot, in the absence of fraud or mistake, be heard to assert that he was not in court nor bound by the adjudication. *Wilsey v. Maynard*, 21 Iowa 107.

The code provision requiring a pleading to be verified by "the party," embraces the party in interest or person for whose benefit the action is prosecuted or defended though not named in the record. *Taber v. Gardner*, 6 Abb. Pr., N. S. (N. Y.) 147.

The term "parties" in the sense of the rule which renders a prior judgment conclusive upon those who sustain the character, is not restricted to those who are parties on the record. It includes all who have a direct interest in the subject matter of the suit, and a right to make a defense or control the proceedings. *Greenl. on Ev.*, § 523; *Bates v. Stanton*, 1 Duer (N. Y.) 79; *How. St. Tr.* 538; *Dowl.* 228; *Burr v. Bigler*, 16 Abb. Pr. (N. Y.) 177.

No person can be made a defendant in a cause except by process of law, or by his own consent; and no one can be directly affected by the judgment of the court, except those who are parties. *Marshall v. Drayton*, 2 Nott & M. (S. Car.) 25.

2. Artificial Persons.—Usually means one of two opposing litigants. It is not confined to natural persons, but may well include municipal corporations. *Hollis v. Davis*, 56 N. H. 74.

3. One or More Persons.—The word "party" may mean either a single individual, or a class or number of persons holding a certain interest, or united in a certain relation.

Which of these meanings it bears, in a given connection—*e. g.*, in a statute requiring a certain instrument to be verified by the oath of the party making the same,—is to be determined by the context. *People v. Croton Aqueduct Board*, 5 Abb. Pr. (N. Y.), 316.

The word "party," in a statute regulating applications for change of ve-

struction when used in special phrases.¹

II. PERSONS WHO CAN SUE AND BE SUED—1. **Generally.**—All persons can sue and are liable to be sued in an action at law;² and the bill of rights of almost every State constitution contains a provision expressly preserving to all persons, a remedy for all injuries by due process of law.³ This constitutional provision does not operate to prohibit the legislature from regulating the costs to be paid on bringing suit,⁴ or the time of entering judgment or issuing ex-

nue, was held to signify all of the defendants or all of the plaintiffs in an action, although, in the statute relating to challenging jurors, each of several defendants setting up separate defenses is held to be a "party." *Rupp v. Swineford*, 40 Wis. 28.

The word "party," as used in a statute allowing judgment on appeal, for either party, stands for plaintiff or defendant, and includes all the persons belonging to that particular class. *Sheldon v. Quinlen*, 5 Hill (N. Y.) 441.

In a statute declaring every contract for the sale of lands void, unless the contract shall be subscribed by the party by whom such sale is to be made, or by the agent of such party lawfully authorized, it means all the vendors, when more than one are included in the contract of sale. *Snyder v. Neefus*, 53 Barb. (N. Y.) 63.

1. Opposite Party.—The phrase "opposite party," as used in a code provision regulating testimony, has been held to mean one whose interest is antagonistic to that of the party calling him to testify. *Trabue v. Turner*, 10 Heisk. (Tenn.) 447.

Adverse Parties.—Two defendants having interests adverse to each other are not adverse parties, within the meaning of a statute allowing issuance of a *supersedeas, in formâ pauperis*, upon notice to the adverse party. *Campbell v. Boulton*, 3 Baxt. (Tenn.) 354.

Party, as used in a statute concerning actions pending at the death of either party, means the party who is in the eye of the law the meritorious cause of action. *Saltmarsh v. Candia*, 51 N. H. 71.

For a discussion of who is a party to the action within the rule disqualifying judges "by reason of consanguinity or affinity to either of the parties," see *Rivenburgh v. Henness*, 4 Lans. (N. Y.) 208.

2. Dicer on Parties to Action (2nd Am. ed., p. 1).

3. Constitutional Provisions.— "All courts shall be open, and every person for any injury done him in his lands, goods, person or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay." Const. of *Alabama*, 1875, art. 1, § 14. To same effect Const. of *Arkansas*, 1874, art. 2, § 13; Const. of *Connecticut*, art. 1, § 12; Const. of *North Dakota*, art. 1, § 22; Const. of *South Dakota*, art. 1, § 20; Const. of *Delaware*, 1831, art. 1, § 9; Const. of *Illinois*, 1870, art. 2, § 19; Const. of *Indiana*, 1851, art. 1, § 57; Const. of *Kansas*, 1859, art. 1, § 18; Const. of *Kentucky*, 1850, art. 13, § 15; Const. of *Louisiana*, 1879, Bill of Rights, art. 11; Const. of *Maine*, 1819, art. 1, § 19; Const. of *Maryland*, 1867, Declaration of Rights, art. 19; Const. of *Minnesota*, 1858, art. 1, § 8; Const. of *Mississippi*, 1869, art. 1, § 28; Const. of *Missouri*, 1875, art. 11, § 10; Const. of *Nebraska*, 1875, art. 1, § 13; Const. of *New Hampshire*, part first, art. 14; Const. of *North Carolina*, art. 1, § 35; Const. of *Ohio*, art. 1, § 16; Const. of *Oregon*, art. 1, § 10; Const. of *Pennsylvania*, art. 1, § 11; Const. of *South Carolina*, art. 1, § 15; Const. of *Tennessee*, art. 1, § 17; Const. of *West Virginia*, 1872, art. 3, § 17.

"Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." Const. of *Wisconsin*, 1848, art. 1, § 9.

4. Costs.—A statute provided that "on every indictment or civil suit . . . the parties convicted or cast shall pay a tax of one dollar, and in every suit in equity, a tax of two dollars." Held, not in violation of the constitutional provision. *READE, J.*: "The third ground of defense is that the constitution requires that the

execution,¹ but it does prohibit the imposition of onerous conditions under which the right to sue must be exercised.² A party to an action may act in person or by attorney.³

courts shall be open to suitors, and that its spirit is, that suits shall not be burdened; but that the power to tax is the power to destroy. This is an extreme position, and if allowed would forbid any costs in suits at all. And, besides, it is not a tax on suits, but upon the losing party in a suit and is not an unreasonable penalty for his false clamor. It will be observed that it is classed in the statute with fines, penalties and amercements." *Hewlett v. Nutt*, 79 N. Car. 266.

A statute required a trial fee to be paid by plaintiff, appellant or moving party, before he is entitled to or can claim the trial or other proceeding upon which such fee is imposed. *Held*, not unconstitutional. In *Bailey v. Frush*, 5 Oregon 136, the court by *BONHAM, J.* said: "Briefly and yet without passing over points made in the argument without due consideration, we are disposed to hold that the language of our constitution that 'justice shall be administered . . . without purchase' means simply that justice shall not be bought with bribes nor shall the attendant or incidental expenses of litigation, in the nature of costs and disbursements, be so exorbitant and onerous as to virtually close the doors of courts of justice to those who may have occasion to enter there. In other words, that the rights of the poor man to a redress of his grievances shall be equally respected with those of the rich, and that equal and exact justice shall be dealt out alike to all."

1. Time of Entering Judgment, etc.—A constitution provided that courts shall be open "at all times." An act required that writs in civil cases should be returned to the regular term of a certain court. It appeared that this court was, by provisions of the constitution, a part of a judicial district of six courts with six clerks, but only one judge. *Held*, act not unconstitutional, because the constitution itself prevented the constant presence of the judge. *McAdoo v. Benbow*, 63 N. Car. 461.

Notwithstanding the above provision it has been held competent for the legislature to suspend the rendition of judgment for money for a definite period. *Johnson v. Higgins*, 3 Metc.

(Ky.) 566; *Barkley v. Glover*, 4 Metc. (Ky.) 44.

An act forbidding the prosecution of a suit against any person while he shall be engaged in the actual military service of the State, is not in violation of the clause in the constitution requiring that justice shall be administered "without sale, denial or delay." *Burns v. Crawford*, 34 Mo. 330; *Donnell v. Stephens*, 35 Mo. 441.

An act suspending privileges of all persons aiding the rebellion of prosecuting and defending actions, is in contravention of the above statute. *Davis v. Pierce*, 7 Minn. 13; *McFarland v. Butler*, 8 Minn. 116; *Jackson v. Butler*, 8 Minn. 117.

An act providing a stay of execution for two and a half years unless plaintiff will agree to take property in satisfaction at two-thirds of its value, contravenes the above provision. *Baily v. Gentry*, 1 Mo. 164; 13 Am. Dec. 484.

A peremptory stay of execution contravenes that provision. *Bumgardner v. Circuit Court of Howard Co.*, 4 Mo. 50.

2. Onerous Conditions.—A statute providing that before a party can question a tax deed he must show that he has paid all the taxes due and assessed upon the land, contravenes this provision of the Constitution. *Conway v. Cable*, 37 Ill. 82; 87 Am. Dec. 240; *Wilson v. McKenna*, 52 Ill. 43; *Weller v. St. Paul*, 5 Minn. 95; *Dunn v. Snell*, 74 Me. 22.

Contra, by a divided court. *Burrow v. Smith*, 2 Sneed (Tenn.) 566. Compare *Whittaker v. Janesville*, 33 Wis. 76.

A statute which requires that persons claiming an interest in lands to be sold for taxes, must commence an action to test the validity of the tax before the sale, or within one year after the tax deed is recorded, cannot operate as a statute of limitations as against a party in possession, nor can it be sustained as a condition upon which only a party may continue to enjoy his property or legal rights, the latter being a violation of the above constitutional provision. *Baker v. Kelly*, 11 Minn. 480.

3. Acting in Person or by Attorney.

2. Particular Persons—(1) SOVEREIGNS AND SOVEREIGN STATES.—(See STATES.)

(2) AMBASSADORS AND CONSULS.—(See also AMBASSADORS, vol. 1, p. 524; CONSULS, vol. 3, p. 764).—The ambassador or minister representing a sovereign state may sue, but he cannot be sued in either a civil or criminal proceeding. Consuls may sue, and are liable to be sued in both civil and criminal proceedings.¹

(3) COUNTIES, TOWNSHIPS, TOWNS.—(See also COUNTIES, vol. 3, p. 343; TOWNSHIPS; TOWNS).—There have been some decisions to the effect that counties and other subdivisions of a State are part of the State government possessing the attribute of sovereignty, and therefore not liable to be sued except under the express provisions of a statute.² There are, however, other decisions to the effect that they are *quasi* corporations, and as such liable to

—“No person shall be debarred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.” Const. of *Alabama*, 1875, art. 1, § 11.

“Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.” *Arizona*, Rev. Stat. 1887, § 690; *Illinois*, Rev. Stat. 1889 (Hurd), p. 178, § 11; *Maine*, Rev. Stat. 1881, p. 655, § 40; Const. of *Mississippi*, 1869, art. 1, § 30; *Missouri*, Rev. Stat. 1889, § 2094; *New York*, Annot. Code, 1889, § 55; *Texas*, Sayles Civil Stat., art. 1210.

Where it is shown or suggested, that a suit in the name of an absent and foreign plaintiff is brought or prosecuted without his knowledge or consent, the court will enquire into the authority of the agent or attorney, on a rule to show cause why the action should not be dismissed; but the objection cannot be urged by the defendant at the trial of the cause; nor will it be required that the authority should be proved by the strict rules of evidence which apply in other cases; and where a letter of agency was produced, which purported to have been subscribed by the plaintiff in the presence of two witnesses, and attested by them before the high bailiff of the Isle of Man, held, that it was *prima facie*, at least, sufficient evidence of the authority. *Bacon v. Smith*, 1 Brev. (S. Car.) 426.

The court will not proceed if it appear that the attorney moving the court has no authority from the party

he claims to represent. *Hudson River etc. R. Co. v. Kay*, 14 Abb. Pr., N. S. (N. Y.), 191.

1. Ministers and Consuls.—The minister resident of a foreign country duly accredited and received, having no real property in *England*, and having done nothing to disentitle him to the general privileges of such public minister, cannot, while he remains such public minister, be sued against his will in a civil action; although such action may arise out of commercial transactions by him in *England*, and although neither his person nor his goods be touched by a suit. (This was a suit for an unpaid assessment on shares of stock in a joint stock company.) *Magdalena Steam Nav. Co. v. Martin*, 2 El. & Bl. 94.

Section 687 of the U. S. Rev. Stat. provides that “The Supreme Court [of the *United States*] . . . shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party.”

A foreign minister cannot waive his privilege from suit. *United States v. Benner*, 1 Baldw. (U. S.) 234.

For other provisions of the statutes of the *United States* and the decisions construing them, see AMBASSADORS, vol. 1, p. 524, and CONSULS AND AMBASSADORS, vol. 3, p. 772.

2. Counties Not Suable.—The county

be sued both in State and United States courts.¹ In many of

government is a part of the State government which is sovereign. The State government, neither in its general nor local capacity, can be sued by her creditors or made amenable to judicial process, except by her own consent. Her creditors must rely solely upon her good faith as to the time, mode and measure of payment. When, therefore, subsequent to the accruing of a claim against a county, an act was passed authorizing suits to be instituted against counties on claims rejected by the county governments, a judgment under such act only has the effect of converting a disputed into an audited claim against a county, and the State, by reason of her sovereignty, still holds control of the question of payments as to all its incidents of time, mode and measure. *Sharp v. Contra Costa Co.*, 34 Cal. 284.

No action at law lies against a county unless the same has been authorized by statute. *Russel v. Devon Co.*, 2 T. R. 667; *Sheldon v. Litchfield Co.*, 1 Root (Conn.) 158; *Lyon v. Fairfield Co.*, 2 Root (Conn.) 30; *Ward v. Hartford Co.*, 12 Conn. 404.

1. Counties Suable.—Independently of any statutory provision, a county has been held to be a *quasi* corporation, and as such can sue and be sued in its own name. *Lawrence Co. v. Chat-taroi R. Co.*, 81 Ky. 225; *Tyrrell v. Simmons*, 3 Jones (N. Car.) 187; relying on *Mills v. Williams*, 11 Ired. (N. Car.) 558.

In an action against a county in a United States circuit court sitting in Nevada, to recover sums due on bonds issued by the county, it was contended that a county is a political subdivision, and a portion of the sovereignty of the State; that it is in no just sense a citizen of the State; that it is not a corporation and cannot be sued except by permission of the State, and then only in such courts as the State may designate for that purpose. In support of these propositions were cited: *Hunsaker v. Borden*, 5 Cal. 290; *Hastings v. San Francisco*, 18 Cal. 57; *Sharp v. Contra Costa Co.*, 34 Cal. 284; *Rock Island Co. v. Steele*, 31 Ill. 543; *Lowndes Co. v. Hunter*, 49 Ala. 511; *Taylor v. Salt Lake Co.*, 2 Utah 495; *Hamilton Co. v. Mighels*, 7 Ohio St. 109; *Dill. Mun. Corp.*, §§ 22, 23.

The plaintiffs contended that a county is a municipal or *quasi* municipal corporation and liable to be sued in any proper court. In *Vincent v. Lincoln Co.*, 30 Fed. Rep. 749, the court, by Sabin, J., held that whatever the legal status may be of counties in Nevada, their liability to be sued was determined affirmatively in *Waitz v. Ormsby Co.*, 1 Nev. 370; *Clarke v. Lyon Co.*, 8 Nev. 181; *Floral Springs Water Co. v. Rives*, 14 Nev. 434. The court there refers to certain constitutional and statutory provisions in Nevada, apparently including counties among municipal corporations, and then continues as follows: "From these provisions of the constitution and the statutes, and the uniform and repeated rulings of the supreme court thereon, the liability of the county to be sued in any court of competent jurisdiction cannot be questioned. It remains, then, only to determine whether or not this liability can be enforced in a national court.

"The jurisdiction of these courts is regulated by Congress solely, and the States are without authority to enlarge, restrict or abridge that jurisdiction. Where the jurisdictional facts exist, as to citizenship and subject matter, it is the right of any person to invoke the jurisdiction and aid of the national courts in the enforcement of alleged rights. It is urged that there is an element of sovereignty lingering about a county which exempts it from the jurisdiction of the United States courts, unless the State has expressly provided by statute that a county shall be subject to such jurisdiction. This claim is not new in character nor in the purpose for which it is invoked—to wit, in aid of repudiation.

"In every reported case which I have found where this defense is urged, its sole and single purpose has been to avoid legal obligations. It is difficult, however, to perceive very much of sovereignty in a county, subject in a State, only to constitutional limitation, or in a territory to the restriction of the organic act. A county is the merest creature of the legislature. From it, it derives its name, its extent of territory, its mode and manner of government, its powers and rights. It is the creature of the legislature called into existence by it, and subject to the restric-

the States, counties are made by statute bodies corporate with power to sue or be sued,¹ while in other States the corporate power is vested in a board of county commissioners.² In some instances it is provided by statute in what name the county shall

tions above named; its whole being may be changed by the same power which created it. Its name may be changed, its territory cut up and parceled out to other counties, its board of officers shorn of their powers, its revenues cut off, its existence as a county blotted out, and this against the will of its inhabitants. *Laramie Co. v. Albany Co.*, 92 U. S. 307. If aught of sovereignty really exists in a county, it would seem to rest wholly in the sovereign right of repudiation, — a right or privilege sometimes exercised by sovereigns."

The court then quotes from *Lyell v. Lapeer Co.*, 6 McLean (U. S.) 446; *McCoy v. Washington Co.*, 3 Wall., Jr. (C. C.) 381; *Cowles v. Mercer Co.*, 7 Wall. (U. S.) 118; and cites *National Bank v. Sebastian Co.*, 5 Dill. (U. S.) 414; *Chicago etc. R. Co. v. Whitton*, 13 Wall. (U. S.) 270; *Marion Co. v. McIntyre*, 10 Fed. Rep. 543; *Cunningham v. Ralls Co.*, 1 Fed. Rep. 453; *Davis v. James*, 2 Fed. Rep. 618; *Jordan v. Cass Co.*, 3 Dill. (U. S.) 185; *Lyell v. St. Clair Co.*, 3 McLean (U. S.) 580, to prove that a county may be sued in a United States court, and thus concludes:

"It may be quite immaterial what name may be given to a particular body; it is the powers possessed, used and exercised by that body which determines its true legal character and status. In the reports of the national courts, supreme and circuit, will be found hundreds of cases in which cities, towns, counties, school districts, police juries, taxing districts, levy districts, etc., appear as parties plaintiff or defendant, enforcing or defending corporate rights, the corporate rights of each individual body, and no question is made of their legal right or capacity so to do. True, it may be said that this proves nothing, since their right and capacity were conceded from the fact that they were not challenged. But it does show the almost unanimous consensus of the bench and bar of the country that these bodies, by virtue of their corporate powers, possessed this right and capacity to sue and be sued, to defend and enforce

their rights in the national courts in the absence of any State statute relative thereto.

"We question if any State in the Union has by statute, in terms, attempted to say when or who of its citizens or corporations, public or private, may be sued in the national courts. Such a statute would be anomalous and for the most part nugatory, since the jurisdiction of these courts is not a subject of State control. The demurrers in these cases must be overruled."

See COUNTIES, vol. 4, p. 346.

1. **Statutory Provisions.** — "Every county is a body corporate with power to sue or be sued in any court of record." Code of *Alabama*, 1886, § 886.

To same effect, *Dakota*, Comp. Laws, 1887, § 572; *Georgia* Code, 1882, § 491; *Idaho*, Rev. Stat. 1887, §§ 1730-1733; *Illinois*, Rev. Stat. (Hurd, 1889), p. 386, § 22; *Iowa*, McClain's Annot. Code, 1888, § 366; *Kansas*, Gen. Stat. 1889, § 1611; *Michigan*, Howell's Annot. Stat. 1882, § 439; *Montana*, Comp. Stat. 1887, p. 842, § 744; *Nebraska*, Comp. Stat. 1889, p. 347, § 20; *New Mexico*, Comp. Laws, 1884, § 332; *Oregon*, Hill's Annot. Laws, 1887, p. 1073; *Pennsylvania*, Bright. Dig., p. 364, §§ 12, 13; *South Carolina*, Gen. Stat. 1882, § 403; *Texas*, Sayles Civil Stat. act 676, 1200; *Utah*, Comp. Laws, 1888, vol. 1, p. 293; *Washington*, Code, 1881, § 2653; *Wisconsin*, Annot. Stat. (S. & B.), § 650; *Wyoming*, Rev. Stat. 1887, § 1791.

2. **Statutory Provisions.** — "§ 1. The county commissioners of the several counties of this State shall sue and be sued in the name of the county of which they are commissioners.

"§ 3. In all suits now pending or that may be hereafter commenced against or by a county, a change in the persons composing the board of county commissioners shall not abate the suit, but it shall be proceeded with as if such change had not taken place." *Florida*, Act of Feb. 28th, 1881, P. L. 61.

The county commissioners "shall be considered a body corporate and politic by the name and style of 'the board of commissioners of the county of —, and as such, and in such name, may

sue and be sued;¹ in which case the statutory provisions must be complied with.² When, however, there is no statutory provision on the subject the county may, it seems, be sued in the name either of "— County," or "The County of —," or in the name of the county commissioners.³ A county can, of course, only sue

prosecute and defend suits," etc. *Indiana*, Rev. Stat. 1881, § 5735; *Pub. Gen. Laws, Maryland*, p. 406, § 1; *Minnesota*, Gen. Stat. 1878, p. 134, § 88; *North Carolina*, Code, 1883, § 705.

1. Statutory Name.—All suits brought by or against any of the counties or incorporated cities, towns or villages, shall be by or against it in its corporate name. *Arizona*, Rev. Stat. 1887, § 677.

"All suits by or against a county shall be in the name thereof." Const. of *Georgia*, 1877, art. 11, § 1.

"Suits in which a county is the party in interest shall be brought by or against the county in the name of the county." *Vermont*, Rev. Laws, 1880, § 2572.

To same effect, *Virginia*, Code, 1887, § 802.

In *Tennessee*, suits for the county are brought in the name of the State for the use of the county; suits against the county seem to be brought against the county. *Tennessee*, Code 1884, §§ 459-461.

Counties may commence and prosecute civil actions in the name of their treasurer, and may appear by agent or attorney in any suit in favor of or against them. *Connecticut*, Rev. Stat. 1888, § 974.

In *Mississippi*, counties sue and are sued in the name of the "board of supervisors of the county of —." *Mississippi*, Code of 1880, § 2175.

2. Statutes Construed as to Names.—

When it is expressly required by statute that all acts or proceedings against a county in its corporate capacity should be in the name of the board of commissioners, an action against "A, B, C and D, commissioners of X county" is erroneously brought, and will be quashed because not in accordance with the statute. *Askew v. Pollock*, 66 N. Car. 49. See *Pegram v. Cleveland Co.*, 65 N. Car. 114.

A suit on behalf of a county must be brought in the name of the board of commissioners of the county, and a complaint in the name of the board of commissioners on the relation of the county auditor is bad, on a demurrer alleging that the plaintiff has not legal

capacity to sue. *Franklin Co. v. McIlvain*, 24 Ind. 382.

So when suits by and against a county must be in the name of such county. *Bennett v. Walker*, 64 Ga. 326.

In an action against a county, the suit should be brought against "the board of supervisors" of the county; but when the action is against the supervisors, the suit should be brought against them individually, specifying their name of office. *Wild v. Columbia Co.*, 9 How. Pr. (N. Y.) 315.

3. Name in Absence of Statute.—A statute declared that "X county is bounded as follows," etc. Another declared that each county shall be a body politic and corporate for the following purposes: "To sue and be sued," etc. It was nowhere declared in express terms what shall be the title of X county as a corporation. A suit was brought in the name of "the county of X." *Held*, proper. In *Richland Co. v. Miller*, 16 S. Car. 236, the court by McGOWAN, J., said: "The meaning of the phrase 'the county of Richland' seems to us to be precisely equivalent to that of 'Richland county.' It appears that the two forms of expression are used indifferently in the constitution and laws, and we cannot say that the expression 'the county of Richland' is not a proper designation of the plaintiff. The question is really one only of words. A corporate body is merely ideal and does not move until put in motion. In some of the States where counties have such bodies as our board, the practice is to sue in the name of such board. In *New York* the county is required by law to sue in the name of its board of supervisors. There is no such provision in this State, but this is substantially an action by the present board of county commissioners of Richland county; for, if a recovery should be had, the money could only be received by the treasurer, the financial agent of the county, under the direction and control of the county commissioners." *Richland Co. v. Miller*, 16 S. Car. 244.

Where a county is by statute a body corporate to sue and be sued, and no direction is given as to the name by

and be sued upon causes of action affecting the county,¹ and in some instances it is made a prerequisite to a suit against a county that the plaintiff's claim should first have been presented and dis-

which a county shall be sued, the suit may be brought against the commissioners of the county, or at least, if that is error it is merely a misdescription of parties defendant, amendable if objected to, and disregarded if not objected to. *Anthony v. Bank of Commerce*, 97 U. S. 374.

An action was brought by "X, county judge of Y county, for the use of Y county." On appeal, *held*, that the name of the nominal plaintiff could be stricken out as surplusage, and as the right to bring the suit was not disputed the error in the title would not be considered ground to dismiss. *Smith v. Moseley*, 74 Tex. 631.

1. Nature of Suits Against County.—Where funds sued for belong to the county, and the suit is upon a bond given to the State as obligee, the suit should be in the name of the State to the use of the county; but if the action is not on a bond or contract in the name of a third person, then the suit should be in the name of the county. This is not only the plain letter of the statute law, but it is the result of the former adjudication of this court." *Cole Co. v. Dallmeyer*, 101 Mo. 57.

An action on the official bond of a township trustee is properly brought by the township as relator when it is a body corporate with right to sue and be sued. *State v. Wilson*, 113 Ind. 501.

An action on an official bond of a county treasurer for money belonging to the county, is properly brought in the name of the county. *Mendocino Co. v. Morris*, 32 Cal. 145.

An action upon a recognizance given in a criminal case is properly commenced in the name of the county as plaintiff, the county being directly interested in the amount due thereon. *Mendocino Co. v. Lamar*, 30 Cal. 627.

An action may be brought in the name of a county to recover money due the general fund of the county. *Solano Co. v. Neville*, 27 Cal. 465. Or for money fraudulently drawn from the county treasurer and converted. *Supervisors of N. Y. v. Tweed*, 13 Abb. Pr., N. S. (N. Y.) 152.

An action for the unlawful burning of a court house may be maintained in the name of the county. *Christian*

Co. Court v. Rankin, 2 Duv. (Ky.) 502; 87 Am. Dec. 505.

The board of county commissioners cannot maintain an action for money in their official capacity unless the money if collected would belong to the county. *Shoemaker v. Grant Co.*, 36 Ind. 175.

An action to abate a nuisance caused by the obstruction of a public highway, cannot, under the *California* Code, be brought in the name of the county as plaintiff. *San Benito Co. v. Whitesides*, 51 Cal. 416.

In a recent action against a county in *Oregon*, *THAYER, C. J.*, delivering the opinion, said, "that an action cannot be maintained against a county except for a cause authorized by statute, is no doubt a correct proportion of law. A county as defined and described in *COUNTY*, vol. 4, p. 343, is 'one of the civil divisions of a State, for judicial and political purposes; a local subdivision of a State, created by the sovereign power of this State of its own will, without the particular solicitation, consent or concurrent action of the people who inhabit it; a local organization, which, for the purpose of civil administration, is vested with a few functions of corporate existence.' And no one would contend that an action could be maintained against such an organization unless the right were given by the power creating it." [Then having quoted the statutory provisions making counties corporations with power to sue and be sued he continues]: "For the purposes for which a county is made a body corporate and politic, it is a person, and is capable of suing and being sued in regard to matters pertaining to those purposes the same as an individual. Its powers as a corporate body, are, however, very limited, they extend only to the subjects enumerated in the section of the laws referred to; but the mere vesting of any corporate powers in a county organization, would, in my opinion, authorize it to sue or be sued without any express provision to that effect. Creating a body corporate for any purpose would impliedly, it seems to me, confer upon it the incidental powers belonging to a corporation which include the

allowed by a board constituted for the purpose.¹ In *Arizona* the county must be sued in the courts within such county.² The same principles applicable to counties would seem to be applicable to townships and unincorporated towns.³ The cause of action must be one affecting the township or town.⁴

(4) **CORPORATIONS**—(See also **CORPORATIONS**, vol. 4, p. 280.)—The right to sue and be sued is always conferred by a charter of incorporation. The corporation must itself be the party to the suit. The stockholders cannot sue in case of corporation rights or liabilities,⁵ unless the corporation absolutely and unqualifiedly refuses to bring the action, and thereby the stockholder is irreparably injured.⁶ Neither can the stockholder be sued for corporation

power to sue and be sued." *Grant Co. v. Lake Co.*, 17 Oregon 453.

See **COUNTIES**, vol. 4, p. 343, upon the general question of when suits may be brought by and against counties.

1. Presentation of Claim Against County.—"Suit must not be brought against a county until the claim has been presented to the court of county commissioners, and disallowed or reduced by the court, and the reduction refused by the claimant." Code of *Alabama*, 1886, § 2574, and cases there cited construing this provision. *Compare Indiana*, Rev. Stat. 1881, §§ 5758, *et seq.*; *Delaware Co. v. Diebold Safe & Lock Co.*, 133 U. S. 473. *Kansas*, Gen. Stat. 1889, §§ 1845, 1853; and § 1630, *et seq.*; *Texas*, Sayles' Civil Stat., art. 677; *Virginia*, Code, 1887, ch. 36, § 843.

2. "Suits against any county shall be commenced in some court of competent jurisdiction within such county." *Arizona*, Rev. Stat. 1887, § 674.

3. Townships.—Unless a township or other subdivision of a county for governmental purposes is made by statute a corporation authorized to sue and be sued, it may not sue or be sued in its own name. Such subdivisions of the county must sue and be sued in the names of the officers of the township or subdivision. *West Bend v. Munch*, 52 Iowa 132; *Wells v. Stornback*, 59 Iowa 376; *White v. Road District No. 1*, 9 Iowa 202.

Unincorporated Towns.—In view of a long-continued practice, a suit was held properly brought by a town in the name of "A B and the Rest of the Inhabitants of the Town of X." *Barkhamsted v. Parsons*, 3 Conn. 1.

School Districts.—When a school district has acquired a name by rep-

utation, it may sue in such name. *School District v. Pillsbury*, 58 N. H. 423.

Road Districts.—A road district cannot become a party in a court of justice in *Iowa*, as a corporation, *quasi* or otherwise. *White v. Road District No. 1*, 9 Iowa 202.

4. Municipal corporations may sue a treasurer holding municipal funds and refusing to pay the same to his successor. *Blanchard v. La Salle*, 99 Ill. 278.

A municipal corporation may maintain an action for the use of a person injured, on the official bond of its treasurer, for a refusal to pay warrants drawn against a particular fund in his custody. *East St. Louis v. Flannigan*, 26 Ill. App. 449.

Municipal corporations may sue in their own name to recover money expended by the board of health in removing a nuisance. *Salem v. Eastern R. Co.*, 98 Mass. 431; 96 Am. Dec. 650; *Winthrop v. Farrar*, 11 Allen (Mass.) 398. See also **MUNICIPAL CORPORATIONS**, vol. 15, p. 949.

5. Corporations Must Sue.—See generally **CORPORATIONS**, vol. 4, p. 274. A corporation is recognized in law only by its corporate name, and must sue and be sued by its corporate name. The individual members may not sue for debts due to, or be sued for debts due by the corporation. *Curtiss v. Murry*, 26 Cal. 633.

Neither an officer, stockholder nor director of a corporation can sue in his own name for injuries done to him as such officer, or to said corporation by the acts of another corporation. Such suit must, if brought, be in the name of the corporation. *Donovan v. Dean*, 1 Flipp. (U. S.) 182.

6. Exceptions.—The stockholders

liabilities except by virtue of a statute.¹ A priest is analogous to a corporation sole, and therefore may sue in his own name to recover possession of church lands.²

may, however, sue in their own names as debtors to the corporation, when, on a proper demand, the corporation refuses to institute action. *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Cogswell v. Bull*, 39 Cal. 320.

In a recent case (1881) the court, *MILLER, J.*, having discussed the case of *Dodge v. Woolsey* at length and the doctrine there laid down, continued as follows:

"We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

"Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization. Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders.

"Or where the board of directors, or a majority of them, are acting for their own interests in a manner destructive of the corporation itself, or of the rights of the other shareholders.

"Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

"Possibly other cases may arise in which, to prevent irremediable injury or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases." *Hawes v. Oakland*, 104 U. S. 460.

When a stockholder sues, it is not sufficient for him simply to aver that the directors, although thereunto requested, had neglected and refused to

institute proceedings, but he must prove a clear case of such absolute and unjustifiable neglect and refusal of the directors to act as would lead to his irreparable injury, should he not be permitted to bring the suit. *Detroit v. Dean*, 106 U. S. 537.

In an action by a stockholder suing for a corporation, he must make the corporation a party either plaintiff or defendant. *Davenport v. Davis*, 112 Wall. (U. S.) 626; *Shawhan v. Zuin*, 79 Ky. 300.

For the official misconduct of the directors of a corporation, and fraud in the discharge of their duties, they are responsible to the corporation; a stockholder cannot sue them. *Smith v. Poor*, 40 Me. 415; 63 Am. Dec. 672; *Smith v. Hurd*, 12 Met. (Mass.) 371; 46 Am. Dec. 690; *Horn Silver Min. Co. v. Ryan*, 42 Minn. 196; *Brown v. Orr*, 112 Pa. St. 233; *Savings Bank v. Caperton*, 87 Ky. 306; *Jones v. Johnson*, 10 Bush (Ky.) 649.

When the managers and a majority of the stockholders of a corporation divert it and its assets and property from their legitimate purposes to the use and benefit of one of such majority, a minority stockholder may bring suit without applying to have suit brought in the name of the corporation. *Rothwell v. Robinson*, 39 Minn. 1; 53 Am. Dec. 646.

1. Suits Against Stockholders.—Statutes imposing an individual liability on stockholders of a corporation may authorize a joint action against the corporation and the stockholders. *Smith v. Colorado F. Ins. Co.*, 14 W. N. C. (Pa.) 399.

A creditor of a corporation may sue one or more of the directors under a statute, making them liable personally for violating any provisions of the charter, and may, if necessary, join the corporation as a co-defendant. *Patterson v. Stewart*, 41 Minn. 84; *Sullivan v. Sullivan Mfg. Co.*, S. Car. 494.

A statutory provision for joining, in an action against a corporation both the corporation and its stockholders, does not authorize such a joinder in a case when the corporation was illegally organized. *Smith v. Colorado F. Ins. Co.*, 14 Fed. Rep. 399.

2. Priests.—A priest having charge

(5) UNINCORPORATED SOCIETIES—(See also SOCIETIES AND CLUBS).

(6) PARTNERSHIP—(See also PARTNERSHIP).

(7) ASSIGNEES IN BANKRUPTCY AND INSOLVENCY RECEIVERS—(See also BANKRUPTCY, vol. 2, p. 67, INSOLVENCY, vol. 11, p. 167; RECEIVER).—The right of assignees in bankruptcy and insolvency to sue and be sued, is determined by the statutes authorizing such assignments, as at common law no assignee was entitled to sue in his own name.¹ At common law a receiver could not sue in his own name because he was the mere custodian of the property and not the owner; but the right to so sue has been given by statute in many States, and even without such statutory provision, he may be authorized to sue by the court.²

(8) BAILEES, ASSIGNEES, etc.—See also BAILMENTS, vol. 2, p. 40; CARRIERS OF GOODS, vol. 2, p. 770; COMMISSION MERCHANTS, vol. 3, p. 317, etc.

of church property coupled with an interest is analogous to a corporation sole, and therefore may sue in his own name to recover possession of church lands. *Santillan v. Moses*, 1 Cal. 92.

Voluntary Associations.—"Any number of persons associated together as a voluntary association not having corporate powers, but known by some distinguishing name, may sue and be sued, and plead and be impleaded by such a name." *Connecticut*, Gen. Stat. 1888, § 979. As to what are voluntary associations under this statute, see *Fox v. Naramore*, 36 Conn. 376.

Under this statute, it is optional with a creditor to bring a suit against the association as such or the individuals composing it, the only difference being that in the former case he can levy only on the property of the association. *Davison v. Holden*, 55 Conn. 103.

If he sues the association he need not disclose the names of the parties. *Martin v. First District Court*, 13 Nev. 85.

Such an association may be sued by such common name. *Idaho*, Rev. Stat. 1887, § 4112.

New York Code, § 1919, provides for actions by unincorporated associations by the president or treasurer. *Bloete v. Simon*, 19 Abb. N. Cas. (N. Y.), 88.

1. Assignees.—An appeal may be prosecuted in the name of an adjudicated bankrupt or in the name of his assignee. *O'Neil v. Dougherty*, 46 Cal. 575.

In the absence of a prohibition in a bankrupt act, a suit may be brought in the name of the bankrupt, with the consent of the assignee. *Mayhew v. Pentacost*, 129 Mass. 332.

And the bankrupt and his co-obligee may be parties plaintiff in an action on a joint contract for the benefit of said co-obligee and the vendee of the bankrupt assignee. *Williams v. Fowler*, 132 Mass. 385.

Where the assignee assigns to the bankrupt a note, which had been part of the bankrupt's estate, to make the bankrupt's exemption, the bankrupt may sue in his own name on a judgment recovered on the note before he was declared a bankrupt. *Robinson v. Hall*, 11 Gray (Mass.) 483.

See *infra*, this title, *Right to Sue Depending on Privity*.

2. Receivers.—See RECEIVERS.

In many States a receiver is authorized to sue in his name, but even without such statutory authorization courts may authorize him so to sue. *Davis v. Gray*, 16 Wall. (U. S.) 203; *Leonard v. Storrs*, 31 Ala. 488; *Hardwick v. Hook*, 8 Ga. 354; *Tillinghast v. Champin*, 4 R. I. 173; 67 Am. Dec. 510; *Wray v. Jamison*, 10 Humph. (Tenn.) 186.

And it has been held he can so sue as a trustee under an express trust within the code provisions. *Hemming v. Raymond*, 35 Minn. 303.

Auctioneers.—Auctioneers have a special property in goods sold by them at auction, and may sue the purchaser for the price thereof in their own name. *Bellee v. Block*, 19 Ark. 566.

(9) EXECUTORS AND ADMINISTRATORS; TRUSTEES—(See EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165; TRUSTEES).

(10) HEIRS; DEVISEES, ETC.—(See also EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165; LEGACIES AND DEVISEES, vol. 13, p. 7).

(11) PERSONS UNDER DISABILITIES—(See also HUSBAND AND WIFE, vol. 9, p. 789; INFANTS, vol. 10, p. 613; INSANITY, vol. 11, p. 105; MARRIED WOMEN, vol. 14, p. 589).

(12) PRINCIPAL AND AGENT—(See also AGENCY, vol. 1, p. 331).

(13) TENANTS IN COMMON, AND JOINT TENANTS—(See also JOINT TENANTS, vol. 11, p. 1057).

(14) LANDLORD AND TENANT—(See also LANDLORD AND TENANT, vol. 12, p. 658).

(15) ALIEN FRIENDS AND ALIEN ENEMIES—(See also ALIENS, vol. 1, p. 456).—An alien friend may sue and be sued.¹ An alien enemy may not sue except by special privilege.² The objection, that the plaintiff is an alien enemy, is waived unless duly made.³ At common law the plea that plaintiff is an alien enemy was a good plea in bar,⁴ but now such plea is good in bar only when the plaintiff was an alien enemy at the time the cause of action accrued. If he became so after suit was brought, the plea is only a bar to the maintenance of the suit at that time.⁵ An alien enemy

1. Alien Friends.—An alien may sue in another's right, as administrator, etc., and his alienage is not pleadable in abatement. *Caroon's Case*, Cro. Car. 8.

For the *United States* authorities, see ALIEN, vol. 1, p. 462.

A native of a foreign State in amity with *England* taken in an act of hostility on board an enemy's fleet and brought to *England* as a prisoner of war, may sue, while so held as a prisoner, on a contract entered into as a prisoner at war. *Sparenburgh v. Bannatyne*, 1 B. & P. 163.

2. Alien Enemy May Not Sue.—Alien carrying on trade in an enemy's country, though resident there also in the character of consul of a neutral state, considered an alien enemy, and as such disabled to sue. *Albrecht v. Sussmam*, 2 V. & B. 323.

At common law a *feme covert* cannot sue alone on a contract made with her before or after marriage, though her husband is an alien enemy. The court said the crown should entitle itself to the husband's rights by an inquisition and then enforce this right of action and give the wife the benefit of it. *De Wahl v. Braime*, 1 H. & N. 178.

An alien enemy coming to a country *sub salvo conductu* may maintain

an action. So may an alien *ami* who remains after war breaks out, living *sub protectione*. *Wells v. Williams*, 1 Salk. 46.

3. Waiver of Objection.—Where, in an action brought by a citizen of *Louisiana* against a citizen of *New York* during the war, no defense was interposed that at the time of the commencement of the action the plaintiff was an alien enemy, and where the trial took place after the termination of hostilities, *held*, that presenting the question at the end of the trial could not remedy the defect in pleading and that a refusal of the court to submit the same to the jury was not error. *Burnside v. Matthews*, 54 N. Y. 78. Compare *M'Nair v. Toler*, 21 Minn. 175.

4. Alien Enemy Plaintiff—Ancient Rule.—By the strict rules of the common law, the plea of alien enemy might be pleaded in bar to all actions of contract, though the right of action accrued prior to the war; because the debt itself was considered as forfeited to the sovereign, as a reprisal for the damages committed by the enemy. *Gilb. Hist. and Pract. of the Common Pleas* 205; *Levine v. Taylor*, 12 Mass. 10.

5. Alien Enemy Plaintiff—Modern Rule.—Where after suit brought, the

may, however, be sued¹ and may defend.² His property may be sold under judicial process even without notice, though that rule is not so strictly applied to cases arising during the war of the rebellion in the *United States*.³

plaintiff becomes an alien enemy, the proper practice is to plead that fact in bar of the further maintenance of the suit. *Le Bret v. Papillon*, 4 East 502; *Flindt v. Waters*, 15 East 260; *Alcinous v. Nigren*, 4 El. & Bl. 217; *Elgee v. Lovell*, 1 Woolw. (U. S.) 102.

Contra, in case the plaintiff becomes an alien before the right of action accrues, then it is pleadable in bar of the suit. *Brandon v. Nesbitt*, 6 T. R. 23; *United States v. Grossmayer*, 9 Wall. (U. S.) 72; *Elgee v. Lovell*, 1 Woolw. (U. S.) 102; *Mumford v. Mumford*, 1 Gall. (U. S.) 366.

A British subject, detained a prisoner in *France* during a war, drew on an Englishman in favor of another British subject detained as prisoner. The beneficiaries endorsed to a French subject and the bills were accepted by the drawees. On return of peace, the Frenchman was allowed to sue the acceptors. *Antoine v. Morshead*, 6 Taunt. 237.

It is no defense to an action on a bill of exchange that the plaintiff, an endorsee and holder thereof, sues in trust for an alien enemy, the endorser. *Daubuz v. Morshead*, 6 Taunt. 332. Unless at the time the bill was drawn and accepted, the beneficiary was an alien enemy. *Willison v. Patteson*, 7 Taunt. 439.

By international treaties, it is frequently provided that in case of war between the nations, no debts due from the individuals of one nation to those of the other shall ever be sequestered or confiscated. When there is such a treaty stipulation, the plea of an alien enemy is not a bar to the suit, although the action is commenced during the pendency of a war, and when war ceases he may either sue again or prosecute his original suit if it had not abated. *Levine v. Taylor*, 12 Mass. 81.

The right of a foreigner by contract is only suspended by a subsequent war, and may be enforced upon the restoration of peace. *Ex parte Bousmaker*, 13 Ves. 71. See Story on Contracts (5th ed.), vol. 1, §§ 743-748; *Stiles v. Easley*, 51 Ill. 275.

Even irrespective of treaty obligations, the strict rule of the common

law as to the forfeiture of the debt, is inapplicable to-day.

1. Alien Enemy Defendant.—While the existence of war closes the courts of each belligerent to the citizens of the other, it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property in their own courts against the citizens of the other, whenever the latter can be reached by process. *Masterson v. Howard*, 18 Wall. (U. S.) 99; *Lee v. Rogers*, 2 Sawy. (U. S.) 549.

2. Alien Enemy May Defend.—An alien enemy may be made a party defendant, and when made a party by personal service or otherwise may, by permission of the court, be heard in his defense by attorney, or the court may appoint counsel in its discretion. *Masterson v. Howard*, 18 Wall. (U. S.) 99; *Russ v. Mitchel*, 11 Fla. 80; *Dorsey v. Kyle*, 30 Md. 512; *Dorsey v. Dorsey*, 30 Md. 523; 96 Am. Dec. 633; *McNair v. Toler*, 21 Minn. 175; *Seymour v. Bailey*, 66 Ill. 288.

In proceedings to forfeit the land of an alleged rebel under the act of Congress of July 17th, 1862, the owner of the property, although a resident of the southern States, within the confederate lines and a confederate, whether in law an alien enemy or not, is entitled to file an answer and defend, because an alien enemy is liable to be sued, and that carries with it the right to defend. *McVeigh v. United States*, 11 Wall. (U. S.) 259; *Miller v. United States*, 11 Wall. (U. S.) 268.

3. Alien Enemy—Sale of Property of.—A sale under a deed of trust to pay debts is valid, though the grantor resides in a confederate State and is a confederate. *Washington University v. Finch*, 18 Wall. (U. S.) 106.

A mortgage cannot be foreclosed against confederates when within the confederate lines and served only by publication. *Lasere v. Rochereau*, 17 Wall. (U. S.) 437. But see *Seymour v. Bailey*, 66 Ill. 288; *Dorsey v. Dorsey*, 30 Md. 522; 96 Am. Dec. 633.

Where, however, an inhabitant of a loyal State voluntarily left it and joined those in rebellion, judicial proceedings with notice by publication

(16) INDIANS—(See also INDIANS, vol. 10, p. 438).—The *status* of Indians in the civil courts of the *United States* and of the State and Territorial courts, is involved in some doubt: but there is a clearly defined tendency on the part of both the legislature and the judiciary to permit them both to sue and to be sued.¹

will pass title, in case of a sale, to his property. *Ludlow v. Ramsey*, 11 Wall. (U. S.) 581.

During the late rebellion, citizens residing in the rebel States were alien enemies and could not sue in courts of the loyal States, but they might be sued therein by citizens of the latter States. Therefore, where a note, having been dishonored, certain land given under deed of trust to secure it was sold to satisfy it, the court refused to set the sale aside on the ground that the payee petitioner was, when the note matured and the land sold, within the confederate lines, and cut off from all intercourse with the loyal States; it further appearing that the petitioner had voluntarily gone and remained South. *Dean v. Nelson*, 10 Wall. (U. S.) 158, held inapplicable to this case. *De Jarnette v. De Giverville*, 56 Mo. 440.

Contra, when such parties were driven out of the State and forbidden to return, and the sale takes place during their enforced absence. *Dean v. Nelson*, 10 Wall. (U. S.) 158.

Contracts between citizens of a confederate State are not void because of their being alien enemies. To bring a case within that rule, the parties contracting must be at the time under the dominion of different and opposing flags. *Acklen v. Hickman*, 60 Ala. 568.

In consequence of the disabilities attending the position of an alien enemy, it has been held that a partnership between persons residing in two different countries for commercial purposes, is at least suspended, if not *ipso facto* determined by the breaking out of war between those countries. *Griswold v. Waddington*, 15 Johns. (N. Y.) 57.

See ALIEN, vol. 1, p. 456.

1. INDIANS.—See INDIANS, vol. 10, p. 440.

"All Indians and people of color heretofore known and called Indians, within this commonwealth, are made and declared to be citizens of this commonwealth, and entitled to all the rights, privileges and immunities, and

subject to all the duties and liabilities to which citizens of this commonwealth are entitled or subject." *Massachusetts* Pub. Stat. 1882, p. 68, § 4. See *Jaha v. Belleg*, 105 Mass. 208; to similar effect, Constitution of *Minnesota*, 1858, art. 7, § 1, and art. 15 § 2.

It seems that in *Connecticut*, Indians may sue and be sued. Gen. Stat. 1875, p. 6, §§ 5, 6.

In *Maine*, agents for the Indians are appointed by the governor, and "such agents may, in their own names and capacity, maintain actions for money due to any Indians, and for injuries done to them and their property; and all sums or damages so recovered shall be distributed to the Indians of the tribe, according to their usages, or be invested in useful articles." Rev. Stat. 1883, p. 172, § 9.

Notwithstanding this statute, an Indian may be sued on a promissory note made by him. *Murch v. Tomer*, 21 Me. 535.

"All Indians shall be capable of suing and being sued in any of the courts of this State, in like manner, and with the same effect as other inhabitants thereof, and shall be entitled to the same judicial rights and privileges." *Michigan*, Howell's Annot. Stat., 1882, § 7309.

A, the offspring of a white man and half breed Indian woman, sued the trustees of his township for refusing to receive his vote. "All free white citizens" under the constitution were entitled to vote. *Held*, A was entitled to vote and to maintain the action. READ, J., dissented. *Jeffries v. Ankeny*, 11 Ohio 372.

In *Rhode Island*, apparently Indians were liable to be sued at common law. A statute was passed in 1822 prohibiting such actions against the *Naragansett* tribe. See *Stokes v. Rodman*, 5 R. I. 405.

The Cherokee Indians in *North Carolina* have been placed on the same footing with other tribes by an act of Congress, passed in pursuance of the power granted by the constitution in reference to "regulating com-

(17) **FELONS.**—A person convicted of a felony is incapable of suing at law or in equity,¹ until his disability is removed,² unless the action is brought as executor, administrator, trustee, or in the right of some other person.³ A person convicted of felony may be sued.⁴

merce with foreign nations among the several States, and with the Indian tribes;" and their contracts made with the plaintiff to prosecute and collect claims alleged to be due them, cannot be enforced against them in a State court, without the consent of Congress. The jurisdiction to determine such matters is lodged in the interior department. *Rollins v. Eastern Band of Cherokee Indians*, 87 N. Car. 229.

1. **Felons.**—See Dacey on Parties to Actions (2nd Am. ed.), pp. 2, 3.

Rights of action in respect of property accruing to the party attainted, either before or after attainder, are vested in the crown without office found; and therefore attainder may be well pleaded in bar to an action on a bill of exchange endorsed to the plaintiff after his attainder. *Bullock v. Dodds*, 2 B. & Ald. 258.

2. "A felon (unless he receives a free pardon containing words of restitution) cannot, generally, on his disability being removed, sue for causes of action which have accrued, or which depend upon contracts made with him at any time before such removal. But though this is true as a general rule, a person convicted of felony may, on his incapacity to sue being restored in some cases, sue on contracts made with him, or for wrongs done to him before his disability ceased." Dacey on Parties to Actions (2nd Am. ed.), p. 2.

3. At common law a felon was not *civiler mortuus* in such sense as to divest his estate, and, therefore, after pardon he is competent to sue. *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118.

4. **Felons Suable.**—The maxim of *civiler mortuus*, on a conviction for felony, does not apply in *Delaware*. Even in *England*, the disability to maintain a civil action after a conviction for treason or felony, attaches only to a party plaintiff, and must be either pleaded in abatement or specially in bar to the action; but any subject of the king there, convicted or attainted of treason or felony, may be sued as a party defendant in a civil action. *Cannon v. Windsor*, 1 Houst.

(Del.) 143. Compare *Willingham v. King*, 23 Fla. 478; *Dade Coal Co. v. Haslett*, 83 Ga. 549; *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118.

"All persons disabled by law from instituting or maintaining a suit may notwithstanding be made defendants in a court of law and cannot plead their own disabilities. And it is presumed that this rule would also be adopted in courts of equity when the suit seeks to establish a pecuniary demand against the party; where, however, the proceeding is *in rem*, and a person under any of the disabilities alluded to is interested in the subject of the suit, then it would seem that as the interest of the party is entirely vested in the crown, the attorney general would be the proper defendant. Whether in such case the party himself should be joined, is a point which does not appear to have been determined; but it is submitted that the rule that no person can be made a party to a suit against whom no relief can be prayed will apply to this case as well as to that of bankrupts." Daniells' Chan. Plead. & Prac. (5th ed.), ch. 4, § 7, p. 156, citing a number of English cases.

A felon cannot plead his attainder in bar to a personal action. *Banyster v. Trussel*, 2 Cro. Eliz. 516; *Cannon v. Windsor*, 1 Houst. (Del.) 143.

A was indicted for a rape on B, convicted and sentenced to imprisonment for life. A statute provided that "a person sentenced to imprisonment in a State prison for life shall thereafter be deemed civilly dead." B having brought a civil suit for damages against A, A answered averring his civil death as a defense. B demurred. *Held*, that though civil death abates an action for personal tort, an answer setting up that defendant is civilly dead is inconsistent, for the fact that defendant has put in the answer proves that he is alive; the answer therefore is bad on demurrer. *Freeman v. Frank*, 10 Abb. Pr. (N. Y.) 370.

A provision that "a sentence to imprisonment for any term less than life suspends the civil rights of the person

III. PARTIES MUST BE REAL, NOT FICTITIOUS.—While the parties to an action may be either natural or artificial, they must be real and not fictitious.¹ Unless an association is incorporated it must sue and be sued in the names of its members, and not in its name as an association,² except where, by statute, such associations are authorized to be parties to suits in that manner.³ Notwithstand-

so sentenced," does not give him immunity from actions or suspend the rights of others. *Davis v. Duffie*, 4 Abb. Pr., N. S. (N. Y.) 478.

See the note on *CIVILITER MORTUUS*, vol. 3, p. 273.

1. Parties Must be Real.—An action cannot be maintained in a name as plaintiff, which is neither that of a natural person, nor of such an artificial person as is recognized by the law as capable of suing. A proceeding commenced in such a name, there being no plaintiff, is not an action, but a mere nullity, and may be dismissed at any time, even if the objection is first made in the supreme court. *Proprietors of the Mexican Mill v. Yellow Jacket Silver Min. Co.*, 4 Nev. 40; 97 Am. Dec. 510.

So where suit was brought by *Astoria Lodge No 112, I. O. O. F.*, which was not a corporation or authorized to sue. *Marsh v. Astoria Lodge*, 27 Ill. 421. See *Barbour v. Albany Lodge*, 73 Ga. 474.

A steamboat cannot be a party plaintiff in an action on a promissory note payable to the steamboat "and owners." *Steamboat Pembina v. Wilson*, 11 Iowa 479. Compare *Steamboat Kentucky v. Hine*, 1 Greene (Iowa) 379.

Some person must be sued, either natural or artificial. Where suit was brought against "*Albany Lodge No. 24, Free and Accepted Masons*," without alleging that defendants were corporations or the members partners so as to be sued as such, there was no party defendant, and therefore no case in court, and nothing to amend by. *Barbour v. Albany Lodge*, 73 Ga. 474.

Where, however, a religious society was sued as "*The Ada Street M. E. Church*," and by the law of the State a church as such could not sue or be sued, actions by or against a church being brought by or against the trustees, it was held the defendants having failed to take advantage of this objection in the trial court could not set it up in the appellate court. *Ada Street M. E. Church v. Garnsey*, 66 Ill. 132.

Parties should vindicate their rights

of property in their own names and persons, and not under cover of simulated titles. Every attempt to do so will be discountenanced, as it tends to embarrass the lawful pursuit of creditors and increase the difficulties of litigation. *Shadburne v. Amonett*, 7 La. Ann. 89.

2. Associations, etc.—An action cannot be maintained in the firm or style of a trading company. *McCready v. Varmeman*, 3 N. J. L. 435, *Burns v. Hall*, 3 N. J. L. 539.

If a suit is brought against A and others unknown described as partners, and A & Co. appear, said A & Co. may sue on an attachment bond given in said suit. *Hedrick v. Osborne*, 99 Ind. 143.

If a suit be brought in a firm name A & Co., after verdict the court will presume it to be in the names of real persons, where the contrary does not appear. *Morse v. Chase*, 4 Watts (Pa.) 456.

The mere fact that the obligee in a contract is designated by a name which is appropriate to a corporate body, does not admit its legal corporate existence, and in a suit thereon the obligee must aver and prove its corporate character. *Holloway v. Memphis etc. R. Co.*, 23 Tex. 465; 76 Am. Dec. 68. See *Soller v. Mouton*, 3 La. Ann. 541; *First National Bank v. Simmes*, 26 La. Ann. 147.

Where a note is made payable to a religious association by name, suit thereon must be brought in the name of the association if incorporated; if not incorporated the suit must be by its members as partners. *Jones v. Watson*, 63 Ga. 679. As to the necessity of joining all members, see the subdivision of this article treating of the right of one to sue or be sued for himself and others.

3. Statutes.—"When an action is founded on a written instrument, suit may be brought for or against any of the parties thereto, by the same name and description as those by which they are designated in such instrument." *Iowa*, *McClain's Annot. Code*, 1888, §

ing an error is made in the name of a party to a contract, he must sue thereon in his right name,¹ in the absence of a statutory provision to the contrary;² and it seems an action against such party on such contract must, in the absence of a statute, be against him in his real name with proper averments.³ When a party ceases to exist, or the name of a party is changed, at common law the action falls,⁴ though this rule is generally modified by stat-

3763. See *Davis v. David*, 1 Greene (Iowa) 427. Compare Revision of *New Jersey*, 1877, p. 852, § 28; *New Mexico*, Comp. Laws, 1884, § 1888; *Tennessee*, Code, § 3485.

In such case averments of incorporation or co-partnership are unnecessary. *Wendall v. Osborne*, 63 Iowa 99; *Harris Mfg. Co. v. Marsh*, 49 Iowa 11.

In many States there are statutes authorizing suit by and against partnerships, voluntary associations, etc., by the names in which they did business. See the respective State statutes. See also PARTNERSHIP, and *supra*, this title, *Persons Who Can Sue and be Sued; Unincorporated Societies*. In such case, the individual names of the parties need not be disclosed. *Martin v. First District Court*, 13 Nev. 85.

1. **Suits on Contracts, Plaintiffs.**—Where a contract is executed to a party by a wrong name he must, nevertheless, sue in his proper name, and may aver in his declaration that defendant made the contract to him by the name mentioned therein. *Pinckard v. Milminer*, 76 Ill. 453; *Medway Cotton Manufactory v. Adams*, 10 Mass. 360; *N. Y. African Society v. Vanick*, 13 Johns. (N. Y.) 38; *Balch v. Aldrich*, 56 Vt. 68.

A note made payable to a person, without the addition of Senior to his name, may be sued in his name with the addition of Senior. *Neil v. Dillon*, 3 Mo. 59.

Where a bond has been executed to a corporation by a name varying from the true name, the corporation may sue in its true name, and aver the execution of the bond to it. *Trustees of McMinn Academy v. Reneau*, 2 Swan (Tenn.) 94.

But where a contract was entered into by the real owner of property in regard to it, in the name of others, it may be sued on by him in their names, as the law can only look at promisors and promisees as the parties in legal interest, and cannot govern its action by questions of equitable right. *Sisson*

v. Cleveland etc. R. Co., 14 Mich. 489; 90 Am. Dec. 252.

When the obligor's name in a bond is written James P. C. and he signs the bond J. P. C. while his real name is Joshua P. C., he may be sued by his true name with averments stating the facts. *Wood v. Coman*, 56 Ala. 283.

So when the misnomer is as to Christian name of the obligee he may sue by his true name with averments. *Sharer v. McLendon*, 26 Ga. 228. Compare *Hedrick v. Osborne*, 99 Ind. 143.

2. **Statutes.**—"Parties to a written instrument by initial letter, or a contraction of the name, may be so designated in an action thereon." *Wyoming*, Rev. Stat. 1887, § 2399. See the statutes referred to in the second preceding note.

3. **Suits on Contracts, Defendants.**—If notes, bonds, etc., are executed by parties in a wrong name, they must be sued by that wrong name, and execution follow, with proper averments. *Crawford v. Satchwell*, 2 Strange 1218; *Gould v. Barnes*, 3 Taunt. 504; *Reeves v. Slater*, 7 B. & C. 486; *Wooster v. Lyons*, 5 Blackf. (Ind.) 60.

If a person alleged to be the actual maker of a note is sued in his right name on the note, it must be proved that he used the name signed to the note as his business name, or recognized it as equivalent to his signature. In the absence of such testimony, the action will not lie. *Keck v. Sedalia Brewing Co.*, 22 Mo. App. 187. See the statutes referred to in the preceding notes.

4. **Party Ceasing to Exist.**—Where a railroad company is consolidated with other railroad companies under a new name, it ceases to exist as a corporation, and an action brought by or against such railroad company before its consolidation, cannot afterward be prosecuted by or against it or in its original name. *Kansas etc. Co. v. Smith*, 40 Kan. 192.

A corporation cannot, however, escape its obligations by changing its name or assuming the form of a new

ute.¹ If a real party is sued by a fictitious or erroneous name, and he is duly served with a summons wherein he is sufficiently described, or he appears and fails to object, the weight of author-

corporation. Thus where A Co. being indebted to B, sold its property to C Co., a majority of whose stockholders were the stockholders of C Co., B obtained judgment against A Co., which had never been dissolved, and was permitted to levy on its property in the possession of C Co. *Dienelt v. Montgomery Webb Co.*, 25 W. N. C. (Pa.) 549; *Hibernia Ins. Co. v. St. Louis etc. Transp. Co.*, 13 Fed. Rep. 516.

Where a corporation after executing obligations in writing is consolidated with another corporation, and the corporation thus formed assumes a new name, such corporation may be sued by the new name thus assumed. *Columbus etc. R. Co. v. Skidmore*, 69 Ill. 566.

Where the charter of a corporation expires by limitation, actions pending by and against it are thereby terminated. *Musson v. Richardson*, 11 Rob. (La.) 37.

When a tract of land is granted by the name of X to individuals who divide same among themselves leaving a part in common, and the town's name is afterwards changed to Y, suit to recover any of such common land must be brought in the name of the proprietors of X not of Y. *Proprietors of Sunapee v. Eastman*, 32 N. H. 470.

When the charter of a municipal corporation is repealed and the same people and the same territory are re-incorporated as a municipality under a new name, although with different powers and different officers, a suit pending against the old corporation at the date of the repeal may be revived against the new corporation. *O'Connor v. Memphis*, 6 Lea (Tenn.) 730.

A claim under a contract made with a school district, prior to the act of 1858, substituting township districts in the place of the former ones, must be enforced by an action against the district, created by the statute. *McDonald v. School District No. 1*, 10 Iowa 469.

Where by act of the legislature the name of a corporation is changed, and by its new name it is made the successor of all the liabilities, choses and assets of the former one, it may main-

tain an action on a promissory note executed to the corporation by the old name without such note being endorsed. This decision is however based partly on the fact that the holder of a note may sue thereon, though not endorsed. *Trustees of North Western College, v. Schuagler*, 37 Iowa 577.

Where a solvent bank goes into liquidation under act of March 14th, 1842, No. 98, though its banking franchises be surrendered, the body corporate exists, and the commissioner in collecting its debts may sue in the corporate name. *Commercial Bank v. Villavaso*, 6 La. Ann. 542.

A receiver is merely a custodian of property (see *supra*, this title, *Persons Who Can Sue and be Sued*), and therefore where an injury is received through the negligence of the servants of a railroad corporation in the hands of a receiver, the action for such injury is properly brought against the receiver of the company at the time the action is brought, though he was not the receiver at the time the accident occurred. *McNulta v. Lockridge*, 32 Ill. App. 86.

At common law an action is abated by the death of a party before judgment. See *DEATH*, vol. 5, p. 130, for the common law and statutory law on this subject.

In a case where a married woman S. J. B. eloped with one T. J. C., and went to another State and there lived with T. J. C. as his wife, and thereafter brought suit in the name of S. J. C. against said T. J. C., it was held that notwithstanding a plea of misnomer in that the action should have been brought in the name of S. J. B., the court did not err in giving judgment for plaintiff in name of S. J. C. *Clark v. Clark*, 19 Kan. 522.

1. *Statutes.*—Under statutes authorizing the changing of names, it is customary to include a clause providing that suit pending should not abate by reason thereof. *E. g.*, *New York*, Annot. Code, 1887, § 2417.

When the name of a corporation is changed, it is provided by statute that "no suit pending at the time of such change of name shall abate by reason thereof, but the same may be prose-

y is that he will be bound by the judgment.¹ The common law

ited to judgment and execution in the original name of such corporation or association, and under such execution on the property of said corporation or association, whether held by its original or amended name, may be varied on and sold to satisfy such judgment." *New Jersey Supplement* to Revision, p. 39, § 19, and p. 145, 145.

1. **Misnomer.**—Where a party defendant is sued, and answers by a wrong name, and judgment is entered against him accordingly, no advantage can be taken of the misnomer. *McCreery v. Overding*, 54 Cal. 168; *Pennsylvania Co. v. Sloan*, 125 Ill. 72.

Notwithstanding a misnomer the party is bound if so described as to make it impossible for him not to know that it was the one meant. Thus where a defendant's name was spelled Luckenough instead of Luckenbach, but he was designated as "Luckenbough, assignee of U," the judgment was held good against him because the description was sufficient to make it clear that he was meant. *Schee v. Grange*, 78 Iowa 101.

So where the initial letters of a defendant were transposed, but she was described as the wife of J. C. Hanning *v. Krapfl*, 68 Iowa 244.

Where a defendant's name is right, but he is erroneously described as of certain place, such mistake is waived if not pleaded in abatement. *Smith v. Bowker*, 1 Mass. 76.

Where a party is sued by a wrong name, and the writ is served on the party intended to be sued, and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained by default against him in the erroneous name, he is concluded, and execution may be issued in that name, and levied upon the property and effects of the real defendant, and in all future litigation on the judgment it may be connected with it by proper averments. *Freeman on Judgments* (3rd. ed.), § 154; *Crawford v. Hatchwell*, 2 Strange 1218; *Smith v. Tatten*, 6 Taunt. 115; *Oakley v. Giles*, 1 East 167; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Guinard v. Heysinger*, 15 Ill. 288; *Pond v. Annis*, 69 Ill. 341; *First Nat. Bank v. Jagers*, 31 Md. 38; 100 Am. Dec. 53. *Contra*, when party is only served

by publication. *Eutrekin v. Chambers*, 11 Kan. 368. Or by summons left at a house where defendant and others lived. *Fitzgerald v. Salentine*, 10 Met. (Mass.) 436.

A fortiori is this true when the defendant appears and defends. *Keech v. Baltimore etc. R. Co.*, 17 Md. 32; *Louisville etc. R. Co. v. Hall*, 12 Bush (Ky.) 131; *Rich. v. Boyer*, 39 Md. 314; *Moore v. Lewis*, 76 Mich. 300.

Where a defendant sued by a wrong name, fails to appear, he does not waive his right to object to the misnomer, after judgment and execution. *Farnham v. Hildreth*, 32 Barb. (N. Y.) 277.

Where a railway company of a certain name is sued and after the period of limitation has expired an amendment is allowed substituting a different name as being that of the defendant, and in the latter name the statute of limitations is pleaded, and the plaintiff replies that the suit was in fact originally brought against the defendant by a wrong name, the issue thus presented is one of fact only: viz, the identity of the party sued. *Pennsylvania Co. v. Sloan*, 125 Ill. 72.

Where in a summons issued on a case settled for the supreme court the names of the parties, Patmor and Rombauer, are spelled Palmer and Rambauer, respectively, but the summons was correct in every other respect, and the errors were caused by no fault of plaintiff in error or his attorney, the service will not be set aside on a motion filed more than four months afterward, and more than one year after the rendering of the judgment complained of, and after the time for bringing a case to the supreme court has elapsed. *Patmor v. Rombauer*, 41 Kan. 295.

If A B is arrested on process against C B, the plea that A B was intended is no justification in an action by A B for false imprisonment. *Shadgett v. Clipson*, 8 East 328; *Wilkes v. Lorck*, 2 Taunt. 400; *Griswold v. Sedgwick*, 6 Cow. (N. Y.) 456; *Mead v. Haws*, 7 Cow. (N. Y.) 322.

But a plea of justification by an officer in trespass that he took plaintiff's goods under a *distringas* against C B, meaning plaintiff, to compel an appearance by him in an action against him and averring plaintiff and C B are

made no provision for the case where a plaintiff was ignorant of the name of a defendant,¹ but such deficiency has been supplied by statute in many of the States.² To take advantage of these statutes it is necessary, however, that the plaintiff should

the same person, is not good unless plaintiff appeared in that action and did not plead the misnomer, the distinction being taken between the mesne and final process. *Cole v. Hindson*, 6 T. R. 234.

If the process is final, the sheriff must execute it or he is liable to action. *Compare Reeves v. Slater*, 7 B. & C. 486.

The statutes quoted in the second succeeding note authorizing suits against parties whose names are unknown will, however, justify an arrest if the party taken was the one intended. *Gurnsey v. Lovell*, 9 Wend. (N. Y.) 319; *Pindar v. Black*, 4 How. Pr. (N. Y.) 95.

1. Ignorance of Party's Name.—"The rule of the common law well establishes the principle that any proceeding in a court against a party defendant must be instituted against him as well as in his true surname as in his Christian name. If sued by any erroneous name in either respect he is not bound to appear, and if he omits to do so the judgment cannot be enforced against him. *Cole v. Hindson*, 6 T. R. 243; *Shadgett v. Clipson*, 8 East 238; *Wilkes v. Lork*, 2 Taunt. 400; *Scandover v. Wame*, 2 Camp. 270; *Morgan v. Bridges*, 1 B. & Ald. 647; *Crawford v. Satchwell*, 2 Strange 1218; *Walley v. McConnell*, 13 Ad. & Ell. 903; *Kelley v. Lawrence*, 3 H. & C. 1; *Griswold v. Sedgwick*, 6 Cow. (N. Y.) 456; *Hoffman v. Fish*, 18 Abb. Pr. (N. Y.) 76; *Farnham v. Hildreth*, 32 Barb. (N. Y.) 277; *Frank v. Levie*, 5 Robt. (N. Y.) 520; *Moulton v. Dr. McCarthy*, 6 Robt. (N. Y.) 470." ROBINSON, J., in *Gardner v. Kraft*, 52 How. Pr. (N. Y.) 499, 500.

2. Ignorance of Name of Party—Statutes.—"Where the plaintiff is ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered the pleading or proceeding may be amended accordingly." *Arizona*, Rev. Stat. 1887, § 669; *Dakota*, Comp. Laws 1887, § 4940. To same effect *California*, Deering's Cr. & St., vol. 3, § 474; *Farris v. Merritt*, 63 Cal. 118; *Idaho*, Rev. Stat. 1887, § 4230; *Indiana*, Rev.

Stat. 1881, § 397; *Kansas*, Gen. Stat. 1889, § 4226; *Massachusetts*, Pub. Stat. 1882, p. 923, § 20; *Michigan*, Howell's Annot. Stat. 1882, §§ 6873, 7308; *Montana*, Comp. Stat. 1887, p. 89, § 118; *Nebraska*, Comp. Stat. 1889, p. 873, § 148; *Nevada*, Gen. Stat. 1885, § 3091; *New Hampshire*, Gen. Laws 1878, p. 512, § 7; *North Carolina*, Code 1883, § 275; *Ohio*, Rev. Stat. 1890, § 5118; *Oregon*, Hill's Annot. Laws, p. 243; *South Carolina*, Code, § 136; *Utah*, Comp. Laws 1888, vol. 2, p. 254, § 3257; *Washington*, Code 1881, § 112; *Wisconsin*, Annot. Stat. (S. & B.), § 2612; *Wyoming*, Rev. Stat. 1887, § 2505. The *Iowa* statute is to the same effect except that it requires the plaintiff to describe the defendant "as accurately as practicable" *Iowa*, McClain's Annot. Code 1888, § 3762; *New Mexico*, Comp. Laws 1884, § 1887.

A suit against the heirs of A, does not sufficiently designate the defendant under this provision. *Reynolds v. May*, 4 Greene (Iowa) 283.

"If any plaintiff shall allege, in his petition, under oath that there are, or that he verily believes there are, persons interested in the subject matter of the petition whose names he cannot insert therein because they are unknown to him, and shall describe the interest of such persons, and how derived, so far as his knowledge extends, the court or the judge or clerk thereof, in vacation, shall make an order as in case of non-residence, vesting more over all allegations in relation to the interest of such unknown parties." *Missouri*, Gen. Stat. 1889, § 2027.

"Where the plaintiff is ignorant of the name or part of the name of a defendant, he may designate that defendant in the summons, and in any other process or proceeding in the action by a fictitious name or by as much of his name as is known, adding a description, identifying the person intended. Where the plaintiff demands judgment against an unknown person he may designate that person as unknown, adding a description tending to identify him. In either case the person intended is thereupon regarded as a defendant in the action, and as sufficiently described therein, for all pur-

ctually be ignorant of the defendant's name and unable to discover it; and he must so aver in his declaration.¹

IV. DESCRIPTIO PERSONÆ—(See also NAME, vol. 16, p. 112).—Parties to an action must be designated by name and not by a mere description.²

oses, including service of the summons. When the name or the remainder of the name or the person becomes known, an order must be made by the court upon such notice and such terms as it prescribes that the proceedings already taken be deemed amended by the insertion of the true name in the place of the fictitious name or part of a name, or the designation as an unknown person, and that all subsequent proceedings be taken under the true name." *New York*, Annot. Code, 1889, § 451.

Even in the absence of an express provision authorizing the substitution of a party's real name when known, it may be done under the statutory provisions allowing amendments. *Aruckle v. Bowman*, 6 Iowa 70.

1. Construction of Statutes.—The statutory provision authorizing a plaintiff, who is ignorant of the name of defendant, to designate him in the summons by a fictitious name, implies an action commenced, and a defendant sued or intended to be sued, whose name is unknown; it does not permit the use of such a name applicable to no particular individual, but adopted as an expedient to cover the name of a person whose name is known, who is not sued or intended to be sued at the outset, and thus permit him to be brought in a case plaintiff discovers at some later period that he should have been made a defendant. *Hancock v. First Nat. Bank*, 93 N. Y. 82.

A plaintiff is not allowed to use a fictitious name for the defendant at his discretion, but only when he is ignorant of the true name. If the name of the defendant be unknown he may be sued by a fictitious name, but there must be a distinct allegation in the complaint that the name is so used by reason of ignorance of the defendant's true name. *Gardner v. Kraft*, 52 How. Pr. (N. Y.) 499.

In an action against a firm, if the name of one member is unknown, and a fictitious name is used to represent him, it must be shown who the co-partner was by some description; also that his name was not known to the plaintiff,

and that the name used is fictitious. It is not allowable to a plaintiff to use a fictitious name at his discretion; but only when he is ignorant of the true name. *Crandall v. Beach*, 7 How. Pr. (N. Y.) 271.

When parties whose names are unknown are sued by fictitious names, the record should show the fact. *Ford v. Doyle*, 37 Cal. 346; *Waterbury v. Mather*, 16 Wend. (N. Y.) 611; *Crandall v. Beach*, 7 How. Pr. (N. Y.) 271.

And the suit will be dismissed in case it appear that the true name might have been easily ascertained by proper enquiry, and the plaintiff does not offer to insert the true name in the complaint. *Rozencrantz v. Rogers*, 40 Cal. 489.

If the defendants' true names are known, and they are sued by fictitious names, the true names cannot be substituted and the parties examined as parties defendant. *Hancock v. First Nat. Bank*, 93 N. Y. 82.

Practice.—On amending a complaint by inserting the true name of a defendant sued by a fictitious name, and duly served, it is not necessary to serve on him a copy of the amended complaint. *Brock v. Martinovich*, 55 Cal. 516.

Though A is served and appears, yet a judgment is void as against him, if sued by a fictitious name, unless the process is amended. *McCabe v. Doe*, 2 E. D. Smith (N. Y.) 64.

If the defendant so sued is served, appears and defends, he cannot complain in the supreme court for want of a formal amendment, substituting his real name. *Moore v. Lewis*, 76 Mich. 300.

An amendment inserting the true name of a defendant in place of a fictitious name, does not change the cause of action. *Farris v. Merritt*, 63 Cal. 118.

A defendant sued by a fictitious name is a party to the action from its commencement. *Farris v. Merritt*, 63 Cal. 118.

2. Descriptio Personæ.—The use of the words "and wife," following the defendant's name, does not make the

Initials may be used,¹ but the party may not be described in the alternative.² The character of the party, whether acting individually or in a representative character, must appear.³

wife a party. *Sossman v. Price*, 57 Ala. 204.

A suit against the "Missouri, Kansas and Texas Railroad Companies and their connecting lines on to Chattanooga," is so indefinite as to the parties defendant that no valid judgment can be rendered against anyone. *Vamell v. Speer*, 55 Ga. 132.

A summons must state the names of all the parties to the action. When there are several parties defendant, it is not sufficient to give the name of one in the summons followed by the words *et al.* *Lyman v. Milton*, 44 Cal. 630. The same rule applied to plaintiffs. *Yarish v. Cedar Rapids etc. R. Co.*, 72 Iowa 556.

A sued in the name of "A and Others, Guardians of X." On motion the "others" was stricken out and T. H. substituted. On appeal, *held* the suit was by A in her own right, the words "and others," etc., being matter of description merely and the court erred in permitting that amendment. *Carskadden v. McGhee*, 7 W. & S. (Pa.) 140.

In an action for injuries caused by a steamboat, the petition named the master as a party defendant, but did not designate the names of the owners, merely styling them "the owners," and they were not served with process. *Held*, that the suit was against the master only. *Kountz v. Brown*, 16 B. Mon. (Ky.) 577.

"The people of the U. S. of the Territory of Idaho" is not an improperly abbreviated title of a party to a cause under § 657 of the Civil Practice act. *People v. Sloper*, 1 Idaho 158.

In all actions and proceedings demanding relief, the names of all the parties thereto should be properly set forth in the summons and pleadings. A general designation of them as "the heirs of M. C." is irregular and will not be tolerated. *Kerler v. Corpening*, 97 N. Car. 330. See *Franken v. Trimble*, 5 Pa. St. 520.

1. Initials.—The fact that the parties to an action are designated by the initials of their Christian names, is no ground for the dismissal of the complaint or reversal of the judgment. The proper remedy is by motion to require the complaint to be corrected or

amended. *Kenyon v. Semon*, 43 Minn. 180.

2. Alternative.—A plaintiff cannot be described in the alternative as one or another. Who the party is must appear clearly and with certainty from the record. *Armstrong v. Durland*, 11 Kan. 15.

Persons may be joined as defendants against whom the right to relief is alleged to exist in the alternative, although a right to relief against one may be inconsistent with a right to relief against the other. *Connecticut Rules of Court*, No. 1, § 3, 58 Conn. 561.

3. Character of Party.—"The rule requiring the character of the party to appear, like most of the other rules of allegation in pleading, is founded upon these considerations:

"1. The adverse party is entitled to notice of the questions he is to come prepared to try.

"2. The court is to be provided with a definite issue within which to present the case to the jury.

"3. The record is to be so expressed that the judgment recovered may show what was determined between the parties, so as to close the controversy to the extent of defined limits.

"4. In the case of representative parties, the last reason is additionally important, for the rights or remedies of beneficiaries who are not parties to the action may be embarrassed by uncertainty as to the scope and effect of the judgment.

"5. To these it may be added that the question of capacity is material on the question of costs.

"But notwithstanding these considerations it is well settled that the action does not fail because of being brought in the individual capacity, when the cause of action accrued in a contract made with the representative as distinguished from one devolving on him in that capacity by the creation of the trust or representative relation." *Note to Stilwell v. Carpenter*, 2 Abb. N. Cas. (N. Y.) 238, 241.

In *Louisiana*, an action for movables is generally brought against the party in possession, and though plaintiff may, he is not bound to sue defendant in the capacity in which he holds the

The words "administrator," "agent," etc., appended to a party's name are merely descriptive unless the word "as" or its equivalent is used to show that the party is a party in a representative capacity.¹

property. *Warren v. Saltenberger*, 6 La. Ann. 352.

1. Words "Administrator," "Agent," etc.—Designating a party in the title of the action, as "A, executor of B, deceased," not using the word "as" or its equivalent, is merely a description of the person. *Stilwell v. Carpenter*, 2 Abb. N. Cas. (N. Y.) 238.

Contra, a suit by "A B, administrator," is a suit as administrator. *Laughter v. Butt*, 25 Ga. 177.

Where a plaintiff styles himself guardian of A B, and declares on a note payable to him in that character, but suit is not brought for the use of the ward, the action is his individual suit. *Bradley v. Graves*, 46 Ala. 277.

A suit by "A and B, his mother and *prochein ami*" is a suit by A and B, the words "his mother and *prochein ami*" being mere *descriptio personæ*. *Willingham v. King*, 23 Fla. 478.

A suit by "A B, agent," is an individual suit. *Owsley v. Woolhopter*, 14 Ga. 124; *Sutton v. Mansfield*, 47 Conn. 388.

A suit in the name of "A, governor, etc.," is A's individual suit, and will not support a declaration in the name of "A, governor of the State of X." *Chapman v. Spence*, 22 Ala. 588.

A suit by "A B assignee," is an individual suit. *Nutting v. Hill*, 71 Ga. 557; *Butterfield v. Macomber*, 22 How. Pr. (N. Y.) 150.

A suit by "A B, president (or cashier) of X Bank," is A B's individual suit. *Davies v. Byrne*, 10 Ga. 329; *Porter v. Nekervis*, 4 Rand. (Va.) 359. *Compare Sturgis v. Rogers*, 26 Ind. 1.

Word "As."—A suit against A as administrator, and commanding attachment of A's property, and that he be summoned, etc., is an action against him in his private capacity. *Baker v. Fuller*, 69 Me. 152.

An action is against a defendant in his individual capacity, notwithstanding it describes him as a trustee for another and is upon a note signed by the defendant "trustee of the estate," etc. *Blackstone Nat. Bank v. Lane*, 80 Me. 165.

In an action by A as administrator of his deceased wife, he cannot declare as such administrator on a right

of action vested in the plaintiff as the husband of his wife, and not as administrator. *Lynch v. Davis*, 12 How. Pr. (N. Y.) 323.

A suit by "M as next friend of S," instead of by "S, by his next friend M," is a mere irregularity without prejudice. *Wilson v. Me-he-chas*, 40 Kan. 648.

Where a defendant is described in the bill as "Major Commissary," etc., and that as such officer he acted so and so, such description may be regarded as surplusage, and the suit be treated as against him in his individual capacity. *Yulee v. Canova*, 11 Fla. 9.

Actions by Public Officers.—In an action by a public officer upon a bond running to him in his official character, the objection that it is not enough to designate the plaintiff by his official title alone, but that his individual name should be given, is one that must be taken before pleading to the merits and cannot be raised for the first time in the appellate court. *Berrien Co. Treasurer v. Bunbury*, 45 Mich. 791.

Actions by public officers, as such, should be brought in their individual names, with the title of their office added. If the title is thus added, and no objection is taken, on the trial it will be assumed, on appeal, that the fact that plaintiff filled such office was understood or taken for granted. *Paige v. Fazackerly*, 36 Barb. (N. Y.) 392.

The suit should be in the name of the officer followed by his official title, and not simply in the name of the office. *Horton v. Parsons*, 37 Hun (N. Y.) 42.

Actions Against Public Officers.—In a case where the chief magistrate of a State is sued not by his name but by his style of office, and the claim made upon him is entirely in his official capacity, the State itself may be considered a party in the record. *Governor of Georgia v. Sundry African Slaves*, 1 Pet. (U. S.) 110.

A suit by or against the governor of a State, as such, in his official character, is a suit by or against the State. *Commonwealth of Kentucky v. Dennison*, 24 How. (U. S.) 66.

In an action against "A, commissioner of highways in the town of X

The character, however, in which a party sues or is sued may be determined from the declaration, as well as from the words used in entitling the cause.¹ One who is a party in a representative

it sufficiently appears that A is sued in his official capacity. *Buyce v. Buyce*, 48 Hun (N. Y.) 433.

An action against the board of supervisors of a county should be brought against them individually, specifying their name of office. *Wild v. Columbia Co.*, 9 How. Pr. (N. Y.) 315.

When it is expressly required by statute that all acts or proceedings against a county in its corporate capacity should be in the name of the board of commissioners, an action against "A, B, C, and D, commissioners of X county, is erroneously brought and will be quashed because not in accordance with the statute. *Askew v. Pollock*, 66 N. Car. 49.

Where a writ commands the sheriff to summon "the board of commissioners of X county, composed of A" and others, the suit will be considered as one against the board in its corporate capacity, and the names of the members treated as surplusage. *Jones v. Commissioners of Rowan*, 85 N. Car. 278.

The fact that the action has been brought against the board of supervisors instead of against the supervisors individually, is not ground for setting aside the summons and complaint. If the board is sued, it must be assumed on such motion that it is sought to charge the county; and the objection that not the county, but the supervisors officially, are liable, and therefore the action ought to have been against them individually, though it may be a defense, or a reason for amending, is not to be taken by motion to set aside the proceedings. *Wild v. Columbia Co.*, 9 How Pr. (N. Y.) 315.

Upon the special question as to the right and liabilities of parties executing contracts as "agent, trustee, etc.," and the authorities upon the question whether such words are *descriptio personæ* or not, see *AGENCY*, vol. 1, p. 388, *et seq.*, and *BILLS AND NOTES*, vol. 2, p. 234, *et seq.* See also *Lawler v. Murphy*, 58 Conn. 294; *Martin v. Lamb*, 77 Ga. 252; *Miller v. Kingsbury*, 128 Ill. 45; *Nave v. First Nat. Bank*, 87 Ind. 204; *Stevenson v. Polk*, 71 Iowa 278; *Arts v. Guthrie*, 75 Iowa 674;

Beason v. Shively, 28 Kan. 574; *McDonald v. Laughlin*, 74 Me. 480; *Eastern R. Co. v. Benedict*, 5 Gray (Mass.) 561; *Hymer v. Ijams*, 56 Md. 470; *Balcombe v. Northup*, 9 Minn. 172; *Loeb v. Barris*, 50 N. J. L. 382; *Witters v. Sowles*, 61 Vt. 366.

A executed to "B, executor of C," a bond for the payment of money. B died, and his administrator brought suit on the bond. *Held*, B's administrator could not maintain the action. It should have been brought by the administrator *de bonis non* of C. *Balinger v. Cureton*, 104 N. Car. 474.

1. Character Appearing from Declaration.—When a name clearly appears in the body of a complaint as that of a party plaintiff, it is not essential that it should also appear in the caption. *Collins v. Lightle*, 50 Ark. 97; *Revill v. Claxon*, 12 Bush (Ky.) 558.

Where the names of the plaintiff and defendant were given in full in the caption and commencement of the complaint, but in a paragraph of the complaint the plaintiff was identified as "she" and "her" without reference to the caption. *Held*, that the parties were sufficiently referred to and identified. *Cates v. McKinney*, 48 Ind. 562; 17 Am. Rep. 768.

Plaintiff's name was not given in full in a petition and was referred to by masculine pronouns. The affidavit was signed C Z, agent for C Z, and stated that deponent knew the facts better "than the plaintiff herself." Amended answer and later pleadings admitted that Caroline Z. was plaintiff. *Held*, court properly found that Caroline and not Conrad Z. was real plaintiff. *Zimmerman v. Farmers' Ins. Co.*, 76 Iowa 352.

The character in which a party sues must be determined from the body of the declaration, and not from his description of himself in its caption. If, therefore, he describes himself as administrator in right of his wife, and declares on a right of action accruing to him individually, he must be regarded as suing in his individual capacity, and the superadded words must be held mere *descriptio personæ*, and as such may be stricken out. *Tate v. Shackelford*, 24 Ala. 510; 60 Am. Dec. 488; *Wolf v. Beaird*, 123 Ill. 585;

capacity is not a party in his individual capacity ;¹ but the same person may be a party in several capacities where the causes of action are such as may be joined, and he is a party plaintiff or defendant in every capacity,² for the same person may not be a plaintiff in one capacity and defendant in another.³

V. SAME PERSON CANNOT BE BOTH PLAINTIFF AND DEFENDANT.—A party cannot sue himself at common law, such procedure being only permissible in equity.⁴

Bragdon v. Harmon, 69 Me. 29; *Filson v. Dunbar*, 26 Pa. St. 475.

If the title of the action does not declare the character in which the plaintiff sues, it may be supplied from the body of the complaint. *Stilwell v. Carpenter*, 2 Abb. N. Cas. (N. Y.) 238.

An action was brought by "A as guardian *ad litem* of B, an infant under the age of 14 years." At close of case defendant moved to dismiss because the suit was not brought by the real party in interest. *Held*, that as the complaint stated a cause of action in favor of the infant, averring a wrong done to her and damages suffered by her, and so indicating that she was the real plaintiff, appearing by her guardian *ad litem*, the defendant was not misled. The formal defect in the title was waived by failure to object prior to answer. *Spooner v. Delaware etc. R. Co.*, 115 N. Y. 22.

Where a complaint shows a cause of action in favor of plaintiff individually, the addition of the word "executor, etc., in the title of the action, and a statement in the complaint that he is executor of the will of a deceased person named, do not prevent a recovery by him individually; the descriptive words may be rejected. *Litchfield v. Flint*, 104 N. Y. 543; *Bragdon v. Harmon*, 69 Me. 29; *Baker v. Fuller*, 69 Me. 152.

A suit against "A, administrator of B," is an action against A in his representative character if the declaration is on an indebtedness of said B. *Jennings v. Wright*, 54 Ga. 537; *Waldsmith v. Waldsmith*, 2 Ohio 156; *Pennock v. Gilleland*, 1 Pitts. (Pa.) 37.

And *vice versa*. *Bagley v. Roberson*, 57 Ga. 148; *Filson v. Dunbar*, 26 Pa. St. 475.

Although a municipal officer is not sued by his official title, that is no valid objection if his liability is shown. *Hart v. Port Huron*, 46 Mich. 428.

1. **Party in Two Capacities.**—One who is a defendant in a particular

capacity as executor, etc., is not a party to the action in his individual capacity, and consequently a judgment entered therein will not bind her individually. *Stockton B. & L. Assoc. v. Chalmers*, 75 Cal. 332.

2. In a suit by a decedent's creditors against A the administrator and A, B and C individually seeking to compel a transfer to the estate property alleged to be held by A, B and C on a constructive trust for the estate, it was held that there was a misjoinder of parties defendant and of causes of action. *Mesmer v. Jenkins*, 61 Cal. 151.

A plaintiff was designated in the title executrix, etc., and the complaint stated that in the will she was named executrix and sole devisee. *Held*, that she could sustain the action in both capacities. *Stilwell v. Carpenter*, 2 Abb. N. Cas. (N. Y.) 238.

A plaintiff may in one action sue in two different capacities—*e. g.*, as executor and devisee—where the causes of action are such as may be joined. *Armstrong v. Hall*, 17 How. Pr. (N. Y.) 76.

In a complaint against an administrator of a deceased agent to compel an accounting, etc., the plaintiff may ask judgment against him individually for the payment of moneys, and the delivery of books and specific property, belonging to plaintiff, which came to the deceased as such agent, and which the defendant has possession of and refuses to deliver. *Day v. Stone*, 15 Abb. Pr. N. S. (N. Y.) 137.

Plaintiff declared in one count against A individually and in another count against "A, trustee of X." *Held* no misjoinder, the words trustee of X being merely *descriptio personæ*. *Blackstone Nat. Bank v. Lane*, 80 Me. 165.

3. See the notes to the following subdivision of this article

4. **Party Cannot Sue Himself.**—The same person cannot be both plaintiff and defendant, either solely or with

A partner cannot sue his firm,¹ and partnerships having common members cannot sue each other.² An obligee cannot sue his co-obligors on a joint obligation.³ This rule applies though the party appears as plaintiff in one capacity

others. *Eastman v. Wright*, 6 Pick. (Mass.) 316; *Pearson v. Nesbitt*, 1 Dev. (N. Car.) 315; 17 Am. Dec. 569.

Where the plaintiff and defendant are the same person, a suit at law cannot be entertained; the remedy is in the court of equity. *Livingston v. Livingston*, 2 Treadw. Const. (S. Car.) 428.

Where the members of an unincorporated volunteer company in the militia subscribed certain constitutional articles, whereby they severally promised to pay to the treasurer of the company for the time being, all fines and assessments which should become due from them to the treasurer or to the company, *held*, that an action by the treasurer against a member to recover an assessment, could not be sustained, because there was no valid consideration for the defendant's promise, it not appearing that any money had been advanced or expenses incurred on the faith of such promise, and because, as the defendant was jointly interested in the funds of the company, the action involved the legal absurdity of a party's suing himself. *Warren v. Stearns*, 19 Pick. (Mass.) 73.

1. Partner Suing Firm.—If a firm employs one of its number to defend a suit on a firm's indebtedness, said member may not sue the firm for his bill of costs incurred in such suit. *Milburn v. Codd*, 7 B. & C. 419.

A member of a firm to whom a firm obligation has been assigned, may not sue another member of the firm who as a member of the firm received a payment on account of said obligation. *Teague v. Hubbard*, 8 B. & C. 345.

One partner may sue his co-partner for conspiracy with others to injure plaintiff. *Murray v. McGarigle*, 69 Wis. 483.

2. Partnership with Common Members.—If one person is a member of two firms, these firms could not sue each other at law, their remedy being only in equity. *Bosanquet v. Wray*, 6 Taunt. 597; 2 Marsh. 319; *Portland Bank v. Hyde*, 11 Me. 196. See *Herrriott v. Kersey*, 69 Iowa 111.

Whether the fact that two co-partnerships having a common member are interested as tenants in common in the estate to be divided, would be a bar to the prosecution of a petition for partition by one of the firms on the ground that no one can be both plaintiff and defendant, was queried in *Blaisdell v. Pray*, 68 Me. 269.

3. Party Both Obligor and Obligee.—If the same person is both a maker and payee of a note, he cannot sue his co-makers if the note be joint, but *contra* if it be severable. *Moffatt v. Van Mullingen*, 2 B. & P. 124, n.; *Beecham v. Smith*, El. Bl. & El. 442; *Faulkner v. Faulkner*, 73 Mo. 327.

Where A, B, C, D, *et al.* unite in a joint and several note, and in a mortgage to secure the same to A, B and C, said A, B and C may sue D *et al.* without joining themselves as defendants. *McDowell v. Jacobs*, 10 Cal. 387.

Where one of several joint obligees or promisees is also obligor or promisor since the suit must be in the name of the assignor, neither the assignee of the other nor of all the obligees or promisees, can sue at law. The only remedy is in chancery. *Gatewood v. Lyle*, 5 T. B. Mon. (Ky.) 6; *Ramsey v. Johnson*, Minor (Ala.) 418; *Justices v. Armstrong*, 3 Dev. (N. Car.) 286.

When, however, the real party in interest must sue, and a joint obligation is made by statute several as well as joint, the assignee of a payee may sue one of several makers, although his assignor was also a maker. *Willis v. Neal*, 39 Ala. 464.

If the subscribers to a railway company prior to incorporation procure services of one of their number as a surveyor, he may not sue at law for compensation for such services. *Holmes v. Higgins*, 1 B. & C. 74. To same effect *Eastman v. Wright*, 6 Pick. (Mass.) 316.

An action at law cannot be maintained by a party of the first part to a contract made with himself and others of the second part. He can only obtain redress in equity. *Price v. Spencer*, 7 Phila. (Pa.) 179.

and as defendant in another;¹ but whether the rule operates to prohibit a plaintiff from summoning himself as a garnishee, is disputed.² This rule, however, does not apply unless the party appear on the record to be on both sides of the action,³ and the identity of the party is proved.⁴ This common law rule is, in some States,

1. Party in Different Capacities.—The rule that a party cannot be both plaintiff and defendant in an action will operate, although the party appears on one side in his individual and on the other in his official character. *Moffat v. Van Mullingen*, 2 Chitty 539; *McElhanon v. McElhanon*, 63 Ill. 457; *McKnight v. Calhoun*, 36 La. Ann. 408; *Harris v. Pickett*, 37 La. Ann. 741. But see *Bosland v. Stokes*, 27 W. N. C. (Pa.) 411.

A mortgagee who is also administrator of the mortgagor, cannot by a nominal assignment of the mortgage, have it foreclosed for his benefit. *Brown v. Mann*, 71 Cal. 192.

Where two executors confessed a judgment to a co-partnership, of which one of them was a member, it was held to be error in fact, and for it the judgment was reversed. *Pearson v. Nesbit*, 1 Dev. (N. Car.) 315; 17 Am. Dec. 569.

Under a rule of court that parties to a suit shall be taken in the way they stand on the docket, unless denied by special notice filed with the plea, an executor sued by an individual cannot, in the absence of such notice, set up the point that plaintiff was a co-executor. *Pringle v. Pringle*, 130 Pa. St. 565.

2. Party, Plaintiff and Garnishee.—“Although the rule is that one person cannot be both plaintiff and defendant in an adversary proceeding, yet the authorities seem to be about evenly divided upon the question whether a plaintiff in an action may have himself summoned as garnishee. But one of several defendants liable *in solido* to the plaintiff cannot be so charged. In a suit by a married woman against her debtor, her husband may be summoned under this process.”

This statement of the law is taken from the article GARNISHMENT, vol. 8, p. 128.

In addition to the authorities there cited, see the following:

Plaintiff may garnishee himself. *Richardson v. Gurney*, 9 La. 285.

If an action be brought against two persons as partners, and one of the

defendants and two others as partners in another concern are summoned as trustees, they cannot be holden as trustees, and must be discharged. *Deny v. Metcalf*, 28 Me. 389.

A firm cannot bring a suit and summon one of its members as a garnishee. *Blaisdell v. Ladd*, 14 N. H. 129.

3. Party Must Appear on Both Sides on Record.—In questions of jurisdiction when such jurisdiction depends upon the parties, the question is determined by the parties on the record, and not by the parties equitably interested. *Sharp's Rifle Mfg. Co. v. Rowan*, 34 Conn. 329.

It is no bar to a recovery that one of several defendants has become possessed of the right of action prosecuted against him and his co-defendants, unless his name appears upon the record both as plaintiff and defendant. *Blanchard v. Ely*, 21 Wend. (N. Y.) 342; 34 Am. Dec. 250; *Smith v. Latimer*, 15 B. Mon. (Ky.) 75.

So where A, being indebted to B, buys a claim against B, owned by C, and then sues thereon in C's name, garnisheeing himself, it was held that the question whether A could sue and garnishee himself was immaterial, because in this case the court looks only at the parties to the record, and the record plaintiff in this case is C. *Beach v. Fairbanks*, 52 Conn. 167.

A note made by the firm of A and B was made payable to A and C, administrators of X. A as administrator assigned his interest therein to C, who brought suit against the firm. *Held*, the action lies. *Smith v. Gregory*, 75 Mo. 121. A and B, executors of C, sued D, E and F. At the trial, D and E moved to amend by adding the name of F co-executor with A and B to names of plaintiffs, and by striking off the name of F as defendant. Refused because made too late. *Conrow v. Conrow*, 24 W. N. C. (Pa.) 339.

4. Identity Must be Proved.—The rule that, from identity of name identity of person may be presumed, cannot be extended so far as to sustain the inference that the same name appearing as plaintiff and defendant in

modified by statute.¹

VI. PARTY MUST HAVE AN INTEREST AND CAPACITY TO SUE OR BE SUED.—No one can be a party to an action who has no interest therein,² and the interest must exist at the time of bringing the

an action represents one and the same person. *Wilson v. Benedict*, 90 Mo. 208.

1. Statutory Modifications.—By a *Pennsylvania* statute it is provided that, "No action now pending on a writ of error, or otherwise, or hereafter to be brought by partners or several persons against partners or several persons, shall abate, or the right of such partners or several persons, plaintiffs, to sustain their action be defeated by reason of one or more individuals being or having been members of both firms, or being or having been of the parties plaintiffs, and also of the parties defendants in the same suit." etc. Act of April 14th, 1838, § 1, P. L. 457.

This act does not authorize one partner to sue himself and his co-partners in assumpsit. *Miller v. Knauff*, 2 Clark (Pa.) 11; *McFadden v. Hunt*, 5 W. & S. (Pa.) 468; *Hall v. Logan*, 34 Pa. St. 331; *Crow v. Green*, 111 Pa. St. 637.

2. Party Must Have an Interest.—No one can be a plaintiff who has not an interest in the suit. *Southern L. Ins. etc. Co. v. Lanier*, 5 Fla. 110; 58 Am. Dec. 448; *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Shoemaker v. Grant Co.*, 36 Ind. 175; *Townsend v. Townsend*, 5 Harr. (Del.) 127; *Stoddard v. Mix*, 14 Conn. 121.

A plaintiff who is not the payee in a note, cannot sue therein in his own name without an assignment to him. *Newman v. Ravenscroft*, 67 Ill. 496.

The same is the law in *Louisiana*. *Foltier v. Schroder*, 19 La. Ann. 17. *Contra*, under the codes requiring "real party in interest" to sue, see *infra* in this article.

The legal plaintiff must have had a right to sue, and if not, a suit by him for the use of those who could sue, is not maintainable. *Buchter v. Dew*, 39 Ill. 40; *Larned v. Carpenter*, 65 Ill. 543.

A contracted in person to furnish brick for B's house. The brick came from a yard owned by A but operated in the name of X & Co. A sued in his own name on the contract. *Held*, on proof that A and X & Co. were

identical, A could recover. *Wall-hormfechtel v. Dobyns*, 32 Mo. 310.

A sheriff who has paid over to a judgment creditor, under the mechanic's lien law, the full amount of his claim, when he was only entitled to be paid, with other judgment creditors, *pro rata*, cannot sue to recover back the excess, as he has no legal or equitable right to it. *Buchter v. Dew*, 39 Ill. 40.

A testator devised lands to his executors in trust to hold the same until his children reached a certain age, and then the lands to be divided among them. The time for the division having arrived the executors brought suit against the testator's widow and children, to obtain (1) a construction as to the widow's right in the realty, (2) an order to sell the land since it could not be partitioned. Demurrer that plaintiffs have no right to sue. *VAN FLEET, V. C.*, "The purpose for which the legal title was placed in the complainants has been accomplished, the trust is ended and the devisees are now entitled, by the terms of the trust, to be invested with a full and complete title to the lands. They are now for all practical purposes, the absolute owners of the lands . . . It is clear that, at the time this bill was filed, the complainants were, both as a matter of law and as a matter of fact, without the least right to or power of control over these lands. They were the property absolutely of the defendants. The duty of making partition of them was not imposed by the will upon the complainants; nor is it claimed or pretended that the condition of the personal estate was such that it could not be divided among the persons entitled to it according to the will, unless the whole or a part of the lands were brought into the division. The complainants, it would seem, therefore, are, in respect to the action they ask the court to take concerning the lands, mere interlopers. They are seeking judicial aid in respect to a matter in which they have no interest, either personal or fiduciary. The rule, I think, must be regarded as funda-

suit.¹ When a party has a *bona fide* interest sufficient to author-

mental, that no person can maintain an action respecting a subject matter in respect to which he has no interest, right, or duty, either personal or fiduciary. The demurrers must be sustained and the complainants' bill dismissed." *Baxter v. Baxter*, 43 N. J. Eq. 82.

A bill to restrain waste cannot be brought by one having no interest in the estate, though agent of the owner. The bill must be in the owner's name. *Hunter v. Noekolds*, 15 L. J. Eq. 320.

If in a proceeding in the nature of a creditor's bill, it appear that plaintiff's judgment was not in his favor but in favor of his children who are now adults, but of whom he was once guardian, the suit will be dismissed. *Ashby v. Ashby*, 39 La. Ann. 105.

"Nothing is more clear than this (I am keeping distinct the questions of injury to private property and the injury to the public), that one man cannot come into this court and complain of an injury affecting the property of another person." *ROMILLY, M. R.*, in *Attorney-Gen'l. v. United Kingdom Electric Tel. Co.*, 30 Beav. 287, 290.

A suit on an administration bond for the conversion of property expressly bequeathed to A cannot be brought by B, another heir and legatee, but having no interest in the goods converted. *State v. Ruhlman*, 111 Ind. 17.

One who has no right or title to sue cannot be joined with others who may have. *Lillard v. Ruckers*, 9 Yerg. (Tenn.) 64.

A suit to contest the validity of a will can only be brought by a party in interest. The language, "any person may contest the validity of a will," etc., as used in a statute on the subject of wills must be limited by the provision of the code, which requires every action to be prosecuted in the name of the real party in interest. *Niederhaus v. Heldt*, 27 Ind. 480.

If under a statutory provision A is sued as a co-defendant in a county where he does not reside, it is necessary that the defendants resident in said county should have a real and substantial interest in the subject of the action adverse to the plaintiff and against whom substantial relief is sought, or the action will be dismissed

on A's motion. *Allen v. Miller*, 11 Ohio St. 374.

The fact that a party appears in and defends an action alone, is not evidence that he is the party in interest. *Carleton v. Patterson*, 29 N. H. 580.

Where one is made a party defendant to an action, who is neither a necessary nor a proper party thereto, the plaintiff cannot be heard to object to his right to assail the complaint or petition, by assignment of error in the supreme court on appeal. *Renner v. Ross*, 111 Ind. 269.

A petition to foreclose a lien alleged that defendant "claims or appears to have of record" some right or title to the premises. An amended petition alleged a deed executed the day before suit was brought by defendant and "conveying or purporting to convey" all the title. Neither averment was denied. *Held*, defendant appeared to have an interest in the matter in controversy. *Stanbrough v. Daniels*, 77 Iowa 561.

1. Interest Must Exist Prior to Suit.—

A plaintiff who sues as the assignee of a cause of action (in which he has no interest at the time of suit brought) cannot maintain his action by purchasing after issue joined, the cause of action described in his complaint. *Garrigue v. Loescher*, 3 Bosw. (N. Y.) 578.

A subsequent ratification of an unauthorized assignment will not enable plaintiff to continue his suit. *Read v. Buffum*, 79 Cal. 77.

The assignee may bring suit on the very day of the assignment, and this although the assignment was of claims for labor performed by the assignors "within two years last past." *Frazer v. Oakdale Lumber etc. Co.*, 72 Cal. 187.

There can be no recovery where the uncontroverted evidence shows that the plaintiff had, prior to the bringing of the suit, assigned the claim in controversy to a third person. *Buffington v. South Missouri Land Co.*, 25 Mo. App. 492.

The fact that, after a suit is instituted, the plaintiff is in custody at the suit of a creditor, and confesses judgment and takes the benefit of the act for the relief of insolvent debtors, and surrenders his interest in the suit he had brought, does not constitute a bar to the action; but it may still be pros-

ize him to bring suit, and the suit is prosecuted to determine a question, which his interest entitles him to have decided, the court will not enquire into the motives actuating him in bringing the suit.¹ A suit, however, will be held to be collusive if prosecuted by one whose interest is not *bona fide*, or for an apparently improper purpose,² and also where parties are joined or the cause

ecuted in his name. *Peshine v. Shep-* person, 17 Gratt. (Va.) 472, 94 Am. Dec. 468.

If, however, an assignor sues without the consent of the assignee and then the assignee re-assigns to the assignor, the assignor may continue his suit for his own benefit. *Moore v. Spiegel*, 143 Mass. 413.

1. Motion of Party.—When a plaintiff has an interest sufficient to bring his action, the court cannot enquire into the motives actuating him. Thus where a tax payer in X town petitioned for an injunction restraining the transfer of real estate by said town to the county in consideration of the location there of the county seat, it is immaterial that the plaintiff is also a tax payer and a resident in Y town where the county seat was then located, and may be induced to bring this action by other motives than a desire to escape liability for taxes in X town. *Brockman v. Creston*, 79 Iowa 587.

So where a party petitions to remove the county seat to another place, the fact that he owns real estate there is immaterial. *Collins v. Ripley*, 8 Iowa 129.

Where a plaintiff seeks to have a municipal contract declared void, and avers facts sufficient to give him a standing in court, the plaintiff's right to the relief sought cannot be successfully challenged by averments that the bill is not filed in good faith, or that plaintiff represents an unsuccessful bidder at whose instance the bill was filed. *Mazet v. Pittsburgh*, 27 W. N. C. (Pa.) 73.

Stockholder in Rival Corporations.—Where there was no doubt that the plaintiff owned his stock, though he had apparently purchased the same to enable him to bring the suit, which was intended to question the right of the directors to calculate the dividends in a certain manner, the court held the suit lay. LORD CHELMSFORD: "However questionable the mode of the plaintiff's introduction to the company may have been, he has an actual

interest in the subject matter of the suit . . . If the question put by, etc. . . . is repeated in this case, 'Is the suit *bona fide* the plaintiff's own suit, or is he merely the hand by which some one else acts?' The correct answer must be, that he consented to become the instrument of others, but for that purpose he has acquired an interest which gives him a common cause with them. I cannot say that, having chosen to place himself in this invidious position with a real interest, though of no great amount at stake, he is not to have the ordinary rights of a plaintiff on account of the motives which led him to acquire the means of appearing in that character." *Bloxam v. Metropolitan R. Co.*, L. R., 3 Ch. App. Cas. 337, 354; *Ramsey v. Gould*, 57 Barb. (N. Y.) 398.

If one be a *bona fide* holder of stock and file a bill to enjoin the company from making a purchase not authorized by the charter, it is not a sufficient reply to the bill that the plaintiff is not in good faith seeking the interests of the company, but is acting in the interests of a rival road. Each stockholder has a right to stand upon his contract, as provided by the charter. *Central R. Co. v. Collins*, 40 Ga. 582.

The mere circumstance that the suit was instigated by a rival company is not alone sufficient to impeach plaintiff's standing. *Colman v. Eastern Counties R. Co.*, 10 Beav. 1.

2. Collusive Suits.—In several cases of bills filed by stockholders to enjoin the performance of a contract by a corporation alleged to be *ultra vires*, the fact that plaintiff became a stockholder for the purpose of bringing the suit, the winning of which would benefit another company in which he was also a stockholder, was considered by the court. *Hare v. London etc. R. Co.*, 2 J. & H. 80, 119; *Rogers v. Oxford etc. R. Co.*, 2 De G. & J. 662, 674.

So where the suit was brought at the instigation of a third party solely to annoy the directors, and said third party had apparently paid for the

of action assigned solely for the purpose of giving jurisdiction to the court.¹ An allegation that the action is collusive must be

stock held by the plaintiff. *Robson v. Dodds*, L. R., 8 Eq. 301.

Where, however, a plaintiff in such a suit admitted that he was a shareholder in a rival company, and instituted the suit by the direction of the latter company who indemnified him against costs, LORD CAMPBELL dismissed the suit, distinguishing this case from one where the plaintiff has been merely instigated to bring the suit by a rival company. "In the one case the suit is the suit of the plaintiff, and is, for aught that appears, instituted at the peril of the plaintiff. In the other case, the whole origin of the suit and the direction and conduct of it emanate altogether from the other company, and the suit would have no existence whatever but for the order of the other company. . . . I have nothing to do with the motives of plaintiffs suing in this court. If they come here in a *bona fide* character, the reason for their coming here is a matter beyond the province of a court of justice to enquire into. But if a man comes here representing to me that he is a *bona fide* shareholder in a company, and that it is the *bona fide* suit of that company, and it turns out not to be the suit of that company, not in reality to be in its origin and its very birth and creation the suit of another company, then I repeat that this is an illusory proceeding and not to be attended to by the court." *Forrest v. Manchester etc. R. Co.*, 4 De G. F. & J. 126, 131, 132; 7 Jur., N. S. 887; *Filder v. London etc. R. Co.*, 1 Hem. & Mil. 489; *Waterbury v. Merchants' Union Express Co.*, 50 Barb. (N. Y.) 157; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637.

Equity will not grant relief "against an action at law where it satisfactorily appears that the proceedings were undertaken merely at the instigation of another person. High on Injunctions (3rd ed.), § 1550; Kerr on Injunctions (3rd Eng. ed.) 22, 170.

"The motives with which a suit is instituted are not generally to be regarded, but if it can be shown satisfactorily that the suit has been instituted by one man merely for the purposes of or, at the instigation of another, the court will not relieve. The fact, however, that the suit may have been got

up by a third party is not enough to deprive a man of his right to have a nuisance discontinued." Kerr on Injunctions (3rd Eng. ed.) 170.

1. **Joinder of Parties or Assignment to Give Jurisdiction.**—The U. S. statutes of March 3rd, 1875 (18 Stat. at Large 470), as amended by the statute of March 3rd, 1887 (24 Stat. at Large 552), provides that assignees can sue in the *United States* courts only when their assignors could do so, except in the case of foreign bills of exchange and certain promissory notes, and also provides that a suit may be dismissed if it appear that "the parties to said suit have been improperly or collusively joined, either as plaintiffs or defendants for the purpose of creating a case cognizable or removable under this act" to the *United States* courts. See *Corbin v. Black Hawk Co.*, 105 U. S. 659.

The statute which requires a suit to be dismissed when it appears that a party has been collusively made or joined for the purpose of creating a case cognizable in the *United States* courts is not intended to restrict those who contemplate bringing a suit from selecting as adversaries all those against whom any substantial relief may be sought. *Garrett v. New York Transit etc. Co.*, 29 Fed. Rep. 129.

In an action to foreclose a mortgage, it was alleged that the mortgage had been assigned to the plaintiff collusively to create a case cognizable in the *United States* courts. WAITE, C. J.: "The transfer was undoubtedly made for the purpose of putting it in the power of Winslow, Lanier & Co., to bring a suit; but this, for anything that now appears, might as well have been begun in a State as in a federal court. The object of the bank seems to have been not to give jurisdiction to the courts of the *United States* but to create an ownership which would cut off the anticipated defenses of the mortgagors. That of itself is not enough to make it proper for the courts of the *United States* to refuse to take jurisdiction, if the title made by the transfer is complete, and such as will enable the assignee to maintain a suit in his own name at all. To justify a dismissal it must appear that the object was to create a case cognizable

explicitly made, and when so made by a defendant it is taken to be true unless denied.¹ The presumption is, however, always in favor of plaintiff's right and capacity to sue, until something is properly averred against it.² At common law it is sufficient if the party plaintiff has the legal title to sue.³

under the act of 1875." *Lanier v. Nash*, 121 U. S., 404, 410.

The owner of a tract of land may convey it to a non-resident, in order that the title may be tried in the federal courts, but the conveyance must be made *bona fide* and not merely colorable to enable the suit to be so brought for the grantor's benefit. *Jones v. League*, 18 How. (U. S.) 76.

It is the duty of a *United States* court to dismiss a suit if the parties thereto have been improperly or collusively made or joined for the purpose of creating a case of which that court would have cognizance. *Harris v. Oakland*, 104 U. S. 450.

Where a plaintiff has the legal title to coupons payable to bearer, he can sue upon them, although he bought them merely with the object of bringing suit upon them in this court, and intending, if he collected them, to pay over a portion of the recovery to some other person. *Pennie v. Thompson*, 17 Blatchf. (U. S.) 18.

Where the plaintiff and the real defendant reside in different States, such defendants may remove the case to the *United States* courts, although there may be joined with them nominal defendants who reside in same State as plaintiff. *Steiner v. Mathewson*, 77 Ga. 657.

But when a claim is assignable, and is assigned to a citizen of the same State as the defendant, for no other purpose than to defeat a transfer of the action on the claim to the federal courts, such motive for the assignment is lawful, and will not defeat an action thereon brought by the assignee in his own name in the State courts. *Vimont v. Chicago etc. R. Co.*, 69 Iowa 296.

Although by statute, a plaintiff may sue a number of defendants in any county where one of them resides, he cannot for the purpose of obtaining jurisdiction over a non-resident of the county, improperly join one who is a resident. On discovery of such improper joinder, the case should be dismissed. *Kerrin v. Roberson*, 49 Mo. 252; *Pearl v. Pickett*, 8 Tex. 122.

1. Allegation of Collusive Action.—

Where defendants in their answer allege that plaintiff was not the real party, but that the action was prosecuted wholly at the instigation and in the interest of rival companies which were the real and actual plaintiffs, and this allegation is not denied, the fact as alleged by defendants must be taken to be true. *Waterbury v. Merchants' Union Express Co.*, 50 Barb. (N. Y.) 157.

A mere allegation in an affidavit that the suit was instigated by third parties not named, although not denied, which allegation is not made in the answer, is not sufficient proof of the fact alleged. *Pentney v. Lynn Paving Commrs.*, 13 W. R. 983.

2. Presumptions.—Plaintiff's right to sue is always presumed, until the contrary is alleged. *Otto v. St. Louis etc. R. Co.*, 12 Mo. App. 168.

A person suing in a representative capacity must allege his right so to sue. *Atchison v. Twine*, 9 Kan. 350.

Where such capacity is properly alleged, it is presumed to exist until it has been disputed. *Hamilton v. Lemphear*, 54 Conn. 237.

A suit in behalf of minors cannot be maintained by a person who is not a party in interest, but who describes himself as guardian of the parties who are interested, when there is no averment that they are minors. The law in such case presumes them to be adults. *Maxedon v. State*, 24 Ind. 370.

If a defendant sets up an assignment by plaintiff, the burden of proof is on defendant. *Hay v. Frazier*, 49 Iowa 454.

3. Legal Title Sufficient.—Payees in a bill having the right to sue the acceptors, may do so even for the use of the drawers. *Davis v. Baker*, 71 Ga. 33.

The payees in a note, if they have possession thereof, may sue thereon in their own name, notwithstanding he has written an assignment on the back of it, as such endorsement is under his control, and he may strike it out or not, as he thinks proper. *Best v.*

VII. PARTY HAVING LEGAL TITLE MUST SUE.—The party vested with the legal title is considered, at common law, to have *ipso facto* an interest entitling him to sue, and he is the only person permitted to sue, although the suit be brought for the sole benefit of another party.¹ Thus the obligee of a contract or non-negotiable paper must sue thereon.² Suits relating to trust property

Nokomis Nat. Bank, 76 Ill. 608; Sweet v. Garwood, 88 Ill. 407; Kerrick v. Stevens, 58 Mich. 297. Compare Whittenhall v. Korber, 12 Kan. 472.

The fact that a note under seal bears a special endorsement under the signature of the obligee, does not prevent such obligee from recovering upon it in his own name, there being no evidence that the note has ever been assigned or delivered to the person named in the special endorsements, or that he has any interest in it. Dean v. Warnock, 98 Pa. St. 565.

1. Party Having Legal Title Must Sue.

—At common law the party having the legal title must sue. Governor of Arkansas v. Ball, Hempst. (U. S.) 541; Gardner v. Armstrong, 31 Mo. 535; Kounty v. Holthouse, 85 Pa. St. 235.

At common law, an action must be brought by the person invested with the legal title. An equitable title conferred no right to sue. And a suit by a person owning the equitable title in his own name could not be brought.

Weathers v. Ray, 4 Dana (Ky.) 474; Pollard v. Somerset Mut. F. Ins. Co., 42 Me. 221; McLean Co. Coal Co. v. Long, 91 Ill. 617; Frankem v. Trimble, 5 Pa. St. 520; De Cordova v. Atchison, 13 Tex. 372.

"It has long been settled in this State, that the promisor upon negotiable paper cannot avoid judgment against him in a suit upon the obligation merely upon the ground that the person or party in whose name the suit is brought or prosecuted has no interest in the enforcement of the promise." BARROWS, J., citing a number of cases. Ticonic Bank v. Bagley, 68 Me. 249; Spofford v. Norton, 126 Mass. 533; Pitts v. Holmes, 10 Cush. (Mass.) 92; McHenry v. Ridgely, 3 Ill. 309; 35 Am. Dec. 110; Labaume v. Sweeney, 17 Mo. 153; Field v. Weir, 28 Miss. 67; Forrest v. O'Donnell, 42 Mich. 556; Raymond v. Johnson, 11 Johns. (N. Y.) 488.

Even though the note or check states, "Pay to A for account of B," A as payee is entitled to sue at common

law. Ridgely Nat. Bank v. Patton, 109 Ill. 479.

The want of the proper payee as a nominal plaintiff is matter of form, not in issue on *non est factum*, cured by a verdict and not fatal in arrest of judgment. Wolfe v. Tyler, 1 Heisk. (Tenn.) 313.

"As a general rule, the action on a contract, whether express or implied, or whether by parol or under seal, or of record, must be brought in the name of the party in whom the legal interest in such contract is vested, and against the party who made it in person or by agent." Georgia Code, 1882, § 3257.

"An action for a tort must, in general, be brought in the name of the person whose legal right has been affected, and who was legally interested in the property at the time the injury thereto was committed, and against the party committing the injury, either by himself, his servant, or agent in his employment." Code of Georgia, 1882, § 3258.

2. Contracts.—At common law, an action upon an express contract in writing must, except in the case of negotiable paper, be brought in the name of the party to whom it was made; and it is not competent to show by parol that the promisee was the agent of another person, for the purpose of enabling such person to maintain an action in his name on the agreement. Newcomb v. Clark, 1 Den. (N. Y.) 226.

An action on a contract must be in the name of the party in whom the legal interest is vested. Dix v. Mercantile Ins. Co., 22 Ill. 272.

A party holding a receipt to another, for goods delivered, should bring his action for the value thereof, in the name of that other. Collins v. Johnson, Hempst. (U. S.) 279.

An action to recover money expended from the treasury of a municipal corporation by the board of health in removing a nuisance, is properly brought in the name of the corporation. Salem v. Eastern R. Co., 98 Mass. 431; 96 Am. Dec. 650.

must be in the name of the trustee;¹ but an attorney in fact is not a trustee in this sense.² The payee or holder by proper endorsement of negotiable paper,³ the person in lawful possession

An action can be maintained on notes or obligations only by those in whom the legal title is vested. *Foltier v. Schroder*, 19 La. Ann. 17, 92 Am. Dec. 521.

Thus on a note executed to A as trustee for B, A or his personal representative must sue. *Society of Chaplin v. Canada*, 8 Conn. 286. *Treat v. Stanton*, 14 Conn. 445; *Porter v. Raymond*, 53 N. H. 519.

In an action by C against A upon a non-negotiable promissory note, signed by A and payable to B or bearer. C offered to prove that when A gave him the note, he told A it should be in his, C's name or order, and C replied, "It is all right; it makes no difference, it is payable to bearer and you can collect;" but the evidence was held inadmissible to vary the legal effect of the instrument, and could not operate to estop C from contending that A could not sue on the note in his own name. *Whitwell v. Winslow*, 134 Mass. 343.

So where A executed a bond to indemnify B and C for becoming bail for X and C did not become bail, but B and D at B's request and on his promise to indemnify, did become bail. Bail was forfeited and paid by B. Held B and C could sue on the bond for the benefit of B. *Bird v. Washburn*, 10 Pick. (Mass.) 223.

1. Trust Property.—A *cestui que trust* of personality has no title that will support a suit at law against a stranger. *Denton v. Denton*, 17 Md. 403.

While as a general rule the personal representatives of a decedent are the only parties who can sue upon obligations to the decedent never delivered to distributees by order of the probate court, yet where administrators duly settled an estate paying all claims and distributing a balance in accordance with the decree of the court to the heirs of the decedent, and also delivered to them certain obligations considered of no value, and therefore not included in the administrator's account, such distributees were permitted to sue thereon in their own name although the administrators had never been discharged because such distributees were in actual possession of the obligations, and entitled in equity to hold them.

Stanley v. Mather, 31 Fed. Rep. 860.

But an administrator plaintiff suing for the benefit of the decedent's estate, is not a nominal party whether the proceeds finally go to pay the debts of the estate or to the plaintiff as heir at law of the decedent. *Wing v. Andrews*, 59 Me. 505.

2. Attorneys in Fact.—A person having a letter of attorney must sue in the name of the principal. *Kinsey v. Hollinshead*, 2 N. J. L. 359; *Ward v. Wilkie*, 3 N. J. L. 411.

An attorney in fact does not hold the character of a trustee, and is not a necessary party to a suit to represent the interest of the principal. *Powell v. Ross*, 4 Cal. 197.

An attorney in fact of an executor or administrator can never maintain an action for the benefit of the estate in his own name. *Neely v. Robinson*, *Hempst.* (U. S.) 9.

The person having the legal cause of action must be named as plaintiff; hence judgment in an action by the heirs of B by their agent A, on a lease executed by him in that capacity, will be reversed. *Frankem v. Trimble*, 5 Pa. St. 520.

It is improper to bring a suit thus: "A and B by their attorney in fact C." This is a technical mistake, however, which is amendable. *Adams v. Edwards*, 115 Pa. St. 211.

3. Negotiable Paper.—Where the payee of a promissory note endorses it to a third party as security for a loan and subsequently pays the loan, the holder may sue for himself, or as trustee for the payee, and recover on the note from the maker, unless the latter is thereby deprived of some equitable defense which he may have had as against the payee. *Logan v. Cassell*, 88 Pa. St. 288; 32 Am. Rep. 453.

Although during the pendency of a suit on a promissory note endorsed in blank, the plaintiff transfer it by delivery, he may still maintain the action if it be agreed between him and the transferee, that notwithstanding the delivery the legal title shall be considered as still remaining in the plaintiff for the purpose of prosecuting the suit. *Keyser v. Shepherd*, 2 Mackey (D. C.) 66.

f personal property,¹ and the party holding the legal title to alty,² may sue in their own names. A person may sue in his wn name on a cause of action to which he has the legal title, but ot on a security therefor to which he has only an equitable title.³

When, however, A executed two otes to B, who sold one to C and subsequently fraudulently induced C to rchange the note so sold for the other e which had been rendered invalid y reason of an alteration, it was held at C could sue A on the original ote, though not in possession, because uity would compel a return of such ote to C by B. *Martin v. Smith*, 13 hila. (Pa.) 103.

If a negotiable note, endorsed in ank by the payee, be lost by the en-orsee, and he afterwards assign to other his right thereto, the assignee annot maintain an action at law in is own name upon such lost note. *Villis v. Cresy*, 17 Me. 9.

1. Personal Property.—A bailee of ersonal property may sue for injuries o property. *Peoria etc. R. Co. v. McIntire*, 39 Ill. 298.

A bailee of a note, holding a receipt to itself therefor, but without any eneficial interest, having voluntarily parted ith possession of it, cannot main-in an action in his own name, ther as such bailee or as agent of the aye. *Sevier v. Holiday*, *Hempst. U. S.*) 160.

In an action for taking personal roperty from the plaintiff's posses-on, when he claimed to be owner, vidence that the title was in a third arty is not to be received merely for ie purpose of showing that the plain-ff is not the real party in interest. he code has not changed the rule at possession is sufficient to maintain ie action. *Paddock v. Wing*, 16 How. r. (N. Y.) 547.

If defendant is a trustee for plaintiff f personal property sued for, plaintiff annot recover. He must sue in equity r an account. *Wheeler v. Allen*, 51 i. Y. 37.

An assignment of all one's interest i a crop growing on another's land, is ale or transfer of the property, and ie assignee, having thereby the legal interest, must sue in his own name. *Arter v. Jarvis*, 9 Johns. (N. Y.) 43.

The assignment of a bill of sale of ersonal property vests the property i the assignee, and enables him to aintain trover, etc., against a subse-

quent purchaser. *Southworth v. Se-bring*, 2 Hill (S. Car.) 587.

A receiver of partnership effects can-not maintain an action of trover in his own name against a person who had converted assets of the firm, be-fore his appointment; he must sue in the name of the firm, in whom was the legal right of action. *Yeager v. Wal-lace*, 44 Pa. St. 294.

A person who is in the actual posses-sion of cattle at the time they are in-jured, is entitled to maintain an action for any injury to them. *Polk v. Cof-fin*, 9 Cal. 56.

An action for injury to personal roperty is rightly brought in the name of the owner at the time of the injury, although he sold it before action brought, or although it was in the possession of his factor, who had a lien thereon. *Holly v. Huggefurd*, 8 Pick. (Mass.) 73.

Where a note in the hands of a de-positary was assigned by deed with power to sue, etc., and was demanded of him and refused, the assignor main-tained trover for conversion of the note, he having the legal interest, even after the assignment. *Day v. Whitney*, i Pick. (Mass.) 503.

2. Real Property.—The only proper plaintiff in an action for the recovery of real estate, is the party holding the legal title, although only the trustee of an express trust. *Boardman v. Beckwith*, 18 Iowa 292.

A party in possession, under color of foreclosure, without proving his title, may maintain an action to cancel deeds as clouds on his title. *Craft v. Merrill*, 14 N. Y. 456.

A sole devisee in possession may sue in trespass for acts committed after testator's death, though testator's estate has not been settled. *Colton v. Onder-donk*, 69 Cal. 155; 58 Am. Rep. 556.

A right to the use of land, entitles the usee to an action against one who attempts to appropriate it. *Lewis v. San Antonio*, 7 Tex. 288.

A party who has only a parol license to use a well cannot maintain an action against one who has rendered the water unfit for use. *Ottawa Gas Light & Coke Co. v. Thompson*, 39 Ill. 598.

3. Claim and Security Therefor.—

VIII. RIGHT TO USE NAME OF LEGAL OR CO-PLAINTIFF—1. Legal Plaintiff.—Since, at common law, suit must be brought⁺ in the name of the party having the legal title for the protection of equitable interests, the holder thereof is allowed to use the name of the person holding the legal title as plaintiff upon indemnifying him against costs,¹ or without such indemnity when, by statute or practice, the use plaintiff is rendered liable for the costs.² The assignment of a chose in action is construed to amount to a contract by the assignor, that the assignee shall be permitted to use his name as plaintiff,³ and the same effect has been given

The holder of negotiable paper duly endorsed may sue thereon in his own name, but may not sue in his own name for conversion of a security given for the payment of the note if he is only an equitable assignee thereof. *Batchelder v. Jenness*, 59 Vt. 104.

A creditor may sue in his own name on a cause of action although he had assigned an equitable lien therefor. *Williams v. Cox*, 78 Ala. 325.

The statute which gives an action to the legal assignee of a bond, does not give him an action on a contract, which, though ancillary, is collateral to it. To recover on such contract, the suit must be instituted in the name of the assignor for the use of the holder. *Beckley v. Eckert*, 3 Pa. St. 292.

1. Use of Name of Legal Plaintiff.—A person may use the name of another person, as plaintiff in a suit, without his authority or consent, upon indemnifying him for costs, if the use of such person's name is necessary to the assertion of his legal rights. *Hargraves v. Lewis*, 6 Ga. 207; *English v. Register*, 7 Ga. 387; *Sumner v. Sleeth*, 87 Ill. 500; *Eckford v. Hogan*, 44 Miss. 398; *Webb v. Steele*, 13 N. H. 230; *Coffey v. White*, 14 W. N. C. (Pa.) 108; *Kennebec Ice & Coal Co., v. Wilmington etc. R. Co.*, 13 W. N. C. (Pa.) 162.

From the institution of suit to the final satisfaction of the judgment, the party who is beneficially interested is permitted to act in his own behalf to enforce his rights, though the proceedings may be in the name of another who appears to have the legal right; and, when necessary, the other party will be forced to allow the proceedings to be preserved in the name of the original plaintiff. *Hudson v. Morriss*, 55 Tex. 595; *Berry v. Gillis*, 17 N. H. 9; 43 Am. Dec. 584.

It is a general rule that where one person has an equitable title to land,

and a bare legal title is in another, the equitable owner has a right to use the name of the legal owner whenever an action at law is necessary. *Townsend Sav. Bank v. Todd*, 47 Conn. 190.

Where a statute authorizes a suit on official bonds in the name of the beneficiary, or in the name of the person to whom they were made for the use of the beneficiary, a suit may be instituted in the name of such obligee, without averment or proof that the suit was instituted by direction of the beneficiary. *Wall v. McConnel*, 65 Tex. 397.

It is competent to persons interested in a claim to real estate to employ the name of the original claimant in proceedings to establish the grant. *United States v. Sutter*, 21 How. (U. S.) 170.

Where however, A sues in the name of B for use of A on a contract under seal between B and C which was for the benefit of A, but not so exclusively as to have authorized A to sue in his own name, if the contract had not been under seal, it is incumbent on A to show his right to use the name of B. *Mississippi etc. R. Co. v. Southern R. Assoc.*, 8 Phila. (Pa.) 107.

In case suit can only be brought by the guardian of a minor, a mother may not use such guardian's name in a suit for personal injuries to the minor without the guardian's consent. *Leger v. Richard*, 10 La. Ann. 669.

The right of any person who has been placed as a litigant upon the records of a court to repudiate under oath the authority of those who apparently represent him, cannot be questioned. *Leger v. Richard*, 10 La. Ann. 669.

2. See the next subdivision of this article.

3. Assignment of Chose in Action.—The assignment of a chose in action vests the right to suit and recovery in the assignee, and authorizes him to use the name of assignor for his

o a conveyance of real estate in the adverse possession of third party.¹ And in case the assignor dies, the assignee may use the name of his assignor's personal representative in bringing suit,² or by statute sue in his own name.³ The right to use the legal plaintiff's name may be tested by proper pleadings.⁴ The assignee is bound by the decision in the suit brought

enefit. *Roberts v. Smith*, 1 Morr. (Iowa) 426; *Ballard v. Greenbush*, 4 Me. 336; *McNulty v. Cooper*, 3 Hill & J. (Md.) 214; *Mosher v. Allen*, 6 Mass. 451; *Pitts v. Holmes*, 10 Cush. (Mass.) 93; *Simpson v. Moulden*, 3 Coldw. (Tenn.) 429; *Johnson v. Irby*, 1 Humph. (Tenn.) 654; *Morris v. Schooner Leona*, 62 Tex. 35.

This applies to assignments of judgments. *Haden v. Walker*, 5 Ala. 86; *Harrison v. Marshall*, 6 Port. (Ala.) 5; *Cobb v. Thompson*, 1 A. K. Marsh. (Ky.) 506.

If, however, the obligation is negotiable, the assignee may not sue in the name of the assignor. *Neyfong v. Wells*, Hard. (Ky.) 571; *Mosher v. Allen*, 16 Mass. 451.

The assignee may use the assignor's name in a suit against a sheriff for not serving a notice to take depositions in due time. *Waterman v. Williams*, 13 Fed. (N. Car.) 198. Compare *Page v. Thompson*, 43 N. H. 373.

1. Conveyance of Realty.—So a conveyance of lands in adverse possession of a third party authorizes to bring a suit in his grantor's name. *Steeple v. Downing*, 60 Ind. 478; *Van Voorhis v. Kelly*, 31 Hun (N. Y.) 293.

A code provision authorizing such a suit has been held to apply only to the immediate and not to a remote grantee. *Smith v. Long*, 12 Abb. N. Cas. (N. Y.) 113.

2. Death of Assignor.—The death of the assignor does not defeat the assignment, but the assignee may use the name of the executor or administrator of the assignor to recover the money. *Dawes v. Boylston*, 9 Mass. 337; 6 Am. Dec. 72; *Cutts v. Perkins*, 12 Mass. 206; *Grover v. Grover*, 24 Pick. (Mass.) 261; 35 Am. Dec. 319.

3. Statutes.—An act authorizing an assignee for a valuable consideration of a note, etc., to sue thereon in his own name when the assignor is dead, if there be no personal representatives of the assignor, or they refuse to sue, does not cover cases of mere gifts or assignments founded upon natural love and affection between near rela-

tives by blood. *Van Derveer v. Wright*, 6 Barb. (N. Y.) 547.

Under such an act a suit cannot be brought in the name of the assignee of a chose in action, unless it appear that the assignor is dead; and the death of the assignor should be averred in the declaration. *Seeley v. Seeley*, 2 Hill (N. Y.) 496.

The assignee of a judgment rendered in another State against a citizen of *Kentucky*, may use the name of the assignor to enforce payment; but if the assignor be dead, he may sue in his own name, if there be no administrator in *Kentucky*, and he will not be compelled to administer. *Cobb v. Thompson*, 1 A. K. Marsh. (Ky.) 507.

4. Testing Validity of Assignment.

If an assignee of a chose in action bring a suit upon it, his right to use the name of the assignor may be questioned; and if he fail in the suit for want of such a right, the action of the supposed assignor, or any one entitled to sue in his name, is not concluded. *Field v. Weir*, 28 Miss. 56.

A plea denying the right or authority of the holder of a note, not endorsed, to sue in the name of the payee for his use, is bad upon demurrer. The proper practice to question the right or authority of the person who institutes the suit is to obtain a rule of court upon him, to show by what authority suit is brought in the name of another for his benefit. *Lynn v. Glidwell*, 8 Yerg. (Tenn.) 1; *Cage v. Foster*, 5 Yerg. (Tenn.) 261; 26 Am. Dec. 265.

When the plaintiff sues as an assignee, the defendant may by proper pleadings, put in issue the validity of the assignment, but he may not require that every precedent owner of the assigned instrument sued upon be made a party in order that they may be estopped by the judgment. *San Antonio etc. R. Co. v. Cockrill*, 72 Tex. 613.

In a suit to recover money for a county brought in the name of another for the use of the county, the county is the real plaintiff, and the

in the name of the assignor only when he has consented to the bringing of the suit.¹ The name of the State cannot be used to enforce a private right, or obtain redress for a private wrong.²

name of such other should be stricken out as surplusage. If this be not done, no issue as to the authority of a third party to sue for the use of the county can be made by a party except by plea in abatement. *Smith v. Moseby*, 74 Tex. 631.

1. Assignee Must Consent to the Bringing of the Suit.—*Workingmen's Bldg. & Loan Assoc. v. Roumfort*, 98 Pa. St. 85.

The decision in a suit, by the assignee of a chose in action, in the name of the assignor, is binding upon the assignee, though not nominally a party.

Claffin v. Fletcher, 10 Biss. (U. S.) 281; *Southgate v. Montgomery*, 1 Paige (N. Y.) 41.

After the assignment of a chose in action and notice to the debtor of the assignment, an action by the assignor without the privity of the assignee is not binding upon such assignee. *Southgate v. Montgomery*, 1 Paige (N. Y.) 41.

The assignee of a chose in action, suing in the name of the assignor, must be made a party to a bill for an injunction to stay the suit, or he will be allowed to proceed in the name of the assignor. *Chase v. Chase*, 1 Paige (N. Y.) 198.

The obligee of a bond, after assigning it to another, can neither maintain an action on it nor revoke the assignment, without the consent of his assignee. *Reed v. Nevins*, 38 Me. 193.

If an assignor sues without the assignee's consent and the assignee re-assigns the claim to the assignor, the latter may prosecute his action for his own benefit. *Moore v. Spiegel*, 143 Mass. 413.

Compare *Clark v. Parker*, 4 Cush. (Mass.) 361; *Moore v. Coughlin*, 4 Allen (Mass.) 335.

If an assignor sues and the consent of the assignee is questioned, it is sufficient if the assignee appears in court and states that he does desire, through his assignment to prevent recovery in the action. *Coulter v. Haynes*, 146 Mass. 458.

A county judge may sue a county treasurer in his own name for the use of the county, for money improperly retained without showing the suit was brought by direction of the commis-

sioners' court. *Wall v. McConnell*, 65 Tex. 397.

2. Use of Name of State.—"The object of this suit is to have decreed the legal title held by the defendant J. W. Shively to block in the city of Astoria to be in the relators—to have the State patent to block 139 which was tide lands, and alleged to have been procured by fraudulent representations, from the State by the said Shively, cancelled and annulled, and to compel a conveyance of the title held under the patent by the defendant Shively to the relators. From this statement of the objects of the suit, it is manifest that all the rights of the relators are purely equitable, and of equitable cognizance only. And the question which confronts us at the threshold of our enquiry is the right of the relators to carry on a litigation in the name of the State for the objects sought by the suit, and the authority of the court in a case so constituted to adjudicate upon it. For it will hardly be asserted, if the subject matter of the litigation concerns the rights of private parties only and exclusively, that the State has no direct interest in the prosecution or result of the suit, that State interference in such controversies ought not to be countenanced or tolerated either directly or upon the relation of private parties. When a remedy is provided either at law or in equity, complete and adequate, by which matters in dispute between private parties may be adjusted and settled, that remedy must be pursued by them; the State cannot lend the power of its name, or invidiously assume and champion the cause of one private citizen against another for the purpose of settling rights or titles in controversy between them, when each and all citizens are equally entitled to its protection." LORD, J., in *State v. Shively*, 10 Oregon 268.

A private person has not the right or power to use the name of the people for the purpose of obtaining redress for private wrongs. *People v. Pacheco*, 29 Cal. 210; *People v. County Judge*, 40 Cal. 479.

Nor to use the name of the governor to make the State a party complainant to set aside a grant from the State,

2. Co-plaintiffs.—At common law all the obligees in a joint obligation must unite as plaintiffs,¹ and therefore one is permitted to use the names of all the others, even without their consent.² One co-plaintiff, therefore, may not have the suit dismissed even as to himself if indemnified against loss, except where it is permissible

without the governor's consent. *Parker v. Hughes*, 25 Ga. 374.

It may be gravely doubted whether, in the absence of any legislation or the consent of the attorney general, any action can be maintained by the State. *State v. Anderson*, 5 Kan. 90.

The sureties on the official bond of a *United States* officer having paid a liability incurred to the *United States* are not thereby authorized to use the name of the *United States* in an action to recover money deposited by said officer in his official capacity, although the *United States* might sue therefor. (In this case the treasury department of the *United States* had authorized such usage of the name of the *United States*, but the secretary of the treasury was not qualified by statute to give this authorization, and therefore on defendant's objection the suit was dismissed.) *United States v. Union Bank* 8 La. Ann. 388.

An ordinance imposed a penalty to be recovered "at the suit of the city of X for the use of said city." *Held*, no person could carry on a suit to recover such a penalty in the name of said city unless the proper city authorities authorize it, or adopt the act after the suit is commenced. *Philadelphia v. Strawbridge*, 12 Phila. (Pa.) 482.

A plaintiff has the right to use the name of the obligee—State, city, etc.—in an official bond in an action thereon, where on account of an injury personal to him he has a right to sue thereon. *East St. Louis v. Flannigan*, 26 Ill. App. 449.

The act of Feb. 17th, 1866, confirming the levee commissioners provisionally appointed by the governor, did not give them authority to sue for the State, nor to make the State a party to a suit. *Gastel v. McGenty*, 20 La. Ann. 431.

Where power is given to certain officers of a town to construct certain works and recover the expenses thereof from individuals in an action of debt, such action should be brought in the name of the town. *Palmyra v. Morton*, 25 Mo. 593.

The trustee of a county cannot sue

in his own name, nor move against the revenue collector of the county for a failure or refusal to pay the revenue collected by him. This must be done by the county judge or chairman. *Dulaney v. Dunlap*, 3 Coldw. (Tenn.) 306.

1. See *infra*, this title, *Foinder of Parties*, for full explanation of the principle.

2. Use of Name of Co-plaintiff.—One of the joint payees or obligees in an instrument may sue thereon in the name of all, without their consent. *Wright v. McLemore*, 10 Yerg. (Tenn.) 235; *Gray v. Wilson*, Meigs (Tenn.) 394; *Sweigart v. Berk.*, 8 S. & R. (Pa.) 308.

If one co-obligee assigns all his interest to the other obligees, they have a right to use his name in an action in the obligation and he may not interfere for any other purpose than to require indemnity against the costs. *Southwick v. Hopkins*, 47 Me. 362; *Lunt v. Stevens*, 24 Me. 534.

One mortgagor may use the names of his joint mortgagors in an action to recover statutory penalty for failure to enter satisfaction on record of said mortgage if he indemnifies him. *Harris v. Swanson*, 62 Ala. 299.

Where a committee in the exercise of statutory powers incur expense for which they are entitled to sue certain persons made liable by statute, the committee may use the names of all of its members on indemnifying any who, having been paid, refuse to join in the suit. *Darling v. Simpson*, 15 Me. 175.

One partner may use the name of his co-partners in legal proceedings to enforce a right of action in the firm; but the co-partners who object to the suit, have a right to be indemnified against the costs. *Whitehead v. Hughes*, 2 Dowl. 258; *Cunningham v. Carpenter*, 10 Ala. 109.

One of several joint assignees in bankruptcy may use the names of all the assignees as plaintiffs in an action on indemnifying the assignees who refuse to join against costs. *Johnson v. Holdsworth*, 4 D. P. C. 63; *Laws v. Bott*, 16 M. & W. 300.

One joint covenantee may not use

to join said party as a co-defendant.¹ It seems that in a collateral proceeding, the burden of proof that a co-plaintiff's name was joined with his consent, rests upon the person making the assertion, when the fact is denied by said co-plaintiff.²

IX. NOMINAL AND USE PLAINTIFFS.—When an action is brought at common law for the use of a person other than the record plaintiff, the record plaintiff is called the nominal or legal plaintiff, and the party for whose benefit the action is prosecuted the equitable or use plaintiff.³ The use plaintiff's name need not appear on record,⁴

the name of his co-covenantors even if he offers indemnity for costs. *Langston v. Wetherell*, 27 L. J. Ex. 400; *contra Harris v. Swanson*, 62 Ala. 299.

1. Dismissal of Suit.—One of two plaintiffs has no right to dismiss a suit against the objections of the other, unless he can satisfy the court that the latter has no interest in the claim, or that he is liable to be injured by its further prosecution; and even then he has no such right if his co-plaintiff shall indemnify him against loss. *Winslow v. Newlan*, 45 Ill. 145; *Loring v. Brackett*, 3 Pick. (Mass.) 403.

The action may be dismissed as to such co-plaintiff, and the other plaintiff file an amended complaint making him a defendant. *Wall v. Galvin*, 80 Ind. 447.

When a party is made a co-plaintiff without his privity or consent, the proper motion is that his name be stricken out, not that the bill be dismissed, even as to him. *Southern L. Ins. etc. Co. v. Lanier*, 5 Fla. 110; 58 Am. Dec. 448.

Under the code provisions allowing a plaintiff to make one who refuses to join as co-plaintiff a defendant, a co-plaintiff may withdraw at any time unless his withdrawal would work injustice. *Noonan v. Orton*, 31 Wis. 265.

2. Burden of Proof.—Where several parties are joined as plaintiffs, but the object of the action is opposed to the interest of some of them, and the judgment rendered deprives them of property and transfers it to their co-plaintiffs, in a subsequent action to recover the property brought by the plaintiffs injured against the plaintiffs benefited, on the ground that they were made plaintiffs in the previous action without their knowledge, the burden of proof rests upon defendants to show that the joinder of plaintiffs in

the former action was with their knowledge and consent. *McCormick v. McCormick* (Ky. 1887), 5 S. W. Rep. 573.

3. Where an action is brought to indemnify a person beneficially interested in the instrument, and not a party to its execution, it may be properly alleged to be for his use. So held in an action for the use of a county on its treasurer's bond, of which the territory was the obligee. *People v. Slocum*, 1 Idaho 62.

An administrator suing for the benefit of an intestate estate cannot be deemed a nominal party, whether the proceeds finally go to pay the debts of the estate or to the plaintiff as heir at law of the intestate. *Wing v. Andrews*, 59 Me. 505.

4. Record Need Not Show Use Plaintiff.

—The fact that a suit is brought for the use of a third person need not be expressed upon the record. *American Express Co. v. Haggard*, 37 Ill. 465; *Northrop v. McGee*, 20 Ill. App. 108; *Matheson v. Wilkinson*, 79 Me. 159; *Artisans' Ins. Co. v. Drennan*, 4 Brewst. (Pa.) 103; *Clarke v. Hogeman*, 13 W. Va. 718.

Where the assignor is insolvent, and a suit is pending in his name for the assignee's benefit, the court will allow the defendant to suggest on the docket for whose use the suit is brought, and will rule the assignee to respond costs. *Canby v. Ridgway*, 1 Binn. (Pa.) 496.

An assignment, by noting on an appearance docket that the suit was for the use of another than the plaintiff, is not a judicial act, but a matter *in pais*. *Rowland v. State*, 58 Pa. St. 196.

Extrinsic evidence is admissible to show who the real party is. *Clafin v. Fletcher*, 10 Biss. (U. S.) 281.

If the petition states the names of those for whose benefit the relief is

is death or other disability is immaterial,¹ and his interest in the suit need not be proved, it being sufficient to show right to recover in the nominal plaintiff.² The nominal plaintiff, however, cannot control the case, may not dismiss the suit, release the cause of action, or accept satisfaction of the claim.³

asked, they are virtually the parties plaintiff. *Gordon v. McCauley*, 73 Ia. 667; *Fenwick v. Phillips*, 3 Metc. Ky. 87; *Neely v. Merritt*, 9 Bush Ky. 346; *United States v. Union Bank*, 8 La. Ann. 388; *Dayton v. Commercial Bank*, 6 Rob. (La.) 17. *Con-za*, *Peck v. Ingraham*, 28 Miss. 246, 66; *Pearce v. Twichell*, 41 Miss. 344. "In all suits prosecuted in the name of one person for the use of another, the person for whose use the suit is brought shall be held the real plaintiff of record." *Tennessee Code*, 1884, 3492.

Where by statute the equitable plaintiffs are to be deemed the plaintiffs in the action, the suit cannot be brought for the use of A and B administrator of C, in a case where an obligation had been intended for the benefit of A and C, and C had died before the action." *Jackson v. People*, Mich. 154.

1. Death of Use Plaintiff.—At common law if the equitable plaintiff in an action *ex contractu* died, his death was not the subject of a plea in abatement. *State v. Dorsey*, 3 Gill & J. (Md.) 75; *Logan v. State*, 39 Md. 177.

Where, however, a husband may by statute sue for damages for the death of his wife and the action is required by statute to be brought in the name of the State for the use of the person entitled. It was held that such statute created no contractual relation between the State, the legal plaintiff and the defendant, and on the death of the equitable plaintiff, the suit abated. *Farvey v. Baltimore etc. R. Co.*, 70 Md. 319.

Nor was the infamy or other disability of the equitable plaintiff. *Fridge v. State*, 3 G. & J. (Md.) 103.

2. Interest of Use Plaintiff.—The interest of an equitable plaintiff need not be proved. *Farwell v. Dewey*, 12 Mich. 436; *Berks Co. v. Levan*, 6 W. N. C. (Pa.) 63.

It is only necessary to show a right to recover in the nominal plaintiff. *Hamilton v. Brown*, 18 Pa. St. 87.

It is immaterial that some other person than the one for whose benefit

the suit is brought, is the party beneficially interested. *Raymond v. Johnson*, 11 Johns. (N. Y.) 488; *Artisans Ins. Co. v. Drennans*, 4 Brewst. (Pa.) 103.

The legal plaintiff need not necessarily be competent to sue himself.

Thus where a partnership assigned an obligation to one of their number, and was subsequently dissolved by the death of a partner, an action may be maintained in the name of the surviving partners for the benefit of said assignee notwithstanding special statutory provisions which would prohibit them from suing for property belonging to the partnership. *Matheson v. Wilkinson*, 79 Me. 159.

So where a bank has gone into the hands of a receiver, and suit is brought in the name of the bank "for the use of the receiver," and defendant denies the existence of the bank, *held* that as the bank is not the real plaintiff, nor a necessary nominal plaintiff, the defense is not good. *Kyle v. Ewing*, 5 Lea (Tenn.) 580. *Compare Crews v. Farmers' Bank*, 31 Gratt. (Va.) 348.

3. Nominal Plaintiff Cannot Control Suit.—When a suit is instituted in the name of the State, by the permission of the attorney general upon the relation of the real party in interest, seeking relief, and the State has no direct interest in the event of the suit, the attorney-general, as such, has no power to control the conduct of the suit, or to withdraw his consent to the use of the name of the people to the prejudice of the relator. *People v. North San Francisco etc. R. Assoc.*, 38 Cal. 564; *People v. Jacob* (Cal. 1886), 12 Pac. Rep. 222; *People v. Clark*, 72 Cal. 289; *State v. Cavers*, 22 Iowa 343.

He cannot execute a binding release of the cause of action. *Mandeville v. Welch*, 5 Wheat. (U. S.) 277; and *Welch v. Mandeville*, 1 Wheat. (U. S.) 233.

The legal plaintiff will not be allowed to interfere in the suit to dismiss it or otherwise prevent a hearing of the case on its merits. *State v. Cavers*, 22 Iowa 343; *Webb v. Steele*, 13 N. H. 230; *McCullum v. Cox*, 1

At common law the death of the nominal plaintiff abated the action, though this rule has been frequently modified by statute.¹ The nominal plaintiff is, at common law, liable for costs,² and by statutory provisions the use plaintiff is also liable.³

Dall. (U. S.) 139; Sumner v. Steeth, 87 Ill. 500; Steeple v. Douning, 60 Ind. 478; Anderson v. Miller, 7 Smed. & M. (Miss.) 586.

Equity will restrain the assignor of a chose in action from discharging a suit at law in his name, brought by the assignee. —v. Arrington, 1 Hayw. (N. Car.) 164.

Where, however, A sues to the use of B, and it appears B had no interest in the suit before the action was brought, A is the real plaintiff and may dismiss and otherwise control the case without B's sanction. Moore v. Bres, 19 La. Ann. 532.

In an action on an undertaking in replevin given to a sheriff in his individual name, brought in the name of the sheriff, but put in suit by the real parties in interest, the sheriff has no authority by stipulation with a surety on the undertaking to dismiss such an action as to such surety without the consent of the parties for whose benefit the undertaking is given. If he does so dismiss the suit, such dismissal is not a bar to a subsequent action on the undertaking prosecuted by the real parties in interest as assignees of said sheriff and against said surety. Norton v. Laurence, 39 Kan. 458.

The legal plaintiff cannot receive satisfaction of a judgment, and a payment to him is not satisfaction. Triplett v. Scott, 12 Ill. 137; Bentley v. Reading, 22 W. N. C. (Pa.) 60.

In an action against an attorney at law, to recover money collected in a suit in favor of the plaintiff, an answer which admits the collection of the money, but avers that the plaintiff was only a nominal party to the suit, although it admits a *prima facie* case for the plaintiff, still leaves upon him the burden of proof to establish upon all the evidence his right to recover. Ross v. Gerrish, 8 Allen. (Mass.) 147.

1. Death of Nominal Plaintiff.—At common law the nominal party was the sole person considered, and therefore in case of his death the action abated.

That is not the law in *Texas* where the death of a nominal plaintiff is immaterial. Price v. Wiley, 19 Tex.

142, 70 Am. Dec. 323; Moore v. Rice, 51 Tex. 289.

And by statute in many States the suit may be prosecuted by the equitable plaintiffs in case of the legal plaintiffs. See the *Pennsylvania* act of April 23rd, 1829 (10 Sm. Laws), 455; Mehaffy v. Share, 2 P. & W. (Pa.) 361. See Morrison v. Deaderick, 10 Humph. (Tenn.) 342.

2. Costs—Nominal Plaintiff.—At common law the nominal plaintiff is solely liable for costs. He is therefore entitled to demand indemnity against costs. Webb v. Steele, 13 N. H. 230.

"The person whose name is used in the prosecution of a suit may, at any time during the progress of the cause, require the party for whose benefit the action is brought, to give bond with good security to indemnify him against all damages and costs." *Tennessee* Code, 1884, § 3493.

But an assignor is not liable for damages for the unlawful issue of a *capias* when the assignee began the suit in the assignor's name. Park v. Toledo etc. R. Co., 41 Mich. 352.

3. Costs—Use Plaintiff.—The equitable plaintiff is not liable for costs. Bennet v. M'Fall, 2 Mill Const. (S. Car.) 198; 2 Treadw. Const. (S. Car.) 769.

A statute providing that "in all suits prosecuted in the name of one person for the use of another, the person for whose use the suit is brought shall be held the real party on record, against whom judgment shall be rendered and execution issue for costs as in other cases," applies to courts of law and not to courts of equity. This statute has but two objects: 1st, to subject the party having the beneficial interest to liability for costs. 2nd, to prevent the death of the nominal plaintiff from working an abatement, or requiring the suit to be revived in the name of the personal representative. Morrison v. Dederick, 10 Humph. (Tenn.) 342.

A statute authorizing a defendant to recover costs from an equitable plaintiff, is not to be construed to relieve the party who brought the suit

X. RIGHT TO SUE IN SPECIAL CASES.—(See CREDITOR'S BILL, vol. 4, p. 573; EJECTMENT, vol. 6, p. 195; FORCIBLE ENTRY AND DETAINER, vol. 8, p. 101; FORECLOSURE OF MORTGAGES, vol. 8, p. 185; FRAUDULENT CONVEYANCES, vol. 8, p. 748; INJUNCTIONS, vol. 10, p. 777; MANDAMUS, vol. 14, p. 88; PARTITION; REPLEVIN; SPECIFIC PERFORMANCE; TRESPASS; TROVER; and all special proceedings under their respective titles)—**1. Civil Actions for Damages in Case of Public Wrongs.**—At common law in case of a felonious injury causing a person's death, the civil remedy of the party injured was suspended until the criminal prosecution was disposed of.¹ The same was true in the case of robberies and larcenies,² but the rule did not apply to all cases of crimes.³ The common-

from his liability for costs. *Kinly v. Donnelly*, 6 Phila. (Pa.) 120.

In a recent common pleas case in *Pennsylvania* the cases are, however, considered at length, and the principle laid down that "where the action has been commenced in the name of the legal plaintiff, without his knowledge or against his consent, he is not liable for costs, that he is only liable for costs where he has authorized the action, and that the use plaintiff, if the action is defeated, is always liable for costs where the action has been brought with his privity or consent." *THAYER, P. J., in Coffey v. White*, 14 W. N. C. (Pa.) 108.

1. Action for Felonious Injury Causing Death.—It is frequently stated that at common law an action for damages for injuries causing death could not be brought because the crime of homicide was a felony, and the felony or public wrong must first be redressed; and inasmuch as the punishment for homicide included the forfeiture of the felon's goods to the crown, and the death of the felon, the private action could result in no benefit and was therefore useless and absurd. See the cases cited in *DEATH*, vol. 5, p. 125.

Numerous other reasons for the rule have been given, viz, the repugnance to setting a price on human life, the difficulty of determining who should be beneficiaries, etc. See *Grosso v. Delaware etc. R. Co.*, 50 N. J. L. 317, 320. But the above reason that the private wrong was merged in the public wrong, and that the public wrong must first be redressed was a sufficient reason at common law for all cases where the death was caused by a felony.

The rule of the common law, however, it has been held, does not prevail

in the *United States*, owing, *inter alia*, to the absence of a forfeiture for felony. *Lofton v. Vogles*, 17 Ind. 105.

2. Robberies and Larcenies.—In robberies and larcenies, the civil remedy in behalf of the party injured is suspended until the criminal prosecution is disposed of; and no suit can be maintained in behalf of the party injured till after the termination of the criminal prosecution. *Crowell v. Merrick*, 19 Me. 392; *Boody v. Keating*, 4 Me. 164; *Foster v. Tucker*, 3 Me. 458. See *Piscataqua Bank v. Turnley*, 1 Miles (Pa.) 312; and *Allison v. Farmers' Bank*, 6 Rand. (Va.) 204. *Contra*, *Pettingill v. Rideout*, 6 N. H. 454; 25 Am. Dec. 473; *Hook v. Minnick*, 19 Ohio St. 462; 2 Am. Rep. 413.

3. Limitation of Rule.—"The common actions of trespass for assault and battery, and of slander in case of libel, also prove that the general position, that where the injury sustained is occasioned by crime there is no civil action, is not universally true. I apprehend that the doctrine, if true at all, is limited to the case of robberies and larcenies which, by the common law, are felonies; and that the civil action was prohibited lest it should be, in effect, like a composition with a felon—the injured party being willing to reimburse himself, and careless of the general interest, which requires the public punishment of the offender. And that this is the foundation of the doctrine may be inferred from the fact that the party robbed was, by the Stat. 21 H. VIII., to have reparation from the estate of the offender, upon conviction, and from the further fact that trespass would lie on a felony of which the party had been convicted, as appears in *Roll. Abr.* 55, *Trespass*, pl. 20

law rule has had only a modified application in the *United States*, and has been generally set aside by statutory provisions.¹ In like manner no private individual can redress a public wrong, nor can he obtain his individual damages unless he has received some special damage peculiar to himself.²

It is possible also that another circumstance may have given rise to the doctrine. By the common law, the lands and goods of a felon were forfeited to the crown, and death also was the punishment. Now, to give an action where the body could not be taken into execution, and where all the lands and effects belonged to the king would be entirely fruitless, no remedy whatever could be had, and the provision by statute for a recompense out of the estate was the only relief which the injured party could have. These reasons do not exist with us." Boardman *v.* Gore, 15 Mass. 337.

An action for damages lies in favor of the husband against a surgeon for unskillfully operating upon his wife, notwithstanding she dies of the operation. Cross *v.* Guthry, 2 Root (Conn.) 90.

An action in assumpsit lies although the money sued for was obtained from plaintiff through the instrumentality of a forgery by one of the defendants. Boardman *v.* Gore, 15 Mass. 331. So where the money was obtained by fraud. Boston etc. R. Co. *v.* Dana, 1 Gray (Mass.) 83; Patton *v.* Freeman, 1 N. J. L. 113.

The civil remedy of a person injured by a felonious assault and battery is not suspended till the offender has been prosecuted criminally. Nowlan *v.* Griffin, 68 Me. 235; 28 Am. Rep. 45. *Contra*, it seems in *England* at common law. Crosby *v.* Leng, 12 East 409.

The private remedy of the owner of a horse for a trespass in cutting and disfiguring the horse's tail, is not merged in the public remedy. Blasingame *v.* Graves, 6 B. Mon. (Ky.) 38.

Nor in case of setting fire to and burning plaintiff's property. White *v.* Fort, 3 Hawks (N. Car.) 251.

Nor in case of enticing away plaintiff's slave. Robinson *v.* Culp, 1 Const. (S. Car.) 231.

An action for damages for a nuisance affecting the health of plaintiff and his family lies, although the nuisance be a public one. Story *v.* Hammond, 4 Ohio 376.

Both a civil and a criminal action lies for libelling a judge. Foster *v.* Commonwealth, 8 W. & S. (Pa.) 77.

"There is not a single adjudged case reported to this day (1828), in which a civil action founded on a wrong amounting to a felony has been adjudged not to lie. On the contrary, judgments have been given for the plaintiff in many such cases, where the felon has been prosecuted and acquitted or convicted, and where he has not been prosecuted criminally. The whole doctrine on this subject in *England* rests upon the *dicta* of the judges thrown out *arguendo*, and assuming various grounds as the foundation of the rule." Allison *v.* Farmers' Bank, 6 Rand. (Va.) 224.

1. *Statutes*.—"For any injury, either to person or property, amounting to a felony, a civil action may be maintained by the party injured, without a prosecution of the offender." Code of *Alabama*, 1886, § 2584; *Pennsylvania*, Brightly's Dig., p. 492, § 84.

"If the injury amounts to a felony, as defined by the code, the person injured must either simultaneously, or concurrently, or previously, prosecute for the same, or allege a good excuse for the failure so to prosecute. Provided, that this section shall not apply to tort committed by railroad corporations or other incorporated companies or their agents, or employees, nor shall the same apply to natural persons." *Georgia* Code, 1882, § 2970. The *Georgia* cases sustaining this section are cited in a note to the above provision.

An action for the recovery of property stolen may be maintained by the owner against the person liable therefor, although the thief is not convicted. *Maine*, Rev. Stat. 1883, p. 889, ch. 120, § 12.

"The commission of a felony shall not stay nor merge any civil remedy." *Virginia*, Code, 1887, § 3884. For the statutory provisions allowing an action for a felonious injury causing death, see DEATH, vol. 5, p. 125.

2. *Public Wrongs*.—The general rule is that when damages are sustained by

the public generally, an individual cannot sue unless he has received a special damage. *Currier v. West Side etc. R. Co.*, 6 Blatchf. (U. S.) 487; *Houch v. Wachter*, 34 Md. 265; *Enos v. Hamilton*, 27 Wis. 256.

In a suit for relief against the acts of a municipal corporation, injuriously affecting all within its jurisdiction, the attorney general is a necessary party; and it is only when such acts work also a special injury to individuals that an action can be maintained in their own names alone. *Davis v. Mayor etc. of New York*, 2 Duer (N. Y.) 663.

A member or a class of the community having a common interest in the subject matter cannot maintain an injunction suit in his own name, or for his individual benefit. Thus, an artisan of a particular calling cannot sue alone to enjoin a violation of the statutes restricting prison labor, on the ground that such violation is prejudicial to his trade. All must join, or he must sue in behalf of himself and all others who are equally interested with him. *Smith v. Lockwood*, 1 Code Rep., N. S. (N. Y.) 319.

A party cannot vindicate others' rights by process in his own name, nor employ civil process to punish wrongs to the public. *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401.

Illustrations—Obstruction of Roads.—Although the unauthorized occupation of a public street by a railway track may be regarded as a nuisance *per se* which will be enjoined, chancery will not restrain an act which affects the whole community at the suit of a private citizen or corporation, unless the plaintiff can make out a case of special damage. *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401; *Larimer etc. R. Co. v. Larimer St. R. Co.*, 27 W. N. C. (Pa.) 113.

The being delayed four hours by an obstruction in a highway and thereby being prevented from performing the same journey as many times in a day as if the obstruction had not existed, is a sufficient injury to entitle the party to sue the obstructor. *Greasley v. Codling*, 2 Bing. 263.

Where, however, a plaintiff proved no damage peculiar to himself beyond being delayed on several occasions in passing along it, and being obliged in common with every one else who attempted to use it, either to pursue his journey by a less direct road, or else to

remove the obstruction, it was held that he was not entitled to maintain the action. *Winterbottom v. Lord Derby*, L. R., 2 Ex. 316.

When, however, a railroad company was authorized by act of parliament to cross a public road on a level, a person being near may not sue for the damages occasioned him by the road being blocked by trains, and by other inconveniences incident to a railroad crossing. *Caledonian R. Co. v. Ogilvy*, 2 Macq. 229. *Compare Ricket v. Metropolitan R. Co.*, L. R., 2 H. L. 175; *Hamilton v. Vicksburg etc. R. Co.*, 119 U. S. 280.

Although a plaintiff suffers more inconvenience than others from an obstruction in a public highway, by reason of his proximity thereto, that will not entitle him to maintain an action. *Houck v. Wachter*, 34 Md. 265.

While the erection of a bridge across a navigable stream so low as to obstruct the passage of boats is a public nuisance, the owner of a boat actually detained by said bridge may sue for damages. *South Carolina R. Co. v. Moore*, 28 Ga. 398; 73 Am. Dec. 778.

Or to abate the nuisance. *State of Pennsylvania v. Wheeling etc. Bridge Co.*, 13 How. (U. S.) 518.

So in case of an improper location of a round house, turn table, etc. *Platt v. Chicago etc. R. Co.*, 74 Iowa 127.

Where the erection of a stairway on an alley impedes an adjoining property owner from gaining access to his building, he thereby suffers such a special injury which will enable him to sue in his own name to abate the nuisance. *Pettis v. Johnson*, 56 Ind. 139. *Contra*, *Lansing v. Smith*, 8 Cow. (N. Y.) 146.

Any inhabitant has the right to forbid the erection of houses, or other edifice on public places. *Mayor etc. of New Orleans v. Gravier*, 11 Martin (La.) 620. *Contra*, *Tift v. Buffalo*, 65 Barb. (N. Y.) 460.

Nuisance.—"An action may be maintained by the proprietor of any land against the owner or lessee of land adjacent, who shall maliciously erect any structure thereon, with intent to annoy or injure the plaintiff in his use or disposition of his land." *Connecticut*, Gen. Stat. 1888, § 982.

An action for damages for a nuisance affecting the health of plaintiff and his family lies, although the nuisance is a public one. *Story v. Hammond*, 4 Ohio 376.

2. Actions for Fines and Penalties—(See also PENALTIES AND PENAL ACTIONS).—An informer may sue in his own name for a penalty at common law, adding the words *qui tam* if the penalty is only his in part. The right of action is, however, regulated in many States by statute, in which case the statutory provisions must of course be followed.

XI. RIGHT TO SUE DEPENDING ON PRIVITY—1. Generally.—It has been previously stated that at common law, suit must be brought in the name of the party having the legal title. From this principle arose the rule that an action *ex contractu* can only be brought by one who is a party to the contract.¹ Thus contracts between municipal corporations and railroad or water companies can only be enforced by the municipal corporation, and not by any of the inhabitants, though they have suffered a special injury by reason

A municipal corporation is liable in damages for so locating a drain as to cause injury to an adjacent property owner, and such owner may sue therefor. *Seymour v. Cummins*, 119 Ind. 148; *Huddleston v. West Bellevue*, 111 Pa. St. 110.

Where the owner of a well gives to another a license to enter upon the premises and take water from the well, such licensee may not sue a third party for damages to the well occasioned by a nuisance, though he may perhaps sue in case for a disturbance of his easement. *Ottawa Gas Light etc. Co. v. Thompson*, 39 Ill. 598.

Public Duties.—A private citizen having no special interest cannot compel performance of a purely public duty by *mandamus*. *Bobbett v. State*, 10 Kan. 1. Or injunction. *Wyandotte etc. Bridge Co. v. Wyandotte Co.*, 10 Kan. 326.

Tax Payers.—The payment of taxes alone does not give one a special interest sufficient to sue alone to set aside or prevent public acts claimed to be illegal. *Tift v. Buffalo*, 65 Barb. (N. Y.) 460; *Warwick v. Mayor of N. Y.*, 28 Barb. (N. Y.) 210.

One inhabitant of a city, whose lands have been affected in the execution of a contract between the defendant and the city, cannot object to informalities as to the form of or parties to that contract. *Kelsey v. King*, 32 Barb. (N. Y.) 410.

But tax payers may restrain the making a contract which will increase taxation. *Handy v. New Orleans*, 39 La. Ann. 107; *Conery v. New Orleans Water Works Co.*, 39 La. Ann. 770.

But a single tax payer may not do

so although he claims to sue for himself and others. *Ayres v. Lawrence*, 63 Barb. (N. Y.) 454; *Kilbourne v. Allyn*, 7 Lans. (N. Y.) 352.

Unless he has sustained a specific injury. *People v. Morgan*, 65 Barb. (N. Y.) 473.

1. A Privity Generally.—A suit upon a contract to furnish the running gear of a wagon at a certain time, which contract has been assigned, should be brought in the assignee's own name. *Mountjoy v. Adair*, 1 Ind. 254.

A delivered lumber under the order of B, a lessee. It was used in improvements upon the premises of C, the lessor. A sued C. *Held* (1), To entitle A to recover he must show a contract, express or implied, on the part of C to pay.

(2) Ordinarily an inference of fact will arise against an owner that he promised to pay for improvements, if he stands by in silence and sees the work done, and afterwards accepts and enjoys the benefit derived from it.

(3) If C, knowing that A expected C to pay him, acted so as to create a belief on A's part that C would pay him, a promise by C to pay might be inferred. *Bailey v. Rutjes*, 86 N. Car. 517.

If A employ B to work on a house, saw logs, etc., and then sells the house, saw mill, etc., to C, and B continues to work for C, B cannot sue C on his contract of employment with A unless by some written agreement C made himself collaterally responsible, or for sufficient consideration he had agreed he should be substituted for A. *Dyer v. Tyler*, 49 Mich. 366.

A, warehouseman, had flour in stor-

of a breach of the contract.¹ A manufacturer or merchant is only liable to the purchaser of his goods for defects in them, unless the defect is one which is imminently dangerous to the community, in which case the wrong occasioned constitutes a tort, and

age belonging to B and other flour to C. C gave X an order on A for some of his flour. A by mistake gave X some of B's flour, which X used, not knowing the mistake. *Held*, A could not recover from X either in tort or in contract the value of said flour or any part of it. *Hills v. Snell*, 104 Mass. 173.

Where A contracts to do a certain work, and *inter alia* to pay all claims against him or against a sub-contractor under him, and A sublets to B, who gave orders on C for various sums to be paid different parties for supplies and labor, which orders C honored and paid, *held*, C cannot sue A to recover moneys so paid by him. *Anderson v. Fitzgerald*, 21 Fed. Rep. 294.

A sold B a ship, but the legal title remained in A for a month after the sale, owing to a delay in duly registering the sale. During that month B ordered the captain to have some work done. It was done by C, who sued A. *Held*, that A was not liable because B had no power to bind him. *Young v. Brander*, 8 East 10.

The registered owner is not *per se* liable for contracts by captain for benefit of ship. *Myers v. Willis*, 17 C. B. 77; *Brodie v. Howard*, 17 C. B. 109; *Mitcheson v. Oliver*, 5 El. & Bl. 419.

The fact of A's name appearing as proprietor of a newspaper in a paper required to be filed under an English statute—does not render A liable in respect of a contract entered into specifically with B, the real proprietor of the newspaper after A has ceased to be interested therein. *Holcroft v. Hoggins*, 2 C. B. 488.

The person to whom a promise is made and from whom the consideration moves, is the only person entitled to sue thereon. *Figure v. Mutual Soc. of St. Joseph*, 46 Vt. 362.

A contract entered into by A in favor of B and C, cannot be sued by B, C and D, D being a stranger. *Scott v. Patton*, 1 A. K. Marsh. (Ky.) 441.

1. Municipal Contracts with Water Companies, etc.—Thus, where a water company is under contract to furnish a supply of water to a city for use

in extinguishing fires, and on failing to do so, a citizen's property was burned, said citizen cannot sue the water company, there being no privity of contract between the citizen and the water company, and mere breach (by omission only) of a contract entered into with the public not being a tort, direct or indirect, to the private property of an individual. *Atkinson v. Newcastle etc. Waterworks Co.*, L. R., 2 Ex. Div. 441; *Fowler v. Athens City Water Works Co.*, 83 Ga. 219; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; 33 Am. Rep. 1; *Davis v. Clinton Water Works Co.*, 54 Iowa 59; 37 Am. Rep. 185; *Becker v. Keokuk Waterworks*, 79 Iowa 419; *Ferris v. Carson Water Co.*, 16 Nev. 44; 40 Am. Rep. 485; *Beck v. Kittanning Water Co.* (Pa. 1887), 11 Atl. Rep. 300.

Where, however, the contract was declared to be made for the benefit of the inhabitants and, *inter alia*, for the protection of private property against destruction by fire, the owner of property which is taxed for water rent, and destroyed by fire in consequence of an insufficient supply of water, may sue the company in his own name on the contract as the real party in interest. *Paducah Lumber Co. v. Paducah Water Supply Co.* (Ky. 1887), 12 S. W. Rep. 554.

So where a railroad company is under contract to build its main line through X town, a citizen cannot sue to compel the performance of the contract unless the public interests of the town are injuriously affected. *Crane v. Chicago etc. R. Co.*, 74 Iowa 330.

A contract between an incorporated city and certain of its citizens with a railway company, whereby the latter agreed for a designated consideration to locate and permanently keep in operation its main machine shops, if sought to be enforced against the company, should be brought by the municipal corporation or by such of its citizens as participated in furnishing the consideration, and who thus have a pecuniary interest in the enforcement of the contract. *St. Louis etc. R. Co. v. Harris*, 73 Tex. 375.

any one injured may sue.¹ An attorney-at-law, a recorder of deeds or public officer is only liable for misfeasance to the person employing him, or to whom he owes a duty.² In case of a sheriff's sale, the sheriff is the only one able to sue a defaulting

Where the charter of a railroad company requires that the road should run through the town of X, provided the citizens of X pay the excess of the cost of that route over one proposed by the company, the citizens of X have such an interest in the premises as will enable them to obtain an injunction restraining the railroad company from violating their charter. *Macon etc. R. Co. v. Stamps*, 85 Ga. 1.

1. Manufacturers and Merchants.—A manufacturer is only liable to the purchaser of goods manufactured for defective materials and for want of care and skill in the construction of the article sold. A third party injured in consequence thereof, although while the article was being used by the purchaser, may not sue the manufacturer. *Winterbottom v. Wright*, 10 M. & W. 109; *Losee v. Clute*, 51 N. Y. 494; 10 Am. Rep. 638.

Where, however the act of negligence is imminently dangerous to the lives of others, the wrongdoer is liable to the injured party. This exception applies to cases where an apothecary carelessly labels or puts up a poison. *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 55.

But not where the medicine is in itself harmless, and only becomes dangerous when mixed with other substances. *Davidson v. Nichols*, 11 Allen (Mass.) 514.

A, a druggist, sold another article for Paris green. By its use by the purchaser on a crop of cotton, the crop was injured. The purchaser only owned part of the crop. *Held*, he could recover for his damage, but the owners of the other part of the crop could not recover. *Jones v. George*, 61 Tex. 345; 48 Am. Rep. 280.

If the tort results "from the violation of a duty which is itself the consequence of a contract, then the right of action is confined to the parties and privies to that contract, except in cases where the party would have had a right of action for the injury done independent of the contract." Code of Georgia, 1882, § 2956; *Grenade v. Hardaway*, 73 Ga. 526.

A hired employee working under

the immediate supervision of his employer, is responsible for negligence and unskillfulness, if at all, only to his employer. *Downer v. Dane*, 19 Pick. (Mass.) 72.

2. Attorneys, etc.—In order to maintain an action against an attorney for negligence, it is necessary that there should be some privity of contract between the plaintiff and the defendant; the attorney is only responsible to the person who retains or employs him, and is not responsible to any person who may rely upon the attorney but who never employed him. *Robertson v. Fleming*, 4 Macq. H. L. Cas. 167; *Fish v. Kelly*, 17 C. B., N. S. 194; *Nat. Sav. Bank v. Ward*, 100 U. S. 195; *Dundee Mortgage & Trust Investment Co. v. Hughes*, 20 Fed. Rep. 39.

Assignment of the benefit of a suit, though written by the plaintiff's attorney, does not bind him to pay the money to the assignee; he is liable only to the assignor. *Lee v. Chambers*, 3 J. J. Marsh. (Ky.) 506.

An assignee of claims in the hands of a collecting agent may bring, in his own name, against the agent, an action for money collected thereon, as for money had and received. *Bullitt v. Methodist Episcopal Church*, 26 Pa. St. 108.

Independently of any statutory enactment on the subject, a recorder of deeds is only liable for an erroneous certificate to the person who asks for and pays for it, and not to his assigns or alienee. *Commonwealth v. Harmer*, 6 Phila. (Pa.) 90; *Houseman v. Girard Mut. Bldg. etc. Assoc.*, 81 Pa. St. 256. See the act of assembly in *Pennsylvania*, April 13th, 1872, § 1 (P. L. 1140).

An assignment of an execution does not enable the assignee to sue in his own name, the officer who fails to collect and pay over the money. *Jones v. Commonwealth*, 2 Litt. (Ky.) 357.

Nor by the assignment of a judgment does the assignor's right to recover against the sheriff for neglect of duty before the assignment, respecting executions that had issued on the judgment, pass to the assignee; nor is such right extinguished by the assign-

purchaser.¹ Only a party to a contract can sue for fraudulent representations made therein,² or for breach of a guarantee or warrantee, unless the contract be negotiable.³

2. Oblige in Written Contract.—An action on a non-negotiable written contract must be in the name of the obligee.⁴ If an error

ment. *Commonwealth v. Fuqua*, 3 Litt. (Ky.) 41.

For a breach of duty by the sheriff, in respect to a writ of execution committed to him, a suit may be brought in the name of the real party (in this case an assignee of the judgment), although not the party of record. *Page v. Thompson*, 43 N. H. 373.

The purchaser of an interest of a chose in action, without having acquired any legal title, and who is thus authorized as agent, to bring a suit at law in the name of the assignor, may also, in the same name prosecute any action growing out of the same, and collateral to it, as, for instance, an action against a sheriff for not serving in due time a notice to take depositions placed in his hands by such assignee. *Waterman v. Williamson*, 13 Ired. (N. Car.) 198.

In general a public officer is liable only to the person to whom the particular duty is owing, and the ruling question in all cases of the kind is as to whether the plaintiff shows the breach of a particular duty to him.

Thus a mortgagee cannot maintain a suit upon a county treasurer's bond for failure to make taxes of the mortgagor out of his personal property. *State v. Harris*, 89 Ind. 363; 46 Am. Rep. 169.

1. Sheriff's Sales.—A bidder at sheriff's sale can only be sued by the sheriff for failing to complete his purchase; the execution plaintiff may not sue. *Rover on Judicial Sales* (2nd ed.), § 744; *People v. Stette*, 103 Ill. 467; *Chappell v. Dann*, 21 Barb. (N. Y.) 17; *Walker v. Braden*, 34 Kan. 660; *Armstrong v. Vroman*, 11 Minn. 220; 88 Am. Dec. 81; *Adams v. Adams*, 4 Watts (Pa.) 160; *Galpin v. Lamb*, 29 Ohio St. 529.

Where, however, a sheriff took notes payable to himself individually and died, it was held that he had taken the notes as a trustee and therefore had no interest in them that could pass to his administrators, and that only the real parties in interest in the proceeds of said notes could sue thereon. *Pratt v. Carr*, 46 Ind. 67.

2. Fraudulent Representations.—A sold to B certain land making fraudulent representations. At B's request the conveyance was made to C as security for a debt due by B. *Held*, B is proper plaintiff in an action for the fraudulent representations. *Phillips v. Bush*, 15 Iowa 64.

A exchanged securities with B. B gave the newly acquired securities to C. *Held*, C could not sue A for fraudulent representations which had induced B to make the exchange. *Simar v. Canaday*, 53 N. Y. 298; 13 Am. Rep. 523.

3. Warrantees and Guarantees.—A guarantor of the payment of a non-negotiable instrument is liable only to the person to whom he makes the guarantee. *Second Nat. Bank v. Diefendorf*, 90 Ill. 396.

A assigned to B a claim against C for goods sold for which C had given A his promissory notes. B sued C. *Held*, C, in that action, could not set up a breach of warrantee by A. *Adler v. Robert Portner Brew. Co.*, 65 Md. 27. When a railroad company issues bonds and the bonds state that they are guaranteed by B railroad company, the bondholders can sue B railroad company in case it is proved that B railroad company consented to the representation contained in the bonds that it guaranteed them. *Opdyke v. Pacific R. Co.*, 3 Dill. (U. S.) 55.

When, however, coupons detached from bonds are negotiable, the holder of a coupon may sue in his name a guarantor of the payment of the principal and interest due on the bond from which the coupon had been taken. *Taylor v. Memphis etc. R. Co.*, 11 Lea (Tenn.) 186.

In a case where an article was purchased by a relative of plaintiff, but plaintiff was present at the time assisting in selecting the same, it was held that if a promise to warrant the article was made to the plaintiff she could sue in her own name for a breach of the warrantee, and it was immaterial who paid for the article. *Dallum v. Birdsell*, 66 Ill. 378.

4. See *infra*, in this article, VII,

is made in stating the name of the obligee, he must sue in his right name, with proper averments.¹ On a contract of subscription, suit must be brought by the party to whom the amount subscribed is made payable in the subscription paper.²

(1) INSURANCE POLICIES.—An action on a life insurance policy must be brought in the name of the beneficiary named in the policy,³ and the same rule applies to a fire or marine insurance

Party Having Legal Title Must Sue.

1. See *infra*, in this article, III, *Parties Must be Real, Not Fictitious*.

2. **Subscription Papers.**—At common law a suit upon a subscription paper must be brought by the parties therein designated as the payees. *McCarmel Church v. Journey*, 9 Lea (Tenn.) 215; *Hutchins v. Smith*, 46 Barb. (N. Y.) 235; *McDonald v. Gray*, 11 Iowa 508; 69 Am. Dec. 509.

Where an agreement was entered into by which certain parties, for the purpose of encouraging the construction of a railroad, promised to pay any railroad company that the agents of the parties might contract with, the sums set against their names, and the agents were empowered to deliver the contract of subscription to such railroad company—*held*, that no assignment of the contract was necessary, but that it would pass to the railroad company by delivery so as to invest them with a right of action thereon. *Cedar Rapids etc. R. Co. v. Stewart*, 25 Iowa 115.

Where parties subscribe to pay moneys to a treasurer to be elected, when a treasurer is elected he may sue thereon. *Thompson v. Page*, 1 Met. (Mass.) 565.

The defendant subscribed, upon a paper circulated by a committee for the purpose, \$200 to be paid to trustees to be appointed by a certain conference of the M. E. Church for erecting a seminary building in D; the subscription not to be binding until these trustees should have been appointed, etc.; the trustees having been appointed and incorporated under the name of the "D Seminary"—*held*, that suit for this subscription might be properly brought in the name of the corporation, without any assignment of the claim by the original committee. *Dansville Seminary v. Welch*, 38 Barb. (N. Y.) 221.

3. **Life Insurance.**—When life insur-

ance is payable to the "assured, his executors, administrators or assigns," said sum insured being for the express benefit of the wife of said assured and their children," the executor must sue notwithstanding that subsequent provision. *Massachusetts Mut. L. Ins. Co. v. Robinson*, 98 Ill. 324; *Bailey v. New England Mut. L. Ins. Co.*, 114 Mass. 177; 19 Am. Rep. 329; *Greenfield v. Massachusetts Mut. L. Ins. Co.*, 47 N. Y. 430; *Grattan v. National Life Ins. Co.*, 14 Hun (N. Y.) 74.

See *Myers v. Keystone Mut. L. Ins. Co.*, 27 Pa. St. 268; 67 Am. Dec. 462.

A life insurance policy insured A "for the sole and separate use of his three children, to be paid to the said assured, their administrators, etc." A afterwards devised the policy to his executors in trust for certain different purposes. *Held*, A's executors could not sue. *Ruppert v. Union Mut. Ins. Co.*, 7 Robt. (N. Y.) 155.

If an insurance policy insures "the life of A for the sole use of B," A cannot sue the company for premiums paid, although the policy was void *ab initio* on account of the fraud of defendant's agents. *North America L. Ins. Co. v. Wilson*, 111 Mass. 542; *Trabaudt v. Connecticut Mut. L. Ins. Co.*, 13 Mass. 167; *United States L. Ins. Co. v. Wright*, 33 Ohio St. 533.

If it is payable to A, or if dead, to his children, "or to their guardian if under age," the statutory provisions as to suits by minors apply, and the suit is properly brought in the names of the children, they appearing by a guardian *ad litem*. *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497; 10 Am. Rep. 166.

An insurance policy payable to the widow of the assured, half for herself and half for use of her children, construed to be collectible at suit of widow. The children are not necessary parties. *Piedmont etc. L. Ins. Co. v. Ray*, 50 Tex. 511.

When A, a creditor of B, procures a policy of insurance on B's life,

policy.¹ When insurance is obtained by one person and the entire insurance money is expressly made payable to a third person, he may sue therefor,² but the rule is the contrary when the policy contains an endorsement, "Loss, if any, payable to B, as his inter-

est in the company promising in the policy, the said assured to pay said sum insured to the said assured, his executors, administrators or assigns," and it appears on the face of the policy that the policy had been applied for by A, who paid the premium, it was held that the words "the assured" used in the policy, apply to A who, on A's death, could sue for the insurance money. *Connecticut Mut. L. Ins. Co. v. Luchs*, 108 U. S. 498; *Brockway v. Connecticut Mut. L. Ins. Co.*, 29 Fed. Rep. 766.

So where a life policy is made payable to the "assured, his executors, etc.," and the policy is expressed on its face to be for A's benefit, A can sue in his own name because the word "assured" was intended to designate the person for whose benefit the insurance was effected. *Hogle v. Guardian L. Ins. Co.*, 6 Robt. (N. Y.) 567; 4 Abb. Pr., N. S. (N. Y.) 346; *Ruppert v. Union Mut. Ins. Co.*, 7 Robt. (N. Y.) 55.

Under the same circumstances A was held entitled to sue, because the real party in interest under the codes. *McComas v. Covenant Mut. L. Ins. Co.*, 56 Mo. 573.

Where an insurance company covenanted with A, his heirs, executors, etc., by policy under seal to pay the sum insured to B on the death of A, suit could not be maintained by B. *Flynn v. North American L. Ins. Co.*, 115 Mass. 449.

Where, however, the policy was in the form of a simple contract the party having the beneficial interest may sue. *Hillyard v. Mutual Ben. L. Ins. Co.*, 15 N. J. L. 415; *Mutual Ben. L. Ins. Co. v. Hillyard*, 37 N. J. L. 444; 18 Am. Rep. 741.

Even at common law the beneficiary of a policy of fire insurance running to nominal parties for the benefit of "whom it may concern" may sue thereon. And he certainly can under the codes. *Insurance Co. of N. A. v. Forchenier*, 86 Ala. 541.

1. Fire and Marine Insurance Policy.—A policy of insurance issued to a particular person must be sued on by him. *Wise v. St. Louis Marine Ins.*

Co., 23 Mo. 80; *Trade Ins. Co. v. Barcliff*, 45 N. J. L. 543; 46 Am. Rep. 792.

When an insurance policy is issued to A, who has a legal title to property insured, and subsequently it being decided that A in purchasing said property from B had defrauded B, and therefore B's conveyance to A was set aside, it having been decided that this did not avoid the policy issued to A, it was further held that A was the proper person to sue thereon. *Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43.

On a contract of insurance with two jointly on their joint property, one cannot sue alone, without proof of an assignment to him of the other's interest, and of the company's assent thereto. *Tate v. Citizens' Mut. F. Ins. Co.*, 13 Gray (Mass.) 79.

2. Third Party Entitled to Entire Sum.

—Where the owner insures property in his own name, but stipulates that the loss, if any, shall be paid to another party, said other party may sue. *Howard F. Ins. Co. v. Chase*, 5 Wall. (U. S.) 509; *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337; *National F. Ins. Co. v. Crane*, 16 Md. 260; *Barrett v. Union Mut. F. Ins. Co.*, 7 Cush. (Mass.) 175; *Grosvenor v. Atlantic F. Ins. Co.*, 17 N. Y. 391; *Frink v. Hampden Ins. Co.*, 45 Barb. (N. Y.) 384; *Matthews v. Queen City Ins. Co.*, 2 Cin. Sup. Ct. (Ohio) 109.

It has been held that he is the only one who can sue. *Ripley v. Astor Ins. Co.*, 17 How. Pr. (N. Y.) 444.

But there are other cases holding that the owner may sue if third party consents. *Patterson v. Triumph Ins. Co.*, 64 Me. 500; *Coates v. Pennsylvania F. Ins. Co.*, 58 Md. 172; 42 Am. Rep. 327; *Turner v. Quincy Mut. F. Ins. Co.*, 109 Mass. 568. Or even without his consent. *Martin v. Franklin F. Ins. Co.*, 38 N. J. L. 140; 20 Am. Rep. 372.

When by the terms of the policy, or assignment pursuant to its terms, the entire sum of the insurance money is payable to a third party he may sue thereon. *Fire Ins. Co. v. Felrath*, 77 Ala. 194; 54 Am. Rep. 58; *Michael v. St. Louis Mut. F. Ins. Co.*, 17 Mo. App. 23.

est may appear."¹ The assignee of an insurance policy cannot

So where the assignee or third party's interest equals or exceeds the amount of the insurance. *Mershon v. National Ins. Co.*, 34 Iowa 87; *Bartlett v. Iowa State Ins. Co.*, 77 Iowa 86; *Cone v. Niagara F. Ins. Co.*, 3 *Thomp. & C. (N. Y.)* 33.

Where a policy issued to A is endorsed "Loss, if any, payable to B, mortgagee," and after a loss, the company, exercising an option given them by the policy, elect to rebuild, and so notify the insured, and the insured accepted this proposition, on the company's failure to rebuild, the action for their breach of that contract must be brought by A, because the legal title to this contract was in him and not in B, to whom the defendant was simply obliged to pay the loss in case no notice of intention to rebuild was given. *Heilmann v. Westchester F. Ins. Co.*, 75 N. Y. 7.

Compare Bank of New South Wales v. Royal Ins. Co., 9 *Ins. Law Journal* 930; *May on Insurance* (2nd ed.), § 432.

1. Loss, if Any, Payable to B as His Interest May Appear.—If A obtains a fire insurance policy on his premises, an endorsement thereon, "Loss, if any, payable to B, as his interest may appear," will not authorize a suit by B against the company. A, being the owner of the policy, is alone entitled to sue thereon. *Thatch v. Metropole Ins. Co.*, 3 *McCrary (U. S.)* 387; *Friemansdorf v. Watertown Ins. Co.*, 1 *Fed. Rep.* 68; *Commercial Ins. Co. v. Treasury Bank*, 61 *Ill.* 482; 14 *Am. Rep.* 73; *St. Paul F. & M. Ins. Co. v. Johnson*, 77 *Ill.* 598; *Hartford F. Ins. Co. v. Davenport*, 37 *Mich.* 608; *Hall v. Fire Association*, 64 *N. H.* 405.

If A dies, his administrator should sue for the benefit of B. *Westchester F. Ins. Co. v. Dodge*, 44 *Mich.* 420.

Even though the State Code provides that the real party in interest must sue. *Fire Ins. Co. v. Felrath*, 77 *Ala.* 194; 54 *Am. Rep.* 58.

A may sue alone as "trustee of an express trust." *Stevens v. Citizens' Ins. Co.*, 69 *Iowa* 658. Under codes it has, however, been held that B and the insured party may join as plaintiffs. *Home Ins. Co. v. Gilman*, 112 *Ind.* 7; *Winne v. Niagara F. Ins. Co.*, 91 *N. Y.* 185; *Lasher v. North Western Nat. Ins. Co.*, 18 *Hun (N. Y.)* 98.

Where, however, a policy was issued

to A, "Loss, if any, payable to B, trustee for C to secure loan," and there was a special provision that, "whenever the company shall pay the holder of any such notes or bonds" (being the loan aforesaid) "any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, it shall at once be legally subrogated to all the rights of such holder, under all the securities held as collateral to the debt to the extent of such payment; or, at his option, may pay to such holder the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the securities held as collateral to the debt; but no such subrogation shall impair the right of the holder of such securities to recover the full amount of his claim," it was held, that this was an express contract with the creditor of the insured, and that to the extent of the debt secured by the deed of trust, the creditor had an interest distinct from that of the owner of the property, and that any loss to that interest accruing under the policy was payable to the trustee for the use of the holder of the note, and that he, the trustee, might maintain an action for the same in his own name. *Hartford F. Ins. Co. v. Olcott*, 97 *Ill.* 439.

In one case, where an endorsement, "Loss, if any, payable to B as his interest may appear," was signed and approved by the company, and B sued. The court held the action was properly brought. *DEPUE, J.*, referring to the principle that a party entitled to the whole interest may sue said: "The same principle will apply where the interest of the third person which the insurer agreed to protect is not equal to the whole interest of the policy, or, as in this case, is such interest as may 'appear.'" The court then refers to *Castelli v. Boddington*, 1 *E. & B.* 66, where it was held that the rights to sue for a loss and for a return of part of premium, may be severed, one being in the insured, the other in his assignee, and continues: "A like severance apportionment occurs where the insurer agrees to be responsible to a third person for an aliquot or ascertainable part of the insurance money. The person with whom the insurer so contracts, undoubtedly holds subject to the con-

sue thereon in his own name,¹ unless the insured has consented to the assignment,² and the whole interest in the policy has been assigned,³ except under codes and statutes authorizing such suits.⁴

ditions of the policy, and under a liability to have his rights defeated by a breach of the conditions of insurance by the insured; but nevertheless he takes under a contract with the insurer of his own making. Upon that contract he should be permitted to pursue his remedy in the same manner in which contracts with parties are enforceable. No injury can result thereby to the insurer. Every defense may be made in a suit prosecuted in the name of the beneficiary which would be available in an action in the name of the insured, and if suits by both parties be pending, the courts, in virtue of their equitable control over actions, may so control the litigation that it may not be made vexatious. Under such circumstances, whether the action be in the name of the insured, for the use of the appointee, or in the name of the latter, is merely a matter of form." *State Ins. Co. v. Maackens*, 38 N. J. L. 546, 567.

On a policy of insurance issued to A and B against loss by fire which contains a provision, "Loss, if any, first payable to A as his interest may appear," where B paid no part of the premium and was not aware the policy had been issued, A may maintain an action in his own name for any loss he may sustain. The person who pays the premium and to whom the loss is payable is the proper party to sue for the loss. *Westchester F. Ins. Co. v. Foster*, 90 Ill. 121.

1. Assignments.—At common law the contract of insurance is not assignable so as to give the assignee a right to sue in his own name. *Folsom v. Belknap Co. Mut. F. Ins. Co.*, 30 N. H. 231; *United States L. Ins. Co. v. Ludwig*, 103 Ill. 305.

If after a loss the insured assigns his policy, or any part of the proceeds, a suit thereon must be brought in the name of the insured at common law. *Hall v. Dorchester Mut. F. Ins. Co.*, 111 Mass. 53.

2. Assent of Company.—When, however, the company has assented to such an assignment of the whole interest in the policy, it has been held that such assent is tantamount to an express promise to pay the assignee, and entitles him to maintain an action against

them in his own name. *Phillips v. Merrimack Mut. F. Ins. Co.*, 10 Cush. (Mass.) 350; *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 506.

If a life insurance policy is made payable to the "assured, his executors, administrators and assigns" and the assured assigns the policy, with the assent of the company, the assignee may sue thereon, although the policy is for the use of the assured's wife and children. *Burroughs v. State Mut. L. Assurance Co.*, 97 Mass. 359.

An action of debt will lie in a policy under seal, renewed by parol, in the name of an assignee of the whole interest of the party originally insured. *Franklin F. Ins. Co. v. Massey*, 33 Pa. St. 221. *Contra*, in absence of such a renewal. *Jessel v. Williamsburgh Ins. Co.*, 3 Hill (N. Y.) 88.

Where the assignment of a policy of insurance is justified by the terms of the policy, an assignee, suing in equity for a loss upon the policy, must bring the suit in his own name. *Rogers v. Trades' Ins. Co.*, 6 Paige (N. Y.) 583.

Where a policy of fire insurance is assigned as collateral security for a debt and the assignment approved by the company, the assignor and assignee may join in a suit to recover the loss. *Boynton v. Clinton etc. Mut. Ins. Co.*, 16 Barb. (N. Y.) 254.

The assignee may sue alone in his own name or in the name of the insured for his use. *New Orleans Ins. Co. v. Gordon*, 68 Tex. 144.

3. Partial Assignment.—See cases cited in previous note. The assignee of a part interest in a policy of fire insurance was allowed to sue the company and join his assignor as defendants in *Bibend v. Liverpool etc. F & L. Ins. Co.*, 30 Cal. 78.

4. Codes and Statutes.—When a policy of life insurance is made payable to "A, his executors, administrators or assigns," and A assigns the same to B, B and the successive assignees may sue thereon in their own names, at least under the codes. *Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329.

The assignee of the whole interest in a policy of insurance, though the assignment is made after loss occurred, may, under a statute authorizing the

(2) BONDS.—An action on a bond must be brought in the name of the obligee named therein.¹ This rule has, however, been

assignee of contracts in writing to maintain suit thereon, as well as under codes authorizing the real party in interest to sue thereon in his own name. *Perry v. Merchants' Ins. Co.*, 25 Ala. 355.

An insurance policy has been held to be included in the "writings containing any agreement for the payment of money," which are rendered assignable by statute with right in the assignee to sue in his own name. *Marts v. Cumberland Mut. F. Ins. Co.*, 44 N. J. L. 478; *Watertown F. Ins. Co. v. Grover etc. Sewing Mach. Co.*, 41 Mich. 131.

Notwithstanding a statute which authorizes the assignee of a policy of insurance to sue in his own name, the assignment must be made with the consent of the company if such consent is required by the policy. *Waterhouse v. Gloucester F. Ins. Co.*, 69 Me. 409.

The right to assign an accrued cause of action being statutory, cannot be defeated, and therefore after the loss has occurred, the insured party may assign the policy without the consent of the insurer. *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252.

Upon the questions as to what are the rights and liabilities of assignees of insurance policies, see FIRE INSURANCE, vol. 7, p. 1002.

See also *Kanday v. Gore District Mut. F. Ins. Co.*, 44 U. C., Q. B. 261; *Bergson v. Builders' Ins. Co.*, 38 Cal. 541.

1. BONDS.—When an unincorporated company appoints an agent at pleasure, and he gives a bond with sureties to the directors of the company, the agent and his sureties are liable to an action brought by the obligees after they had ceased to be directors. *Anderson v. Longden*, 1 Wheat. (U. S.) 85.

Bonds for the payment of purchase-money, given to commissioners appointed by a court of equity to sell lands, were put in suit by commissioners, afterwards substituted by the court for those who were obligees in the bonds. *Held*, that such suit could be maintained, and was rightly brought in the name of the first commissioners; and that the declaration need not show, nor need it otherwise appear, that the action was for the benefit of such sec-

ond commissioners. *Clarkson v. Doddridge*, 14 Gratt. (Va.) 42.

On an attachment bond payable to the sheriff, the plaintiff in the attachment may not sue. *Forrest v. O'Donnell*, 42 Mich. 556.

In a suit by the State for its own use, upon a bond payable to the State, no relator need be named. *Fry v. State*, 27 Ind. 348.

When an official bond is executed to the people of a state, the people are the proper parties plaintiff in a suit thereon, to whatever fund or person the sum recovered may belong. *People v. Harper*, 91 Ill. 357.

But the officer's successor if entitled to the money claimed, is the proper relator to maintain the action. *Hiatt v. State*, 110 Ind. 472.

He may not sue in his own name. *Armstrong v. Durland*, 11 Kan. 15.

If a tax collector's bond is payable to the State, all the money due thereon, though part is due to the county and part to the State, may be recovered in an action in the name of the People of the State. *People v. Love*, 25 Cal. 520.

A, a commissioner to collect State taxes, appointed a deputy who executed a bond to A as commissioner. There was no statute regulating the appointing of a deputy or taking such bond. *Held*, suit thereon could only be brought by A, and not by A and the State jointly. *Galbraith v. Gaines*, 10 Lea (Tenn.) 568.

If a bond for the use of a town is made to its treasurer, he must sue. *Farmington v. Hobert*, 74 Me. 416.

When in an official bond the parties thereto "agree to pay each and every person who may be entitled thereto, all such sums of money, etc.," an action thereon is properly brought in the name of the party injured. It cannot be maintained in the name of the people. *Wagner v. Knowles*, 67 Ill. 325.

Although a replevin bond may be assigned to a third person, the execution thereon must still issue in the name of the obligee, and a delivery bond taken to the assignee by virtue of said execution, is irregular. *Jones v. Powell*, 5 Litt. (Ky.) 289.

On an administration bond, payable to the governor by name, and to his successors in office, the suit for the benefit of the party injured must be

modified by statutes,¹ and is affected by the general code provision that all suits must be brought in the name of the real party in interest.²

brought in the name of the governor for the time being, and not by his style of office. Governor of Arkansas v. Ball, Hempst. (U. S.) 541; Ward v. Hubbard, 62 Tex. 559.

So as to a penal bond payable to a judge by name and his successors in office. Harris v. Plant, 31 Ala. 639.

1. Statutes—Illustrations—Party Aggrieved.—"For any breach of an official bond or undertaking of any officer of this State, executor, administrator or guardian, or of any bond or undertaking given in an official capacity to the State, or any officer thereof, the person aggrieved may sue in his own name, assigning the appropriate breach." Code of Alabama, 1886, § 2575; Kansas, Gen. Stat. 1889, § 4800; Tennessee, Code, 1884, § 3494.

For definitions of who is the "person aggrieved," see Sprowl v. Lawrence, 33 Ala. 674; Morrow v. Wood, 56 Ala. 1; Lewis v. Lee Co., 66 Ala. 480; Dudley v. Chilton Co., 66 Ala. 593.

Compare Stewart v. Duncan, 40 Minn. 410.

Notwithstanding such statute the person aggrieved may if he prefer, sue in the name of the obligee in the bond to his use. Amason v. Nash, 24 Ala. 279.

Person Intended to be Secured.—"When a bond or other instrument given to the State or county, or other municipal corporation, or to any officer or person, is intended for the security of the public generally, or of particular individuals, suit may be brought thereon in the name of any person intended to be thus secured who has sustained an injury in consequence of a breach thereof." Iowa, McClain's Annot. Code, 1888, § 3757.

Under this provision in the Iowa Code, if the instrument was intended as security, it is immaterial that it is not in form a statutory bond or obligation. Sheppard v. Collins, 12 Iowa 570; Allen v. Platt, 79 Iowa 113.

Where a county treasurer collected taxes voted in aid of a railroad company, and makes default, the company may sue on his bond. Cedar Rapids etc. R. Co. v. Cowen, 77 Iowa 535.

Where a contractor gives bond "to pay all just claims against him, etc.,"

arising out of the work to be done, all persons having such claims either in person or as assignees may sue on the bond in their own names. Jordan v. Kavanaugh, 63 Iowa 152; Baker v. Bryan, 64 Iowa 561; Wells v. Kavanaugh, 70 Iowa 519.

Contra, where it is apparent the bond was not intended for the benefit of such persons, but for the benefit of the person employing the contractor. Weller v. Goble, 66 Iowa 113.

A person for whose security a bond was intended may sue thereon, whoever was the obligee. Van Gorder v. Lundy, 66 Iowa 448; Arts v. Guthrie, 75 Iowa 674; Rowley v. Jewett, 56 Iowa 492; Huntington v. Fisher, 27 Iowa 276.

The person entitled to the possession of the money in the hands of any public officer is entitled to sue on his bond. Wells v. Stornback, 59 Iowa 376.

Although a State may sue upon a county treasurer's bond for a defalcation in the State revenue, it cannot do so after the county has been barred by the statute of limitations, the State having by statute a special remedy against the county for the defalcation. State v. Henderson, 40 Iowa 242.

"When any bond, note, or other security is taken to any officer of a community or corporation in this State, wherein the beneficial interest belongs, or, on the face of such security, appears to belong to such community or corporation, any action to recover or enforce the same may be maintained by such community or corporation in its own corporate name." Connecticut, Gen. Stat. 1888, § 977.

Under the Indiana statute a creditor of the estate may sue upon an executor's, administrator's or guardian's bond. State v. Fitch, 113 Ind. 478.

"An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate." California, Deering's C. & St., vol. 3, § 1586.

2. Code Provisions.—Under the general code provisions, the obligee in a bond can sue for all liabilities thereunder, while each person to be secured

3. Third Parties.—The common law rule that a third person not a party to a contract, could not sue thereon has, however, long since been held inapplicable to the case of a contract made for the benefit of a third party,¹ provided the contract be not

thereby may sue in his own name as the real party in interest for any liability to himself. *Harvey Co. v. Munger*, 24 Kan. 205; *Blake v. Johnson Co.*, 18 Kan. 266; *Crowell v. Ward*, 16 Kan. 60; *Lane v. Kasey*, 1 Metc. (Ky.) 412; *Hughes v. Cotton*, 13 Bush (Ky.) 596; *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23; 19 Am. Rep. 50; *Board of School Directors of Madison v. Brown*, 33 La. Ann. 383; *Stillwell v. Hurlbert*, 18 N. Y. 374.

Even though the bond is not in the statutory form. *Lane v. Kasey*, 1 Metc. (Ky.) 411.

The real parties in interest may not join as plaintiffs. *Hammond v. Crawford*, 9 Bush (Ky.) 75.

If a replevin bond is made payable to the officer who levied the writ, the plaintiff in the attachment cannot sue in his own name even under code. *Agnew v. Leath*, 63 Ala. 345.

Contra when the bond is by statute made payable to plaintiff. *Indiana*, Rev. Stat. 1881, § 1270; *Walls v. Johnson*, 16 Ind. 374; *Thomas v. Irwin*, 90 Ind. 557.

On an attachment bond payable to the sheriff, the plaintiff in the attachment may sue. *Curiac v. Packard*, 29 Cal. 194.

Contra at common law. *Forrest v. O'Donnell*, 42 Mich. 556.

The statutes requiring the real party in interest to sue, does not apply to official bonds made payable to the State. *Carmichael v. Moore*, 88 N. Car. 29; *Norman v. Walker*, 101 N. Car. 24.

Under the *California* Code, suits on official bonds must be in the name of the State. *People v. Stacy*, 74 Cal. 373. So in *Indiana*, Rev. Stat. 1881, § 253.

1. Third Party May Sue.—The right of a third party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country. *Hendrick v. Lindsay*, 93 U. S. 143. See (under codes) *Mason v. Hall*, 30 Ala. 599; *Shotwell v. Gilkey*, 31 Ala. 724; *Hecht v. Caughron*, 46 Ark. 132; *Sacramento Lumber Co. v. Wagner*, 67 Cal. 293;

Green v. Morrison, 5 Colo. 18; *Steele v. Clark*, 77 Ill. 471; *Thompson v. Dearborn*, 107 Ill. 87; *Rogers v. Gosnell*, 58 Mo. 589; *Shamp v. Meyer*, 20 Neb. 223; *Lawrence v. Fox*, 20 N. Y. 268; *Wood v. Moriarty*, 15 R. I. 518.

"A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." *California*, Civil Code, § 1559; *Dakota*, Comp. Laws 1887, § 3499; *Idaho*, Rev. Stat. 1887, § 3221.

Where A gives his note and mortgages his land to a bank, and then conveys it to B providing in the conveyance that B shall pay the debts secured on the land to the bank, and B conveys the land to C with a proviso that the latter will hold him harmless, B being directly liable to A, the bank may sue him and recover, but the undertaking by C to save B harmless gives the bank no right to sue C. *First Nat. Bank v. Schussler* (Ky. 1886), 2 S. W. Rep. 145.

A creditor of a firm cannot maintain an action upon an agreement made with the firm, by one not a member, to pay a portion—for instance, one-quarter of its indebtedness, as no one creditor can show from the contract that it was intended for his benefit, or covers any part of his debt. Per FINCH, J., "It would be a great extension of the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, to give a right of action to a creditor for whose benefit the promise might or might not have been made . . . We prefer to restrict the doctrine within the precise limits of its original application." *Wheat v. Rice*, 97 N. Y. 296.

A person who is not a party to a contract, and for whose benefit it was not expressly made, cannot maintain an action thereon, notwithstanding the contract, if performed by the parties to it, would incidentally enure to his benefit. *Chung Kee v. Davidson*, 73 Cal. 522; *Second Nat. Bank v. Grand Lodge*, 98 U. S. 123.

Where two persons for a consideration sufficient as between themselves, covenant to do some act, which, if done, would incidentally result in the

under seal,¹ while under codes the party for whose benefit a contract is made has been expressly held to be the real party in interest.² A mortgagee cannot sue the grantee of his mortgagor who had contracted to pay the mortgage,³ but a vendor by arti-

benefit of a mere stranger, he has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other. Case of subscription as follows: "We, the undersigned, pledge ourselves to subscribe for and take stock in the X railroad to the amount set opposite our name respectively, on condition that it is located through or north of Y." Held, X company could not sue thereon. *Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 219.

To same effect, *Simson v. Brown*, 68 N. Y. 355.

To sustain an action by a third party upon a promise made for his benefit, there must be, 1st, An existing claim against the promisee in favor of such third party. 2nd, A liability of the promisor to the promisee, and 3rd, An engagement by the promisor to the promisee to discharge his liability to the promisee by paying or satisfying the third party's claim against the promisee. *Lorillard v. Clyde*, 56 N. Y. Super. Ct. 14. Compare *Gwin v. Thomas Iron Co.*, 115 Pa. St. 611.

In order that a third party not a party to a contract may sue thereon, it must appear that there was a clear intent upon the part of both the first and the second that the promisor should become a debtor to said third person. A mere benefit accruing to him is not sufficient. *Wright v. Terry*, 23 Fla. 160; *Burton v. Larkin*, 36 Kan. 246; 59 Am. Rep. 541.

To entitle a third person not named as a party to a contract, to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of *cestui que trust* under the contract. *Re Empress Engineering Co., L. R.*, 16 Ch. Div. 125; *Gaudy v. Gaudy, L. R.*, 30 Ch. Div. 57; *Morrill v. Lane*, 136 Mass. 93.

The provision in a municipal contract that the contractor shall pay his workmen in cash, and that if he does not do so, or does not furnish evidence of that fact, the municipality shall retain of the money due him sufficient therefor until their claims be fully

satisfied, gives no right of action against the municipality by such workmen; it can only be enforced at the option of the municipality. *Ritchie v. District of Columbia*, 18 Ct. of Cl. 78. See *CONTRACT*, vol. 3, p. 823.

1. **Contracts Under Seal.**—Third person not allowed to sue unless made a party to a contract under seal. *McLaren v. Hutchinson*, 18 Cal. 80; 22 Cal. 187; 3 Am. Dec. 59. Compare *Lewis v. Covillaud*, 21 Cal. 178; *Moore v. House*, 64 Ill. 162; *Gautzert v. Hoge*, 73 Ill. 30; *Sandusky v. Neal*, 2 Ill. App. 624; *Farmington v. Hobert*, 74 Me. 416; *Flynn v. North American L. Ins. Co.*, 115 Mass. 449; *Cocks v. Varney*, 45 N. J. Eq. 72; *Loeb v. Barris*, 50 N. J. L. 382; *Read v. Young*, 1 D. Chip. (Vt.) 244.

A town cannot sue on a bond running to its treasurer, though the bond is for the use of the town. *Farmington v. Hobert*, 74 Me. 416. See *infra*, this title.

Contracts under seal between two, for the doing of a certain work by one to be paid for by the other, cannot be enforced after the work was done against others not parties to the instrument, either as parties by ratification or as partners. *New England Granite Dredging Co. v. Rockport Granite Co.*, 149 Mass. 381.

2. **Codes.**—Under the codes, the party for whose benefit a contract is made is the real party in interest and therefore he may sue thereon in his own name. *Mason v. Hall*, 30 Ala. 599; *Shotwell v. Gilkey*, 31 Ala. 724; *Hecht v. Caughron*, 46 Ark. 132; *Western Development Co. v. Emery*, 61 Cal. 611; *Hardy v. Blazee*, 29 Ind. 226; *Miller v. Billingsby*, 41 Ind. 489; *Henderson v. McDonald*, 84 Ind. 149; *Rice v. Savery*, 22 Iowa 470; *Plano Mfg. Co. v. Burrows*, 40 Kan. 361; *Dodge v. Moss*, 82 Ky. 441; *Schneider v. White*, 12 Oregon 503; *St. Mark's Church v. Teed*, 120 N. Y. 583.

So on the other hand may the person to whom the promise is made sue in his name as trustee of an express trust. *Rice v. Savery*, 22 Iowa 470.

3. **Mortgages.**—If A, having made a mortgage, sells his property to B, and

cles can sue the assignee of his vendee.¹ When an obligation is payable to one as an officer, or to his successors, the person holding the office when suit is brought may sue in his own name.²

B contracts to pay the mortgage, that contract creates no direct obligation from B to the mortgagee, and therefore the mortgagee cannot sue B thereon at law, though in equity the mortgagee may avail himself of A's rights against B. *Keller v. Ashford*, 133 U. S. 610; *Gable v. Scarlett*, 56 Md. 169; *Prentice v. Brimhall*, 123 Mass. 291.

Contra, *Bay v. Williams*, 112 Ill. 91; 54 Am. Rep. 209.

In the above case A need not join the mortgagee in an action against B for the purchase money. *Leese v. Sherwood* 21 Cal. 151.

If, however, the purchaser enters into a new contract with the mortgagee, as for different times and modes of payment, the purchaser may sue the mortgagee thereon. *Earl of Oxford v. Lady Rodney*, 14 Ves. 417.

In *Pennsylvania* it was originally held that a purchaser taking land "under and subject" to an encumbrance, thereby impliedly promised to pay the indebtedness, and the creditor could sue him in the name of his original debtor. This was, however, changed by the act of June 12th, 1878, P. L. 205.

1. Contracts of Sale of Realty.—The assignee of a contract for the sale of real estate, by accepting the assignment, becomes a party to the contract, and personally liable thereon for the purchase money then unpaid. *Wightman v. Spofford*, 56 Iowa 145.

Contra when the assignment is conditional. *Roe v. Barker*, 17 Hun (N. Y.) 84.

2. Obligations to One and His Successors.—A note payable to a treasurer of, etc., or his successor, may be sued in the name of him who was the legal treasurer at date of suit, if the note was in fact the property of the corporation, etc. *Taniter v. Winter*, 53 Me. 348; *Fisher v. Ellis*, 3 Pick. (Mass.) 322; *Berrien Co. v. Bunbury*, 45 Mich. 79.

Where overseers of the poor are authorized to indenture children as apprentices, and their successors are authorized to sue on such indenture, an indenture was made by selectmen who were *ex-officio* overseers of the poor, but who designated themselves simply

as selectmen. *Held*, the overseers of the poor in office when suit was brought were entitled to sue in their own names. *Powers v. Ware*, 2 Pick. (Mass.) 451.

A note payable to an insurance company or its treasurer is not a promise in the alternative to one of two distinct parties, but whether viewed as a promise in terms to the company or to their treasurer is in either case a contract with the company, on which the right of action exists in the company alone. *Atlantic Mut. F. Ins. Co. v. Young*, 38 N. H. 451; 75 Am. Dec. 200.

An action on a promise to the mayor and aldermen of a city to pay for a license of a theatre, is rightly brought in the name of the city. *Boston v. Schaffer*, 9 Pick. (Mass.) 415.

Trustees were appointed to sell town lots with power to appoint successors. A note was made payable to them as trustees. *Held*, they alone could sue, and an action in the name of some of them and the successors of the others would not lie. *Bumpass v. Richardson*, 1 Stew. (Ala.) 16.

If trustees of an association who have brought suit on a note taken by them for a loan of company funds are superseded in their office, their successors may maintain the action in the name of the original trustees, at the request of the association, notwithstanding a release of the action by the original trustees. *Pierce v. Robie*, 39 Me. 205; 63 Am. Dec. 614.

Equity.—In equity, the assignee of a chose in action may enforce his rights in his own name. *Caldwell v. Meshew*, 44 Ark. 564; *Dixon v. Buell*, 21 Ill. 203; *Young v. Person*, 2 Hayw. (N. Car.) 223; *Ensign v. Kellogg*, 4 Pick. (Mass.) 1; *Hutchinson v. Simon*, 57 Miss. 628; *Hooker v. Eagle Bank*, 30 N. Y. 83; 86 Am. Dec. 351.

Though the assignee of a note not negotiable cannot sue a remote assignee at law, yet he may in equity. *Smith v. Harley*, 8 Mo. 559.

The assignee of a note may sue in a court of equity, and a promise by the maker to the assignee to pay him will not deprive that court of jurisdiction. *Townsend v. Carpenter*, 11 Ohio 21.

Nor will a statutory authority to sue

4. Assignees.—An assignee of a non-negotiable obligation cannot sue thereon in his own name,¹ unless the obligor has expressly promised to pay said assignee.² The assignee of a fee

law in his own name. *Winn v. Howles*, 6 Munf. (Va.) 23.

But an assignee of a chose in action cannot come into a court of chancery on the mere ground that he cannot sue at law in his own name, unless he is revented from suing in the name of the assignor, or unless the assignor, before the assignment, would have had right to go into that court. *Moseley v. Boush*, 4 Rand. (Va.) 392; *Adair v. Vinchester*, 7 Gill & J. (Md.) 114.

A court of chancery will judicially notice the fact that courts of law protect the rights of assignees suing in the name of their assignor. *Southgate v. Montgomery*, 1 Paige (N. Y.) 41.

The assignee of a bond having a complete remedy at law can enforce it at law only, if at all. *Ryan v. Parer*, 1 Ired. Eq. (N. Car.) 89; *Haynes v. Thompson*, 34 Miss. 17.

Where a bond has been assigned, and the assignor becomes bankrupt, and the assignee in bankruptcy refuses to allow an action to be brought in his own name upon the bond, and no suit at law can be brought except in the name of the assignee in bankruptcy, the assignee of the bond will be allowed to bring a suit in chancery in his own name upon the bond. *Ontario Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 96.

Where the assignee of a claim seeks to enforce his claim by the aid of a court of equity, the court will examine into the consideration of the assignment, the nature of the property assigned and the relation of the parties, for the purpose of doing what equity requires in the case, and they will set aside an assignment as improvidently obtained, where undue advantage has been taken of a person ignorant of his rights, especially where the parties stand in the relation of guardian and ward, or parent and child. *Haskell v. Codman*, 8 Met. (Mass.) 536; *S. P. in Michigan*, *Street v. Dow*, Harr. (Mich.) 427.

In a bill of equity by the assignee of a chose in action, the assignor is a necessary party, if there remains any right or liability in the assignor which may be affected by the decree. *Montague v. Lobdell*, 11 Cush. (Mass.) 111.

1. Assignees.—One who is in legal

effect merely the assignee of a claim against the government of the United States cannot maintain an action upon it in his own name, though he holds an official voucher for it issued to him in his own name. *Johnston v. United States*, 13 Ct. of Cl. 217.

An assignee of a non-negotiable note cannot sue thereon in his own name. *Matlock v. Hendrickson*, 13 N. J. L. 263; *McKinney v. Alvis*, 14 Ill. 33; *Kinniken v. Dulaney*, 5 Harr. (Del.) 384; *Sabin v. Hamilton*, 2 Ark. 485.

After a note is taken up by the endorser, its negotiability ceases, and he cannot, by transferring the note, assign his right of action at law, so as to enable the assignee to sue in his own name. *Swann v. Schofield*, 2 Cranch (C. C.) 140.

The assignee of an account cannot maintain an action thereon in his own name. *Anderson v. Lewis*, 10 Ark. 304.

If A is indebted to B, and B is indebted to C, and then B gives C an order on A to pay C the amount due him by B, and credit it on the amount due by A to B, an action cannot be brought by C against A to recover the amount of the order, even though A had promised B that he would pay the amount to C. *Wharton v. Walker*, 4 B. & C. 163; *Fairlie v. Denton*, 8 B. & C. 395; *Price v. Easton*, 4 B. & Ad. 433; *Johnston v. United States*, 13 Ct. of Cl. 217.

Where A is indebted to B, and B is indebted to C, and promises to pay C when he obtains his money from A, and C has no legal or equitable assignment of B's claim against A and no judgment against B, and there is no privity between C and A, C cannot recover from A the debt due from A to B. *Smith v. Bourbon Co.*, 43 Kan. 619.

Debt does not lie in the name of an assignee, although the obligation is to his assignor, his heirs, executors or assigns. *Skinner v. Somes*, 14 Mass. 107; *Sayre v. Lucas*, 2 Stew. (Ala.) 259; 20 Am. Dec. 33; *Smock v. Taylor*, 1 N. J. L. 177; *Sheppard v. Stiles*, 7 N. J. L. 94.

2. Promise to Assignee by Obligor.—

In a suit by A against B, a defense that A being indebted to C, it was

farm rent or a ground rent may sue therefor in his own name;¹ but the assignee of a lease may not sue for the rent in his own name.² The assignee of a lottery ticket may not sue thereon in

agreed between A, B and C, that B should pay C, and that B promised to pay C, is bad, unless it appear that C actually released A, at least in the absence of actual payment by B. *Cochrane v. Green*, 9 C. B., N. S. 448.

A owes B and C owes both B and A. A verbal agreement between the three that B should transfer the debt due him by A to the account of C, although carried out so far by B as to deliver C an account wherein he charges him with the debt due by A, does not release A. B could sue A unless there was an express agreement to accept C as his debtor and to discharge A. *Cuxon v. Chadley*, 3 B. & C. 591.

If A is indebted to B, and B to C, and all parties consent that A should pay to C his indebtedness to B, after such agreement C can sue A for the said debt originally due B. *Wilson v. Coupland*, 5 B. & Ald. 228.

The assignee of a chose in action may maintain a suit in his own name upon the promise of the debtor to pay the same to him. *Lang v. Fiske*, 11 Me. 385; *Smith v. Berry*, 18 Me. 122; *Warren v. Wheeler*, 21 Me. 484; *Page v. Danforth*, 53 Me. 174; *Gordon v. Downey*, 1 Gill (Md.) 41; *Hay v. Green*, 12 Cush. (Mass.) 282; *Burrows v. Glover*, 106 Mass. 324; *Boyd v. Webster*, 58 N. H. 337; *Bucklin v. Ward*, 7 Vt. 195; *Hodges v. Eastman*, 12 Vt. 358; *Clarke v. Thompson*, 2 R. I. 146; *Matherson v. Crain*, 1 McCord (S. Car.) 219; *De Barry v. Withers*, 44 Pa. St. 356; *Mt. Olivet Cemetery v. Shubert*, 2 Head (Tenn.) 116.

Evidence that the debtor under a contract offered to pay the debt to the assignee of the contract, provided the time of payment should be extended, does not make out a case of novation which renders it necessary to sue in the name of the assignee. *Tefft v. McNoah*, 9 Mich. 201.

On a contract of insurance with two jointly on their joint property, one cannot sue alone, without proof of an assignment to him of the other's interest and of the company's assent thereto. *Tate v. Citizen's Mut. F. Ins. Co.*, 13 Gray (Mass.) 79.

If a parol promise is made to three, and one transfer his interest to the

other two, though the defendant, with knowledge of the fact, promise to pay the two, yet the three must join in the action, if it be brought on the original promise. *Jarman v. Howard*, 3 A. K. Marsh. (Ky.) 384.

If a bond for the conveyance of land upon certain conditions, be assigned by the obligee, and the obligor, upon the back of the bond agree under his hand and seal, with the assignee by name, to extend the time of performance limited in the condition of the bond, an action thereon cannot be supported by the assignee in his own name. *Cole v. Bodfish*, 17 Me. 310.

Where two of three towns, jointly authorized by statute to let the right to take fish, etc., released to the third—*held*, that the third town might maintain an action alone for the price of a subsequent letting. *Watertown v. White*, 13 Mass. 477.

If A owes B, and A consents that B shall assign the debt to C, and it is so assigned, it is still competent for B to sue A in his own name for the use of C. *Winchester v. Hackley*, 2 Cranch (U. S.) 342.

If A owes B, and C claims payment from A as the assignee of B, and thereupon A promises C to pay him, C cannot sue A in his own name unless there has been communication and a new arrangement between all the parties. *McKinney v. Alvis*, 14 Ill. 33.

If an assignor sues in his own name on an open account, he must aver a promise to him by the debtor. *Smith v. Cottrel*, 8 Baxt. (Tenn.) 62.

1. Fee Farm Rents.—"The assignee of a fee farm rent, being an estate of inheritance, is, upon the principles of the common law, entitled to sue therefor in his own name. It is an exception from the general rule that choses in action cannot be transferred, and stands upon the ground of being not a mere personal debt, but a perdurable inheritance." *Scott v. Lunt*, 7 Pet. (U. S.) 596 (a *Virginia* rent).

Ground rents in *Pennsylvania* are interests in the land, and the assignee thereof sues thereon in his own name. See *Juvenal v. Patterson*, 10 Pa. St. 282.

2. Leases.—The assignee of a lease,

his own name.¹ The assignee of negotiable paper duly transferred may sue thereon in his own name.² Assignees of insolvents are vested with the title of their solvent assignee, and may therefore sue in their own name.³ A new firm may not sue on obligations

or the grantee of the land leased, may not sue the lessee for rent in the absence of a promise by him to pay the rent to him. *Lord v. Carnes*, 98 Mass. 308.

1. **Lottery Tickets.**—The holder of a lottery ticket sold it to B. The ticket won. In a suit by B against the party selling the ticket, *held*, B could not sue, as there was no privity between him and the defendant. *Jones v. Carter*, 8 Q. B. 134.

When two persons had purchased tickets in a lottery severally, and had mutually agreed to pay to each other a moiety of the prizes drawn by each, the purchaser of each ticket must sue alone for the prize drawn by such ticket. *Homer v. Whitman*, 15 Mass. 132.

2. **Negotiable Paper.**—A note payable to A, B, or order, must be endorsed by the payee to enable the holder other than the payee to sue upon it in his own name. *Hooker v. Gallagher*, 6 Fla. 351; *Fine v. High Bridge M. E. Church*, 44 N. J. L. 148.

The word "endorsement" implies a transfer by writing upon the instrument transferred. If a note therefore is transferred by a separate writing, the assignor must be made a party defendant to the action. *Keller v. Williams*, 49 Ind. 504.

An endorsement by payee's administrator will authorize suit by endorsee. *Cahoon v. Moore*, 11 Vt. 604.

An endorsee of a promissory note cannot sue on the endorsement or on the note, when he has re-assigned it as collateral security to his endorser, at least not until after the debt secured is satisfied. *Smith v. Felton*, 85 Ind. 223.

The endorsee though holding the note as collateral may sue in his own name. *Sheldon v. Middleton*, 10 Iowa 17; *McCrum v. Corby*, 11 Kan. 464; *Smith v. Isaacs*, 23 La. Ann. 454.

The payees cannot sue on a note which he has endorsed and delivered to a third party and which has not been re-endorsed, unless he was in fact at the time suit begins, the beneficial owner of the note, and as such enti-

tled to have such endorsement made to him. *Simon v. Wildt*, 84 Ky. 157.

A note not under seal, "to be paid in the office" notes of a bank is not negotiable by the usage or custom of merchants. It is therefore not assignable under any statute authorizing assignment of promissory notes or bonds. And therefore if such a note is assigned, suit thereon must nevertheless be brought in the name of the person in whose favor the note was originally drawn. *Irvine v. Lowry*, 14 Pet. (U. S.) 293.

The holder of a note payable to bearer may sue thereon in his own name, because the delivery of the note without endorsement vests the legal title in the holder. *Smyth v. Carden*, 1 Swan (Tenn.) 28; *Allensworth v. Moore*, 3 G. Greene (Iowa) 273.

Though holding the note for collection. *Bingham v. Gurney*, 1 Mich. 349.

The holder of a bond issued by a railroad corporation, payable "to—" may sue thereon in his own name. *Chapin v. Vermont etc. R. Co.*, 8 Gray (Mass.) 575.

The holder of county warrants payable to another person must show a written endorsement or assignment to him in order to sue in his own name. *Bradley Co. v. Surgoine*, 9 Baxt. (Tenn.) 407.

3. **Assignees in Bankruptcy, etc.**—The assignee in bankruptcy is a necessary party to suits brought by or against his assignor. *Brandon v. Cabinese*, 10 Ala. 155.

The bankrupt need not be joined. *Fry v. Street*, 37 Ark. 39.

The bankrupt may sue in his own name with the assignee's consent. *Mayhew v. Pentecost*, 129 Mass. 332.

The assignee is the legal owner of all notes, etc., executed to him as such, and he or his personal representative must sue thereon. *Russell v. Hosmer*, 8 Conn. 229.

The assignee under the insolvent laws must sue in his own name. *Wilkinson v. Renwick*, 23 Wend. (N. Y.) 63; *Johns v. Johns*, 6 Ohio 271; *Ferrall v. Paine*, 2 Strobb. (S. Car.) 293; *Hall v. Brockett*, 60 N. H. 215; *Solas v.*

due the old firm.¹

5. Partial Assignments.—An assignee of part of a claim may not

Cay, 12 Rich. (S. Car.) 558. Compare Smith v. Zalinski, 26 Hun (N. Y.) 225.

In case of a chose in action, whether the act provides so or not, the legal title becomes vested in the insolvent's assignee, and he must sue thereon, and a purchaser from him should sue in the name of such assignee. Hart v. Stone, 30 Conn. 94; Rogers v. Union Stone Co., 134 Mass. 31.

After the fiduciary character of assignees has ceased, they can maintain no action on an acknowledgment by a deputy sheriff that he has funds in his hands arising from the sale of certain articles of property assigned by the owner to them for the benefit of his creditors, and his promise to account to them in their capacity of assignees for the proceeds of these articles, unless they have some interest in the funds, or can show that they prosecute the suit at the request of the party entitled to them. Morril v. Dunn, 39 Me. 281.

A general assignee of an insolvent debtor cannot sue in the courts of the United States, unless his assignor could have sued there. Sere v. Pitot, 6 Cranch (U. S.) 335.

Proceedings in bankruptcy do not affect the previously acquired right of an assignee of a chose in action to sue in the bankrupt's name. Hayes v. Pike, 17 N. H. 564.

But the purchaser from an assignee in insolvency of a note payable to the insolvent or his order and not endorsed by either the insolvent or his assignee, may sue in the name of the insolvent. Stone v. Hubbard, 7 Cush. (Mass.) 595.

So where the obligation assigned was a note negotiable. Benoist v. Darby, 12 Mo. 196.

Where the assignee of an insolvent debtor sells a note to the insolvent debtor, who was the original payee in the note, said insolvent debtor may sue thereon in the name of the assignee with his consent. Pitts v. Holmes, 10 Cush. (Mass.) 92.

A promissory note, inserted by a bankrupt in his schedule of assets filed under the United States bankrupt law of 1841, was afterwards assigned to him by his assignee, under § 3 of that act. Held, that he might sue in

his own name, on a judgment recovered on the note before he was declared a bankrupt. Robinson v. Hall, 11 Gray (Mass.) 483.

He may not sue in his own name without an express promise by debtor to pay him. Hay v. Green, 12 Cush. (Mass.) 282.

One of two plaintiffs in a judgment, who has become an insolvent debtor, and assigned his property for the purpose of obtaining a discharge under an insolvent act, cannot subsequently be joined as a plaintiff in an action on the judgment; the suit must be prosecuted in the names of the solvent plaintiff and the assignees. Willink v. Renwick, 23 Wend. (N. Y.) 63.

Contra when the action is on a judgment in which the insolvent and another were co-plaintiffs. Williams v. Fowle, 132 Mass. 385.

If a partner makes an assignment in bankruptcy, his co-partners and his assignee must join in an action on a debt due the firm. Browning v. Marvin, 22 Hun (N. Y.) 547.

1. New Firms.—When a new partner is admitted to a firm, the mere transfer of a balance due the old firm into the books of the new firm does not authorize the new firm to sue thereon, without the debtor's consent. Armsby v. Farnam, 16 Pick. (Mass.) 318.

If suit is brought by a partnership on a contract, it must appear that all who sue were partners at the time of making the contract; for one who has been subsequently admitted as a partner cannot join in the action, though it were agreed as between the partners themselves that he should become equally interested with the others in all the existing property and rights of the firm; unless, after the accession of the incoming partner, there has been a new and binding promise to pay to the firm as newly constituted. Greenleaf's Evid. (14th ed.), vol. 2, § 478; Wilsford v. Wood, 1 Esp. 182; Firemen's Ins. Co. v. Floss, 67 Md. 403; McGregor v. Cleveland, 5 Wend. (N. Y.) 475.

Unless the action is brought upon a negotiable instrument duly endorsed to plaintiff or in blank. Ord v. Portal, 3 Camp. 239; Ege v. Kyle, 2 Watts (Pa.) 222.

Contra when not so endorsed.

sue thereon,¹ except in equity.² The assignor may still control the claim, unless the debtor consents to the partial assignment.³ It is a misjoinder for the assignor and assignee in case of a partial assignment to join as plaintiffs,⁴ except under code provisions.⁵

Pease v. Hirst, 10 B. & C. 122; *Ege v. Kyle*, 2 Watts (Pa.) 222.

1. Partial Assignment.—Although a party be absolutely entitled to part of the sum due on a bond, etc., he may not sue thereon as the real party in interest, if the bond, etc., is one and single for the payment of a gross sum of money. *Pleasants v. Erskine*, 82 Ala. 386. *Compare* *Leese v. Sherwood*, 21 Cal. 151.

The holder of an order from a lessor to a lessee, for two-thirds of the rent of the premises cannot maintain an action thereon in his own name. *Crosby v. Loop*, 14 Ill. 330.

An insurance company paid an owner of a house an amount less than the amount of his loss. *Held*, an action against a party for setting fire to the house could only be in the name of the property owner. *Ætna Ins. Co. v. Hannibal etc. R. Co.*, 3 Dill. (U. S.) 1.

So if A and B own a contract and A assigns his interest to C, suit cannot be brought in the name of B and C. *Learned v. Ayres*, 41 Mich. 677.

Where, however, an assignee of a demand left with an attorney for collection, assigned it to another, excepting \$50, of which the attorney had notice, and then received the money, an action for money had and received was sustained against the attorney, in the name of the first assignee, for \$50, but no more. For the residue, the second assignee must sue—the money being received for the use of the two assignees respectively. *Taylor v. Bates*, 5 Cow. (N. Y.) 376. See *Wadsworth v. Griswold, Harp.* (S. Car.) 17; *Beran v. Tradesmen's Nat. Bank* (Supreme Ct.), 10 N. Y. Supp. 677.

The endorser of a bill, being sued by the holder, paid him part of the sum mentioned in the bill, and thereafter sued the acceptor for the amount so paid. The acceptor defended *inter alia* on the ground that the endorser could not recover because he had not paid the whole of the bill. This defense was held not maintainable. *Pownall v. Ferrand*, 6 B. & C. 439.

2. Remedy in Equity.—Where a demand is due or becoming due, and the

claimant assigns part of it to different persons, one of the assignees may bring a suit in equity to recover his part of it. *Field v. Mayor etc. of N. Y.*, 6 N. Y. 179; 57 Am. Dec. 435; *Wellsburg Bank v. Kimberlands*, 16 W. Va. 555.

The assignor must be a party to the bill. *Smith v. Garry*, 2 Dev. & B. Eq. (N. Car.) 42.

While a partial assignment of a contract between individuals may be enforced in equity, yet where a municipality is a party to a contract it is not bound to recognize a partial assignment of it. *Appeals of Philadelphia*, 86 Pa. St. 179; *Geist's Appeal*, 104 Pa. St. 351.

3. Power of Assignor.—The principle preventing the splitting of causes of action is applicable to the assignment of part of a claim, and therefore notwithstanding such an assignment if it be without the consent of the debtor, the assignor may control the entire claim, accept satisfaction, effect a compromise, etc. *Mandeville v. Welch*, 5 Wheat. (U. S.) 277; *Westham Granite Co. v. Chandler*, 4 Mackey (D. C.) 32; *Love v. Fairfield*, 13 Mo. 300; 53 Am. Dec. 148; *Burnett v. Crandal*, 63 Mo. 410. *Compare* *Weinstock v. Bellwood*, 12 Bush (Ky.) 139; *Eberhardt v. Schuster*, 10 Abb. N. Cas. (N. Y.) 374.

An assignee of part of a debt may not sue the debtor therefor in his own name unless the assignment was made with the debtor's consent. *Marziou v. Pioche*, 8 Cal. 536; *Grain v. Aldrich*, 38 Cal. 514; 99 Am. Dec. 423; *Getchell v. Maney*, 69 Me. 442; *Thomas v. Rock Island Gold etc. Min. Co.*, 54 Cal. 578.

4. Joinder.—Where the original promisees in a contract assign part of their interest, after the contract is made, it would be a misjoinder to make the assignee of such interest a plaintiff, jointly with the original promisees in an action on the contract. *Oelrichs v. Artz*, 21 Md. 524. *Compare* *Raines v. United States*, 11 Ct. of Cl. 648.

5. Codes.—Under the rules established by the judges under the Practice act in *Connecticut* it is provided *inter*

Whether the code provision that the real party in interest must sue, does or does not apply to a partial assignee is disputed,¹ but the provision does apply where the assignment is absolute, although the assignor retains a part interest.²

6. Assignment by Contractors.—An employee cannot assign his contract of employment without the consent of his employer.³

alia, "If a part interest in a contract obligation be assigned, the assignor (retaining the remaining interest) and assignee, may join as plaintiffs." See *Hamilton v. Lamphear*, 54 Conn. 237. To same effect under the codes, *Groves v. Ruby*, 24 Ind. 418; *Delaware Co. v. Diebold Safe and Lock Co.*, 133 U. S. 473; *Singleton v. O'Brien*, 125 Ind. 151; *Childs v. Alexander*, 22 S. Car. 169.

1. Real Party in Interest.—The provision that suits shall be brought in the name of the real party in interest, does not apply where part of a cause of action only is assigned. In such case, suit for the whole must be brought in the name of the original owner. *Cable v. St. Louis Marine R. etc. Co.*, 21 Mo. 133; *Pleasants v. Erskine*, 82 Ala. 386. *Contra*, *Grain v. Aldrich*, 38 Cal. 514; 99 Am. Dec. 423; *Shaver v. Western Union Tel. Co.*, 57 N. Y. 464.

In case of a partial assignment, it is no bar to an action by the assignor that the assignee has sued and recovered his part of the claim. *Fourth Nat. Bank v. Noonan*, 14 Mo. App. 243.

2. Absolute Assignment.—But an absolute assignment of a demand enables the assignee to sue and recover the whole debt, even though by the assignment he acquired only a portion of the demand. *Gradwohl v. Harris*, 29 Cal. 150; *Brumback v. Oldham*, 1 Idaho, N. S. 709, or the assignment was merely as collateral security. *Wetmore v. San Francisco*, 44 Cal. 294.

And an order on a debtor to pay the whole sum due his creditor to a third party, is an assignment to such third party who may sue thereon in his own name. The creditor may no longer sue unless perhaps for his assignee's benefit. *Wheatley v. Strobe*, 12 Cal. 92; *Pope v. Huth*, 14 Cal. 403.

Claims due for labor were assigned to collect by suit in the assignee's name or otherwise, he to receive twenty-five per cent. pay over the balance, and pay all costs. *Held*, that he might sue in his own name. *Peters*

v. St. Louis etc. R. Co., 24 Mo. 586; *Carpenter v. Johnson*, 1 Nev. 331.

In case of an absolute assignment the assignees must sue. They cannot authorize the assignor to sue. *Peck v. Dodds*, 10 Nev. 204.

3. Assignment by Employee.—If A employs B to do certain work, C cannot sue A for doing that work though B had delegated the entire employment to C, and C actually performed the work but without the privity of A. *Schmalting v. Tomlinson*, 6 Taunt. 147; *Morse v. Traynor*, 26 Neb. 594.

Sub-contractors, subsequently admitted to participate in the benefit of a contract, without the privity and consent of the promisor, cannot join in a suit on the contract. *Blakeney v. Evans*, 2 Cranch (U. S.) 185; *Barstow v. Gray*, 3 Me. 409.

A, who had been in the habit of dealing with B, sent a written order for goods directed to B. On the same day C had bought B's business, and C executed A's order without giving A notice that the goods were not supplied by B. *Held*, that C could not sue A for the price of the goods, because A had not contracted with C, and further, by allowing this action, A would be deprived of any set-off he had against B. *Boulton v. Jones*, 2 H. & N. 564; *Boston Ice Co. v. Potter*, 123 Mass. 28; 25 Am. Rep. 9.

Under the act of Congress of July 17th, 1862 (12 Stat. L. 596, § 14), prohibiting the assignment of contracts with the *United States*, and declaring that a transfer shall annul the contract, it has been held that a suit for damages for a breach by the *United States* could not be brought on such transferred contract; but where there has been a delivery of goods under the contract, duly accepted by the *United States*, an action may be maintained by the contractor for the use of the assignee in *quantum meruit*. *Wheeler v. United States*, 5 Ct. of Cl. 504.

But if A consents that B should assign to C all or any part of the contract, that would create a new promise from A to C and C could sue A

The employee himself may recover, though he does the work jointly with another.¹

7. Statutory Modification of the Law as to Assignments.—The common law rule as to actions by assignees has been modified in every State by statute to a greater or less extent.² Statutes authorizing assignments of choses in action apply generally to all

thereon. *Oldfield v. Lowe*, 9 B. & C. 73; *Delaware Co. v. Diebold Safe and Lock Co.*, 133 U. S. 473; *Dunsher v. Hill*, 20 Ill. 499; *Smith v. Mayberry*, 13 Nev. 427.

Sub-contractors or assignees of contracts, may however, enforce their claims in equity. *Benedict v. Williams*, 20 Blatchf. (U. S.) 276.

And under the codes by actions in their own name. *Warner v. Wilson*, 4 Cal. 310; *Pease v. Thompson*, 67 Iowa 70.

1. Assignor May Sue.—If a man agrees to do certain work, and he does it jointly with another, he is still entitled to recover on the agreement. *Blakeney v. Evans*, 2 Cranch (U. S.) 185.

If A and B, partners, contract to do certain work and then dissolve partnership, and A undertakes and completes the contract, suit must be brought by A and B jointly. *Page v. Wolcott*, 15 Gray (Mass.) 536.

When, however, A and B make a contract with a municipality to do certain work on the streets, to be paid by municipal assessments to be given to the contractors and collectible either by them or their assigns, and B sold A his interest in the contract and A completed the work and assessments were made payable to A, he can sue alone to recover the said assessments. *Fitch v. Creighton*, 24 How. (U. S.) 159.

2. England.—In *England* an assignee is authorized by statute to sue in his own name in the case of the assignment of promissory notes (Stat. 4 Anne, ch. 9, § 1), bail bonds (Stat. 4 Anne, ch. 16, § 20), replevin bonds (Stat. 11 Geo. II, ch. 19, § 23; but assignment of these bonds is not necessary under Stat. 19 & 20 Vict., ch. 108, §§ 63, 66, 70), bills of lading (Stat. 18 & 19 Vict., ch. 111, § 1), administration bonds (Stat. 20 & 21 Vict., ch. 77, § 81 compared with 21 & 22 Vict., ch. 95, § 15. See also *Sandrey v. Michell*, 3 B. & S. 405), life and marine policies of insurance (Stat. 30 & 31 Vict., ch. 144; 31 & 32 Vict., ch. 86), choses in

action belonging to companies within the Companies act, 1862 (Stat. 25 & 26 Vict., ch. 89, § 157). This summary of the English statutes is from *Dicey's Parties to Actions* (2nd Am. ed.) 117.

Connecticut.—In *Connecticut*, promissory notes are made negotiable. Gen. Stat. 1888, § 1858; and it is also provided that:

"The assignee and equitable and bona fide owner of any chose in action not negotiable, may sue thereon in his own name; but he shall, in his complaint, allege that he is the actual bona fide owner thereof, and set forth when and how he acquired title thereto." *Connecticut*, Gen. Stat. 1888, § 981.

Dakota.—"A thing in action, arising out of a violation of a right of property or out of an obligation, may be transferred by the owner." *Dakota*, Comp. Laws 1887, § 2877; *Idaho*, Rev. Stat. 1887, § 2891.

Delaware, Illinois, Indiana and Pennsylvania.—Bonds, specialties and notes in writing may be assigned by endorsement and the assignee sue thereon in his own name. *Delaware*, Rev. Code 1874, ch. 63, § 8; *Illinois*, Rev. Stat. 1889 (Hurd), p. 943, §§ 4-5; *Indiana*, Rev. Stat., 1881, §§ 5501-2; *Pennsylvania*, Bright. Dig., p. 191, §§ 1-3.

Georgia and Iowa.—"All choses in action arising upon contract may be assigned so as to vest the title in the assignee; but he takes it, except negotiable securities, subject to the equities existing between the assignor and the debtor at the time of the assignment, and until notice of the assignment is given to the person liable." *Georgia*, Code, 1882, § 2244.

To same effect: *Iowa*, McClain's Annot. Code, 1888, §§ 3260-3263.

Maine.—"Assignees of choses in action not negotiable, assigned in writing, may bring and maintain actions in their own name; but the assignee shall hold the assignor harmless of costs, and shall file with his writ the assignment or a copy thereof; and all rights of set off are reserved to the de-

pendant." *Maine*, Rev. Stat. 1881, p. 712, § 130.

A failure to file the copy of the assignment is waived if not objected to, until a second term. *Littlefield v. Pinkham*, 72 Me. 369.

Maryland.—"The assignee of any judgment, bond specialty or other chose in action for the payment of money or any legacy or distributive share of the estate of a deceased person *bona fide* entitled thereto by assignment in writing signed by the person authorized to make the same, may, by virtue of such assignment, maintain an action or issue an execution in his own name against the debtor therein named, in the same manner as the assignor might have done before the assignment," subject to all defenses good against the assignor. *Maryland*, Pub. Gen. Laws 1888, p. 62, § 1.

This provision only authorizes the assignee to sue "the debtor therein named." See *Gable v. Scarlett*, 56 Md. 169.

Massachusetts.—The debts or claims due to a decedent's estate may be sold by the executor and administrator, and the purchaser is entitled to sue thereon in his own name. *Massachusetts*, Pub. Stat. 1882, p. 765, § 5. See *Buckland v. Green*, 133 Mass. 421; *Currier v. Howard*, 14 Gray (Mass.) 511.

Michigan.—"The assignee of any bond, note or other chose in action not negotiable under existing laws, which has been or may be hereafter assigned, may sue and recover the same in his own name," subject to equities against assignor. *Michigan*, How. Annot. Stat. 1882, § 7344.

The assignment of a chose in action need not be in writing. *Herbstreit v. Beckwith*, 35 Mich. 93.

Though as to paper negotiable at common law, the assignment must be by endorsement. *Minor v. Bewick*, 55 Mich. 491.

Mississippi.—"All promissory notes and all other writings for the payment of money or other thing may be assigned by endorsement, whether the same be payable to order or assigns or not, and the assignee or endorsee may maintain such action thereon in his own name as the assignor or endorsee could have maintained, with a provision as to defenses good against original payee." *Mississippi*, Code of 1880, § 1124.

"The assignee of any chose in action may sue for and recover the same in

his own name if the assignment be in writing." *Mississippi*, Code of 1880, § 1507.

Nebraska.—"The assignee of a thing in action may maintain an action thereon, in his own name and behalf, without the name of the assignor." *Nebraska*, Comp. Stat., p. 857, § 30.

New Jersey.—"All bills, bonds and other writings, whether sealed or not, containing any agreement for the payment of money, and all contracts for the sale and conveyance of real estate, shall be assignable at law; and the assignee may sue thereon in his own name." *New Jersey*, Revision 1878, p. 850, § 19.

Virginia.—The assignee or beneficial owner of any bond, note, writing or other chose in action not negotiable, may maintain thereon in his own name any action which the original obligee, payee or contracting party might have brought; but shall allow all just discounts, not only against himself, but against such obligee, payee or contracting party, before the defendant had notice of the assignment or transfer by such obligee, payee or contracting party, and shall also allow all such discounts against any intermediate assignor or transferrer, the right to which was acquired on the faith of the assignment or transfer to him and before the defendant had notice of the assignment or transfer by such assignor or transferrer to another." *Virginia*, Code, 1887, § 2860.

In *Virginia*, the English statute 4 Anne, ch. 9, § 1, is not in force, but the legislature passed an act allowing the assignee to sue in his own name against the maker of a note, and it was decided in the *United States* Supreme Court that an endorser could sue his immediate endorsee in his own name not by virtue of the act, but on the implied assumpsit between them; but not a prior endorser, because there was no privity between an assignor and his remote assignee. *Mandeville v. Riddle*, 1 Cranch (U. S.) 290. See the appendix, note (A) to 1 Cranch; *Harris v. Johnston*, 3 Cranch (U. S.) 311.

Washington.—"Any assignee or assignees of any judgment, bond, specialty, book account or other chose in action, for the payment of money by assignment in writing, signed by the person authorized to make the same may, by virtue of such assignment, sue and maintain an action or actions in any court of law or equity as the case

actions *ex contractu*,¹ and they have been held applicable to

may require, in his or her name against the obligor or obligors, debtor or debtors therein named, notwithstanding the assignor may have an interest in the thing assigned;" reserving, however, the right to set off against claim in hands of original owner. *West Virginia*, Code 1881, § 15.

West Virginia.—"The assignee of any bond, note, account or writing not negotiable, may maintain thereupon an action in his own name without the addition of 'assignee,' which the original obligee or payee might have brought; but shall allow all just discounts not only against himself, but against the assignor before the defendant had notice of the assignment. In every such action the plaintiff may unite claims payable to him individually with those payable to him as such assignee." *West Virginia*, Code 1887, p. 702, § 14.

1. **Chose in Action Construed.**—Where a statute authorizes generally the assignment of "choses in action," it has been held that the statute "reaches every right in property which was ever assignable in equity or capable of survivorship to executors." *Cook v. Bell*, 18 Mich. 393.

A judgment is a chose in action within the meaning of statutes authorizing the assignment of "choses in action." *Ware v. Bucksport etc. R. Co.*, 69 Me. 97; *Murphy v. Cochran*, 1 Hill (N. Y.) 339. See *Wilson v. McElroy*, 2 Smed. & M. (Miss.) 241.

The transfer of a judgment vests in the transferee a right to receive the proceeds, but not to move in his name against an officer. *Clingman v. Barrett*, 6 Humph. (Tenn.) 20.

An open account is a "chose in action for the payment of money" within the statutes authorizing assignees to sue in their own names. *Crawford v. Brooke*, 4 Gill (Md.) 213; *Shaffer v. Union Min. Co.*, 55 Md. 74.

So is a life insurance policy. *New York L. Ins. Co. v. Flack*, 3 Md. 341.

And a fire insurance policy. *Watertown F. Ins. Co. v. Grover etc. Sewing Mach. Co.*, 41 Mich. 131; *Martz v. Cumberland Mut. F. Ins. Co.*, 44 N. J. L. 478.

An assignee for collection may sue in his own name. *Boyd v. Corbitt*, 37 Mich. 52; *Lobdell v. Merchants' etc.*

Bank, 33 Mich. 408; *Brigham v. Gurney*, 1 Mich. 349; *McKinney v. Miller*, 19 Mich. 142.

Contra, *Dickenson v. Burr*, 15 Ark. 372.

A trustee and assignee of a joint stock company may sue in his own name for unpaid subscriptions. *Glenn v. Scott*, 28 Fed. Rep. 804 (construing *Virginia* statute). Under these statutes a guarantee of collection endorsed on a promissory note payable to bearer may be sued by any subsequent holder in his own name. *Waldron v. Harring*, 28 Mich. 493. Compare *Lahmers v. Schmidt*, 35 Minn. 434.

A building contract secured under the mechanics' lien law is assignable under the *Virginia* code. *Iaeger v. Bossieux*, 15 Gratt. (Va.) 83; 76 Am. Dec. 189.

A written contract for a sale of land is a "chose in action" within the statute. *Cook v. Bell*, 18 Mich. 387.

A bond is assignable, though not in terms payable, to order or assigns. *Sheppard v. Stites*, 7 N. J. L. 90; *Farmer v. Baker*, 3 Brev. (S. Car.) 548. Assignees of choses in action which are not agreements for the payment of money, cannot maintain an action in his own name. *Ruckman v. Outwater*, 28 N. J. L. 571.

On a stock contract in two parts, in one of which A promised to receive from B or order a certain amount of stock at a certain date, and in the other of which B promised to transfer to A or his order the same amount upon his paying to him or his order at the same rate—*held*, that the assignee of B might maintain an action in his own name. *Reed v. Ingraham*, 2 Yeates (Pa.) 487.

An instrument of writing binding the obligee to pay a money rent, let a third party have a portion of the produce of demised premises, and furnish means of carrying it away, is not a chose in action purely for the payment of money, and therefore is not within the statute. *Gordon v. Downey*, 1 Gill (Md.) 41. Compare *Durst v. Swift*, 11 Tex. 273.

In general, actions for breach of personal contracts which have been assigned must be brought in the name of the assignor, except where an express promise is shown to respond to the assignee. *Flanagan v. Camden*

actions *ex delicto* also, when the statute did not use language limiting it to actions *ex contractu*.¹ If the statute requires an assignment in writing, an assignee by delivery must sue in the name of his assignor,² and the assignee may, in all cases, notwithstanding the statute, sue in the name of his assignor, except where he is required to sue as the real party in interest under the codes.³ Subsequent assignees may also sue in their own names.⁴ The assignee may not sue when his assignor could not.⁵ He need not refer to a general statute authorizing him to sue, but must plead a particular statute.⁶ The statutes do not affect instru-

Mut. Ins. Co., 25 N. J. L. 506; Kerr v. Hawthorne, 4 Yeates (Pa.) 170.

The assignment must be by the legal party, not a beneficiary. Cummings v. Lynn, 1 Dall. (Pa.) 444.

The cause of action for the reformation of a contract on account of fraud or mutual mistake is assignable, and passes by an assignment of the contract. Bentley v. Smith, 1 Abb. App. Dec. (N. Y.) 126.

1. **Torts.**—It includes choses in action for a tort if they survive to one's personal representatives. Cook v. Bell, 18 Mich. 387. See Ellis v. Allen, 80 Ala. 515.

The assignee of a warehouse receipt may sue the warehouseman for conversion on his refusal to deliver the goods to him. Zellner v. Mobley, 84 Ga. 746.

2. **Assignment by Delivery.**—If the statute requires an assignment in writing, an assignee by delivery merely is vested with the same rights as if the transfer had been by writing, except that he cannot sue therefor in his own name. Phillips v. Sellers, 42 Ala. 658; Ashby v. Carr, 40 Miss. 64; Buckner v. Greenwood, 6 Ark. 200; Lowenburg v. Jones, 56 Miss. 688; Buntieg v. Camden etc. R. Co., 81 Pa. St. 254; Bradley Co. v. Surgoine, 9 Baxt. (Tenn.) 407.

So as to instruments negotiable at common law. Tradesmen's Nat. Bank v. Green, 57 Md. 602; Minor v. Bewick, 55 Mich. 491; Hooker v. Gallagher, 6 Fla. 351.

The assignment in writing need not be on the instrument assigned, but it must be such a writing as will be sufficient to transfer the *bona fide* title to the instrument. Kent v. Somervell, 7 Gill & J. (Md.) 265.

3. **Suit by Assignor.**—The above provision does not make such assignee a legal owner of the claim sued on. It simply allows him to maintain a suit

on such equitable title. The assignee may therefore at his option sue in his own name under the permission of the statute or under the common law, in the name of the assignor as the holder of the legal title. Beach v. Fairbanks, 52 Conn. 167; Matherson v. Wilkin-son, 79 Me. 159; McDonald v. Laughlin, 74 Me. 480; Canfield v. McIlwaine, 32 Md. 100; Hampson v. Owens, 55 Md. 583; Park v. Toledo etc. R. Co., 41 Mich. 352; Coachman v. Hunt, 2 Rich. (S. Car.) 450; Garland v. Richeson, 4 Rand. (Va.) 266. But see Gambelin v. Walker, 1 Ark. 220; Neyfong v. Wells, Hard. (Ky.) 571.

Since the statute of 1797, an assignee of a bond "for the payment of money" must sue in his own name. Reed v. Bainbridge, 4 N. J. L. 357; Carhart v. Miller, 5 N. J. L. 573.

4. **Subsequent Assignees.**—Under the codes allowing such assignees to sue, every successive assignee by endorsement may sue, and if the obligation is once endorsed in blank every successive holder may fill up the endorsement and sue in his own name. Flexner v. Dickerson, 65 Ala. 72.

The right of an assignee to sue in his own name under the statutes is not limited to the immediate assignee, but embraces any subsequent assignee. Bennington Iron Co. v. Rutherford, 18 N. J. L. 158; Wood v. Decoster, 66 Me. 542; Spiker v. Nydegger, 30 Md. 321.

5. **Assignor Unable to Sue.**—An assignee cannot sue where his assignor could not. Therefore, the assignor of a partnership interest cannot be sued by his assignee and the remaining partners on a claim held by the original firm against him. Learned v. Ayres, 41 Mich. 677.

6. **Pleading.**—In declaring in the name of an assignee on a bond, it is not necessary to refer to the act of assembly authorizing the assignee to sue

ments negotiable at common law,¹ nor do they impair or change the rights of the defendant.² The plaintiff must aver the assignment,³ and the defendant may deny it.⁴ In some States it is

in his own name. *Gano v. Slaughter*, Hard. (Ky.) 81.

Otherwise in an official bond, where there is a special and particular legislative provision. *Todd v. McClenahan*, Sneed (Ky.) 304.

1. Instruments Negotiable at Common Law.—The statutes authorizing assignees to sue in their own name have not abolished the common law rule as to suits on negotiable instruments; and therefore an assignee of a bill of exchange or other instrument negotiable at common law cannot institute an action upon it in the name of another party. *Hampson v. Owens*, 55 Md. 583.

Notwithstanding the statutes, a holder by delivery merely of an instrument negotiable at common law must sue in the name of his assignor to his use. *Tradesmen's Nat. Bank v. Green*, 57 Md. 602; *Minor v. Bewick*, 55 Mich. 491; *Hooker v. Gallagher*, 6 Fla. 351.

Unless he holds by delivery after an endorsement in blank, in which case he may fill up the blank endorsement and recover thereon in his own name; and this may be done at the trial. *Lucas v. Byrne*, 35 Md. 485; *Kunkel v. Spooner*, 9 Md. 462; 66 Am. Dec. 332; *Chesley v. Taylor*, 3 Gill (Md.) 251; *McNulty v. Cooper*, 3 Gill & J. (Md.) 214.

2. Defendant's Right.—The statutes only authorize suits in the name of the assignee. They do not prevent the defendant setting up any defenses good against the assignor and existing before notice of the assignment. *Harwood v. Jones*, 10 Gill & J. (Md.) 404; *Cox v. Hill*, 6 Md. 274; *Wheeler v. Hughes*, 1 Dall. (Pa.) 23; *Smith v. Carder*, 33 Ark. 709.

3. Plaintiff Must Aver Assignment.—*Yell v. Snow*, 24 Ark. 554; *Smith v. Dean*, 19 Mo. 63; *Stroud v. Howell*, 3 N. J. L. 229; *Lowther v. Lawrence*, *Wright* (Ohio) 180; *Gordon v. Browne*, 3 Hen. & M. (Va.) 219.

Contra, *Brooks v. Whiting*, 5 Ark. 18.

The plaintiff need not describe himself as assignee in the summons. *Moffet v. Bolmer*, 3 N. J. L. 284.

Where, in an action of debt, brought by the assignee, on a money bond, the only allegation of the assignment con-

tained in the declaration was, "and which bond Benjamin Haile received by assignment from John Kirkpatrick & Company, for value received." *Held*, that a motion for a nonsuit should not be granted, on account of the insufficiency of the allegation of the assignment, although it was not drawn *secundum artem*. *Haile v. Richardson*, 2 Strobbh. (S. Car.) 114.

A bond, made to a single woman, who subsequently married, was assigned by her and her husband to plaintiff. On motion to set aside a nonsuit, *held*, that it was not necessary for him, suing in his own name, to mention the marriage or name the husband; it was sufficient to style himself the assignee of the single woman, and to aver that the bond was "duly assigned" to him. *Frost v. Croft*, 9 Rich. (S. Car.) 285.

In a suit upon a bond by the assignee, *proferit* of the assignment is necessary, and the want of it is fatal on general demurrer. *Alston v. Whiting*, 6 Ark. 402; *Roane v. Hinton*, 6 Ark. 525; *Merchant v. Slater*, 6 Ark. 529.

In debt on a bond, brought by an assignee, the want of *proferit* of the assignment can only be taken advantage of by demurrer, and cannot after judgment by default. *Shields v. Barden*, 6 Ark. 459.

The plaintiff need not aver the consideration of the assignment. *Smilie v. Stevens*, 41 Vt. 321.

4. Defendant May Deny Assignment.—Where the plaintiff sues as the assignee of a bond, a plea directly denying the assignment, and verified by affidavit, is good. *Jordan v. Mewborn*, 8 Ark. 502.

In an action on a bond by an assignee thereof, a plea that the obligee had previously assigned the same to another person is bad, without alleging that such other person is still the owner. *Marvin v. Bolles*, 18 N. J. L. 365.

In a suit by an assignee of a bond, he must, on the plea of *non est factum*, prove the assignment. *M'Murtry v. Campbell*, 1 Ohio 262; *S. P. in North Carolina*, *Wright's Case*, 2 Hayw. (N. Car.) 150; *Nixon v. Dickey*, 3 N. J. L. 252.

necessary for the plaintiff to make the assignor a party defendant in certain cases.¹ In many of the States this question is determined by the code provision requiring the real party in interest to sue.²

8. Real Party in Interest.—In many of the States it is expressly provided that an action shall be prosecuted³ in the name of the real party in interest.⁴ In *Alabama* this provision extends only

But the execution of the bond need not be proved, unless the defendant make affidavit of the truth of his plea. *M'Murtry v. Campbell*, 1 Ohio 262; *Ragland v. Ragland*, 5 Mo. 54.

Proof of the execution of an assignment to the plaintiff, followed by a production of the assignment by the plaintiff in his own possession, is *prima facie* evidence of due delivery to him. *Story v. Bishop*, 4 E. D. Smith (N. Y.) 423.

Whether a person claiming to be assignee by a written instrument is so or not, is a question of law for the court, and not of fact for the jury. *Clark v. Edney*, 6 Ired. (N. Car.) 50.

In an action on a bond by the assignee, where the plea denies the assignment, a replication tracing the plaintiff's title through assignments different from those alleged in the declaration is a departure, and is bad on general demurrer. *Jordan v. Mewborn*, 8 Ark. 502.

If A convey to B, and B to C, in a suit by C, A cannot deny B's title. *Clarke v. Roberts*, 25 Hun (N. Y.) 86.

Contra, when C took the assignment from B as an agent for A, but without relying on its having been assigned for A and without any action on the part of A which would estop him from denying C's title. *Thompson v. Noble* (Supreme Ct.), 8 N. Y. Supp. 373.

1. Assignors Made Defendants.—Where the assignment of a thing in action is not authorized by statute, the assignor must be a party, as plaintiff or defendant." *Arkansas*, Dig. of Stat., 1884, § 4934; *St. Louis etc. R. Co. v. Camden Bank*, 47 Ark. 541; *Kentucky*, Code 1888, § 19; *Perry v. Seitz*, 2 Duv. (Ky.) 122.

When any action is brought by the assignee of a claim arising out of contract, and not assigned by endorsement in writing, the assignor shall be made a defendant to answer as to the assignment or his interest in the subject of the action." *Indiana*, Rev.

Stat. 1881, § 276; *Mewherree v. Price*, 11 Ind. 199. And a long series of decisions. *Gill v. Johnson*, 1 Metc. (Ky.) 649.

Under the above statute, a complaint for non-performance of a contract alleging a transfer "by an agreement in writing," was demurrable for non-joinder of the assignor. *Gordon v. Carter*, 79 Ind. 386.

If the assignor be dead, his personal representative should be made a party. *St. John v. Hardwick*, 11 Ind. 251.

Under the above statute the court may even after verdict permit the assignor to appear and disclaim all interest in the suit. *Morrison v. Ross*, 113 Ind. 186.

The assignor of a note given for land sold and conveyed is not a necessary party to a bill to enforce the lien for the unpaid purchase money. *Leacock v. Hall*, 13 B. Mon. (Ky.) 210.

2. See following note.

3. Prosecuted.—The code provision requiring a case to be prosecuted in the name of the real party in interest, when accompanied by a provision that no action shall abate by the transfer of any interest therein, must be construed to mean that every action shall be commenced in the name of the real party in interest. *Elliot v. Teal*, 5 Sawy. (U. S.) 188; *Lawson v. Woodstock*, 37 Hun (N. Y.) 352.

4. Code Provisions.—Every action shall be prosecuted in the name of the real party in interest, except as otherwise prescribed. *Arizona*, Rev. Stat. 1887, § 680; *Arkansas*, Dig. of Stat. 1884, § 4933; *California*, Deering's C. & Stat., vol. 3, § 367; *Idaho*, Rev. Stat. 1887, § 4090; *Iowa*, McClain's Annot. Code, 1888, § 3748; *Kentucky*, Code, 1888, § 18; *Montana*, Comp. Stat. 1887, p. 61, § 5; *Nebraska*, Comp. Stat. 1889, p. 856, § 29; *Nevada*, Gen. Stat. 1885, § 3026; *New Mexico*, Comp. Laws, 1884, § 1882; *New York*, Annot. Code, 1889, § 449; *Ohio*, Rev. Stat. 1890, § 4993; *Utah*, Comp. Laws, 1888, vol. 2, p. 229, § 3169; *Washington*, Code,

to actions on contracts for the payment of money.¹ When the

1881, § 4; *Wyoming*, Rev. Stat. 1887, § 2382.

In a number of States this requirement is accompanied by the provision that "this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." *Florida*, Act of Feb. 25th, 1881 (P. L. 60-61); *Indiana*, Rev. Stat. 1881, § 251; *Kansas*, Gen. Stat. 1889, § 4103; *Minnesota*, Gen. Stat. 1878, p. 709, § 261; *Missouri*, Rev. Stat. 1889, § 1990; *Oregon*, Hill's Annot. Laws, 1887, p. 148, § 27; *Wisconsin*, Annot. Stat. (S. & B.), § 2605.

While in a few States this is accompanied by the following provision:

"But an action may be maintained by a grantee of land in the name of a grantor, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision. *Dakota*, Comp. Laws, 1887, § 4870. *Compare North Carolina*, Code 1883, § 177; *South Carolina*, Code, § 132.

"The rule prescribed in the preceding section [that an action must be prosecuted by the real party in interest] may be so applied when a person forfeits his bond, or renders his sureties liable that any person injured thereby, or who is by law entitled to the benefit of the security, may bring an action thereon, in his own name, against the person and his sureties, to recover the amount to which he is entitled by reason of the delinquency, which action may be prosecuted on a certified copy of the bond; and the custodian of the bond shall deliver such copy to any person claiming to be so injured, on tender of the proper fee, but the provisions of this section as to the form of the action shall not be imperative if provision is otherwise made by law; nor shall a judgment for one delinquency preclude the same or another party from an action on the same instrument for another delinquency." *Ohio*, Rev. Stat. 1890, § 4994; *Wyoming*, Rev. Stat. 1887, § 2383, adding the words: "A county may sue in its corporate name upon any official bond of any of its officers."

1. *Alabama*.—"Actions on promissory notes, bonds or other contracts,

express or implied, for the payment of money, must be prosecuted in the name of the party really interested, whether he has the legal title or not, subject to any defense the payor, obligor or debtor may have had against the payee, obligee or creditor previous to notice of assignment or transfer, except that, in actions upon bills of exchange and promissory notes payable at a bank or banking house, or at a designated place, and other commercial instruments, the suit must be instituted in the name of the person having the legal title."

"In all cases where suits are brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party on the record." Code of *Alabama*, 1886, §§ 2594, 2595. For a construction of the above exception, see *Carmelich v. Minis*, 88 Ala. 335; *Lake Side Land Co. v. Dromgoole*, 89 Ala. 505.

"An action can only be brought by one having a real and actual interest which he pursues; but as soon as that interest arises, he may bring his action." *Louisiana*, Code, 1876, § 15. See *Ashby v. Ashby*, 39 La. Ann. 105.

A code provision authorizing the real party in interest to sue on contracts for the payment of money, does not authorize the real party in interest to sue on a promise in writing to do some particular act or duty. Only those having the legal title can sue. *Skinner v. Bedell*, 32 Ala. 44; *Henley v. Bush*, 33 Ala. 636; *Auerbach v. Pritchett*, 58 Ala. 451.

Nor does it authorize the real party in interest to sue on a judgment. *Smith v. Harrison*, 33 Ala. 706; *Johnson v. Martin*, 54 Ala. 271; *Masterson v. Gibson*, 56 Ala. 56; *Wolfe v. Eberlein*, 74 Ala. 99; 49 Am. Rep. 809; *Lovins v. Humphries*, 67 Ala. 437.

Nor on an official bond. *Morrow v. Wood*, 56 Ala. 1.

Nor a telegraph company for failure to deliver a message. *Daugherty v. American Union Teleg. Co.*, 75 Ala. 168; 51 Am. Rep. 435.

Nor on a covenant of warranty of the soundness of a slave. *Newson v. Huey*, 36 Ala. 37.

Certain bonds and other choses in action having been executed and delivered by the defendant to one James

provision is general it applies to actions *ex delicto*, notwithstanding the provision that it "shall not be deemed to authorize the assignment of a thing in action not arising out of contract."¹ The object of the provision is to do away with the artificial distinctions known to the common law,² and not to affect the rights of the parties.³ The provision has not been uniformly construed, and it is

J. Pleasants, and having been transferred by him, the transferee entered into a contract with the transferrer to pay Samuel Pleasants, plaintiff's intestate, one-fourth part of the sum collected upon said obligations. *Held*, that this contract did not clothe Samuel Pleasants with the real interest required by *Alabama Code* 1876, § 2890, to enable plaintiff to prosecute an action upon the bonds. *Pleasants v. Erskine*, 82 Ala. 386.

1. **Actions Ex Delicto.**—The code of *New York* originally contained no provision that the provision requiring the real party in interest to sue "shall not be deemed to authorize the assignment of a thing in action not arising out of contract." That proviso was added in 1851. In a suit by A to recover damages for personal injuries to B, the cause of action therefore having been assigned to A. Demurrer. *DUER, J.*: "It seems to be the opinion, from the cases brought before us, of many members of the profession, that the code has abolished the distinctions that formerly prevailed, and that every right of action, no matter from what cause it may arise, is now assignable, so as to enable the assignee to maintain the action in his own name, in all cases whatever; but this is certainly an error, and is the very error which the addition made to § 111 of the code in the amendments of 1851 was designed to correct. The only alteration made by the code is to enable the assignee to maintain the action in his own name, in those cases, and in those only, in which, by the law, as it existed when the code was adopted, the right of action was assignable in law or in equity. The common law offences of champerty and maintenance are not wholly obsolete. On the other hand, as the code has not enlarged, neither has it restricted, the power of assignment; for we wholly dissent from the construction that some judges seem disposed to give to § 111 as amended in 1851, namely, that it is limited to demands arising out of contract, and forbids by implica-

tion the assignment of any founded upon a tort. We hold that every demand that is connected with a right in property, real or personal, and which claims redress for a violation of the right, is assignable, whether the violation is, technically speaking, a tort or simply a breach of contract. And we think that this rule is a legitimate, if not a necessary, deduction from the opinion of the supreme court as delivered by *COWAN, J.*, in the case of *People v. Tioga C. Pleas*, 19 Wend. (N. Y.) 73. The rule thus stated excludes only those torts that are so strictly personal that they die with the person, and it corresponds exactly with the views of Mr. Justice Paige in *Hoyt v. Thompson*, 5 N. Y. 347. The demurrer in the case before us, as the cause of action stated in the complaint is for a tort strictly personal, is well taken." *Purple v. Hudson River R. Co.*, 4 Duer (N. Y.), 74.

2. **Object of Provision.**—"The object of the provision of the statute, requiring the action to be prosecuted in the name of the real party in interest, would seem to be principally to do away with the artificial distinctions which formerly existed in courts of law, and to require the presence of such parties as are necessary to make an end of the controversy." *Castner v. Austin*, 2 Minn. 49.

3. **"Party Really Interested"—Defined.**—What the words "the party really interested," as used in said section mean, I readily admit I do not very well understand; no rule, so far as I know, has been laid down by which their meaning, as applicable to particular cases, or to cases generally, can be certainly ascertained. In ordinary cases there is little difficulty. Where the dry, legal title is in one, and a clear, equitable title is in another, whether by transfer, delivery or otherwise, to whom alone the money belongs, and who only is entitled to receive it, and authorized to discharge the debtor, in such cases there is no trouble; the action must be brought in the name of the equitable owner. He is, in the language of

difficult to state briefly the general propositions relating to it.¹ Generally the person entitled to the proceeds of the suit must be the plaintiff,² and the fact that the plaintiff has the legal title is not suffi-

id section, the party really interested. ut where the party having the legal title is also the only party entitled to receive the money and discharge the debtor, although when collected, he holds the money not for his own use, but for the use of some other person or persons, and to whose use he is to apply it, or to whom he is bound to pay it, in all such cases the action must be in the name of the party having the legal title. For example, a person dies intestate; his creditors and his distributees are the persons really interested in his estate, but the legal title, especially as to personalty passes, and vests in his personal representatives, and they only at law can maintain an action to collect the debts due to the deceased; they only are entitled to receive the money, and they only in discharge the debtors." *Yerby v. Sexton*, 48 Ala. 311, 325.

Although the code has abolished the distinction between actions at law and suits in equity, so far as regards the form of procedure, still the principles by which the rights of parties are to be determined remain unchanged. *Eck v. Newton*, 46 Barb. (N. Y.) 173; *Lyers v. Davis*, 22 N. Y. 489.

1. General Rules.—Mr. Pomeroy, having reviewed a number of cases, thus concludes his discussion of the subject: The rule deduced from these authorities is plain and imperative: the assignee need not be the legal owner of the thing in action; if the legal owner, he must of course bring the action, but, if the assignee's right or ownership is for any reason or in any manner questionable, he is still the proper plaintiff, in most of the States the only plaintiff, although in a few the assignor could be joined as a plaintiff or as a defendant." *Pom. Remedies and Rem. Right* (2nd ed.), § 127.

2. Parties Entitled to Proceeds of Suit.

The survivors of a joint contract are the real parties in interest, and may sue for a breach of the contract without joining the heirs or representatives of a deceased joint contractor. *Indiana etc. R. Co. v. Adamson*, 114 Ind. 12.

After dissolution of a partnership, a member who purchased the partnership property may sue for its assets in

his own name. *Walker v. Steele*, 9 Colo. 388.

Persons purchasing property with their own money, intending to turn it over to a railroad company with which they are connected, are the real parties in interest in an action to establish their rights as against an associate in the purchase who refuses to surrender certain shares of stock in the company. *King v. Barnes*, 109 N. Y. 267.

He who pays the consideration of a contract is *prima facie* the party beneficially interested therein, and may sue thereon, although the contract be in the name of another party. *Tracy v. Gunn*, 29 Kan. 508.

Under the Practice act of *Missouri*, requiring actions to be brought in the name of the party in interest, if A deposit money in a bank in the name of B, and deliver B the pass-book, with power to draw, B is not such a party in interest as can sue for the deposit. *Williams v. Whitlock*, 14 Mo. 552.

When a contract is made with a party in which another has a beneficial and resulting interest, the party with whom the contract was made has the right to recover, though he allege the injury only to be to the stranger to the instrument or contract. *People v. Slocum*, 1 Idaho 62.

Receivers of partnership are real parties in interest, and therefore may sue in their own names. *Leonard v. Storrs*, 31 Ala. 488.

An action to recover money embezzled by defendant from a foreign government, while holding office there, may be brought by an officer of that government in his own name, on proof that the property is vested in such officer for the time being of the foreign government, and he is authorized to sue therefor in his own name in that country. For the purposes of the suit he, and not the government, will be held to be the real party in interest. *Peel v. Elliott*, 7 Abb. Pr. (N. Y.) 433.

An administrator *de bonis non* may maintain an action in equity to coerce payment of a note and enforce a lien by which it was secured, although the note was taken in his individual name by the former administrator in satisfaction of a debt due the estate, at least when the former administrator never

cient unless he has also the beneficial interest,¹ though this rule is

made the note his own by charging himself with it, and was not charged with it in his account. *Burrus v. Roulhae*, 2 Bush (Ky.) 39; *Maraman v. Trunnell*, 3 Metc. (Ky.) 146; 77 Am. Dec. 167.

A sole legatee, also named executor, but who has not qualified as such, may not sue on his own name individually on note payable to the decedent as the person really interested, at least when there is no proof or facts authorizing a presumption that decedent was not indebted, or his debts had been paid. *Wood v. Cosby*, 76 Ala. 558.

A testator gave a legacy to the person who at six years after his decease should act as treasurer of the X society. During the said six years X, Y and Z societies were simultaneously dissolved, and the members formed the A society, with objects similar to the X society. *Held*, that an action for the legacy should be brought in the name of the treasurer of A society, he being the real party in interest. *DeWitt v. Chandler*, 11 Abb. Pr. (N. Y.) 459.

But a distributee of a decedent's estate, to whom a promissory note (assets of the estate) has been allotted as a part of his share, on a division of the estate by agreement without administration, among the parties interested, on proof that all decedents had been paid, may sue on said note in his name. *Carter v. Owens*, 41 Ala. 217; *Humphreys v. Keith*, 11 Kan. 108.

The assignee of a contract with whom the employer agrees to deal in future as if he were the original contractor, may maintain a statutory action to enforce a lien under the contract as the real party in interest, though he had agreed to pay over part of the profit to his assignor. *Pensacola R. Co. v. Schaffer*, 76 Ala. 233.

If after suit brought the cause of action is assigned, but judgment obtained in name of the original plaintiff, and a bond given upon an appeal in his name, the assignee being the real party in interest, may sue on such bond. *Bennett v. McGrade*, 15 Minn. 132.

A executed a mortgage on certain lands to B. B sold same to C, and C covenanted in the deed signed by both B and C that he would pay the mortgage. *Held*, A is the real party in interest, and therefore entitled to sue C

on his covenant on having a transfer thereof to him by B. *Ryall v. Prince*, 82 Ala. 264.

In an action against a trespasser for damages to growing crops, the lessee is the "real party in interest," and the lessor need not be joined. *Bridgers v. Dill*, 97 N. Car. 222.

So, where a vendee agrees in writing to pay debts of his vendors, said vendor's creditor must sue in their own name, if they can sue at all. *McLaren v. Hutchinson*, 22 Cal. 187; 83 Am. Dec. 59.

In an action to enforce an assessment for the reclamation of swamp lands, the reclamation district is the real party in interest, and a judgment therein in favor of plaintiff, if otherwise valid, will not be reversed because such action was not brought in the name of the people. *Reclamation District No. 108 v. Hagar*, 66 Cal. 54; *Reclamation District No. 3 v. Parvin*, 67 Cal. 501.

Under the code provision, notes made payable to officials or their successors in office may be sued upon by another official, who under a new law is entitled to receive the proceeds. *Yerby v. Sexton*, 48 Ala. 311; *Williams v. State*, 37 Ark. 463.

"When any public officer shall die, or in any way go out of office, all actions which shall or would have accrued to him in his official capacity, may be brought by his successor." *Connecticut*, Gen. Stat. 1888, § 978.

The same rule applies to actions on official bonds. *Haynes v. Butler*, 30 Ark. 69; *Hunnicut v. Kirkpatrick*, 39 Ark. 172; *Sacramento Co. v. Bird*, 31 Cal. 66.

1. Legal Title Alone Insufficient.—The mere holder of a negotiable note, who has no interest in it, may not sue in his own name. A *narr.* averring A made a note payable to B, who endorsed and delivered it, and said note before it became due, was duly delivered to plaintiff, is insufficient to show right of action in plaintiff. Plaintiff must trace his title to the note, show in what manner B endorsed it, to whom he delivered it, and for what purpose it was delivered to plaintiffs. *Parker v. Totten*, 10 How. Pr. (N. Y.) 233.

A was the holder of a note payable to B and endorsed in blank. In an action by A, defendant offered to prove

not by any means universally true.¹ A third party may sue or

that the note was never transferred to, that he was not the legal owner and holder thereof, or the real party in interest, and that it was in fact transferred to another, who was the owner and real party in interest. *Held*, that the production of the note was *prima facie* evidence of title, but it could be rebutted by defendant's evidence. *Lays v. Hathorn*, 74 N. Y. 486.

In a recent *Ohio* case the *New York* cases were reviewed, and the law laid down in accordance with the case of *Lays v. Hathorn*, 74 N. Y. 486; *Osborn v. McClelland*, 43 Ohio St. 84.

Provisions of the code defining what instruments are negotiable and providing that the endorsee or holder thereof may maintain an action thereon in his own name, must, in determining who is the proper plaintiff, be construed in connection with the provision that actions shall be prosecuted in the name of the real party in interest. *Osborn v. McClelland*, 43 Ohio St. 84.

In an action on a note endorsed by payees and in the possession of plaintiffs, it appeared that the note was made for the accommodation of the payees, and delivered to plaintiffs after it was due, on an account to apply what he should collect, that it had been discounted and not paid to the discounting bank, and it was not proved that the bank no longer owned it. *Held*, the action could not be sustained, as it was not prosecuted by the real party in interest. *Clark v. Phillips*, 21 How. Pr. N. Y. 87.

Where, however, the payees specially endorsed the notes to the plaintiff and directed payment to his order, the defendant may not offer evidence to prove that the endorsement was for collection merely, and that the payees were still the real owners. *Freeman v. Falconer*, 45 N. Y. Super. Ct. 383, 4 N. Y. Super. Ct. 132.

Mere possession of a non-negotiable note is not sufficient proof of title. *Merrill v. Smith*, 22 Tex. 53.

1. **Legal Title Alone.**—Where the plaintiff in an action holds the whole legal title to the demand, he is a real party in interest under the codes. *Donnor v. Irvine*, 74 Cal. 435; *Hastings v. McKinley*, 1 E. D. Smith (N. Y.) 273.

A holder of a check who can trace a legal title to it may maintain an action upon it in his own name, whether he possesses the beneficial interest in its contents or not. *Harpending v. Daniel*, 80 Ky. 449.

The person having a promissory note, whether negotiable or not, in his possession may bring an action thereon in his own name, though no endorsement of the note has been made to him by the payee. *Heartman v. Franks*, 36 Ark. 501; *Rising v. Teabout*, 73 Iowa 419; *Warnock v. Richardson*, 50 Iowa 450; *Green v. Marble*, 37 Iowa 95; *Pearson v. Cummings*, 28 Iowa 344; *Weeks v. Medler*, 20 Kan. 57; *Cassidy v. First Nat. Bank*, 30 Minn. 86.

Where, however, the note was made to two payees, they must unite in an action thereon. One cannot sue without joining the other, though the note is payable to bearer and is in his possession. *McNamee v. Carpenter*, 56 Iowa 276.

If made to one person as a trustee for a number, he may sue without joining the persons interested. *Scantlin v. Allison*, 12 Kan. 85.

The assignee of a note, transferred not by endorsement or delivery, but by a separate writing, may sue on it in his own name. *Morris v. Poillon*, 50 Ala. 403; *Heartman v. Franks*, 36 Ark. 501; *Allen v. Newbery*, 8 Iowa 65; *Jones v. Elliott*, 4 La. Ann. 303.

So if the assignment is by parol. *Conyngnam v. Smith*, 16 Iowa 471.

In case of an assignment by delivery only, if necessary the payee can be joined by either plaintiff or defendant. *Heartman v. Franks*, 36 Ark. 501.

When a negotiable note payable to order is transferred without endorsement, the holder takes it as a mere chose in action, and, while he may maintain an action upon it in his own name, he must prove the transfer to himself if denied, and mere possession is not *prima facie* evidence of ownership. *Van Eman v. Stanchfield*, 10 Minn. 255.

The real owner of a negotiable note, not endorsed, is the proper person to sue thereon. *Andrews v. McDaniel*, 68 N. Car. 385.

Where a bank sued on a draft payable "to the order of A, cashier," and the complaint alleged that it was de-

contracts made for his benefit.¹ Actions on subscriptions may be brought by the party entitled to the money when paid.² Generally, under the codes, an assignee of a claim is the real party in interest,³ but the assignment must be proved, at least if the claim

livered to the said A, cashier, "for the said bank," on demurrer, *held*, that the action was well brought in the name of the bank. *Camden Bank v. Rodgers*, 4 How. Pr. (N. Y.) 63.

A note payable to "X, as executive agent of Y company," is legally payable to Y company. Therefore, Y company must sue thereon as the real party in interest, and as the contract is not in a legal sense, made in the name of X nor with him, he cannot sue thereon as trustee under an express trust. *Considerant v. Brisbane*, 2 Bosw. (N. Y.) 471.

This decision was reversed, and it was held that X could sue as trustee of an express trust. *Considerant v. Brisbane*, 22 N. Y. 389.

When the plaintiff in an action on a bill of exchange payable to the order of the payee was neither the payee nor an indorsee, an averment that he was the owner thereof, without showing by what right he claimed the same, is insufficient to enable him to maintain the action. *Montague v. Reiniger*, 11 Iowa 503.

Contra, when the plaintiff was the payee and had indorsed the note to X, who had indorsed it in blank. *Whittemhall v. Korber*, 12 Kan. 618.

A complaint, in an action on a note delivered to the plaintiff by one of the makers without any indorsement of the payee named therein, alleging that the note was executed for discount, and that, on the refusal of the payee to discount it, plaintiff discounted it, is not demurrable for failure to make the nominal payee a party, under Civil Code providing that every action shall be brought in the name of the real party in interest. The rule that the payee who transfers a note without indorsement retains the legal title, does not apply in such case, as the nominal payee never had the legal title. *Rogge v. Cassidy* (Ky. 1890), 13 S. W. Rep. 716.

A holder of a bond by delivery merely, may sue in his own name. *Kiff v. Weaver*, 94 N. Car. 274.

See also the cases in second following note on suits by assignees as to cases of assignment for collection etc.

1. See *infra*, this title, *Third Parties*.

2. **Subscriptions.**—If a subscription for building a railroad is intended for the benefit of a development company, such a company may sue thereon. Whoever is entitled to the subscription when paid, may sue therefor. *Western Development Co. v. Emery*, 61 Cal. 611.

If A and others subscribe a paper agreeing to pay the sums subscribed to certain persons named therein as trustees, who were therein requested to purchase land and erect an academy thereon, such trustees having so purchased land and erected a building may sue A for his subscription in their own name, they being the real party in interest. *Hutchins v. Smith*, 46 Barb. (N. Y.) 235; *Presbyterian Society v. Beach*, 74 N. Y. 72.

On incorporation of the academy, the suit could properly be brought in the corporate name. *Dansville Seminary v. Welch*, 38 Barb. (N. Y.) 221. See *Presbyterian Society v. Beach*, 74 N. Y. 72.

Under the codes, the assignee of a chose in action is the proper party to bring an action thereon, if he is the party in interest, and entitled to the money due upon the same. *Combs v. Bateman*, 10 Barb. (N. Y.) 573; *Smith v. Schibel*, 19 Mo. 140.

3. **Assignees.**—The assignee of an agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, is assignable, and the assignee may sue thereon in his own name. *Gray v. Garrison*, 9 Cal. 325.

So any conditional promise to pay money. *Hays v. Branham*, 36 Ind. 219.

An owner of a stallion having leased him for a season may assign his lease and rights thereunder, and assignee may sue thereon in his own name. *Doll v. Anderson*, 27 Cal. 248.

Assignees of judgments must sue in their own names. *Low v. Burrows*, 12 Cal. 181; *Searing v. Berry*, 58 Iowa 20.

Open accounts. *McLaughlin v. First Nat. Bank* (Dak. 1889), 43 N. W. Rep. 715. Book Accounts. *Brum-*

back *v.* Oldham, 1 Idaho 709; Overstreet *v.* Freeman, 12 Ind. 390; Knadler *v.* Sharp, 36 Iowa 232; Clark *v.* Wiss, 34 Kan. 553; Carpenter *v.* Johnson, 1 Nev. 331; Haysler *v.* Dawson, 28 Mo. App. 531; Armstrong *v.* Custiney, 43 Barb. (N. Y.) 340; Allen *v.* Miller, 11 Ohio St. 374; Minus *v.* Swartz, 37 Tex. 13.

Where A owes B, and the two agree with C that the claim shall be paid to him, an assignee of C may, under the *California* statutes, maintain an action against A in his own name. McLaren *v.* Hutchinson, 22 Cal. 187; 83 Am. Dec. 59.

The assignee of a contract for the delivery of personal property may sue in his own name. Mewherter *v.* Price, 11 Ind. 199.

Assignees of an attorney's fee. Krapp *v.* Eldridge, 33 Kan. 106.

An assignee for collection merely may sue in his own name. Knadler *v.* Sharp, 36 Iowa 232; Gere *v.* Council Bluffs Ins. Co., 67 Iowa 272; Vimont *v.* Chicago etc. R. Co., 64 Iowa 513; Boyd *v.* Corbitt, 37 Mich. 52; Young *v.* Hudson, 99 Mo. 102; White *v.* Stanley, 29 Ohio St. 423.

Contra, Bostwick *v.* Bryant, 113 Ind. 448; Rock Co. Nat. Bank *v.* Hollister, 21 Minn. 385; Third Nat. Bank *v.* Clark, 23 Minn. 263; Hoagland *v.* Van Etten, 23 Neb. 462; Ritter *v.* Stevenson, 7 Cal. 388; Hoagland *v.* Van Etten, 22 Neb. 681; Iselin *v.* Rowlands, 30 Hun (N. Y.) 488; Bell *v.* Tilden, 16 Hun (N. Y.) 346; Abrams *v.* Cureton, 74 N. Car. 523.

It has been held that such an assignee may sue in his own name as trustee of an express trust. Wynne *v.* Heck, 92 N. Car. 414.

When payees specially indorse notes to plaintiff and direct payment to him, defendant may set up that the endorsement was for collection merely. Freeman *v.* Falconer, 45 N. Y. Super. Ct. 383, 44 N. Y. Super. Ct. 132.

An assignment of evidences of debt, as collateral security to a creditor, to be collected by him at his discretion, is no bar to a suit against the debtor by the creditor. Whatever the plaintiff has collected must be allowed as payment *pro tanto*, the defendant being bound to prove it. Kemmil *v.* Wilson, 4 Wash. (U. S.) 308.

A contract of guarantee is assignable. Cole *v.* Merchants' Bank, 60 Ind. 350; Sinker *v.* Kidder, 123 Ind. 528.

An agreement to assign any judgment obtained on a claim against a third person is an equitable assignment of the claim, and the assignee only can sue therefor. Bartholomew Co. *v.* Jameson 86 Ind. 154.

An assignee of a claim for the price of a land warrant may sue in his own name. Lytle *v.* Lytle, 2 Metc. (Ky.) 127; Ryall *v.* Prince, 82 Ala. 264.

If A contracts to sell land to B, and B assigns his contract to two or more persons, it seems B's assignees may unite in a joint action in their own names against A on the contract. Owen *v.* Funk, 24 Cal. 171; Cook *v.* Bell, 18 Mich. 387.

A note payable in work or goods may be assigned and an assignee sue in his own name. Schmier *v.* Fay, 12 Kan. 184; Combs *v.* Bateman, 10 Barb. (N. Y.) 573.

An assignee for the benefit of creditors is both a trustee of an express trust and the real party in interest. Langdon *v.* Thompson, 25 Minn. 509; Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106; Butterfield *v.* Macomber, 22 How. Pr. (N. Y.) 150; Robinson *v.* Nix, 22 Fla. 321; Gates *v.* Northern Pac. R. Co., 64 Wis. 64.

An assignee of a promissory note transferred as collateral security may sue thereon in his own name upon the pledgor's failing to pay the debt secured. Warner *v.* Wilson, 4 Cal. 310; White *v.* Phelps, 14 Minn. 27; 100 Am. Dec. 190; Herron *v.* Cole, 25 Neb. 692; Williams *v.* Norton, 3 Kan. 295.

And recover the whole amount due on the collateral. Ginocchio *v.* Amador Canal etc. Co., 67 Cal. 493.

If a note signed as collateral security is a lien on property, the assignor cannot sue in equity to enforce the lien. Roberts *v.* Jacks, 31 Ark. 597.

The statutory lien of a mechanic or material man may be assigned, and the assignee may, in his own name, maintain an action to enforce the lien. Tuttle *v.* Howe, 14 Minn. 145; 100 Am. Dec. 205; Rogers *v.* Omaha Hotel Co., 4 Neb. 54; Goff *v.* Papin, 34 Mo. 177. Compare Iaege *v.* Bossieux, 15 Gratt. (Va.) 83; 76 Am. Dec. 189.

Contra, Hallahan *v.* Herbert, 57 N. Y. 409.

Assignee of a claim for money advanced. Long *v.* Heinrich, 46 Mo. 603; Bell *v.* Smith, 13 Daly (N. Y.) 486.

Assignee of a claim in suit. Ander-

is not negotiable at common law.¹ The real party in interest may sue on a note, though it is not in his possession,² unless it is in the possession of a third party claiming title to it.³ Code provisions requiring the real party in interest to sue, do not apply to actions of ejectment,⁴ to suits in equity where the jurisdictions are distinct,⁵ nor to suits required by statute to be brought by a certain plaintiff,⁶ but they do apply to writs of *quo warranto*,

son *v.* Miller, 7 Smed. & M. (Miss.) 586; Bartholomew Co. *v.* Jameson, 86 Ind. 154; Beran *v.* Tradesmens' Nat. Bank (Supreme Ct.), 10 N. Y. Supp. 677.

Assignee of a debt evidenced by a note which has been lost. Long *v.* Constant, 19 Mo. 320; 61 Am. Dec. 559.

Assignee of a claim for rent. Walker *v.* Mauro, 18 Mo. 564; Mills *v.* Murry, 1 Neb. 327.

Assignee of a tax bill issued to a contractor. Bambrick *v.* Campbell, 37 Mo. App. 460.

The defendant, by agreement with A and B, let land to them to plant on shares, and in the agreement it was stipulated, that the defendant should keep the fences in repair so far as necessary to protect the crops from damage from cattle. A and B assigned their interests in the crop. *Held*, that the assignees might maintain an action in their own name against the defendant for damages to the crop arising from his neglect to keep the fences in repair. Parmelee *v.* Dann, 23 Barb. (N. Y.) 461.

1. Assignment Must be Proved if Claim Is Non-negotiable.—Turner *v.* Hayden, 33 Mo. App. 15; Altman *v.* Fowler, 70 Mich. 57; Rising *v.* Teabout, 73 Iowa 419; Kuhn *v.* Schwartz, 33 Mo. App. 610; Rush *v.* Thaggard, 68 Tex. 774.

The account of the proprietors of a water-power against persons holding portions of the power under them, for their shares of the expenses of repairs, was put into the hands of the person who made the repairs, with directions to collect the same, and to apply it in payment for his work, but without any formal assignment. *Held*, that an action against a party liable for a portion of said account was properly brought in the name of the person so holding the account. Wooliscroft *v.* Norton, 15 Wis. 198.

A member of a firm can assign a firm claim. Therefore the assignee of a firm claim secured by a mortgage given to a firm, need not prove a regu-

lar assignment to him by the firm on foreclosing the mortgage. Moses *v.* Hatfield, 27 S. Car. 324.

2. Real Party Without Possession.—The real party in interest in a bond or note under seal may maintain an action thereon in his name, though he became the assignee or transferee thereof after it was lost. Glassell *v.* Mason, 32 Ala. 719.

3. Claim in Possession of Another Party.—Where, however, a note is actually in the possession of a third party who claims title thereto, a plaintiff may not recover thereon on offering to prove that he is the real party in interest. He must first proceed against said third party and recover the note. McKinney *v.* Hamilton, 53 Mich. 497; Van Alstyne *v.* National Commercial Bank, 4 Abb. App. Dec. (N. Y.) 449; Crandall *v.* Schroepfel, 1 Hun (N. Y.) 557.

A fortiori must thus be true at common law. Cobb *v.* Tirrell, 141 Mass. 459.

4. Ejectment.—Code provisions requiring the real party in interest to sue, and that the beneficiary of a suit must be considered the real party in interest, have no reference to suits in ejectment which must be brought in the name of the person holding the legal title. Dane *v.* Glennon, 72 Ala. 160; Caldwell *v.* Smith, 77 Ala. 157; Peck *v.* Newton, 46 Barb. (N. Y.) 173; Anson *v.* Townsend, 73 Cal. 415.

5. Equity.—Nor to suits in equity where the two jurisdictions are distinct. Dawson *v.* Burrus, 73 Ala. 111.

6. Statutory Plaintiffs.—When by statute suit must be brought in the name of the State, etc., no other person can be plaintiff, although the real party in interest under the codes. Monterey Co. *v.* Abbott, 77 Cal. 541; State Bank *v.* Heney, 40 Minn. 145; Hoogland *v.* Hudson, 8 How. Pr. (N. Y.) 343; Carmichael *v.* Moore, 88 N. Car. 29; Duncan *v.* Philpot, 64 N. Car. 479.

The provision that the real party in interest should sue "except as provided

mandamus, certiorari, etc.¹ If a plaintiff is not the real party in interest, that may be pleaded in bar of the suit,² though in some cases the plea has been held bad unless a defense against the real party is set up.³ The defendant may deny the fact of an assignment,⁴ but not the power to assign⁵ the technical validity of the assignment.⁶

section —" does not limit the exception to the said section. Therefore, when by statute an officer is authorized to sue for a forfeiture to the State, he may sue in his own name, though the State is the real party in interest. *Hanh v. Wells*, 4 Oregon 249.

1. *Quo Warranto*, etc.—A writ of *quo warranto* may be prosecuted in the name of the State as well as of any individual entitled to the office in question. *Bartlet v. State*, 13 Kan. 99.

Under this code provision, writs of *mandamus, certiorari*, etc., must issue in the name of the real party in interest; and if to redress a private wrong to a private citizen, must be in his name. *People v. Pacheco*, 29 Cal. 210; *People v. County Judge*, 40 Cal. 479; *State v. Herson Co.*, 11 Kan. 66; *State v. Marston*, 6 Kan. 524.

A private party, to be entitled to a writ of *mandamus*, must have an interest in the subject matter of the action, which is distinguishable from the mass of the community. *Linden v. Alameda Co.*, 45 Cal. 6.

2. Plaintiff Not Real Party in Interest.

Under the codes a plea in bar, or an answer affirmatively averring that the plaintiff was not the "real party in interest," is good. *Bryan v. Wilson*, 27 Ala. 208; *Swift v. Ellsworth*, 10 Ind. 35; 71 Am. Dec. 316; *Wilson v. Clark*, 1 Ind. 385; *State v. Ruhlman*, 111 Ind. 17; *Bostwick v. Bryant*, 113 Ind. 448; *Rohrer v. Turrill*, 4 Minn. 37; *Williams v. Whitlock*, 14 Mo. 552; *Lays v. Hathorn*, 74 N. Y. 486; *Osborn v. McClelland*, 43 Ohio St. 284. See *Com. on Rem. and Rem. Rights* (2nd ed.), § 128, *et. seq.*

An answer averring that plaintiff is not, and that another person than the plaintiff is, the real party in interest, without stating the facts supporting that conclusion, is bad. *Raymond v. Pritchard*, 24 Ind. 318; *Smith v. Logan*, 18 Nev. 153.

In an action by a corporation as to property, the legal title to which is vested in the plaintiff, it is no defense to allege that another party has become the owner "of the sole beneficial inter-

est" in the rights, property and immunities of the corporation. *Winona etc. R. Co. v. St. Paul etc. R. Co.*, 33 Minn. 359.

Where an answer denies that the plaintiff is the real party in interest, it is error to exclude evidence offered by defendant in support of the issues so tendered by his answer. *Nauson v. Jacob*, 93 Mo. 331.

Where, however, in a suit for taking and converting personal property from the plaintiff's possession, the defendant alleges it was taken in execution as to the property of one A, said defendant cannot offer evidence that the property never belonged to plaintiff, but that one B was the owner of it, for the purpose of showing that the plaintiff is not the real party in interest. The plaintiff having an interest in protecting his possession is the real party in interest within the meaning of the code. *Pad-dock v. Wing*, 16 How. Pr. (N. Y.) 547.

3. *Plea Must Allege a Defense*.—A defense that plaintiff, the payee or holder by indorsement of a note, is not the real party in interest is not good unless payment to, or defense against, the party really interested, is also set up. *Prier v. Dunlap*, 5 Cal. 483; *Gushee v. Leavitt*, 5 Cal. 160; *Caldwell v. Laurence*, 84 Ill. 161; *Lohman v. Cass Co. Bank*, 87 Ill. 616; *Hutchinson v. Crane*, 100 Ill. 269; *Farwell v. Tyler*, 5 Iowa 535; *Klein v. Buckner*, 30 La. Ann. 680; *Allen v. Paunell*, 51 Tex. 165.

Such defense only furnishes ground for an order requiring the real party in interest to be brought in. *Vanbuskirk v. Levy*, 3 Metc. (Ky.) 133; *Carpenter v. Miles*, 17 B. Mon. (Ky.) 598.

4. *Denial of Assignments*.—The fact of an assignment may be denied. *Read v. Buffum*, 79 Cal. 77.

5. *Denial of Power*.—The power of the assignor to assign the chose in action cannot be questioned by the defendant in an action thereon by the assignee. *Small v. Chicago etc. R. Co.*, 55 Iowa 582.

6. *Technical Defects*.—The fact that the assignment is technically defective is immaterial. *Kelley v. Love*, 35 Ind. 106; *Thomas v. Irwin*, 90 Ind. 557;

nor its validity as against assignor's creditors,¹ nor can he question the consideration² or motive of the assignment.³

9. Trustee of an Express Trust.—The codes also contain provisions allowing executors, administrators and trustees of an express trust to sue in their own names.⁴ Considerable of the

Burrows v. Stryker, 47 Iowa 477; *State v. Butterworth*, 2 Iowa 158; *Harper v. Butler*, 2 Pet. (U. S.) 239. See *DeFrance v. Davis*, Walker (Miss.) 69.

So where it only passes the equitable title. *Hastings v. McKinley*, 1 E. D. Smith (N. Y.) 273.

1. Frauds.—Nor is the fact that the assignment was fraudulent as to the assignor's creditors a defense. *Rohrer v. Turrill*, 4 Minn. 309; *Lehman v. Clark* (Ala. 1888), 4 So. Rep. 651; *McKierman v. Lenzen*, 56 Cal. 61.

2. Consideration.—The assignee of a bond, note, etc., is the real party in interest, although the consideration for the assignment is a payment to be made to the assignor after recovery in the suit. *Bassett v. Inman*, 7 Colo. 270.

The mere fact that no consideration was paid by the assignee is immaterial, and in the absence of circumstances tending to show that an assignment was colorable, a judgment for the assignee ought not to be reversed for the refusal of the court to allow the want of consideration to be shown. *Burnett v. Gwynne*, 2 Abb. Pr. (N. Y.) 79.

The defendant cannot question the consideration of the assignment. *Wood v. Brewer*, 66 Ala. 570; *Caulfield v. Sanders*, 17 Cal. 569; *Morrison v. Ross*, 113 Ind. 186; *Freeman v. Falconer*, 45 N. Y. Super. Ct. 383; *Young v. Hudson*, 99 Mo. 102; *Sheridan v. Mayor* etc. of N. Y., 68 N. Y. 30; *Clark v. Downing*, 1 E. D. Smith (N. Y.) 406.

3. Motive.—Defendant cannot question assignor's motive. *Morrison v. Ross*, 113 Ind. 186; *Newsom v. Russell*, 77 N. Car. 277.

The fact that the assignment was made only for the purpose of enabling the assignee to have several like claims adjusted in a single suit, does not impair the validity of the transfers, nor prejudice the debtor. The assignee may sue in his own name. *Briscoe v. Eckley*, 35 Mich. 112.

A conveyance of land made for the express purpose of enabling the grantee to sue in his own name to recover said land from one holding under a deed alleged to be fraudulent, the recovery to be for the benefit of the grantor, does

not make the grantee the real party in interest, so that he can sue in his own name. *Gruber v. Baker*, 20 Nev. 453.

4. Code Provisions.—"An executor, administrator or trustee of an express trust, or a person expressly authorized by statute may sue without joining with him, the persons for whose benefit the action is prosecuted. A person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section." *California*, *Deering's C. & St.*, vol. 3, § 369; *Connecticut*, *Gen. Stat.* 1888, § 886, and rule 1, § 4, 58 Conn. 562; *Dakota*, *Comp. Laws* 1887, § 4872; *Florida*, Act of Feb. 25th, 1881 (P. L. 60-61); *Idaho*, *Rev. Stat.* 1887, § 4092; *Indiana*, *Rev. Stat.* 1881, § 252; *Iowa*, *McClain's Anno. Code*, 1888, § 3749; *Kansas*, *Gen. Stat.* 1889, § 4105; *Kentucky*, *Code* 1888, § 21; *Minnesota*, *Gen. Stat.* 1878, p. 710, § 28; *Missouri*, *Rev. Stat.* 1889, § 1991; *Montana*, *Comp. Stat.* 1887, p. 61, § 6; *Nebraska*, *Comp. Stat.* 1889, p. 857, § 32; *Nevada*, *Gen. Stat.* 1885, § 3028; *New Mexico*, *Comp. Laws* 1884, § 1883; *New York*, *Annot. Code*, 1889, § 449; *North Carolina*, *Code*, 1883, § 179; *Ohio*, *Rev. Stat.* 1890, § 4095; *Oregon*, *Hill's Annot. Laws* 1887, p. 151, § 29; *South Carolina*, *Code*, § 134; *Utah*, *Comp. Laws*, 1888, vol. 2, p. 230, § 3171; *Washington*, *Code*, 1881, § 5; *Wisconsin*, *Annot. Stat. (S. & B.)*, p. 1485, § 2607; *Wyoming*, *Rev. Stat.* 1887, § 2384.

The second clause in above act does not restrict but rather enlarges the meaning of the words "trustee of an express trust," in the first clause. *Weaver v. Trustees of Wabash etc. Canal*, 28 Ind. 112.

These statutes are permissive only, not imperative. *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 501.

A sealed note, payable to A as administrator, was transferred to B, who brought suit in the name of "A as administrator, etc., for the use of B." *Demurrer overruled*. In *Carroll v. Still*, 13 Conn. 430, the court by McGOWAN, J., said: "It is possible it would have been more technically correct if

difficulty in determining who is the real party in interest is occasioned by this provision of the code.¹ Under this provision the legal party may sue, though others are beneficially interested.² Receivers of partnerships may sue.³ So may all trustees of trusts expressly created,⁴ agents⁵ and obligees in bonds;⁶

the action had been brought in the name of Dunovant [B], but the code declares without qualification or limitation, that in such a case the administrator 'may sue,' and we are not to narrow, by construction, the express statutory provision, whether the administrator has or has not transferred the equitable interest in the single bill so made payable to him, and on that account falling within the exception. Appeal dismissed."

1. See the conflicting cases in the notes to the previous paragraph.

2. **Legal Party.**—Under this provision, the party holding the legal title to a cause of action, though he be a mere agent or trustee, with no beneficial interest therein, may sue thereon in his own name. *Cassidy v. Woodward*, 77 Iowa 354.

One to whom a note and accompanying mortgage is given, may enforce the same in his own name, though a third person has an interest in the debt. *Lundberg v. Northwestern Elevator Co.*, 42 Minn. 37.

If an assignor assigns absolutely, but retains an interest in the claim assigned, the assignee may sue in his own name and without joining the assignor. As to the assignor's part, he is a trustee of an express trust. *Carpenter v. Johnson*, 1 Nev. 331. *Contra*, *Lewando v. Dunham*, 1 Hilt. (N. Y.) 114.

The sheriff is the proper party plaintiff in an action on a forthcoming bond, as he is the trustee of an express trust. *Wagner v. Romero*, 3 N. Mex. 131.

The payee of a check, note, etc., may always sue thereon, because, if he is the beneficiary, he is the real party in interest; if another is the beneficiary, he is the trustee of an express trust. *Fish v. Jacobsohn*, 2 Abb. App. Dec. (N. Y.) 132. *Contra*, *Clawson v. Cone*, 2 Handy (Ohio) 67.

3. **Partnership Receiver.**—A partnership receiver is a trustee of an express trust. *Henning v. Raymond*, 35 Minn. 303.

4. **Express Trustees.**—Person in whose name or with whom a contract is made for the benefit of another.

Lake v. Albert, 37 Minn. 453; *Clark v. Fosdick*, 118 N. Y. 7; *Wolcott v. Standley*, 62 Ind. 108; *Merchant's Bank v. McClelland*, 9 Colo. 608.

The trustee in a chattel trust deed must sue. *Pollard v. Thomas*, 61 Miss. 150.

One not paying the charges to a carrier may, nevertheless, if deceived in the bill of lading as consignor, consignee and owner, sue the carrier for an overcharge as trustee of an express trust. *Waterman v. Chicago etc. R. Co.*, 61 Wis. 464; 50 Am. Rep. 145.

One to whom a contract for payment of money is assigned, in trust for one who had made advances to the assignor, may sue thereon as trustee of an express trust. *Wetmore v. Hegeman*, 88 N. Y. 69.

All trustees or express trusts. *Winters v. Rush*, 34 Cal. 136; *Pearce v. Twitchell*, 41 Miss. 344; *Harney v. Dutcher*, 15 Mo. 89; 55 Am. Dec. 131; *Wright v. Tinsley*, 30 Mo. 389; *Weaver v. Wabash etc. Canal*, 28 Ind. 112; *Lewis v. Graham*, 4 Abb. Pr. (N. Y.) 106.

Trustee in a Deed of Trust.—*Gardner v. Armstrong*, 31 Mo. 535.

5. **Agents.**—When A, the general agent of a mining company, deposits money with a bank as "agent," subject to his check, and his checks so drawn are duly honored, he may sue the bank in his own name for a balance due on his account. *McLaughlin v. First Nat. Bank* (Dak. 1889), 43 N. W. Rep. 715.

Where a contract has been taken by an agent in his own name, although for the benefit of principal, he is "a trustee of an express trust" within the above statute. *Cremer v. Wimmer*, 40 Minn. 511. To same effect, *Close v. Hodges*, 44 Minn. 204.

An agent of a machine company, who contracts and sells machines for the company, is a "trustee of an express trust," and may sue on a parol contract in his own name. *Davis v. Reynolds*, 48 How. Pr. (N. Y.) 210.

6. **Obligee in Bond.**—Where a bond of a trustee and his surety was given to "the people of the State of New

but not a township board of health,¹ nor one whose trusteeship is not proved.² When the trustee sues under this provision, the *cestuis que trustent* are deemed before the court by representation.³

10. Law of Louisiana and Texas.—In *Louisiana* and *Texas* the rule of the civil law prevails, and all assignees are entitled to sue in their own names.⁴

11. Defenses Pleadable in Actions by Assignees.—See also ASSIGNMENTS, vol. 1, p. 226; FIRE INSURANCE, vol. 7, p. 1002; LIFE INSURANCE, vol. 13, p. 629; etc.⁵

12. Assignments Pendente Lite.—At common law an assignment

York," for the benefit of those interested in the trust estate, an action for the bond was properly brought in the name of the people, they being "trustees of an express trust." *People v. Norton*, 9 N. Y. 176; *People v. Struller*, 16 Hun (N. Y.) 234; *Mayor etc. of N. Y. v. Doody*, 4 Abb. Pr. (N. Y.) 127.

1. The persons who compose the board of health of a township are not trustees of an express trust, and therefore cannot, under *Iowa* Code, §§ 2543, 2544, providing that suits must be prosecuted by the real parties in interest, or the trustees of an express trust, sue in their own names to recover moneys for the use of said board. *Sanderson v. Cerro Gordo Co.*, 80 Iowa 89.

2. Where it does not appear that one lending money is acting as trustee, or has any interest in the money loaned, he cannot sue in his own name to recover it. *Chin Kem You v. Ah Joan*, 75 Cal. 124.

3. Under the code, when a trustee of an express trust is sued, the *cestuis que trustent* are deemed before the court by representation. *Mead v. Mitchell*, 5 Abb. Pr. (N. Y.) 92.

4. Louisiana and Texas.—In the civil law there was no distinction between legal and equitable owners, and therefore the assignee of any chose in action could sue in his own name. This rule prevails in *Louisiana*. *Martin v. Ihmsen*, 21 How. (U. S.) 394.

And in *Texas*, the assignee of a chose in action may sue in his own name, but his right so to do is apparently not founded on a statute, but on a practice which has conformed to the general equity practice in that particular. See *Galveston etc. R. Co. v. Freeman*, 57 Tex. 156. "Under our system, unless provided otherwise by statute, the real owner of property, whether it

be a chose in action or not, can sue to reduce it to possession. No technical rule, requiring suit to be brought in the name of a person as a mere matter of form, has any place in our practice or system of laws—at least so far as to preclude the party beneficially interested from suing in his own name, when the nominal party refuses the use of his name as plaintiff. *Morris v. Schooner Leona*, 62 Tex. 35.

The assignee of a promissory note, transferred by a separate instrument, may sue in his own name. *Jones v. Elliott*, 4 La. Ann. 303.

The assignee of a judgment may not sue in his own name. *Marbury v. Pace*, 30 La. Ann. 1330.

5. Code Provisions.—In actions on assigned choses in action, it is usually provided in the codes that it shall be "without prejudice to any set-off or other defense existing at the time of or before notice of the assignment," except upon *bona fide* assignment of notes and bills before due. See *Arizona*, Rev. Stat. 1887, § 681; *Arkansas*, Dig. of Stat., §§ 475, 476; *California*, Deering's C. & St., vol. 3, § 368; *Connecticut*, Gen. Stat. 1888, § 1017; *Dakota*, Comp. Laws, 1887, § 4871; *Idaho*, Rev. Stat. 1887, § 4091; *Indiana*, Rev. Stat. 1881, § 276; *Iowa*, McClain's Annot. Code, 1888, § 3751; *Kansas*, Gen. Stat. 1889, § 4104; *Kentucky*, Code, 1888, § 19; *Minnesota*, Gen. Stat. 1878, p. 710, § 27; *Mississippi*, Code of, 1880, § 1124; *Montana*, Comp. Stat. 1887, p. 61, § 5; *Nebraska*, Comp. Stat. 1889, p. 857, § 31; *Nevada*, Gen. Stat. 1885, § 3027; *North Carolina*, Code, 1883, § 17; *Wisconsin*, Annot. Stat. (S. & B.), § 2606; *Utah*, Comp. Laws, 1888, vol. 2, p. 230, § 3170; *Ohio*, Rev. Stat. 1890, § 4993; *Oregon*, Hill's Annot. Laws, 1887, p. 150, § 28; *South Carolina*, Code, § 133.

if a chose in action, pending suit thereon, abated the suit.¹ In equity the effect of such an assignment was simply to render necessary to bring in the assignee as a party.² By statute, in many States, it is provided that the action shall not abate in consequence of such an assignment; but that it could be continued in the name of the original party or his assignee.³ Under these statutes it has been held that the statutes apply to all cases where the chose in action is assignable;⁴ that they only apply where

1. Common Law.—At common law, an assignment of a chose in action, pending suit thereon, operated as a dismissal of the suit. *Hall v. Gentry*, 1 K. Marsh. (Ky.) 555.

2. Equity.—In equity an assignment, *pendente lite*, will not be cause for dismissing a bill if the defendants proceed without objection. *Pond v. Clark*, 24 Conn. 370.

When, however, such assignment is made by defendant it will be necessary to bring in the assignee as a party. *Johnson v. Metropolitan Washing Mach. Co.*, 33 Conn. 467; *Sedgwick v. Cleveland*, 7 Paige (N. Y.) 287.

3. Statutes.—"An action shall not abate by . . . the transfer of any interest therein, if the cause of action survive or continue . . . In case of any other transfer of interest," than by death or disability, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." *Arizona*, Rev. Stat., 1887, § 725.

To same effect, *Arkansas*, Dig. of Stat. 1884, § 4935; *California*, Deering's C. & St., vol. 3, § 385; *Connecticut*, Rule of Court, vol. 1, § 6, 58 Conn. 562; *Dakota*, Comp. Laws, 1887, § 4881; *Idaho*, Rev. Stat. 1887, § 108; *Indiana*, Rev. Stat. 1881, § 271; *Iowa*, McClain's Annot. Code, 1888, § 766; *Kansas*, Gen. Stat. 1889, § 4117; *Kentucky*, Code, 1888, § 20; *Minnesota*, Gen. Stat. 1878, p. 711, § 41; *Mississippi*, Code, 1880, § 1507; *Missouri*, Rev. Stat. 1889, § 2204; *Montana*, Comp. Stat. 1887, p. 63, § 22; *Nebraska*, Comp. Stat. 1889, p. 858, § 45; *Nevada*, Gen. Stat. 1885, § 3038; *New York*, Annot. Code, 1889, § 7556; *North Carolina*, Code, 1883, § 188; *Ohio*, Rev. Stat. 1890, § 5012; *Oregon*, Hill's Annot. Laws, 1887, p. 160, § 38; *South Carolina*, Code, § 142; *Utah*, Comp. Laws, 1888, vol. 2, p. 233, § 3187; *Washington*, Code, 1881, § 17; *Wisconsin*, Annot. Stat. (S. & B.), §§ 2800, 2801.

The act has been held to apply to suits brought prior to its passage. *Cutter v. Waddingham*, 33 Mo. 269.

In *Tennessee* and *Texas*, the right exists by the common law of the State. *Paul v. Williams*, 12 Lea (Tenn.) 215; *Moore v. Rice*, 51 Tex. 289.

In *Pennsylvania*, if a plaintiff in ejectment assigns his title, the purchaser or assignee may prosecute the action. Act of April 26th, 1850, § 4 (P. L. 591); *Purd. Dig.*, tit. Abatement.

4. Statute Applies to What Actions.—Conveyance of land by plaintiff pending ejectment does not defeat the action. *Barstow v. Newman*, 34 Cal. 90; *Camarillo v. Fenlon*, 49 Cal. 202.

This is the case in *Pennsylvania* by special statute, act of April 26th, 1850, § 4 (P. L. 591). *Purd.*, Abatement.

When land is conveyed by defendant in ejectment, *pendente lite*, the grantees are entitled to be substituted and a default against their grantor will be set aside on their motion. *Plummer v. Brown*, 64 Cal. 429.

If the assignees of a defendant are not entitled to be substituted, they are at least entitled to defend in the name of the grantor. *Ex parte South & North Ala. R. Co.*, 95 U. S. 221; *Roszell v. Roszell*, 105 U. S. 77.

One of several co-defendants in an ejectment suit, each being in possession of a distinct part of the property sued for, who has purchased the plaintiff's interest in the subject-matter of the suit, may be substituted as plaintiff. *Bullion Min. Co. v. Cræsus etc. Min. Co.*, 2 Nev. 168; 90 Am. Dec. 526.

An action to restrain a nuisance maintained by defendant on property adjoining plaintiff's premises, and for damages caused by the nuisance, is not an action for a personal injury, and on the transfer of plaintiff's premises, alleged to be affected by the nuisance, the right of action passes to the transferee who is entitled to be substituted as plaintiff. *Nickerson v. Crawford* (Supreme Ct.), 11 N. Y. Supp. 503.

the right to sue is actually assigned,¹ and the plaintiff continues to exist;² that the power of the court to substitute the purchaser is discretionary;³ that the substitution will be denied when it would deprive the defendant of a substantial right;⁴ that the

When a receiver of a national bank had brought suit, and subsequently an "agent" was appointed under the acts of Congress applicable to the case, the "agent" may be substituted as plaintiff. *McConville v. Gilmour*, 36 Fed. Rep. 277.

A suit against a railroad company for negligently setting fire to plaintiff's buildings may continue in the original plaintiff's name, although the insurance company has paid him the full amount of his insurance on the buildings. *Nichols v. Chicago etc. R. Co.* (Minn.), 32 N. W. Rep. 176.

Notwithstanding an assignment for the benefit of creditors by a plaintiff, suit may continue in his name. *Lamson v. Woodstock*, 37 Hun (N. Y.) 352. Or the name of the assignee may be substituted. *Jewell v. Porter* (Ky. 1889), 11 S. W. Rep. 717.

An assignee for creditors of one co-plaintiff need not be substituted. *Stewart v. Spaulding*, 72 Cal. 264.

The right of an assignee for creditors, *pendente lite*, to intervene was denied in *Haynes v. Rizer*, 14 Lea (Tenn.) 246.

1. Requisites of Assignment.—After an action has been commenced, the plaintiff may dispose of the judgment he may recover, without investing the person purchasing it with the legal interest to the chose in action; and under such an assignment, it would be improper for the court to substitute the holder of it as plaintiff in the action, with the power to prosecute in his own name. *Allen v. Newbery*, 8 Iowa 65. Compare *Beran v. Tradesmen's Nat. Bank* (Supreme Ct.), 10 N. Y. Supp. 677; *Board of Commrs. v. Jameson*, 86 Ind. 154; *Anderson v. Miller*, 7 Smed. & M. (Miss.) 586.

2. Plaintiff Ceasing to Exist.—This statute does not authorize the continuance in its own name of an action by or against a railroad company after its consolidation with other companies under a new name, because it ceases to exist as a corporation when so consolidated, and the statute only applies to cases of transfer where the original party still exists. *Kansas etc. R. Co. v. Smith*, 40 Kan. 192; *Supervisors of La Pointe v. O'Malley*, 47 Wis. 332.

3. Substitution Discretionary.—The substitution of the assignee *pendente lite* is in the discretion of the trial court, and the supreme court will not interfere unless such discretion has been abused. *Jones v. Julian*, 12 Ind. 274; *Pond v. Irwin*, 113 Ind. 243; *Snyder v. Phillips*, 66 Iowa 481; *Chickasaw Co. v. Pitcher*, 36 Iowa 593.

A and B brought suit. A assigned his interest to B, then B died, and B's administrator asked that the suit might be continued in his name alone, as the sole existing party in interest. The defendant objected, the court having quoted the statute: "It is optional, therefore, with the court to allow, or not, the retirement of A. As in that case, however, there would be no party to respond in costs but an administrator, and as the change is strenuously objected to, and no necessity for it is shown, it appears to me proper that the action, so far as he is concerned, should, as it clearly may, be continued in the name of the original party . . . The administrator [of B] may be let in." *Sheldon v. Havens*, 7 How. Pr. (N. Y.) 268.

So when A and B jointly sue C, and pending the action A conveys his interest to B, the court may in its discretion substitute the purchaser as sole plaintiff or permit the suit to be prosecuted in names of original plaintiffs. *Harvey v. Myer*, 9 Ind. 391.

In case of an assignment in bankruptcy pending an action in a State court, the assignee is deemed substituted to this extent only that he may continue the prosecution of the case, and make such application to the State court as may be necessary for the determination of said action. *Clark v. Binninger*, 39 How. Pr. (N. Y.) 363.

4. Substitution Denied.—When a plaintiff transfers his interest after the commencement of a suit, it rests entirely in the discretion of the court whether the assignee shall be substituted or not. No such order of substitution will be made, unless special circumstances are shown to satisfy the court of its propriety or necessity, and in all cases, it will be made a condition, that the original plaintiff shall not thereby be rendered a com-

substitution is to be made on motion, of which notice must be given;¹ that at the hearing the assignee's ownership must clearly appear;² that in case of substitution the pleadings used need not

petent witness for the substituted plaintiff. *Murray v. General Mut. Ins. Co.*, 2 Duer (N. Y.) 607; *Harris v. Bennett*, 6 How. Pr. (N. Y.) 220.

The substitution should be denied where it would deprive defendant of a substantial right, as where plaintiff assigned pending an attachment charged by defendant's counterclaim to be wrongful. *Snyder v. Phillips*, 66 Iowa 481.

1. **Notice.**—A brought suit, assigned his claim to B, then became a bankrupt, and then died. On notice to defendant's attorneys and widow and next of kin of A, a motion to substitute B as plaintiff was made and granted. Defendants appealed. A stipulation of A's assignee in bankruptcy waiving notice of the motion and all objection to the order was filed. On argument at general term, *held*, that the order was properly made though no administration was ever taken out on A's estate, and the stipulation was properly received and considered by the general term. *Schell v. Devlin*, 82 N. Y. 333.

In the absence of the bankruptcy, notice would have to be given to the personal representatives of the deceased plaintiff. *McLaughlin v. Mayor etc. of N. Y.*, 8 Daly (N. Y.) 474; 58 How. Pr. (N. Y.) 105.

Where the plaintiff dies, an assignee, *pendente lite*, cannot come in and prosecute the suit without having given notice to the administrators or heirs of the plaintiff, unless the defendant consents or fails to object. *Howard v. McKenzie*, 54 Tex. 171; *Moore v. Rice*, 51 Tex. 289; *McLaughlin v. Mayor etc. of New York*, 8 Daly (N. Y.) 474.

Where an assignee is substituted as plaintiff, no notice thereof need be given to defendant whose default has been entered for failing to appear. *Farrell v. Jones*, 63 Cal. 194.

The substitution of plaintiff's assignee for benefit of creditors as plaintiff, does not require notice to defendant. *Jewell v. Porter* (Ky. 1889), 11 S. W. Rep. 717.

2. **Proof of Assignment.**—If the assignee desires to proceed in the action, he must in a proper proceeding establish the fact of the transfer and obtain the leave of the court to continue the action in the name of the original

plaintiff, or be added or substituted in the action which must be upon notice to parties. *Chisholm v. Clitherall*, 12 Minn. 375.

On a motion for substitution, the assignee must show a clear *prima facie* case of succession to the plaintiff's title. On such motion the court will not decide between two parties each claiming to be the plaintiff's successor. *St. John v. Croel*, 10 How. Pr. (N. Y.) 253.

"Pending an action, a transferee of the plaintiff's interest may move to be substituted in his place. Notice of the motion must be given to the defendant. On the hearing, the applicant must establish his ownership, and the defendant may deny it. If there be doubt about it, the court may deny the motion and order the action to proceed irrespective of any such transfer. If there be no doubt about it, or the defendant by default or silence admits it, the court may order the substitution; and even then, if justice or safety requires, it may order an amendment of the proceedings, 'or otherwise'; by this process the defendant has ample chance to understand and contest the new ownership. If in the motion he raises the issue, the court may decide it, or order such supplemental pleadings beyond the mere substitution as to carry the contested issue over to the trial. If the court decides it, and orders substitution without changing the pleadings, it cannot be raised again upon the hearing. In an equity case such as this, the issue on the motion is decided, if it be decided, by the sort of tribunal to which the defendant alone is entitled. In an action at law, where the defendant stands contesting the ownership and demanding that the issue, like the old ones, be tried by the jury to which he is entitled, it may be that the court should order such supplemental pleadings as would introduce the new issue into the trial. Thus all the rights of the defendant in every case are fully protected. Only one suggestion is made to the contrary. On the motion, where the court decides the question in favor of substitution, and without permitting allegations to be framed which will let in the new issue at the trial, the dissatisfied defendant has only the further remedy of an appeal from the

be amended unless new issues are raised;¹ that the substitution of the assignee only concerns the plaintiff and the assignee; that the defendants cannot move for it;² that after an assignment the original plaintiff has no power to control the action;³ that a waiver of a misjoinder of plaintiffs binds a substituted assignee;⁴ that if the substituted assignee fails to give indemnity ordered by court, the suit will be dismissed;⁵ that successive substitutions may be permitted in the same case,⁶ and that the act does not apply to proceedings in a surrogate's court.⁷ The name of an assignee *pendente lite* may be added as a party to the record, under the powers of amendment given to courts in the code

order, but it is said, on that appeal, he can go no further than the general term and cannot review the order in this court. That may be, though we do not so decide; but the legislature infringes no right of the defendant by not allowing an appeal to this court." *Smith v. Zalinski*, 94 N. Y. 524. Compare *Ferry v. Page*, 8 Iowa 455. Error in substituting the wrong party as plaintiff may be corrected. *Ferry v. Page*, 8 Iowa 455.

1. **Pleadings.**—After the issues in a cause are all made up, a person claiming to be assignee of the cause of action may be substituted as plaintiff, and in such case it is not necessary that he should file a supplemental complaint. *Virgin v. Brubaker*, 4 Nev. 31; *Smith v. Zalinski*, 94 N. Y. 524.

2. **Defendant Cannot Move Substitution.**—The substitution as plaintiff of the assignee, *pendente lite*, of a cause of action, is a matter which the defendant cannot move. It concerns only the plaintiff or the person to whom the transfer is made. If the defendant desires to take advantage of the transfer for any cause, he must do so by supplemental answer. As against a defendant, a plaintiff is entitled to stay in court until his case has been tried. *Hestres v. Brennan*, 37 Cal. 385; *Packard v. Wood*, 17 Abb. Pr. (N. Y.) 318; *Cuff v. Dorland*, 7 Abb. N. Cas. (N. Y.) 194; *Moon v. Hardee*, 38 Mich. 566; *Newberry v. Trowbridge*, 13 Mich. 263.

A plaintiff may waive his right to demand an indemnifying bond upon making a transfer of a cause of action, and if he allows the suit to be proceeded with in his name without demanding such bond for his protection, it is not a matter of which defendant can complain. *Asher v. St. Louis etc. R. Co.*, 89 Mo. 116; *Renfro v. Prior*, 25

Mo. App. 402; *Packard v. Wood*, 17 Abb. Pr. (N. Y.) 318.

3. **Power of Original Plaintiff.**—It is the right of an assignee, *pendente lite*, to prosecute the case, either in the name of the original plaintiff, or by having himself substituted in the action by an order of court. The original plaintiff is divested of all power to control the action. *Walker v. Felt*, 54 Cal. 386.

After an assignment by plaintiff, *pendente lite*, and notice to the defendant, the defendant cannot compromise with plaintiff. An order dismissing the suit to which the assignee did not consent will be set aside. *Cantrell v. Hewlett*, 2 Bush (Ky.) 311.

4. **Waiver.**—Where defendants, by agreements filed, waive a misjoinder of parties plaintiff, such waiver is binding on purchasers *pendente lite* from the defendants. *Punchard v. Delk*, 55 Tex. 304.

5. **Dismissal.**—In the case of an assignment *pendente lite*, if the court, upon the application of the person making the transfer, orders the party to whom the transfer was made to give indemnity to the original plaintiff, and the order is not complied with, the suit may be dismissed and judgment entered for defendant. *Asher v. St. Louis etc. R. Co.*, 89 Mo. 116.

6. **Successive Substitutions.**—Substitution of the parties to whom the cause of action has been transferred may be made as often as there is a transfer of the cause of action. *Temple v. Smith*, 14 Neb. 513.

7. **Surrogate's Court.**—The provisions of the codes, as to introducing new parts to a pending action, and as to proceeding upon a transfer of interest by a party thereto, have no application to proceedings in a surrogate's court. *Tilden v. Dows*, 2 Dem. (N. Y.) 489.

tates.¹ For the effect of the death of a party, removal of a trustee, etc.,² see ABATEMENT, vol. 1, p. 6; TRUSTEES; and, *infra*, his title, *Substitution*.

13. Privity in Actions Ex Delicto.—There is no question of privity involved in an action *ex delicto*. The wrong done authorizes anyone injured to sue.³ At common law, causes in action arising out of a tort were not assignable, because the right of action did not survive the death of the party injured.⁴ Even at common law, however, an insurance company having paid a loss, could sue the tortfeasor causing the loss in the name of the insured party,⁵ and the present doctrine is that all actions for torts to property

1. Amendments.—Irrespective of the above statutory provisions, it was held that upon an assignment, *pendente lite*, the court, under its statutory power to amend by adding the name of any party, etc., could amend the record and pleadings by allowing the assignee to be added as a party to the record. *Wellman v. Dismukes*, 42 Mo. 101.

2. Removal of Trustee.—A removal of a trustee, *pendente lite*, does not abate the suit. Their successors may continue the action in the name of the original trustees. *Pierce v. Robie*, 39 Me. 55; 63 Am. Dec. 614.

3. Torts. Privity.—See *Scott v. Shepherd*, 2 W. Black. 82; Sm. L. C. 8th Am. ed., vol. 1, pt. 2, p. 797, 366. See PROXIMATE AND REMOTE CAUSE. Mr. Dicey in his admirable work on Parties to Actions discusses at considerable length the question of parties to actions on torts, laying down as to parties plaintiff, *inter alia*, the following general rules: "Rule 78. No one can bring an action for any injury which is not an injury to himself.

"Rule 78. The person who sustains an injury is the person to bring an action for the injury against the wrongdoer, and as to parties defendant, *inter alia*.

"Rule 96. No person is liable to be sued for any injury of which he is not the cause.

"Rule 97. Any person who causes an injury to another is liable to be sued by the person injured." Dicey on Parties to Actions, pp. 347, 353, 429, 432.

If A lets a horse to B, and C borrows the horse from B and injures it by overdriving, A may sue C therefor. *O'Riley v. Waters*, 19 Kan. 439. He may sue both B and C. *Banfield v. Whipple*, 10 Allen (Mass.) 27.

As to the right of action in case of torts arising out of contracts, see *infra* this title, *Right to Sue Depend-*

ing on Privity, generally, wherein the right to sue manufacturers and merchants, to recover damages for injuries occasioned by defects in the articles sold, is discussed.

4. Torts Not Assignable.—A cause of action arising out of tort is not assignable. *Oliver v. Walsh*, 6 Cal. 456; *Bates v. Forsyth*, 69 Ga. 365.

An action of trespass or trover for injury done to personal property while in possession of a lessee thereof during the term of his lease must be brought by such lessee. *Triscony v. Orr*, 49 Cal. 612.

The owner of goods in his own possession is entitled to sue for a wrongful attachment thereof, and his said right of action is not defeated by his subsequent sale of the goods to a third person. *Ellis v. Allen*, 80 Ala. 515.

A party in possession of goods may sue for an injury thereto. *Polk v. Coffin*, 9 Cal. 56.

5. Insurance Companies.—An insurance company having paid a loss is entitled to recover the sum paid from the party, common carrier, etc., who would have been liable for the loss to the insured, in an action brought not in its own name, but in the name of the insured against the carrier. *London Assur. Co. v. Sainsbury*, 3 Dougl. 245; *Mason v. Sainsbury*, 3 Dougl. 60; *Yates v. Whyte*, 4 Bing. N. C. 272; *Hall v. Chattanooga etc. R. Co.*, 13 Wall. (U. S.) 367; *Halcombe v. Richmond etc. R. Co.*, 78 Ga. 776; *Peoria M. & F. Ins. Co. v. Frost*, 37 Ill. 333; *Connecticut Mut. L. Ins. Co. v. New York etc. R. Co.*, 25 Conn. 265; 65 Am. Dec. 571; *Kennebec Ice etc. Co. v. Wilmington etc. R. Co.*, 13 W. N. C. (Pa.) 162. *Contra*, *Quebec F. Ins. Co. v. St. Louis*, 1 L. Can. 222.

In case of a marine insurance the company may sue in its own name, be-

survive, and they are therefore assignable.¹ The test of assignability is the survival of the contract.² But one joint tortfeasor cannot take an assignment of the claim and recover against his joint tortfeasor.³

cause of the doctrine of abandonment which has no existence in fire or life insurance. *Peoria M. & F. Ins. Co. v. Frost*, 37 Ill. 333.

In like manner an insurance company may sue in the *United States* court of claims in the name of the owner for the amount of a loss paid by them to said owner of goods, etc., impressed into the service of the *United States* under the acts authorizing such actions. *Shaw v. United States*, 8 Ct. of Cl. (U. S.) 488.

If an insured party brings suit for damages against a person negligently setting fire to his buildings, and is then paid the full amount of his insurance on said buildings, he can continue the suit in his own name under the provisions of a statute authorizing an action to be prosecuted to the end in the name of the original party, notwithstanding any transfer of interest. *Nichols v. Chicago etc. R. Co.*, 36 Minn. 452.

1. Torts Assignable.—Right of action for a tort which survives to the personal representatives, such as torts to real or personal property, may be assigned so as to pass an interest to the assignee which he can enforce by suit at law in his own name. *Whitaker v. Gavitt*, 18 Conn. 522; *Final v. Backus*, 18 Mich. 218; *Chicago R. Co. v. Packwood*, 59 Miss. 280; *Butler v. New York etc. R. Co.*, 22 Barb. (N. Y.) 110; *Snyder v. Wabash etc. R. Co.*, 86 Mo. 613; *McArthur v. Green Bay etc. Canal Co.*, 34 Wis. 152; *East Tenn. etc. R. Co. v. Henderson*, 1 Lea (Tenn.) 1; *Weire v. Davenport*, 11 Iowa 49; 77 Am. Dec. 132; *Gray v. McCallister*, 50 Iowa 497; *Vimont v. Chicago etc. R. Co.*, 64 Iowa 513; *Hawley v. Chicago etc. R. Co.*, 71 Iowa 717.

The attribute of assignability is not confined to rights of action belonging to natural persons; it extends with equal effect to those belonging to artificial persons; therefore, a right of action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association is assignable, and an action can be maintained by the assignee. *Grocers' Nat. Bank v. Clark*, 48 Barb. (N. Y.) 26.

Replevin will lie for the possession of

mules stolen from the owner, in favor of his assignee, of the right of action therefor, and in such assignee's name. *Doering v. Kenamore*, 86 Mo. 588.

The assignee of property converted, and of the right of action therefor, may maintain an action in his own name for the property and for damages. *Smith v. Kennett*, 18 Mo. 154; *Goodger v. Finn*, 10 Mo. App. 326; *Lazard v. Wheeler*, 22 Cal. 139; *Tyson v. McGuineas*, 25 Wis. 656; *Pom. on Remedies and Rem. Rights* (2nd ed.), § 148.

Where the bailee of a horse agreed to return the horse fifty pounds heavier or to pay a forfeit—the horse was injured owing to a defect in a highway, and the bailee paid the forfeit. *Held*, he could sue the town in the bailor's name. *Dumas v. Hampton*, 58 N. H. 134.

Since a claim for money tortiously obtained may be sued on in assumpsit, such claim is assignable and the assignee may sue in his own name. *Stewart v. Balderston*, 10 Kan. 131.

A right of action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association, is assignable; and an action therefor can be maintained by the assignee. *Grocers' Nat. Bank v. Clark*, 48 Barb. (N. Y.) 26, 32 How. Pr. (N. Y.) 160.

If A's personal property is attached in a suit against B, and A sells the property to C pending the attachment, an action of trespass against the attaching officer is properly brought by A to the use of C. *Holly v. Huggeford*, 8 Pick. (Mass.) 73. Or in A's name alone. *Ellis v. Allen*, 80 Ala. 515. See the discussion of this subject in *Pom. on Remedies and Rem. Rights* (2nd ed.), § 147, *et seq.*

2. Test of Assignability.—The test is the survival of the contract. *Laurence v. Martin*, 22 Cal. 173; *Snyder v. Wabash etc. R.*, 86 Mo. 613; *Galveston etc. R. v. Freeman*, 57 Tex. 156; *Purple v. Hudson River R. Co.*, 4 Duer (N. Y.) 74.

A cause of action for slander does not survive and therefore it is not assignable. *Renfro v. Prior*, 25 Mo. App. 402. See *Pom. on Remedies and Rem. Rights* (2nd ed.), § 147, *et seq.*

3. Joint Tortfeasors.—If A and B are

XII. JOINDER OF PARTIES.—(See also JOINDER, vol. 11, p. 896).—

1. Actions Ex Contractu.—(1) PLAINTIFFS.—Persons having rights of action arising out of several and distinct contracts with the same obligor, or several rights of actions against the same obligor, arising out of one and the same contract, may not join as plaintiffs in one action against the said obligor,¹ except as authorized by stat-

joint tortfeasors and A satisfies the claim of the injured party, he may not take from him an assignment of his right of action and sue B either in his own name or in the name of his assignor. Upham v. Dickinson, 38 Mich. 338.

1. Several Causes of Actions.—Several plaintiffs, claiming distinct rights, cannot join in the same action. Barry v. Rogers, 2 Bibb (Ky.) 314; Hinchman v. Paterson H. R. Co., 17 N. J. Eq. 75.

Where money is due to a county and State as separate corporations, or to the one exclusive of the other, they cannot join as plaintiffs. Salt Lake Co. v. Golding, 2 Utah 319.

In one suit the court will not take cognizance of distinct and separate claims of different persons. Where the damage as well as the interest is several, each party must sue separately. Governor v. Webb, 12 Ga. 189.

Several persons, having separate and distinct interests in a chattel, cannot unite in replevin. Chambers v. Hunt, 18 N. J. L. 339.

Where the treasurer of a company purchased their assets and promised to pay to the stockholders a certain sum per share therefor, *held*, that the stockholders could maintain separate actions for their respective shares. Therasson v. McSpedon, 2 Hilt. (N. Y.) 1.

Partners cannot join in an action to recover their shares of partnership property in the hands of another partner after dissolution. Their remedy is several. Masters v. Freeman, 17 Ohio St. 323.

Several judgment creditors cannot unite at law in one suit to reach the equitable property of a common judgment debtor. Sage v. Mosher, 28 Barb. (N. Y.) 287.

Distributees of the personal property of an intestate cannot, in general, join in a suit for their shares against the administrator, or other person into whose hands it comes. Waldsmith v. Waldsmith, 2 Ohio 156; Lee v. Gibbons, 14 S. & R. (Pa.) 110.

When the share of one of several *cestuis que trustent* in a trust fund is as-

certained and known, as where it is a moiety, or other aliquot part of the fund, a suit for a breach of trust may be maintained against the trustee, by the person entitled to that share, without joining the other *cestuis que trustent* as parties. Pickering v. De Roche-mont, 45 N. H. 67.

Where the property of a deceased person came into the hands of the defendant, and he declared that he held it in trust for the children of the deceased, and it appeared that there were no debts due from his estate, the children were allowed to maintain a joint action against him, without taking out letters of administration. Lee v. Gibbons, 14 S. & R. (Pa.) 110.

Parties to a wager, who deposit the stakes in the hands of a stakeholder, cannot recover them of him in a joint action. Mytinger v. Springer, 3 W. & S. (Pa.) 405; 28 Am. Dec. 774.

Where money is deposited with a stakeholder, on the event of a wager, by a person who acts as agent for several others, the stakeholder, being ignorant of the principals on whose account the money is deposited, actions to recover back the money may be brought in the name of the principals, each of whom may sue separately for his portion, and not of the agent. Yates v. Foot, 12 Johns. (N. Y.) 1.

The corporation of the city of Albany were authorized by statute to collect the wharfage and dockage of certain piers and docks, and distribute the same to the pier and dock owners in due proportion. The pier owners, who were distributees of a portion of their dues, associated themselves together and chose a president, in whose name an action was brought, according to the provisions of the statutes of 1849 and 1851, to recover the amount due the defendants for wharfage. *Held*, that if the proprietors of the piers were actually interested, as an association, in an exclusive manner, in the amount due for wharfage, they might maintain an action for the same in their own name, under the code; but that, as each owner was severally interested in the

ute.¹ Where, however, there are a number of obligees in a joint contract, the cause of action arising therefrom is joint, and all the obligees must unite as plaintiffs,² although some of the said

amount due him as distributee, and was entitled to receive and hold his share separately, the action would not lie in the name of the association, notwithstanding the organization and election of a president. *Corning v. Greene*, 23 Barb. (N. Y.) 33.

At common law in proceedings to compel a railroad company to make compensation for damages sustained, separate land owners cannot join. *Norfolk etc. R. Co. v. Smoot*, 81 Va. 495.

Where a covenant is several each covenantee must sue separately. *Germania F. Ins. Co. v. Hawks*, 55 Ga. 674.

When one is bound by contract to two persons severally, and only severally, their interests being also several, they not only may, but must sue upon it severally, and in joint action the plaintiffs may not be permitted, over defendant's objection, to introduce evidence of a several contract. No. 5 Min. Co. v. Bruce, 4 Colo. 293.

1. Statutes.—"All communities having tax liens upon the same piece of land may join in one complaint for the foreclosure of the same." *Connecticut*, Gen. Stat. 1888, § 3891. See also *JOINDER*, vol. II, p. 986.

2. Joint Obligees.—All the payees in a note, or obligees in a contract, must join in an action thereon, unless it has been assigned to a less number of them. *Yell v. Snow*, 24 Ark. 554; *Quisenberry v. Artis*, 1 Duv. (Ky.) 30; *Sims v. Tyre*, 1 Treadw. Const. (S. Car.) 123; 3 Brev. (S. Car.) 249; *Holyoke v. Loud*, 69 Me. 59; *Thieman v. Goodnight*, 17 Mo. App. 429.

All obligees in a bond must join as plaintiffs. *Hays v. Lasater*, 3 Ark. 565; *Phillips v. Singer Mfg. Co.*, 88 Ill. 305; *Burns v. Follansbee*, 20 Ill. App. 41; *Ehle v. Purdy*, 6 Wend. (N. Y.) 629; *Dewey v. Carey*, 60 Mo. 224; *Sweigart v. Berk*, 8 S. & R. (Pa.) 308; *Lillie v. Lillie*, 55 Vt. 470.

An action for breach of a contract, entered into with two persons, must be brought in the joint names of these parties as plaintiffs. *Rainey v. Smizer*, 28 Mo. 310; *Alling v. Woodruff*, 16 La. Ann. 6; *State v. Hesselmeyer*, 34 Mo. 76.

Where A and B contracted with C for certain services, and A paid him in

part therefor, A cannot alone sue C for damages for breach of contract, because the contract is joint. *Archer v. Bogue*, 4 Ill. 526.

Two incorporated companies may join in an action, of assumpsit, to recover money deposited in a bank in their joint names. *New York etc. Sharon Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412.

In an action to recover from mortgages a surplus remaining after a sale of the mortgaged premises, all the mortgagors must join as plaintiffs. *Clapp v. Pawtucket Institution for Savings*, 15 R. I. 489.

Where several owners of a vessel are interested in the cargo, they are properly joined in an action against a factor for the balance of the proceeds, as settled by one of them, the account being stated as with the owners. *Jellison v. Lafonta*, 10 Pick. (Mass.) 244.

Originally at common law all joint obligees had to join, or the failure to join was pleadable in abatement. If any resided out of the jurisdiction, the plaintiff had to proceed to outlawry against them until that was remedied by statute 3 and 4 Wm. IV., ch. 42, requiring defendant to state in his plea that all persons not joined as plaintiffs resided without the jurisdiction, giving the place of his residence. Under this statute it was held that in an action by one joint obligee, a plea in abatement that there were other co-obligees, some resident and some non-resident, was not bad. *Joll v. Howe*, 4 C. B. 249.

In like manner, U. S. Rev. Stat., § 737, providing that a "non-joinder of parties who are not inhabitants of, nor found within the district, shall not constitute matter of abatement or objection to the suit," does not apply to a case of a necessary party to the action. *Conolly v. Wells*, 33 Fed. Rep. 205; *Wall v. Thomas*, 41 Fed. Rep. 620.

On a contract of insurance with two jointly on their joint property, one cannot sue alone without proof of an assignment to him of the other's interest, and of the company's assent thereto. *Tate v. Citizens' Mut. F. Ins. Co.*, 13 Gray (Mass.) 79; *Blanchard v. Dyer*, 21 Me. 111; 38 Am. Dec. 553.

Where four persons jointly procure insurance to be made on a vessel owned

obligees have no interest in the amount recovered,¹ and although some of them never executed and refuse to execute the contract.² The parties to the contract may, however, agree that suit thereon may be brought by one of the obligees named therein without

by them jointly, and afterwards while the ownership remained the same, a loss happened, it was held that an action on the policy by one of the four, to recover his share of the loss could not be maintained. All should have joined as plaintiff. *Blanchard v. Dyer*, 21 Me. 111; 38 Am. Dec. 253.

As to when all the owners of a vessel must be joined as plaintiffs in an action against insurance brokers to recover the amount received by them for insurance due upon the loss of the vessel, see *Bishop v. Edmiston*, 13 Abb. Pr. (N. Y.) 346.

If goods be sold which belong to several persons jointly, all of the owners, whether partners or not, must join in an action of assumpsit for the purchase money. *Beller v. Block*, 19 Ark. 566; *Tully v. Excelsior Iron Works*, 115 Ill. 544.

A person having an equitable title to land may be joined with one having the legal title, in an action to recover for damages done to a building erected thereon at the expense of both. *Schuylkill Nav. Co. v. Farr*, 4 W. & S. (Pa.) 362.

Trustees constitute but one person in law, and, like executors, etc., must join in a suit concerning their trust. *Brinckerhoff v. Wemple*, 1 Wend. (N. Y.) 474.

Where the rights of several persons are identical in nature and kind, and only differ in extent and quantity, they may join as plaintiffs. *Bolman v. Overall*, 80 Ala. 451; 60 Am. Rep. 170.

In an action on a covenant, contained in an agreement between the covenantor and "A and such other parties as he may associate with him under the name of A & Company," signed and sealed by the covenantor and signed "A & Co." the covenant being to pay to "the said A & Co., parties of the second part," for work to be done by them, all those who are partners at the time of signing the agreement may join in the action, on proof that A had executed the covenant in behalf of, and by authority of the firm. *Seymour v. Western R. Co.*, 106 U. S. 320; *Hoffman v. Porter*, 2 Brock. (U. S.) 156.

Deeds of composition between A of

the first part and all the creditors of A of the second part authorize all of said creditors to sue thereon. *Gresty v. Gibson*, L. R., 1 Ex. 112; *Reeves v. Watts*, L. R., 1 Q. B. 412; 7 B. & S. 523; *McLaren v. Baxter*, L. R., 2 C. P. 559.

To recover property jointly bailed, all the owners must join as plaintiffs. *Stachely v. Peirce*, 28 Tex. 328.

In *Louisiana*, joint obligees are not required to unite as plaintiffs. *Hincks v. Converse*, 38 La. Ann. 871, overruling *Alling v. Woodruff*, 16 La. Ann. 6; *Bukner v. Beard*, 32 La. Ann. 226.

When one of several joint obligees fraudulently executes a release to the obligor, such a release is not only not binding on the other joint obligees, but also enables them to sue without joining the party who had released. *South Fork Canal Co. v. Gordon*, 6 Wall. (U. S.) 561.

1. Obligee Not Interested.—If a joint contract is made by A and B with C, and the contract is cancelled by C, as to B, and thereafter A sues C for damages sustained by him alone under the contract, A must, if he relies upon the original contract of A and B with C, join B in the action. *McGilvery v. Moorhead*, 3 Cal. 267. To same effect, *Phillips v. Henshaw*, 5 Cal. 509.

2. Joint Covenantees Failing to Execute the Deed.—When in an action plaintiff declares on a covenant made by defendant with plaintiff and others, the defendant may demur that the other joint covenantees should be joined with plaintiff, and this though it appear that the other joint covenantees had not executed the deed because they might nevertheless sue. *Petrie v. Bury*, 5 B. & C. 353.

The effect of the refusal of joint covenantees to sign a covenant upon the right of those who do sign to sue not decided in *Petrie v. Bury*, 3 B. & C. 353. In a subsequent case this question was squarely raised and it was decided that the covenantee who signed could not sue alone in the lifetime of the other covenantee; first, because the covenantor only consented to a contract with the two covenantees, there being

joining the others.¹ Dormant partners need not join as plaintiffs,² nor need any person who is not a party to the contract, although interested in or affected by it;³ but such persons may

nothing to show an intention, that in the event of one refusing to sign, the other should have the right to sue alone; and second, because the disclaimer by the covenantee who refused to sign showed an intention to give the other covenantee the right to sue, which, before the execution of the disclaimer might have been exercised by both covenantees; that is, the disclaimer is an assignment of a chose in action which is not lawful at common law. *Wetherell v. Langston*, 1 Exch. 634.

In this case another action was subsequently begun in the name of both covenantees, whereupon the one who had refused to sign applied for an order to strike off his name as plaintiff. An indemnity for costs was offered and declined, and it was decided that the name could not be used without the party's consent, notwithstanding the indemnity. *Langston v. Wetherell*, 27 L. J. Ex. 400.

This rule that all joint covenantees, whether signing the deed or not, must join has, however, no application until it is ascertained that there is a joint covenantee. Therefore, when a covenant purported to be made between A and B of the first part and C of the second part, and the covenant ran between the party of the first part and the party of the second part, and B never signed the deed, it was held that B never in truth became a party to the instrument, and therefore A was the party of the first part, and he could sue alone on the covenant. *Philadelphia etc. R. Co. v. Howard*, 13 How. (U. S.) 307.

The refusal of one covenantee to join may be alleged as an excuse for not joining him. *Hays v. Lasater*, 3 Ark. 565.

When an unincorporated association makes a contract, in an action thereon, it has been held that one whose name is signed to the articles of association, but who had not signed himself and had never authorized such signature, need not be joined as a party plaintiff. *Boyd v. Merriell*, 52 Ill. 151.

1. Party Authorized to Sue by Contract.—Where several persons jointly interested agreed to horse a coach, each of them one stage, on the road from L

to B, and that in case of default, one of them should sue the defaulter for a penalty to be divided among all the non-defaulters, the party appointed may sue alone for the penalty because the agreement is in effect and undertaking not to object on account of all who ought otherwise to have been joined in the action not being joined. *Radenhurst v. Bates*, 3 Bing. 463.

Shareholders in a cost book company, a species of partnership, may not agree that unpaid calls for their subscription may be sued for by the person at the time acting as pursuer of the company, because *inter alia* agreeing to allow an action on a contract by one not in privity to it. *Hybart v. Parker*, 4 C. B., N. S. 209.

Where several mutually agree, each upon consideration of the promise of all the others, to pay money for a certain object of common benefit and interest, if one fails to perform, all the others must unite in a suit on the contract, even though the contract provided that all the payments should be made to certain of the subscribers. *Moore v. Chesley*, 17 N. H. 151.

2. Dormant Partners.—Dormant partners need not be joined as plaintiffs. *Leveck v. Shaftoe*, 3 Esp. 468; *Lloyd v. Archbowle*, 2 Taunt. 324; *Ship Potomac*, 2 Black (U. S.) 58; *Barstow v. Gray*, 3 Me. 409; *Wilson v. Rockland Mfg. Co.*, 2 Harr. (Del.) 67; *Clark v. Miller*, 4 Wend. (N. Y.) 628; *Clarkson v. Carter*, 3 Cow. (N. Y.) 84; *Keane v. Fisher*, 9 La. Ann. 70; *Mitchell v. Dall*, 2 Har. & G. (Md.) 159; *Mayall v. Boston etc. R.*, 19 N. H. 122; 49 Am. Dec. 149; *Howe v. Savory*, 49 Barb. (N. Y.) 403; *Wilkes v. Clark*, 1 Dev. (N. Car.) 178; *Morse v. Chase*, 4 Watts (Pa.) 456; *Boehm v. Calisch* (Tex. 1887), 3 S. W. Rep. 293. Nor subcontractors. *Barstow v. Gray*, 3 Me. 409.

If A contracts with B & Co. and the witness was for the benefit of B alone, B alone may sue on such contract. *Moller v. Lambert*, 2 Camp. 548; *Teed v. Elworthy*, 14 East 214; *Jones v. Goodrich*, 19 Ill. 380.

3. Interested Person Not a Party.—If A sell to B the wool clipped from his sheep and his son's sheep, B must sue A alone on such contract, although it con-

perhaps be joined at their option.¹ The rules regulating the joinder of plaintiffs seem to apply also to the joinder of use plaintiffs when the suit is brought in the name of a nominal plaintiff.² If a joint obligee dies, the right of action survives to his co-obligee, who must sue alone without joining the personal representative of the deceased obligee.³

tains provisions as to care to be taken of the son's sheep, and the son in fact signs the contracts. *Stearns v. Foote*, 20 Pick. (Mass.) 432.

Although the officers and crew of a whaling ship are interested in the net proceeds of a voyage, they should not be joined in an action on a contract of mateship between two masters of whaling vessels. *Baxter v. Rodman*, 3 Pick. (Mass.) 435; *Grozier v. Atwood*, 4 Pick. (Mass.) 234.

A promise of three, upon a consideration proceeding from them and a fourth person, will support an action by the three. *Cabot v. Haskins*, 3 Pick. (Mass.) 83.

"If A sells grain to B for future delivery, and then buys grain from C to fulfill his contract at a price to depend upon whether A can recover the price from B, there being no privity between B and C, A can sue B alone for the purchase money. *Kadish v. Young*, 108 Ill. 170; 43 Am. Rep. 548.

1. Right Optional with Plaintiff.—Where A enters into a contract with B with reference to a subject matter, and C was actually interested therein, B and C may join in an action for breach thereof, notwithstanding A was ignorant of C's interest. *McCord v. Love*, 3 Ala. 107; *Cottingham v. Owens*, 71 Ill. 397; *Silliman v. Tuttle*, 45 Barb. (N. Y.) 171. *Contra Phillips v. Penmyurt*, 1 Ark. 59; *McKnight v. Watkins*, 6 Mo. App. 118.

2. Use Plaintiffs.—Where a bond is taken to the State for the benefit of parties having separate interests, they need not be joined as use plaintiffs. *State v. Hesselmeyer*, 34 Mo. 76.

In an action on a sheriff's bond the obligee cannot sue to the use of several people, who have been severally interested and injured. *Governor v. Webb*, 12 Ga. 189.

Where, however, a sheriff sues a purchaser at sheriff's sale for the purchase money, he may make use plaintiffs in such action several plaintiffs in execution, whose interest is of the same nature, and who all claim a partici-

pation in the fund sued for. *Glenn v. Black*, 31 Ga. 393.

3. Death of a Joint Oblige.—A covenant to and with A and B, to pay A an annuity during B's life is joint, and on A's death the right of action survives to B, and A's administrator cannot sue. *Anderson v. Martindale*, 1 East 497; *Crocker v. Beal*, 1 Low. (U. S.) 416; *Dana v. Parker*, 27 Fed. Rep. 263; *Callison v. Little*, 2 Port. (Ala.) 89; *Donnell v. Manson*, 109 Mass. 576; *Smith v. Franklin*, 1 Mass. 480; *Jackson v. People*, 6 Mich. 154; *Freeman v. Curran*, 1 Minn. 169.

Where a note is assigned to trustees and their successors in the trust, on the death of one of the trustees, the right of action on the note survives to the survivors, and the successor of the deceased cannot be joined with them. *Roane v. Lafferty*, 5 Ark. 465.

Where A covenants with B and C and B dies and then C dies, their personal representatives may not join in an action against A, but C's representatives must sue alone. *Beebe v. Miller*, Minor (Ala.) 364.

The common law rule that upon a joint contract the right of action rests in the surviving obligees is not changed by the codes, so that the survivors, having the whole interest may sue for a breach thereof without joining the representatives of those who are dead. *Indiana etc. R. Co. v. Adamson*, 114 Ind. 282; *Robinson v. Hintrager*, 36 Fed. Rep. 752.

"In all cases where any joint contractor, other than a partner, shall have died, the executor or administrator of such decedent may be joined with the surviving contractor or contractors as a joint plaintiff, in any action upon any joint contract of said decedent and said survivor or survivors, and as a joint defendant where the estate of such decedent is not in settlement as an insolvent estate. But in case the estate of such decedent shall afterwards be represented insolvent, such insolvency may be suggested on the record; and thereupon said action, in respect to such defendant, shall be discontinued.

Whether a contract is several or joint is a question of construction. Generally, where there are joint obligees, the contract is joint.¹ Where, however, the language of the contract requires the obligor to account to each of the obligees, respectively, or by the use of any words imports a separate right of action, the contract is several, and each obligee may sue thereon.² In like

Any judgment against such executor or administrator shall run against the estate of such decedent only, and in the same manner as if he were sued alone; provided, that nothing herein shall operate to extend the time limited by the court of probate for the presentation of claims against the estate of such decedent." *Connecticut*, Gen. Stat. 1888, § 1047.

In an action in the name of one of two joint obligees, on a note secured by mortgage, the defendant having excepted to the petition, on the ground of the non-joinder of the representatives of the other obligee, whom the plaintiff had alleged to be deceased—*held*, that the exception was sufficiently answered by another averment in the petition that the survivor was the sole owner of the cause of action. *Hansell v. Gregg*, 7 Tex. 223.

1. Joint Obligees.—A note payable to A or B is, at least, evidence of a joint contract with both payees, if not of a several contract with each of them; and so both are entitled to sue jointly thereon. *Westgate v. Healy*, 4 R. I. 523; *Willoughby v. Willoughby*, 5 N. H. 244; *Walrad v. Petric*, 4 Wend. (N. Y.) 575. Either may sue separately. *Ellis v. McLemore*, 1 Bailey (S. Car.) 113.

Where A had an interest in three patents, the other interest in each patent being severally owned by B, C, and D, and A, B, C and D unite in an agreement not under seal, to sell the patents to E, it was intimated that an action for royalties should be brought by A, B, C and D jointly and not by any one alone, but the point was not necessary to the decision of the case and not decided. *Chanter v. Leese*, 3474 M. & W. 295.

2. Contracts Construed to be Several.—If two joint owners of merchandise consign it to a merchant for sale, and inform him that each owns one moiety, and if they give separate and variant instructions, each for his own moiety, one of the consignors alone may maintain a separate action against the consignee for a violation of his separate instructions, the separate in-

structions serving the joint interest. *Hall v. Leigh*, 8 Cranch (U. S.) 50.

Each owner of a ship may maintain a separate suit against the ship's husband to compel an account of the profits of the voyage, when they had contracted each and every of them with the others and each and every of the others "that the voyage should be under said ship husband's management." *Owston v. Ogle*, 13 East 538. *Compare* *Servante v. James*, 10 B. & C. 410; *Bunn v. Morris*, 3 Cal. (N. Y.) 54; *Martin v. Buck*, 11 Johns. (N. Y.) 270; *Vandermulen v. Vandermulen*, 108 N. Y. 195.

If A contracts with B, C and D to pay "each one-fourth of all moneys received" from sale of lands held by the four as tenants in common, the covenant is several. *Vandermulen v. Vandermulen*, 108 N. Y. 195.

Where an agreement not under seal is to account with A, or to reconvey to him certain property, and to do the same to B with other property, and to both with still different estate, as it became in those ways from A and B, and from both, a separate action lies for A for his separate proportion. *Jewett v. Cunard*, 3 Woodb. & M. (U. S.) 277.

By certificates of insurance, a co-operative insurance company agreed to pay on the death of a member the sum specified in the certificate to the beneficiary named, and to the surviving members of the class to which he belonged "share and share alike." *Held*, on the death of a member, a separate action was maintainable against the company by one of the surviving members of the class, to recover his proportionate share of the sum specified; that the words "share and share alike" were words of severance and created a several right. "The form of those certificates, however, is not here important, because it appears from the certificates of the plaintiff and Mr. Sanford [the deceased member] that the interest of each of those persons was several, as it was founded on a separate consideration and an independent contract, and the promise, as

lleged, was to pay to the members or heir designated beneficiaries share and hare alike. The action follows the ature of the interest and where that is everal, separate actions may be main- ained, even if the language of the romise is joint." *Hess v. Nellis*, 1 homp. & C. (N. Y.) 118; *Van Wart . Price*, 14 Abb. Pr. (N. Y.) 4, note; *Warner v. Ross*, 9 Abb. N. Cas. (N. .) 385; *Shaw v. Sherwood*, Cro. Eliz. 29; *Eccleston v. Clipsham*, 1 Saund. 53; *Withers v. Moore*, 3 B. & C. 254; Addison on Cont. 79; 1 Pars. on Cont. 11. The words "share and share like" are words of severance and create several right, especially when con- sidered in the light of the fact that the onsideration was several. As the nguage of the promise was not ex- pressly joint, but to say the least, may e construed to be joint or several, it ould, according to the authorities ited, be held several, because the in- erest of the promisees is several. *Em- eluth v. Home Benefit Assoc.*, 122 N. . 130.

Three joint owners of land em- ployed an agent to sell it. He was to ccount to each separately for their re- spective interest. *Held*, each owner ould sue separately for his interest alized at the sale. *Lawless v. Law-* ss, 39 Mo. App. 539.

Where several legatees entitled to sum of money bequeathed to them in qual shares, join in a power of attor- ey authorizing A to collect for them eir respective legacies, each legatee ay maintain an action in severalty gainst the attorney to recover the ount of his legacy. *Power v. Hatha-* ay, 43 Barb. (N. Y.) 214; *Best v. inz*, 73 Wis. 243.

In a suit against an attorney in fact, r an account of his agency, all the rincipals in the contract should be oined in the action. The attorney annot be held to render as many ac- ounts of his agency as there are prin- ipals in a joint contract. *Nicholson . Hennen*, 16 La. Ann. 33.

An agreement, "we, the subscribers, o agree to pay to X the sums written gainst our names," for a certain pur- ose, is a several contract by the sub- riberes and each must sue severally ereon. *Carter v. Carter*, 14 Pick. Mass.) 424.

A promise to pay the respective wners of land taken for a road, such um as A shall award, authorizes each wner to sue separately for the sum

awarded, his interest being separate. *Farmer v. Stewart*, 2 N. H. 97.

A promise to A to pay several other persons in equal proportions, where it is not intended that they shall receive or recover the entire sum, and divide it, does not warrant a joint suit; each must bring a separate action. *Owings v. Owings*, 1 Har. & G. (Md.) 484.

When on sale of a partnership busi- ness, the purchaser contracts *inter alia* to pay one partner all the money he had advanced in respect of the co-part- nership and for which it was accounta- ble to him, the said partner may sue the purchaser for the money so ad- vanced without joining his co-partners. *Jones v. Robinson*, 1 Ex. 454.

Where a number of parties agree to enter into a partnership, and several subsequently refuse, each party injured may sue for the damages occasioned him, without joining in any way those who had committed no breach. *Gold- smith v. Sacks*, 8 Sawy. (U. S.) 110, 17 Fed. Rep. 726.

A covenant of warranty of title in a deed is divisible, and a remote grantee of any part of the land included in said first deed may sue on said covenant without joining the grantees of the rest of the land. *Whitzman v. Hirsh*, 87 Tenn. 513.

Where the interest of the covenan- tees is joint, although the covenant is in terms joint and several, the action fol- lows the nature of the contract and must be brought in the names of all the covenantees. *Pugh v. Stringfield*, 3 C. B., N. S. 2; *Pugh v. Stringfield*, 4 C. B., N. S. 364.

If joint owners of land lease the same, they must sue jointly for the rent. *Marys v. Anderson*, 24 Pa. St. 272.

If A and B execute a joint lease to C who covenants to pay A \$20 rent and B \$20 rent, A and B may unite in a suit for restitution of premises and damages on failure to pay rent. *Treat v. Lid-* dell, 10 Cal. 302. *Contra*, *Powis v. Smith*, 5 B. & Ald. 850; *Herriott v. Kersey*, 69 Iowa 111.

A was a carrier, and needing assist- ance engaged B and C to assist with their horses. Each had three horses, and the six drew the wagon. It was agreed that B and C should make out separate accounts. *Held*, that B and C could not sue A jointly, as the contract was several. *Smith v. Hunt*, 2 Chitty 142.

If A and B contract in one writing to do certain services for C, A and B

manner when a right of action is given by a statute to several, the right of action is joint unless the language used imports the contrary.¹ In actions on implied contracts, the rule is that the right of action follows the consideration, and it is several,² unless

each to receive therefor a separate and distinct compensation. Either may sue C alone for the amount due to him. *Richey v. Branson*, 33 Mo. App. 418.

A, "in behalf of the members of an orchestra," of which A was a member, signed a paper agreeing to continue their services if B guaranteed payment therefor. B agreed in writing to so guarantee. In a suit by A alone against B, *held*, the contract was a joint one, and all the orchestra must join in the suit. *Lucas v. Beale*, 10 C. B. 739; *Harms v. McCormick*, 30 Ill. App. 125.

But where the leader of a band contracts to furnish a given number of musicians at a fair, he must sue alone. *Corbett v. Shumacker*, 83 Ill. 403.

Where however, A, B and C, "a committee of subscribers" to a certain object, enter into a contract with D, which contract was signed by A "in behalf of himself and the rest of the committee," the legal interest in the contract was held to be in A, B and C, and they could sue thereon in their own names without joining the other subscribers. *Potter v. Yale College*, 8 Conn. 52.

Where several persons interested in resisting a suit appoint a committee to employ counsel and defend the case, and agreed in writing to pay the committee such *pro rata* assessments as might be laid upon them to meet expenses, and one party fails to pay, each member of the committee may sue separately for the amount paid by him. *Finney v. Brant*, 19 Mo. 42. They cannot sue jointly. *Lindell v. Brant*, 17 Mo. 150.

1. Statutory Actions.—Under the acts of Congress providing for sales of real property for taxes, the proceeds above the taxes to be held "for the use of the owner or his legal representatives," and allowing recovery thereof by suit in the United States court of claims, every person having an estate in the realty must join in an action therefor, and a non-joinder is fatal. *Cuthbert v. United States*, 20 Ct. of Cl. 172.

Where by statute an action to recover expenses incurred is given to a committee who are to act by majorities, all the members of such committee must join as plaintiff. *Darling v. Simpson*, 15 Me. 175.

Where by statute, three towns are authorized to sell a fishery right, and two for a valuable consideration release to the third, and the third sells, the said third town may sue alone for the purchase money. *Watertown v. White*, 13 Mass. 477.

Where a town votes to indemnify its selectmen against any claim for damages substantiated against them or either of them or any agent acting properly under their authority in a certain matter, and the selectmen were A, B and C, A and B may sue jointly to recover damages recovered in an action against them, A and B, and paid by A, and their expenses incurred, though incurred and paid separately, and C need not be joined, there being no evidence that he was ever sued or incurred any such damage. *Hadsell v. Hancock*, 3 Gray (Mass.) 526.

In consequence of irregularities a tax was held invalid. The assessors paid back one-third of the amount collected. The town voted to indemnify them. *Held*, each assessor might sue to recover such indemnity. *Nelson v. Milford*, 7 Pick. (Mass.) 18.

Under the *Massachusetts* statute requiring legatees to refund proportionally, when property bequeathed to one is taken in execution for the testator's debts, the action must be against the other legatees severally and not jointly. *Brigden v. Cheever*, 10 Mass. 450.

2. Implied Contracts, Several.—If two persons advance money for a third person, they must sue separately. Thus A, B and C being appointed assignees under a commission of bankruptcy, and having acted as such, A and B pay each half of his bill to the solicitor, *held*, that A and B could not maintain a joint action against C for his proportion of the money paid, but each must bring a separate action. *Brand v. Boulcott*, 3 B. & P. 235.

When two agents are employed by certain claimants to land to secure their title, and services are rendered and expenses incurred, such services and expenses being individual and not joint, separate actions therefor may be maintained by each agent. *Conner v. Hutchinson*, 12 Cal. 126.

Where the defendant authorizes his

the evidence proves a joinder in the performance of the labor, the payment of the money, etc.¹ This principle applies to actions by sureties against their principal, against each other,²

agents to draw upon him for such sums as they should expend for him, or for which they would be held liable, and their drafts are dishonored, each agent may sue separately for his proportion of the sum expended. *Finney v. Brant*, 19 Mo. 42.

Where an executor pays out money of the estate erroneously, he must sue alone and in his individual right to recover back the same. *Lawrence v. Carter*, 16 Pick. (Mass.) 12.

Where several plaintiffs joined in an action to recover back money paid as usury, and it did not appear that the money so paid was paid out of a joint fund, but that two of the plaintiffs were merely sureties for the two others in the notes by which the money was raised, *held*, that it was a misjoinder of parties fatal to the action. *Brents v. Tinebaugh*, 12 B. Mon. (Ky.) 87.

1. Implied Contracts; Joint—If A, B and C make advances to X for services to be performed, A, B and C may unite in an action to recover back a balance due them from X, though X was to perform the services entirely under supervision of C alone. *Gouverneur v. Elliott*, 2 Hall (N. Y.) 211.

Where agents for obtaining the laying out of a highway advanced money jointly, and took receipts as for money disbursed by them jointly, they were held to have rightly joined in a suit for reimbursement. *Jewett v. Cornforth*, 3 Me. 107.

Two guardians of a spendthrift sold his lands under a void license, and paid his debts with the avails, some being paid by one, and some by the other. The sale was avoided, and they were compelled, on their covenants in the deed given by them of the lands, to refund to the purchaser. *Held*, that they should join in a suit against the ward, to recover the money paid by them in discharge of his debts. *Sherman v. Akens*, 4 Pick. (Mass.) 283.

If expense has been incurred by the joint order of a committee appointed under a statute, all must join to recover the same; and, if payment of his share be made to one of them, he cannot therefore defeat the action. *Darling v. Simpson*, 15 Me. 175.

Proof by the defendant's agent, that he "engaged the plaintiffs to do certain

threshing for the defendant," shows that the plaintiffs were joint contractors, and properly joined in an action of assumpsit to recover for the threshing. *Martin v. Martin*, 3 Chand. (Wis.) 303.

Where a promise is implied, the actions must follow the consideration, and be joint or several, accordingly; but where the action arises on an express promise, if that be joint, the action must be. *Lee v. Gibbons*, 14 S. & R. (Pa.) 105.

If goods be sold which belong to several persons jointly, all of the owners whether partners or not must join in an action of assumpsit for the purchase money. *Beller v. Block*, 19 Ark. 566; *Tully v. Excelsior Iron Works*, 115 Ill. 544.

2. Actions by Sureties.—Co-sureties cannot join in an action to recover money paid by them for their principal unless the payment be made out of a joint fund by a joint note or in one sum as a joint payment. *May v. May*, 1 Car. & P. 44; *Parker v. Leek*, 1 Stew. (Ala.) 523; *Ross v. Allen*, 67 Ill. 317; *Gould v. Gould*, 8 Cow. (N. Y.) 168; *Lombard v. Cobb*, 14 Me. 222; *Clapp v. Rice*, 15 Gray (Mass.) 557; 77 Am. Dec. 387; *Appleton v. Bascom*, 3 Met. (Mass.) 169; *Pearson v. Parker*, 3 N. H. 366; *Whipple v. Briggs*, 28 Vt. 65; *Litler v. Horsey*, 2 Ohio 209. *Compare Doremus v. Selden*, 19 Johns. (N. Y.) 213; *Smith v. Hicks*, 1 Wend. (N. Y.) 206. *Contra* under code provisions, *Skiff v. Cross*, 21 Iowa 459; *Rizer v. Callen*, 27 Kan. 339.

Where they pay the money jointly, they cannot sue separately. *Doolittle v. Dwight*, 2 Met. (Mass.) 561.

Where several sureties pay the debt of their principal, and there is no evidence of a partnership or joint interest, or of payment from a joint fund, the presumption of law is that each paid his proportion of the debt. *Bunker v. Tufts*, 55 Me. 180; *Lombard v. Cobb*, 14 Me. 222.

Where a joint judgment is rendered against several heirs of a deceased surety and the money paid by them, they are entitled to maintain a joint action against the principal debtor for the sum paid. *Snider v. Greathouse*, 16 Ark. 72; 63 Am. Dec. 54.

and to actions by arbitrators for their fees.¹

If a contract is in terms several, it does not become joint because several persons sign the contract,² or are liable to either the plaintiff or defendant by virtue of a collateral contract;³ nor

Where the holder of moneys left with him to indemnify several sureties converts the same, one surety, if he has paid alone the principal's obligation, may sue said holder without joining his co-sureties. *Bush v. Haeussler*, 26 Mo. App. 265.

Where twenty persons agreed to exercise a public right of fishery, and to defend such right at law, each bearing his proportion of the expenses, whoever should happen to be sued, and three are sued, and pay the expenses of the suit, these three can join in an action against a fourth to recover his proportion of such expense, the joint liability of the plaintiffs coupled with defendant's promise, and not the payment of the money, being the cause of action. *Wright v. Post*, 3 Conn. 142.

Where a contract is made to indemnify several sureties, and one alone pays the principal's obligation, he may sue alone to enforce the contract of indemnity. *Bush v. Haeussler*, 26 Mo. App. 265; *Cross v. Williams*, 72 Mo. 577.

When a covenant to indemnify against the payment of a debt, is made to two or more persons jointly, all must join in an action upon it, and the failure to join would defeat the action, although they may have severally paid the debt, and out of their separate funds in equal or unequal proportions. *McNairy v. Thompson*, 1 Sneed (Tenn.) 141.

Upon the right of sureties to join or sue separately in actions against each other for contribution, see *Burroughs v. Lott*, 19 Cal. 125; *Dussol v. Bruguere*, 50 Cal. 456; *Rush v. Bishop*, 60 Tex. 177; *Prescott v. Newell*, 39 Vt. 82.

1. Arbitrators.—Arbitrators have several claims for their fees, and each arbitrator should sue therefore alone. *Butman v. Abbot*, 2 Me. 361; *Hinman v. Hapgood*, 1 Den. (N. Y.) 188; 43 Am. Dec. 663.

A joint suit was successively brought in *England* in 1887, without objection. *Crampton v. Ridley*, L. R., 20 Q. B. Div. 48. And the same is proper when there is an express joint contract. *Hogins v. Gordon*, 32 B. 466.

2. Several Contracts Not Made Joint

by Joinder of Parties.—A contract which is plainly meant to be several is not to be treated as joint merely because several persons have signed it on one side or the other. *Widner v. Western Union Tel. Co.*, 47 Mich. 612.

Where A and B had severally subscribed a paper promising to pay a certain sum for establishing an institution, and part of such sum had been paid, and a receipt taken therefor, expressed to be "received of A and B," held, that A might sue alone to recover back the amount paid by himself, on failure of the defendant to establish the institution. *Carter v. Carter*, 14 Pick. (Mass.) 424.

When under a contract by A with B and others, if the interests of B *et al.* are several, and their causes of action several, each may sue A alone. *Beckwith v. Talbot*, 95 U. S. 289.

When under a contract D is to pay A for certain services, the fact that B and C unite in the agreement permitting A to do the work does not render it necessary for A to join them as co-plaintiff in an action against D for the compensation. *Craig v. Fry*, 68 Cal. 363.

3. Collateral Contracts.—Mechanic's labor was done under a contract with the owner; in consideration of forbearance, a subsequent purchaser promised to pay the claim. Held, that there was no privity of contract between the original owner and the purchaser, and that they could not be sued in a joint action seeking a joint judgment. *Mervin v. Sherman*, 9 Iowa 331.

A stranger need not be made party defendant in an action against an executor for the recovery of a legacy which the defendant alleges has been paid to such stranger for the benefit of the legatees. *Gleason v. Thayer*, 24 Barb. (N. Y.) 82.

In a contract between A and B, C and D joined as sureties for A, C and D were not entitled under the contract to sue for money due thereon, but only bound to pay certain liquidated damages, in A's default. Held, A could sue B on the contract without joining C and D as co-plaintiffs. *Widner v. Western Union Tel. Co.*, 47 Mich. 612.

does it become joint in consequence of a joinder in proceedings subsequent to the making of the contract.¹ On the other hand, if a contract is in terms joint, it does not become several because the obligees therein were originally severally interested;² nor in

1. Several Contract Not Made Joint by Subsequent Proceedings.—A submission to arbitration not resulting in an award, but in a simple recommendation, by the referees, to pay, in consequence of which a payment in part is actually made, will not enable a plaintiff to charge the parties paying jointly, when they were before only liable severally. *Stoddard v. Gage*, 41 Me. 287.

If the goods of one of several joint debtors be taken in execution and wasted, or if the officer demand from one of the debtors illegal fees, an action *ex contractu* against the officer should be brought by the owner alone, and not by all the debtors jointly. *Ulmer v. Cunningham*, 2 Me. 117.

Where money is collected by a sheriff from several defendants under an execution which is afterwards quashed, they cannot unite in an action to recover the amount paid, and obtain one judgment adjudging to each of them the sums they are entitled to. *Riley v. Marshall*, 5 Ala. 682.

Where two plaintiffs sued out several attachments, and the sheriff took only one bail bond, *held*, that as the plaintiffs' interest were several only, they could not join in a suit on the bond. *Gridley v. Starr*, 1 Root (Conn.) 281.

Holders of separate judgments, whose executions have been levied on personal property which has been taken from the sheriff by replevin, may unite as plaintiffs in a suit for breach of the replevin bond. *Thomas v. Irwin*, 90 Ind. 557.

Where two several creditors have separate mortgages in different property, and they agree to sue their debtor at their joint expense, on one of the causes of action, and divide the recovery, does not create such a joint interest as will support a joint action. *Freer v. Cowles*, 44 Ala. 314.

A joint suit cannot be maintained on a recognizance to several trustees, in a certain sum to each, although, by a misprision of the clerk, judgment was entered in favor of the trustees jointly for their costs. *Page v. Baldwin*, 29 Vt. 428.

Co-sureties cannot maintain a joint

action on the case against a person who subsequently "aids or assists" their principal in a fraudulent transfer, or concealment of his property to secure it from creditors, although, after such conveyance, they became joint creditors by the joint payment of said note. *Bunker v. Tuft*, 55 Me. 180.

An administrator gave two bonds on demand to the orphan's court with different sureties in each. Decrees entered against sureties on first bond for liability prior to their discharge and against sureties on second bond for liability accruing subsequently. The administrator and the sureties on the two bonds united in a suit of error. Writ dismissed because the joinder was improper. *Jones v. Etheridge*, 6 Port. (Ala.) 208.

2. Several Interests.—If a joint covenant is expressly created in a sealed instrument, the fact that the covenantees had separate interest will not enable them to sue separately. For, unlike parol contracts or contracts not under seal, which require and therefore follow the consideration, a sealed instrument is obligatory by virtue of its form only, and hence only in the form agreed upon. *Catlin v. Barnard*, 1 Aik. (Vt.) 9. A separate interest was held sufficient to authorize a separate suit in *Carthral v. Brown*, 3 Leigh (Va.) 101.

That all obligees must join as plaintiffs in an action on the covenant notwithstanding their several interests, see *Farni v. Tesson*, 1 Black (U. S.) 309; *Davis v. Wannamaker*, 2 Colo. 637; *Lindee v. Lake*, 6 Iowa 164; *Clapp v. Pawtucket Institution for Savings*, 15 R. I. 489.

A large number of the early English cases upon this question as to the construction of covenants and the right to sue thereon will be found collected in the notes to *Eccleston v. Clipsham*, 1 Saund. 153 and *Coryton v. Lithebye*, 2 Saund. 117 b. But these cases seem now to be only of historical interest, as the rule laid down in *Keightley v. Watson*, 3 Ex. 716, is the final result after much discussion of the question and many contradictory decisions.

Whether the right to sue on a covenant be joint or several depends upon

consequence of any subsequent severance of their interests,¹

the nature of the covenant. Thus in a case where one covenantee had brought suit, and his right to a separate action being the point in question, *POLLOCK, C. B.*, said: "I consider that the enquiry really is as to the true meaning of the covenant, at the same time bearing in mind the rule—a rule which I am by no means willing to break in upon—that the same covenant cannot be treated as joint or several at the option of the covenantee. If a covenant be so constructed as to be ambiguous, that is, so as to serve either the one view or the other, then it will be joint if the interest be joint, and it will be several if the interest be several. On the other hand, if it be in its terms unmistakably joint, then, although the interest be several, all the parties must be joined in the action. So if the covenant be made clearly several, the action must be several, although the interest be joint. It is a question of construction." The other barons all concurred upon this point and *PARKE, B.*, further said: "The rule that covenants are to be construed according to the interests of the parties is a rule of construction merely." *I. e.*, a rule applicable like many other rules to the construction of a covenant, and not a rule determining the question as to whether the right of action is joint or several. *Keightley v. Watson*, 3 Ex. 716, 721-2. See *Bradburne v. Botfield*, 14 M. & W. 559, 572; *Sorsbie v. Park*, 12 M. & W. 146.

In accordance with the earlier decisions rather than the later, it was decided in 1856 that where a statute gave to tax assessors as compensation for their services, a percentage of the amount of the assessment list, and there were more assessors than one, each assessor could sue for the particular amount due him because his interest was several. *Bolton v. Cummings*, 25 Conn. 410. Compare also *Townsend v. Townsend*, 5 Harr. (Del.) 127; *Howe Machine Co. v. Hickox*, 106 Ill. 461; *Hansel v. Morris*, 1 Blackf. (Ind.) 307; *Ehle v. Purdy*, 6 Wend. (N. Y.) 629; *Ford v. Bronaugh*, 11 B. Mon. (Ky.) 14; *Blakey v. Blakey*, 2 Dana (Ky.) 460; *Cleaves v. Lord*, 3 Gray (Mass.) 66; *Nelson v. Milford*, 7 Pick. (Mass.) 18; *Capen v. Barrows*, 1 Gray (Mass.) 376; *Little v. Hobbs*, 8 Jones (N. Car.) 179; 78 Am. Dec. 275; *Titus v. Railroad Co.*, 5 Phila.

(Pa.) 360; *Catawissa R. Co. v. Titus*, 49 Pa. St. 277.

1. Subsequent Severance of Interest.—If a contract is joint, the fact that one party thereto paid his share of a liability, and the other party did not, does not afford such evidence of a separate interest in the original contract made with the defendant, as authorizes separate suits. *Moody v. Sewall*, 14 Me. 295; *Archer v. Bogue*, 4 Ill. 526.

Where two persons, under their hand and seal, acknowledge a debt and promise to pay it by a mortgage given by one, and one of them subsequently executes the mortgage, it is an acknowledgment of a debt due by both and the action is still against both. *Thompson v. Crocker*, 1 Rice (S. Car.) 23.

Where H and B made a joint contract, which was afterwards performed and cancelled as to B, *held*, that H could not sue upon it severally, but must make B a co-plaintiff. *M'Gilvery v. Moorehead*, 3 Cal. 267. To same effect, *Phillips v. Henshaw*, 5 Cal. 509.

A bond given to A and B for the payment of any sum recovered in a suit is joint, and is not rendered several by a decree in the suit adjudging separate amounts to A and B. *McLeod v. Scott*, 38 Ark. 72.

Although a certificate in payment to two physicians for attending an inquest is based on an estimate as to the amount due each, that is not conclusive against a joint employment and does not prevent a joint action on the certificate. *Pueblo Co. v. Marshall*, 10 Colo. 84.

A party cannot sue alone on a bond of indemnity made to himself and other obligees on a prior bond, without showing that he alone has received injury by the breach thereof. *Percival v. McCoy*, 4 McCrary (U. S.) 418.

An action on an attachment "bond, payable to several persons jointly, and conditioned for the payment to them of all such damages as they may sustain from the wrongful or vexatious suing out of the attachment," can only be maintained by all the obligees jointly, though the alleged damage may have accrued to only one of them. *Boyd v. Martin*, 10 Ala. 700; *Masterson v. Phinizy*, 56 Ala. 336. Or several damages accrued to each. *McLeod v. Scott*, 38 Ark. 72. One may sue in *California*. *Lally v. Wise*, 28 Cal. 539.

And a joinder would be bad on de-

unless such severance is caused by the act of the defendant.¹ A covenant cannot be treated as joint or several at the option of the covenantee.²

(2) DEFENDANTS.—Persons liable on several and distinct contracts with the same person, or to several actions upon one and the same contract with several obligees, may not be joined as defendants.³ Thus a maker and endorser of a note must be sued separately;⁴ arbitrators must sue the parties to the arbitration

murrer. *Summers v. Farish*, 10 Cal. 347; *Brown v. Davis*, 15 Cal. 9.

1. **Severance by Defendant.**—Where, however, the defendant himself causes the severance, as when he pays to one or more of the joint obligees his or their proportion, it has been held that the others could sue separately. *Beach v. Hotchkiss*, 2 Conn. 697; *Buckner v. Beard*, 32 La. Ann. 226.

Several persons subscribed to a fund to be placed in the hands of three of their number as attorneys of the others, and to be loaned by them to S. An instrument was executed by S promising to repay the loan to the attorneys. *Held*, that a suit could be maintained against S by one of the subscribers alone to recover the amount of his subscription after it became due, if he was the only subscriber remaining unpaid. *Rice v. Savery*, 22 Iowa 470.

It has been held, however, necessary that all the parties agree to the severance of the joint interest, and that the obligor should promise to pay each his several share, and the suit is based on the new promise. *Angus v. Robinson*, 59 Vt. 585.

2. See *Keightley v. Watson*, 3 Exch. 721.

3. **Joinder of Defendants.**—If there are several tenants, claiming several parcels of land by distinct titles, they cannot lawfully be joined in one writ, and if they are, they may plead in abatement of the writ. *Green v. Liter*, 8 Cranch (U. S.) 229.

By a statute of *Kentucky*, several, who claim separate tracts of land from distinct sources of title, may be joined in the same suit. *Lewis v. Marshall*, 5 Pet. 474.

In an action by a vendor on a covenant in his deed, made by his vendee, he may not join the assignees of his vendee. *Brooks v. Water Lot Co.*, 7 Ga. 101.

If A must account to B for rents, etc., to a certain date, and C is liable to account for rents, etc., after that date, B cannot sue A and C jointly. *Patterson v. Kellogg*, 53 Conn. 38.

If A and B employ C to build a boat for a certain sum, to be paid "each his one half," the contract is several and not joint. *Costigan v. Lunt*, 104 Mass. 217.

On a note given by several, to be paid one-sixth by A, one-sixth by B, etc., a joint action will not lie. Several actions against each must be brought. *M'Bean v. Todd*, 2 Bibb (Ky.) 320. But compare *Wilde v. Haycraft*, 2 Duv. (Ky.) 309.

Two merchants in *New York* wrote to the plaintiff, in *England*, that they were about to ship to him a cargo, and instructing him to make insurance, and added, "the shipment is for our joint account; the proceeds, after deducting insurance, you will place to the credit of each of us, individually, one half." The plaintiff, in his answer, acknowledged that the net proceeds were to be placed to the credit of the two respectively, in equal proportions. The two, after the shipment, drew separate bills on the plaintiff, which he paid. In a suit against the two, to recover a balance on this transaction, the amount of the bills being charged to their joint account. *Held*, that the defendants were not jointly answerable. *Martin v. Buck*, 11 Johns. (N. Y.) 271.

A plaintiff may not, in an action for misfeasance by a public officer, join the person in office and his predecessor. *New Orleans Ins. Assoc. v. Harper*, 32 La. Ann. 1165.

Several distinct causes of action having no cognate origin, and in which there is no common interest to be adjudicated in one judgment, cannot be cumulated in one action against several defendants. *Riggs v. Bell*, 39 Ia. Ann. 1030.

4. **Maker and Endorser.**—At common law every endorsement of a note is a new contract, and suit must be brought separately against the maker and each endorser. *Fawcett v. Fell*, 77 Pa. St. 308; *Register v. Casperson*, 3 Harr. (Del.) 289.

And where a State bank was author-

separately for their fees;¹ a principal and his surety, guarantor or agent must be separately sued.² This principle of the common law is not altered by the general code provisions, but only by such provisions as expressly change the rule.³ When a contract is joint and several, one or all the obligees may be sued, but no smaller number,⁴ except where such suit is authorized by

ized by its charter to join separate endorsers, and the bank brought suit in another State than the one incorporating it, it was held that the common law rule prevailed, and no matter where the endorsements had been made, suit must be severally brought against each endorser. *Givens v. Western Bank*, 2 Ala. 397.

1. Arbitrators.—Arbitrators may not join as defendants the parties to an arbitration in an action to recover their fees. *Young v. Starkey*, 1 Cal. 426; *Hinman v. Hapgood*, 1 Den. (N. Y.) 188; 43 Am. Dec. 663.

The action must be brought against the person or persons making the demand. *Butman v. Abbot*, 2 Me. 361. *Contra*, *Crampton v. Ridley*, L. R., 20 Q. B. Div. 48. And under an express contract to pay. *Hoggins v. Gordon*, 3 Q. B. 466.

A member of the committee chosen by the towns of Plymouth and Wareham, pursuant to *Massachusetts* Stat. 1838, ch. 19, to regulate the fishery in Agawam and Halfway Pond rivers, may recover for the services performed by him under that act, in an action against the town by which he was chosen, if that town has received, from the proceeds of the fishery, a sum sufficient to pay him, without joining the other town as a defendant. *Robinson v. Wareham*, 2 Gray (Mass.) 315.

2. Principal and Guarantor, etc.—A guarantor and his principal may not be sued jointly. *Clark v. Morgan*, 13 Ill. App. 597; *Tourtellott v. Junkin*, 4 Blackf. (Ind.) 483; *Tyler v. Trustees of Tualatin Academy*, 14 Oregon 485; *Parmerlee v. Williams*, 71 Mo. 410. A principal and agent may not be jointly sued. *Kadish v. Bullen*, 10 Ill. App. 566.

A signed a note as surety for B, and afterwards the payee, being dissatisfied with his security, procured C to sign the note as additional security. C paid the note and sued A and B jointly for money paid. *Held*, that an action against them jointly would not lie. *Lapham v. Barnes*, 2 Vt. 213; *S. P. Warner v. Price*, 3 Wend. (N. Y.) 397.

In *Louisiana*, in an action on an official bond, the sureties may be sued without joining the principal. *Griffing v. Caldwell*, 1 Rob. (La.) 15; *Smith v. Scott*, 3 Rob. (La.) 258; *Curtis v. Martin*, 5 Martin (La.) 674; *United States v. Hodge*, 6 How. (U. S.) 279; *People v. Jenkins*, 17 Cal. 500; *State v. McDonnell*, 12 La. Ann. 741. Principal and surety may be joined. *Conery v. Coons*, 33 La. Ann. 372.

An administrator and his sureties may be joined in a suit against the administrator for an account and settlement, and for judgment against the sureties for the balance found due upon the settlement of such account. *Payne v. Hook*, 7 Wall. (U. S.) 425; 14 Wall. (U. S.) 252; *Donahue v. Roberts*, 1 McCrary (U. S.) 112.

3. Code Provisions.—The rule that persons only severally liable cannot be included in the same action as parties defendant, has not been altered by the codes except where there are express provisions as in the provision for joining persons severally liable upon the same obligation or instrument, etc. The provision for joinder of actions arising out of the same transaction, or transactions connected with the same subject of action, only admits of a joinder when both causes of action affect all the parties defendant. *LeRoy v. Shaw*, 2 Duer (N. Y.) 626.

A code provision, that in an action against several a separate judgment may be entered, does not authorize joining as defendants a contractor and one who endorsed in the contract a guarantee that the contractor would perform his contracts. *Smith v. Loomis*, 72 Me. 51.

The code has not changed the law, that a defendant liable upon an original undertaking, cannot be joined with one severally liable upon a collateral undertaking. *Phalen v. Dingee*, 4 E. D. Smith (N. Y.) 379.

4. Joint and Several Obligations.—On a joint and several obligation the plaintiff may sue one or all of the obligors. *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Cummings v. People*,

statute.¹ When, however, a contract is joint, all the obligors should be joined as defendants.² Dormant partners need not be

50 Ill. 132; Wright v. Hicks, Brayt. (Vt.) 22.

On a joint and several bond, suit may be brought against one of the sureties without joining another with him. Poullain v. Brown, 80 Ga. 27.

If one obligor is a partnership and the other an individual, the partnership may be sued alone. Van Tine v. Crane, 1 Wend. (N. Y.) 524.

In strictures of law, he cannot sue an intermediate number, he must sue all or one, but the defect is waived by pleading to the merits. Minor v. Merchants' Bank, 1 Pet. (U. S.) 46; Cummings v. People, 50 Ill. 132; State v. Chandler, 79 Me. 172; Harwood v. Roberts, 5 Me. 441; Fay v. Jenks, 78 Mich. 312; Merrick v. Bank of the Metropolis, 8 Gill (Md.) 59; Claremont Bank v. Wood, 12 Vt. 252.

If a joint action is brought against all the makers of a joint and several note, the action cannot be severed, and judgment taken against one. Platner v. Johnson, 3 Hill (N. Y.) 476.

If suit is brought against one party to a joint and several obligation, subsequent suits can only be against one party, the plaintiff having elected by his first suit to treat the contract as several. Bangor Bank v. Treat, 6 Me. 207; 19 Am. Dec. 210.

When in an action on a joint and several promissory note, the defendants answer severally and plead matters going to their personal discharge, the plaintiff may discontinue as to one defendant without discharging the other. Young v. Brown, 10 Iowa 538; Quigley v. Merritt, 4 Iowa 475.

1. **Statutory Changes.**—The rule of the common law, that on a joint and several bond, all the obligors or any of them might be joined, but not two out of three, is now changed by the code provision allowing persons severally liable upon the same obligation or instrument to be all or any of them included in the same action. Field v. Van Cott, 5 Daly (N. Y.) 308; Deloach v. Dixon, Hempst. (U. S.) 428.

The above rule of the common law has never been recognized in Texas. Glasscock v. Hamilton, 62 Tex. 143.

2. **Joint Obligors.**—All the obligors in a joint contract must be joined as defendants. McCall v. Price, 1 McCord (S. Car.) 82; People v. Sloper, 1 Idaho

158; Page v. Brant, 18 Ill. 37; Beale v. Trudeau, 18 La Ann. 129; Pike v. Dashiell, 7 Har. & J. (Md.) 466; Keller v. Blasdel, 1 Nev. 491.

If a tort is waived, the joint tortfeasors may be sued jointly in assumption. Gilmore v. Wilbur, 12 Pick. (Mass.) 120; 22 Am. Dec. 410.

The rule that in an action *ex contractu* the non-joinder of a defendant is pleadable in abatement, applies to an action of debt under a statute to recover back money lost at play. Bristow v. James, 7 T. R. 257.

In a suit to enforce the personal liability of stockholders, all stockholders should be joined. Umsted v. Buskirk, 17 Ohio St. 113.

A constable levied several executions sued out by A, on property of the debtors. The landlords of the debtors forbade the removal and sale of the property, claiming it as liable for the rents. Thereupon A and B entered into a written agreement to indemnify the constable "agreeably to law." C signed this agreement although his name was not in the body of the instrument. The agreement was delivered to the constable on the day and at the place of sale, A, B and C acknowledging it as their act, and B and C declaring verbally that they were A's sureties. Held, that this was the joint promise of A, B and C to indemnify the constable for removing and selling the property under A's executions, and paying the proceeds to him; and that the sale by the constable was a consideration to support the assumpsit as to them all. Crawford v. Jarrett, 2 Leigh (Va.) 630.

If the heirs of X unite in signing an agreement that B shall receive an equal share with each other child in the distribution of X's estate, B must join all the heirs signing the agreement in an action thereon. Beard v. Lofton, 102 Ind. 408.

Where there are several signers to a contract for the payment by each of \$100, they may be sued jointly. Wilde v. Haycraft, 2 Duv. (Ky.) 309. But compare M'Bean v. Todd, 2 Bibb (Ky.) 320.

Where a joint obligation of three is assigned, so as to limit the assignee's right of recovery to one of them alone, the assignee can sue only in the assignor's name, and all the obligors

joined, nor any one not a party to the contract, although affected by the result of the suit thereon.¹ If an obligee is also an obligor, he cannot sue his co-obligors if the contract is joint; but he may do so if the contract is several, or joint and several.² When the contract is joint the plaintiff cannot discontinue as to any of the defendants,³ unless such defendants have a defense

must be joined in the suit. *Lyon v. Ross*, 1 A. K. Marsh. (Ky.) 308.

Where several insurance companies, by a common agent and under a common name, to wit: The "Underwriters' Agency," entered into an insurance contract by a written instrument, each company receiving its share of the premium and being liable for its proportion of the loss, a joint action lies against them on the policy. *Sutherland v. Underwriters' Agency*, 53 Ga. 442.

In a case where the policy was executed by four companies in their own names and stipulated that each acted for itself, and would only be liable for one-fourth of the amount insured in case of loss, four separate actions against each company were consolidated. *Viele v. Germania Ins. Co.*, 26 Iowa 9; 96 Am. Dec. 83.

In *Louisiana* it was at one time necessary for an obligee to join all the obligors, as the R. C. C. 2085 required that "in every suit on a joint contract, all of the obligors must be made parties." This, however, was amended by act of December 30th, 1870; Acts of 1871, p. 19. See *Hincks v. Converse*, 38 La. Ann. 871; *Mitchell v. D'Armond*, 30 La. Ann. 396.

1. Dormant Partners.—Dormant partners need not be joined as defendants, but all the ostensible and public members of a co-partnership existing at the time of the making of the contract sued on, must be joined. *Tomlinson v. Spencer*, 5 Cal. 291; *Page v. Brant*, 18 Ill. 37; *New York Dry Dock Co. v. Treadwell*, 19 Wend. (N. Y.) 525.

An attachment of goods in hands of ostensible partners in a suit against him alone has preference to a subsequent attachment of same goods in an action against all partners. *Lord v. Baldwin*, 6 Pick. (Mass.) 348.

In a suit for damages against the master and part owner of a vessel, for breach of a contract to insure the cargo, *held*, that it was not necessary to make the other owners parties to the suit. *Bissel v. Terrell*, 18 La. Ann. 45.

In a suit against executors to recover property bequeathed by the deceased, but claimed to be in fact the property

of the plaintiff, the legatees thereof are not necessary parties defendant. *King v. Lawrence*, 14 Wis. 238.

2. See *infra*, this title, *Same Person Cannot be Both Plaintiff and Defendant*.

3. Discontinuance.—A discontinuance as to a defendant served is a discontinuance as to all defendants unless they consent. *Masterson v. Gibson*, 56 Ala. 56; *Whitaker v. Van Horn*, 43 Ala. 255; *Fennell v. Masterson*, 43 Ala. 268; *Bachus v. Mickle*, 45 Ala. 445; *Jones v. Engelhardt*, 78 Ala. 505; *Hale v. Crowell*, 2 Fla. 534; 50 Am. Dec. 301; *Storm v. Roberts*, 54 Iowa 677; *Hall v. Rochester*, 3 Cow. (N. Y.) 374; *Fay v. Jenks*, 78 Mich. 312; *Murm v. Haynes*, 46 Mich. 140; *Callam v. Barnes*, 44 Mich. 593. *Contra*, *DeLoach v. Dixon*, Hempst. (U. S.) 428 (construing *Arkansas* Code).

It is even a discontinuance as to one against whom judgment has been entered by default. *Murm v. Haynes*, 46 Mich. 140.

In actions on joint contracts, or causes of actions, the plaintiff may, by statute, discontinue or abate as to any defendants not served and proceed to judgment against those served. *Alabama*, Code, 1886, § 2607; Rev. Stat. *Arizona*, 1887, § 733; *California*, *Deering's C. & St.*, vol. 3, § 414; *Georgia*, Code, 1882, § 3585; *Stanford v. Bradford*, 45 Ga. 97; *Idaho*, Rev. Stat. 1887, § 4147; *Kentucky*, Code, 1888, §§ 370, 373; *Moore v. Estes*, 79 Ky. 282; *Quisenberry v. Artis*, 1 Duv. (Ky.) 30; *Massachusetts*, Pub. Stat. 1882, p. 957, § 14.

The case as against one not served should be disposed of in some way, prior to judgment against the others. *Diggins v. Reay*, 54 Cal. 525.

"The court may permit the plaintiff to discontinue the suit as to one or more of several defendants who have been served with process or who may have answered when such discontinuance would not operate to the prejudice of the other defendants," except that as to a principal obligor the suit can only be discontinued and judgment re-

personal to themselves,¹ or the action was brought under a law allowing imprisonment for debt, and no bail was required.² In actions on implied contracts, several defendants cannot be joined unless a joint liability is proved.³

covered against the other defendants when the principal obligor lies beyond jurisdiction of court or his residence is unknown, or he is dead, or actually insolvent. *Arizona*, Rev. Stat. 1887, §§ 729, 730.

"When two or more persons sue or are sued in the same action, either on a contract or for a tort, the plaintiff may amend his declaration by striking out one or more of such defendants and proceeding against the remaining defendant or defendants, if there is no other legal difficulty in the case." When several plaintiffs sue jointly, the declaration may be amended by striking out the name of one or more of such plaintiffs. *Georgia*, Code, 1882, §§ 3485, 3486.

Section 3485 does not authorize a discontinuance as to any defendant served in an action on a joint judgment. *Howell v. Shands*, 35 Ga. 66.

The discontinuance authorized may be entered after a plea in abatement. *McArdle v. Bullock*, 45 Ga. 89.

A plaintiff in ejectment, if no counter claim is made, has a right to dismiss the action as to any part of the defendants, and proceed to judgment against the others. *Dimick v. Deringer*, 32 Cal. 488.

1. Personal Defenses.—If one defendant has a defense personal in its character, as infancy, coverture, discharge in bankruptcy, limitations, etc., plaintiff may discontinue as to that defendant and proceed against the others. *Burgess v. Merrill*, 4 Taunt. 468; *Mock v. Walker*, 42 Ala. 668; *Reynolds v. Simpkins*, 67 Ala. 378; *Kimmel v. Shultz*, 1 Ill. 169; *Shields v. Perkins*, 2 Bibb (Ky.) 227; *Broun v. Warner*, 2 J. J. Marsh. (Ky.) 38; *Cutts v. Gordon*, 13 Me. 474; 29 Am. Dec. 520; *Hartnes v. Thompson*, 5 Johns. (N. Y.) 160; *Robertson v. Smith*, 18 Johns. (N. Y.) 459; *Woodward v. Newhall*, 1 Pick. (Mass.) 500; *Tuttle v. Cooper*, 10 Pick. (Mass.) 281; *Fay v. Jenks*, 78 Mich. 312.

In *South Carolina*, this exception does not obtain in case of a suit against an adult and an infant. *Connolly v. Hull*, 3 McCord (S. Car.) 6.

But a plaintiff cannot anticipate that

a person jointly liable with the defendant would avail himself, if made a party to the suit, of the defense of the statute of limitations, and on that ground omit to make such person a party defendant. *Hyde v. Van Valkenburgh*, 1 Daly (N. Y.) 416.

2. Joinder Under Law Allowing Imprisonment for Debt.—Under the old practice allowing imprisonment for debt, a distinction was taken between the cases where bail was required and where it was not. Where bail was required the plaintiff could only declare against all. Where bail was not required, he was permitted to declare separately against each defendant, omitting whom he chose. *Lewin v. Smith*, 4 East 589; *Stables v. Ashley*, 1 B. & P. 49; *Montgomery v. Hasbrouck*, 3 Johns. (N. Y.) 538; *Bell v. Carrell*, 1 Cow. (N. Y.) 193.

3. Implied Assumpsits.—An action of assumpsit on the common counts against several defendants for money had and received, etc., can only be obtained when there was a joint contract or the money was jointly received by all the defendants or was paid out of a joint fund. *Osborne v. Harper*, 5 East 223; *Simmons v. Spencer*, 3 McCrary (U. S.) 48; *Manahan v. Gibbons*, 19 Johns. (N. Y.) 109, 427; *Doremus v. Selden*, 19 Johns. (N. Y.) 213; *Smith v. Hicks*, 1 Wend. (N. Y.) 202; *Parsons v. De Forrest*, 2 Hall (N. Y.) 130; *Jewett v. Cornforth*, 3 Me. 107; *Florence Sewing Mach. Co. v. Grover etc. Sewing Mach. Co.*, 110 Mass. 70; *Murphy v. Bidwell*, 52 Mich. 487.

Two individuals assumed the responsibility of settling and receiving a debt due to another, and united in the settlement, claiming to be equally interested, and divided the money received between them. *Held*, that they were jointly liable to the true owner, though it was received by one alone. *Weathers v. Ray*, 4 Dana (Ky.) 474.

Persons do not become jointly liable as joint parties or contractors merely from having received benefits from the services of another. *Rogers v. Heath*, 48 Mich. 583.

Assumpsit against A, B, C and D, for money deposited with A on his

If a plaintiff sues, alleging a several contract, his allegation is supported by proof of a joint obligation;¹ but if a joint obligation is alleged, it must be proved.² The plaintiff must also recover against all defendants, unless a defense personal to one or more is interposed,³ except by force of statutory provisions.⁴ If one

false and fraudulent representations that he conducted a bank of which the others were directors, *held*, although B, C and D had allowed their names to be so used, they were not jointly liable in assumpsit and were not estopped from denying their joint liability. *Bennett v. Dean*, 41 Mich. 472.

1. Allegata and Probata, Several Contract.—An allegation of an individual contract is supported by proof of a joint obligation under the codes. *Waits v. McClure*, 10 Bush (Ky.) 763.

And at common law, because it is still the undertaking of the defendant *in solido*. *Collins v. Smith*, 78 Pa. St. 423.

2. Joint Contract.—When a joint contract is alleged it must be proved as alleged. *Blight v. Ashsley*, Pet. (C. C.) 16; *Walcott v. Canfield*, 3 Conn. 194; *Howell v. Shands*, 35 Ga. 66; *Robertson v. Smith*, 18 Johns. (N. Y.) 459; *Livingston v. Tremper*, 11 Johns. (N. Y.) 101; *Tom v. Goodrich*, 2 Johns. (N. Y.) 213; *Erwin v. Divine*, 2 T. B. Mon. (Ky.) 124; *Jenkins v. Hurt*, 2 Rand. (Va.) 446.

This rule holds in an action of debt *qui tam* for a penalty, though the debt is founded on a tort. *Hill v. Davis*, 4 Mass. 137; *Burnham v. Webster*, 5 Mass. 270. See *Powers v. Spear*, 3 N. H. 36.

In an action against two of three obligors on a bond which the complaint alleges to have been jointly executed, but which is at the trial proved without objection to be joint and several, and a verdict rendered thereon, the court will on appeal allow the complaint to be amended to conform to the proof. *Field v. Van Cott*, 5 Daly (N. Y.) 308.

3. Joint Contract Alleged.—In an action *ex contractu* against several, the plaintiff must prove a joint contract, and recover against all, unless a defense personal to one or more of the defendants is interposed. *Tolman v. Spaulding*, 4 Ill. 13; *Snell v. De Land*, 43 Ill. 323; *Livingston v. Tremper*, 11 Johns. (N. Y.) 101; *Munn v. Haynes*, 46 Mich. 140; *Rowan v. Rowan*, 29 Pa. St. 181. A release of one releases all.

Benjamin v. McConnell, 9 Ill. 536; 46 Am. Dec. 474.

Arizona.—"Whenever heretofore or hereafter any joint or joint and several bond, obligation or contract shall have been or shall be executed, the obligee or holder thereof may release any one or more of the joint or joint and several makers or obligors thereto without releasing the others, but such release shall not operate to or in any manner affect or impair the right of any joint or joint and several maker or obligor to contribution against his co-maker or co-obligor." *Arizona*, Rev. Stat. 1887, § 133. Compare *Connecticut*, Gen. Stat. 1888, § 1022; *Kansas*, Gen. Stat. 1889, § 1102.

A joint judgment debtor may be released and other joint judgment debtors held liable. *Aylesworth v. Brown*, 31 Ind. 270.

Even under the codes a plea of payment by one is a defense for all. *Rouse v. Howard*, 1 Duv. (Ky.) 31.

In an action *ex contractu* at common law, if brought against two defendants upon a joint contract, judgment cannot be given against one defendant without the other. *Sheriff v. Wilks*, 1 East 48; *Wooten v. Nall*, 18 Ga. 609.

Where several defendants are served and all make default, the clerk cannot enter judgment against one only. *Stearns v. Aguirre*, 7 Cal. 443; *Long v. Serrano*, 55 Cal. 20.

If in an action against A, B and C, A and B make default, and C denies a joint contract and judgment is in his favor, plaintiff cannot take judgment against those who defaulted. *Tuttle v. Cooper*, 10 Pick. (Mass.) 281.

Where several defendants are served, it is erroneous to order judgment against only one. *Clark v. Porter*, 53 Cal. 410.

4. Statutory Changes.—The common law rule that in an action on a joint contract against several persons, the plaintiff cannot recover against either, without establishing that the contract sued upon is the joint contract of all, still applies in actions which were commenced before the enacting of a code of provisions authorizing amend-

ments in case of such a misjoinder, at least where the code is not expressly made applicable to pending cases. *Fielden v. Lahens*, 9 Bosw. (N. Y.) 436.

As to actions subsequently brought, the rule does not apply, as the court may and should cure the pleadings by amendments as to parties and allegations. *Downing v. Mann*, 3 E. D. Smith (N. Y.) 36; *Claffin v. Butterly*, 5 Duer (N. Y.) 327; *Kritzner v. Warner*, 4 Cal. 231; *Lewis v. Clarkin*, 18 Cal. 399; *People v. Frisbie*, 18 Cal. 402; *Wooten v. Nall*, 18 Ga. 609; *Bloomington v. Du Rell*, 1 Idaho 33; *Lower v. Franks*, 115 Ind. 334; *Smith v. Loomis*, 72 Me. 51; *Smith v. Cas-sell*, 70 Wis. 567.

It has, however, been held in a few cases that a code provision that in an action against several, judgment may be entered against one or more, does not authorize a judgment upon a contract alleged to be made by several defendants, but proved to be made by only part of them. *Walker v. Mobile M. Dock etc. Co.*, 31 Ala. 529; *Gossom v. Badgette*, 6 Bush (Ky.) 97, 99 Am. Dec. 658.

When in a proceeding to enforce a lien on realty, it appears from the evidence that certain parties defendant have no interest in the property, the court may permit their names to be stricken out at the trial. *Doane v. Houghton*, 75 Cal. 360.

Under the code practice requiring the action to be brought by the real party in interest, it is quite immaterial in what proportions joint plaintiffs may be interested, and a variance between the allegation and proof in that respect is immaterial. *Lyon v. Bertram*, 20 How. (U. S.) 149.

"In actions upon contracts, expressed or implied, against two or more defendants as partners or joint obligors or payors, whether so alleged or not, proof of their joint liability of partnership of the defendants or their Christian or surnames shall not in the first instance be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or unless the defendant shall file a plea in bar denying the partnership or joint liability, or the execution of the instrument sued upon, verified by affidavit." There is a similar provision in actions by partners. *Illinois*, Rev. Stat., 1889 (Hurd), p. 1015, §§ 35, 36. See *Forsyth v. Doolittle*, 120 U. S. 73.

In suits brought against alleged joint debtors in actions *ex contractu*, it shall not be necessary for the plaintiff to prove their joint liability as alleged in order to maintain his action; but he shall be entitled to recover as in actions *ex delicto* against such one or more of the defendants as shall be shown by the evidence to be indebted to him; and judgment shall be entered in his favor against such one or more of said defendants as fully as if the defendant or defendants against whom he shall fail to establish his claim had not been joined in the suit. *Maryland*, Pub. Gen. Laws 1888, p. 863, § 12. Separate judgments may be entered by statute. *Maine*, Rev. Stat., 1881, p. 698, § 84.

Under the statute making joint obligations, joint and several, it is not essential to recovery in assumpsit on a contract laid in the declaration as joint, to prove a joint contract by all defendants. Proof of a several contract with one is sufficient to warrant a recovery as against him. *Kirchner v. Laughlin*, 4 N. Mex. 218.

A statutory provision that "though all the defendants have been summoned, judgment may be rendered against any of them severally, when plaintiff would be entitled to judgment against such defendants if the action had been against them severally" gives a joint and several right of action, and therefore although a joint contract be alleged, it need not be proved. *Lower v. Franks*, 115 Ind. 334.

A statutory provision that "in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper," does not apply to a case where by statute a joint suit against all the obligors in a bond is the only remedy thereon. *Aucker v. Adams*, 23 Ohio St. 543.

A code provision that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, does not, in a suit by partners, on a note proved to be made to one of them individually, authorize a judgment in favor of him alone, as that would amount to giving a judgment for one in whose favor no cause of action is stated in the complaints. *Weinreich v. Johnson*, 78 Cal. 254.

Illinois, Rev. Stat., ch. 40, § 7, dispensing with certain proofs from joint

defendant dies, the suit may be discontinued as to him.¹ If one co-obligor dies, his estate at common law was released from liability, and only the surviving co-obligors could be sued,² the declaration alleging the death of the co-obligor not joined.³ This

obligees under the general issue, does not change the common law, that plaintiffs who sue as joint contractors must show a joint interest in the subject matter. *Snell v. DeLand*, 43 Ill. 323.

Section 10 of the Practice act of 1855 can have no application to a cause, except where the defendants are regularly before the court. Where an action is commenced against two defendants as joint debtors, and process is served upon one, and no process is served upon or appearance entered by the other, if the plaintiff declare and proceed to trial against both, and it appears on the trial that the contract was not joint, but was made with one of the defendants only, the plaintiff should be nonsuited. *Fleming v. Freese*, 26 N. J. L. 263.

1. Death of Co-defendant.—In case one of several joint defendants in an action *ex contractu* dies, the representatives of the decedent cannot be joined with the survivors. *Seaman v. Slater*, 18 Fed. Rep. 485; *New Haven etc. Co. v. Hayden*, 119 Mass. 361; *Lanier v. Irvine*, 24 Minn. 116; *Fowler v. Houston*, 1 Nev. 469; *Fisher v. Allen*, 36 N. J. L. 203; *Union Bank v. Mott*, 27 N. Y. 633; *De Agreda v. Mantel*, 1 Abb. Pr. (N. Y.) 130. And a discontinuance as to the survivor will not authorize the summoning of decedent's representatives. *Ricker v. Gerrish*, 124 Mass. 367.

Where, however, a plaintiff sues all the parties to a written contract under statutory authority so to do, and said parties are severally liable, and plaintiff's *narr.* contains one count against each defendant, if one die, his personal representative may be summoned in to defend. *Colt v. Learned*, 133 Mass. 409. But to the contrary effect is *Seaman v. Slater*, 18 Fed. Rep. 485.

In action against two on a joint contract, the death of one being suggested, the plaintiff may proceed to judgment against the other. *Harrison v. King*, Minor (Ala.) 364.

2. Death of Co-obligor.—Where one of several joint contractors dies, his administrator cannot be sued jointly with the surviving joint contractors. *Murphy v. Branch Bank*, 5 Ala. 421; *Reed v.*

Summers, 79 Ala. 522; *May v. Hanson*, 6 Cal. 642; *Eggleson v. Buck*, 31 Ill. 254; *Eich v. Sievers*, 73 Ill. 194; *Walker v. Doane*, 131 Ill. 27; *Lutz v. Schmidt*, 16 Ill. App. 477; *Indiana*, Rev. Stat. 1881, §§ 624, 2311; *Wapello Co. v. Bigham*, 10 Iowa 39; 74 Am. Dec. 370; *State v. Banks*, 48 Md. 513; *Cochrane v. Cushing*, 124 Mass. 219; *United States v. Spiel*, 3 McCrary (U. S.) 107; *De Agreda v. Mantel*, 1 Abb. Pr. (N. Y.) 130; *Neal v. Gilmore*, 79 Pa. St. 421; *State Treasurer v. Friott*, 24 Vt. 134; *Chandler v. Hill*, 2 Hen. & M. (Va.) 124.

A joint and several note was given by two persons, one of whom died, and the other was appointed one of his executors. *Held*, that in a suit on the note, the survivor, in his individual capacity, could not be joined with himself and his co-executors. *Morehouse v. Ballou*, 16 Barb. (N. Y.) 289. *Brown v. Babcock*, 3 How. Pr. (N. Y.) 305.

If in a suit against the estate of one of two joint contractors, the pleadings show no joint liability, nor a surviving joint contractor, and a trial is had without bringing in the other, the plaintiff may recover. *Bonnon v. Urton*, 3 Greene (Iowa) 228.

On demurrer, a plea in abatement was held good in *South Carolina*, in an action on a joint bond, against the representatives of one party deceased, the other party living at the time in another State. *Boykin v. Watson*, Mill Const. (S. Car.) 157.

In a replevin suit to recover attached property from a sheriff, the executor of the deceased plaintiff, in attachment is not a proper party defendant. *Bevan v. Hayden*, 13 Iowa 122.

The executors or administrators of two deceased obligors cannot be joined in the same action. *Watkins v. Tate*, 3 Call (Va.) 521; *Grymes v. Pendleton*, 4 Call (Va.) 130; *Head v. Oliver*, 1 A. K. Marsh. (Ky.) 254.

3. Pleading.—If a declaration avers a joint contract, the death of a co-obligor must be averred, as in the absence of such an averment he is presumably alive. *Hanley v. Donoghue*, 59 Md. 239; 43 Am. Rep. 554; *Smith v. Miller*, 49 N. J. L. 521.

rule, however, never prevailed in *Indiana*¹ and has been generally abolished by statute.²

1. *Indiana Law*.—The common law rule that the death of one of two or more joint promisors or obligors discharged at law his estate from all liability, and the survivor or survivors alone could be sued, has never been a part of the law in *Indiana*. *McCoy v. Payne*, 68 Ind. 327; *Hudelson v. Armstrong*, 70 Ind. 99; *Eldred v. First Nat. Bank*, 71 Ind. 543.

2. *Statute Law*.—That the personal representatives of the deceased obligor and the surviving co-obligor may be joined, see *Arkansas*, Dig. of Stat. 1884, §§ 3901, 4944; *Little Grocer Co. v. Johnson*, 50 Ark. 62; *Kentucky*, Code, 1888, § 27; *Trimmier v. Thomson*, 10 S. Car. 164.

In an action on a bond, the personal representatives of a deceased obligor may be joined as a defendant with the surviving co-obligors, after the claim on which the action is founded has been presented to and disallowed by him. *Lawrence v. Doolan*, 68 Cal. 309.

Under the Code of *Georgia*, a surviving partner and the representatives of a deceased co-partner may be joined as defendants where the partnership and the surviving partner are alleged to be insolvents. *Anderson v. Pollard*, 62 Ga. 46.

Statutes declaring that upon the death of one or more joint obligors the joint debt or contract shall and may survive against his heirs, etc., authorize joint suit against the surviving obligor and the executor of the deceased obligor. The law being remedial should be liberally construed. *Henderson v. Talbert*, 5 Smed. & M. (Miss.) 109; *Brown v. Clary*, 1 Hayw. (N. Car.), 107; *Davis v. Wilkinson*, 1 Hayw. (N. Car.) 334.

For the same reason although the statute only uses the word "debts," it was held to apply to the case of joint judgment debtors. *Lewis v. Fogan*, 2 Dev. (N. Car.) 298.

Under the above statutory provisions in a suit upon a judgment recovered against a firm, all the partners are not necessary parties. *Belleville Sav. Bank v. Winslow*, 30 Fed. Rep. 488.

A statute provided that "in no case brought on any joint contract, etc., shall the courts . . . entertain any plea or defense upon the part of any heir, etc., that one or more of said joint obligors,

etc., has deceased, since the commencement of or pending suit; but the same shall be proceeded in to judgment and execution against the estate of such decedent, as though the said suit or suits had been commenced against the decedent alone." *Held*, to authorize the substitution of administrators of a joint obligor dying pending a suit against all the co-obligors. *GORDON, J.*, having referred to *Miller v. Reed*, 3 Casey (Pa.) 248, said: "Now we might, without doing any great violence to the act, limit its operation to the curing of the defect, in the old law, as pointed out by the above case. In that event its effect would be to prevent a plea in abatement upon a suit, brought against the executor or administrator after the death of a joint obligor, who had been sued during his lifetime, with his co-obligor. This, however, would be as we conceive, an unnecessary distortion of the act, for the mere purpose of saving a technicality that subserves no good purpose. As this case now stands we have judgment as well against the administrators of the decedent, as against the living obligor, and thus the expenses and costs of a second suit are saved. Again, the incongruity of such a judgment is but imaginary. There is certainly no difficulty in enforcing it. Had the death occurred immediately after judgment, its position with reference to collection would have been precisely what it is now, and yet we apprehend no lawyer would feel much embarrassment over a case of that kind." *Dingman v. Amsink*, 77 Pa. St. 118.

The above act does not render it necessary to bring in as parties the personal representatives of deceased defendant. His death may be suggested on the record, and the action continue against the survivor. *Machette v. Magee*, 9 Phila. (Pa.) 24.

An early statutory provision in *Tennessee* that "in case of the death of one or more joint obligors, the debt or contract shall and may survive against the heirs, executors and administrators of the deceased obligor or obligors, as well as against the survivor or survivors," has been invariably construed to authorize the joinder as defendants of the surviving obligor, and the personal representatives of the deceased obligor.

(3) STATUTORY MODIFICATIONS OF THE LAW AS TO JOINDER.

—Many statutory modifications of the provisions of the common law on the subject of joinder have been noted at their appropriate places in the preceding text and notes. In addition thereto it is to be noted that in many States, by statute, the several liability of the parties to contracts has been made joint in the case of persons severally liable upon the same obligation or instrument,¹ while in many States it is also provided that joint

Taylor v. Taylor, 5 Humph. (Tenn.) 110.

"If one of the several obligors or promisors jointly holden by a contract in writing dies, the representatives of such deceased person and the surviving obligors or promisors, may be charged by virtue of such contract in the same manner as if it had been joint and several." *Vermont*, Rev. Laws, 1880, § 935. To same effect, *Virginia*, Code, 1887, § 2855; *West Virginia*, Code, 1887, p. 701, § 13.

A suit on a joint judgment obtained in the lifetime of one deceased, against himself and others, may be sued against his personal representative alone under *Minnesota* statutes. *United States v. Spiel*, 3 McCrary (U. S.) 107.

1. Persons Severally Liable on Same Instruments.—See JOINDER, vol. 11, p. 986. In addition to the statutes there quoted, there are the following:

District of Columbia.—The statute relating to this matter in the *District of Columbia* is peculiarly worded, reading as follows: "Where money is payable by two or more persons jointly or severally, as by joint obligors, covenantors, makers, drawers, or endorsors, one action may be sustained and judgment recovered against all or any of the parties by whom the money is payable at the option of the plaintiff. But an action against one or some of the parties by whom the money is payable may, while the litigation therein continues, be pleaded in bar of another action against another or others of the said parties." Section 827, Rev. Stat. relating to *District of Columbia*; 14 Stat. 405, § 20. This authorizes a joint suit against all the parties liable on a promissory note. *Burdette v. Bartlett*, 95 U. S. 637; *Spoford v. Brown*, 1 McArthur (D. C.) 223.

Dakota.—"Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, whether the action is brought upon the instrument or by a party thereto, to recover against

other parties liable over to him, and persons liable severally for the same debt or demand, although upon different obligations on instruments, may all, or any of them, be included in the same action, at the option of the plaintiff." *Dakota*, Comp. Laws, 1887, § 4880; *Wisconsin*, Annot. Stat. (S. & B.), § 2609.

Georgia.—"In all cases, the endorser may be sued in the same action and in the same county with the maker, drawer or acceptor." *Georgia*, Code, 1882, § 2782. See *McGuire v. Wagnon*, 59 Ga. 591; *Ware v. City Bank*, 59 Ga. 840.

The maker of a note, and one endorsing it, "to be liable in the second instance," cannot be sued together in the same action. *Bartlett v. Byers*, 35 Ga. 142.

Idaho is to same effect as *Connecticut*. *Idaho*, Rev. Stat. 1887, § 4106.

New Mexico.—"Where two or more persons are bound by contract, or by judgment, decree or statute, whether jointly only, or jointly and severally, or severally only, and including the parties to negotiable paper, common orders and checks, and sureties on the same or separate instruments, or by any liability growing out of the same, the action thereon may, at the option of the plaintiff, be brought against any or all of them. When any of these so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the decedents, or against any or all such representatives." *New Mexico*, Comp. Laws, 1884, § 1885.

Pennsylvania.—"It shall be lawful hereafter for any individual or body, politic or corporate, holding a note, draft or bill of exchange, indorsed by one or more indorsers, to include in any suit to be instituted for the recovery of any sum which may be due thereon to such holder, all and every person or persons liable for the payment thereof, or any one or more of them, and such suit shall not alter or

affect the legal responsibility of the defendants respectively to each other." *Pennsylvania* Act of March 29th, 1819. 7 Bioreus Laws, p. 217. This act was however repealed by the act of April 11th, 1825, P. L. 225.

Texas.—All the parties to notes, etc., may be joined. *Thompson v. Payne*, 21 Tex. 621.

Utah.—"Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all, or any of them, be included in the same action, at the option of the plaintiff." *Utah*, Comp. Laws, 1888, vol. 2, p. 232, § 3185.

Washington.—Same as *Utah*, omitting the words "and sureties on the same or separate instruments." *Washington*, Code, 1881, § 16.

Wyoming.—"One or more of the persons severally liable on an instrument may be included in the same action thereon." *Wyoming*, Rev. Stat. 1887, § 2398.

Under code provisions for joining "any or all parties severally liable upon the same obligation or instrument," any number of the parties to a bond may be joined. *People v. Love*, 25 Cal. 520; *Heppe v. Johnson*, 73 Cal. 265. So in *Louisiana*. *Conery v. Coons*, 33 La. Ann. 372.

In some States there is a special provision for suits upon official bonds which in effect make such bonds joint and several. *Cassady v. Trustees of Schools*, 105 Ill. 560.

Under some of these statutes it has however been held that all of the indorsers, if living, must be joined with the maker and not a part of them. *Dillon v. State Bank*, 6 Blackf. (Ind.) 5; *Crump v. Wooten*, 41 Miss. 611. *Contra*, *Green v. Burnet*, 1 Handy (Ohio) 28c.

When B and C indorse on a note executed by A, that "We, jointly or severally, for value received, hereby guarantee the prompt payment of the within note," such stipulation was held in *Indiana* to be a contract of guarantee, separate and distinct from the note, that B and C were guarantors only, and therefore could not properly be sued thereon jointly with A in an action on the note. (The *Indiana* statute does not include guarantors.) *Cole v. Merchant's Bank*, 60 Ind. 350.

The maker and indorser of a note cannot be joined as defendants unless

the indorser is liable without first suing the maker. *Couch v. First Nat. Bank*, 64 Ind. 92.

An indorsee may maintain separate actions and recover separate judgments against each party liable on the note. *Morrison v. Fishel*, 64 Ind. 177.

A joint action may not be brought against a lessee for rent and a guarantor on a separate instrument of the payment of the rent. *Tibbits v. Percy*, 24 Barb. (N. Y.) 39.

If a guarantor engages alone by a separate writing, distinct from the instrument signed by the maker, although endorsed thereon, his contract is a separate cause of action; and in an action against both, the complaint is demurrable, on the ground that causes of action have been improperly united. *Harris v. Eldridge*, 5 Abb. N. Cas. (N. Y.) 278; *Griffin v. Grundy Co.*, 10 Iowa 226; *Tibbits v. Percy*, 24 Barb. (N. Y.) 39; *Wallis v. Carpenter*, 13 Allen (Mass.) 19.

Under statutes making all joint contracts joint and several, and authorizing joinder in the same action of persons severally liable upon the same obligation, etc., the sureties on a separate contract of suretyship may be joined with their principal in an action for a breach of the principal's contract. *Wibaux v. Grinnell Live Stock Co.*, 9 Mont. 154.

A statute requiring that all drawers and indorsers living in the State shall be joined, was held to include acceptors in *Gwin v. Mandeville*, 9 Smed. & M. (Miss.) 320.

Under these statutes principal and sureties may be joined. *Brainerd v. Jones*, 11 How. Pr. (N. Y.) 569.

When only the maker or indorser is served, the plaintiff may declare against him alone. *Scott v. Standard*, 19 Wend. (N. Y.) 642.

Statutes held applicable to justice's courts as well as to courts of record. *Hughes v. Fisher*, 10 Colo. 383; *Thomas v. Anderson*, 58 Cal. 99.

The statutes affect the remedy merely. *Givens v. Western Bank*, 2 Ala. 397.

The undertakings of the maker and that of the indorser of a note are separate undertakings, and though all the parties may under the statute be joined in one action, this does not make their several contracts one. It does not, therefore, authorize the court to enter up a joint judgment against all on a service made upon a party (*Church v. Edson*, 39 Mich. 113); or authorize, in

contracts are to be considered joint and several.¹

an action on a judgment entered against one party to a note, the joinder of other parties to the note against whom judgments have not been rendered (*Lindh v. Crowley*, 26 Kan. 47), nor make the answer of a maker enure as an answer of the indorsers, nor an answer of several indorsers enure as an answer of the others. *Alfred v. Watkins*, 1 Edm. Sel. Cas. (N. Y.) 369.

The statute as to suing all the parties to a note in one action has not been repealed, and the right which it gives to sever the action at any time to take judgment against any of the parties should not be taken away by a mere order of the court as to adding parties. *Sawyer v. Chambers*, 11 Abb. Pr. (N. Y.) 110.

A single bill under seal is not a note, but a specialty, and the signers and indorsers of such an instrument, though made negotiable and payable at a bank, cannot be jointly sued upon it. *Mann v. Sutton*, 4 Rand. (Va.) 253.

The term "obligation" in *New York Code*, § 120, which provides that persons severally liable on the same obligation or instrument, etc., may allow any of them to be included in the same action at the plaintiff's option, should be confined to its legal meaning, and does not embrace causes of action not evidenced by a writing. *Strong v. Wheaton*, 38 Barb. (N. Y.) 616.

When a number of people sign a paper stipulating they would pay the sum appended to their names, they cannot be joined as defendants in an action thereon. *Thomas v. Anderson*, 58 Cal. 99.

Where, however, two insurance companies unite in executing a policy of insurance wherein their several liability is distinctly set out, they may be joined as defendants in an action to recover the loss. *Bernero v. South British & Nat. Ins. Co.*, 65 Cal. 386.

These statutes authorize the joinder in one action of the legal representatives of the maker and the legal representatives of the indorser of a promissory note. *Keyser v. Fendall*, 5 Mackey (D. C.) 47. And of the legal representatives of one maker and the surviving maker. *Bostwick v. McEvoy*, 62 Cal. 496; *Rules of Const. Connecticut*, No. 1, § 1; 58 Conn. 561, *United States v. Tracy*, 8 Ben. (U. S.) 1; *United States*

v. Laurence, 14 Blatchf. (U. S.) 229. *Contra*, *Mattison v. Childs*, 5 Colo. 78; *Morehouse v. Ballou*, 16 Barb. (N. Y.) 289; *Burgoyne v. Ohio L. Ins. etc. Co.*, 5 Ohio St. 586.

The maker and executor of the indorser may be joined. *Churchill v. Trapp*, 3 Abb. Pr. (N. Y.) 306.

If two parties to a written contract, severally liable thereon, are jointly sued under this statutory provision, and one dies, his executor may be made a party. *Colt v. Learned*, 133 Mass. 409.

By statute in *New York*, where two or more are bound in one recognizance or bond, severally only, yet all may be joined in one action. *People v. Corbett*, 8 Wend. (N. Y.) 529.

So by the practice in *New Jersey*, in case of several recognizers. *State v. Stout*, 11 N. J. L. 124.

1. Joint Contracts Made Joint and Several.—"The acceptor of any bill of exchange, or any other principal obligor in any contract, may be sued either alone or jointly with any other party who may be liable thereon, but no judgment shall be rendered against such other party not primarily liable on such bill or other contract unless judgment shall have been previously, or shall be at the same time rendered, against such acceptor or other principal obligor, except where the plaintiff may discontinue his suit against such principal obligor as hereinafter provided." *Arizona*, Rev. Stat. 1887, § 687.

Parties jointly bound by a contract may be sued separately or jointly at plaintiff's option. *Bradford v. Toney*, 30 Ark. 763.

Joint Contracts.—By statute, in case of joint contracts in writing, it is provided that "the obligation or promise is in law several as well as joint, and suit may be instituted thereon against the legal representatives of such as are dead." *Code of Alabama*, 1886, § 2604. To same effect *Arkansas*, Dig. of Stat. 1884, §§ 3898-3900; *Delaware*, Rev. Code, 1874, ch. 63, § 9; *Illinois*, Rev. Stat. 1889 (Hurd), p. 840, § 3; *Iowa*, McClain's Annot. Code, 1888, § 3755; *Kansas*, Gen. Stat. 1889, §§ 1098, 1101; *Missouri*, Rev. Stat. 1889, §§ 2384, 2385; *Montana*, Comp. Stat. 1887, p. 1006, § 1296; *New Mexico*, Comp. Laws 1884, §§ 1845, 1889. In *Dakota* it is joint

(4) CODE PROVISIONS.—The provisions of the codes on the subject of joinder are as follows: "All persons having an interest in the subject of an action and in obtaining the relief demanded, may be joined as plaintiffs.¹ Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination and settlement of the questions involved in the action.² Of the parties to the action, those who are united in

unless each party receives some benefit from the consideration. See *Dakota*, Comp. Laws, 1887, §§ 3424-26, 3574-75.

"If two or more persons be jointly bound by contract, the action thereon may be brought against all or any of them, at the plaintiff's option. If any of the persons so bound be dead, the action may be brought against any or all of the survivors with the representatives of all or any of the decedents, or against the latter or any of them. If all the persons so bound be dead, the action may be brought against the representatives of all or of any of them. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others." *Kentucky*, Code 1888, § 27. Compare Code of *Mississippi*, 1880, § 1134; *Missouri*, Rev. Stat. 1889, § 1995; Code of *Tennessee*, 1884, § 3486.

In *Tennessee*, by statute, a creditor may sue any one or more joint obligors or partners, and such suit is no bar to a suit subsequently brought against the remaining partners or obligors. *Lowry v. Hardwick*, 4 Humph. (Tenn.) 188; *S. P. Morris v. McAnally*, 3 Coldw. (Tenn.) 304.

A statute providing that joint obligations shall be joint and several does not apply to partnership obligations, and does not authorize a suit on a partnership debt against one member of a firm. *Coates v. Preston*, 105 Ill. 470. Or by one member of a firm. *Dement v. Rokker*, 126 Ill. 174.

The creditor may sue any or all members of the partnership and a judgment against one or more is no bar to proceedings against the others. *Williams v. Rogers*, 14 Bush (Ky.) 776, overruling *Nichols v. Burton*, 5 Bush (Ky.) 320.

Any of the partners may be sued on a judgment recovered against the firm. *Belleville Sav. Bank v. Winslow*, 30 Fed. Rep. 488.

Where under a code the real party

in interest must sue, and when a joint obligation is to be reconsidered several as well as joint, the holder of a note may sue one of several makers thereof, notwithstanding the fact that he received the note by indorsement from the payee who was also a maker thereof. *Willis v. Neal*, 39 Ala. 464.

When by the code joint obligations are made joint and several, the non-joinder of any co-obligors cannot be objected to in any way. *McKee v. Griffin*, 60 Ala. 427; *Steed v. McIntyre*, 68 Ala. 407.

1. Code Provisions—Plaintiffs.—"All persons having an interest in the subject of an action, and in obtaining the relief demanded, may be joined as plaintiffs, except where it is otherwise provided." *Arkansas*, Dig. of Stat. 1884, § 4939; *California*, Deering's C. & St., vol. 3, § 378; *Connecticut*, Gen. Stat. 1888, § 883; *Dakota*, Comp. Laws, 1887, § 4877; *Idaho*, Rev. Stat. 1887, § 4101; *Indiana*, Rev. Stat. 1881, § 262; *Iowa*, McClain's Code, 1888, § 3750; *Kansas*, Gen. Stat. 1889, § 4112; *Kentucky*, Code, 1888, § 22; *Missouri*, Rev. Stat. 1889, § 1991; *Montana*, Comp. Stat. 1887, p. 62, § 15; *Nebraska*, Comp. Stat. 1889, p. 857, § 40; *Nevada*, Gen. Stat. 1885, § 3034; *New Mexico*, Comp. Laws, 1884, § 1884; *New York*, Annot. Code, 1889, § 446; *North Carolina*, Code, 1883, § 183; *Ohio*, Rev. Stat. 1890, § 5005; *South Carolina*, Code, § 138; *Utah*, Comp. Laws, 1888, vol. 2, p. 232, § 3180; *Wyoming*, Rev. Stat. 1887, § 2394.

2. Code Provisions — Defendants. — "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination and settlement of the questions involved in the action." *Arkansas*, Dig. of Stat. 1884, § 4940; *Connecticut*, Gen. Stat. 1888, § 884; *Indiana*, Rev. Stat. 1881, § 268; *Iowa*, McClain's Annot. Code, 1888, § 3752; *Kansas*, Gen. Stat. 1889, § 4113; *Kentucky*,

interest shall be joined as plaintiffs or defendants, but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant; and where the question is one of common or general interest to many persons, or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.¹ The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in."²

Code, 1888, § 23; *Nebraska*, Comp. Stat. 1889, p. 857, § 41, *Nevada*, Gen. Stat. 1885, § 3035, *New York*, Annot. Code, 1889, § 447, *Ohio*, Rev. Stat. 1890, § 5006, *South Carolina*, Code, § 139; *Wyoming*, Rev. Stat. 1887, § 2395.

Some codes contain the above clause and add "and in an action to determine the title or right of possession to real property, which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant." *California*, Deering's C. & St., vol. 3, § 379; *Idaho*, Rev. Stat. 1887, § 4102; *Montana*, Comp. Stat. 1887, p. 62, § 16; *Utah*, Comp. Laws, 1888, vol. 2, p. 232, § 3181. While still other codes add the further provision that "any person claiming title or right of possession to real estate may be made parties plaintiff or defendant, as the case may require to any such action." *Dakota*, Comp. Laws, 1887, § 4878; *Idaho*, Rev. Stat. 1887, § 4103, *Missouri*, Rev. Stat. 1889, § 1993; *North Carolina*, Code, 1883, § 184.

1. **Code Provisions—Unwilling Plaintiff, etc.**—"Of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants, but if the consent of anyone who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint, and where the question is one of a common or general interest, to many persons, or when the parties are numerous and it is impracticable to bring them all before court, one or more may sue or defend for the benefit of all." *Arizona*, Rev. Stat. 1887, § 692. To same effect, *Arkansas*, Dig. of Stat. 1884, §§ 4941, 4942; *California*, Deering's C. & St., vol. 3, § 382; *Colorado*, Code Civ. Proc. 1883, § 12; *Con-*

necticut, Gen. Stat. 1888, §§ 883, 885; *Dakota*, Comp. Laws, 1887, § 4879; *Idaho*, Rev. Stat. 1887, § 4105; *Indiana*, Rev. Stat. 1881, § 269; *Iowa*, McClain's Annot. Code, 1888, §§ 3753, 3754; *Kansas*, Gen. Stat. 1889, §§ 4114, 4115; *Kentucky*, Code, 1888, §§ 24, 25; *Missouri*, Rev. Stat. 1889, § 1994; *Montana*, Comp. Stat. 1887, p. 63, § 19; *Nebraska*, Comp. Stat. 1889, p. 858, §§ 42, 43; *Nevada*, Gen. Stat. 1885, § 3036, *New York*, Annot. Code, 1889, § 448, *North Carolina*, Code, 1883, § 185; *Ohio*, Rev. Stat. 1890, §§ 5007, 5008; *South Carolina*, Code, § 140; *Utah*, Comp. Laws, 1888, vol. 2, p. 232, § 3184; *Washington*, Code, 1881, §§ 13, 14; *Wyoming*, Rev. Stat. 1887, §§ 2396, 2397.

2. **Code Provisions—Bringing in New Parties.**—"The court may determine any controversy between the parties before it, when it can be done without prejudice to the right of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in." *Arizona*, Rev. Stat. 1887, § 727; *Arkansas*, Dig. of Stat. 1884, § 4945; *California*, Deering's C. & St., vol. 3, § 389; *Connecticut*, Gen. Stat. 1888, § 887; *Dakota*, Comp. Laws, 1887, § 4885; *Idaho*, Rev. Stat. 1887, § 4113; *Indiana*, Rev. Stat. 1881, § 272; *Iowa*, McClain's Annot. Code, 1888, § 3756; *Kansas*, Gen. Stat. 1889, § 4118; *Kentucky*, Code, 1888, § 28; *Missouri*, Rev. Stat. 1889, § 2099; *Montana*, Comp. Stat. 1887, p. 64, § 26; *Nebraska*, Comp. Stat. 1889, p. 858, § 46; *Nevada*, Gen. Stat. 1885, § 3039; *New York*, Annot. Code, 1889, § 452; *North Carolina*, Code, 1883, § 189; *Ohio*, Rev. Stat. 1890, § 5013; *Oregon*, Hill's Annot. Laws, 1887, p. 163, § 41; *South Carolina*, Code, § 143; *Utah*, Comp. Laws, 1888

(5) CODE PROVISIONS CONSTRUED.—(a) *Plaintiffs*.—The code provisions as to plaintiffs apply not only to equitable actions,¹ it also to legal actions,² such as replevin,³ and even to actions

1. 2, p. 234, § 3192; *Washington*, Code, § 20; *Wisconsin* Annot. Stat. (S. B.), § 2610; *Wyoming*, Rev. Stat. § 2402.

1. Equitable Actions—Illustrations.—These code provisions are in harmony with the rules applied in courts of equity. *Turner v. Conant*, 18 Abb. N. as. (N. Y.) 160.

Where A buys land from B, paying part cash, and giving C's note for the balance, secured by a mortgage on the land by A and C, on discovery of a fraud A and C can join in a suit to cancel the note and mortgage. *Bowman v. Germy*, 23 Kan. 306.

A and B were co-owners of land. A died. In an action to restrain the maintenance of a railroad constructed by A's lifetime, *held*, A's heirs were interested in the subject matter of the action and therefore proper parties plaintiff. *Shepard v. Manhattan R. Co.* (Supreme Ct.), 5 N. Y. Supp. 189.

In an action by the holder of one of several notes, given for the purchase of money of land, to enforce the vendor's lien, all the encumbrances or holders of the notes are necessary parties. *Jenkins v. Smith*, 4 Metc. (Ky.) 380.

Several persons suffering a common injury by a nuisance, independent and different from what the general public suffers, may unite as plaintiffs to restrain the nuisance. *Bushnell v. Robinson*, 62 Iowa 540; *Palmer v. Waddell*, 2 Kan. 352; *Atchison St. R. Co. v. Cave*, 38 Kan. 744.

Parties who have a common interest in annulling a patent for land, although they have no joint interest in the land diverse to the patentee, may be joined as plaintiffs in action to procure its cancellation. *People v. Morrill*, 26 Cal. 336.

But where tenants in common convey by separate deeds their several interests in an entire tract of land, they cannot unite in one suit to have all their deeds cancelled. *Jeffers v. Forbes*, 18 Kan. 174.

Restraining Collection of Taxes.—When, by one assessment, taxes are levied upon separate tracts of land, the owners thereof may unite in a joint action to enjoin the collection of the assessments. *Keese v. Denver*, 10 Colo. 112; *Brandirff v. Harrison Co.*, 50 Iowa 164; *Richman v. Muscatine Co.*, 70

Iowa 627; *Wyandotte etc. Bridge Co. v. Wyandotte Co.*, 10 Kan. 326.

Two persons owning separate tracts of land assessed for drainage cannot prosecute a joint action to enjoin the collection of the assessments against their lands. *Jones v. Cardwell*, 98 Ind. 331.

Where several townships separately vote taxes to aid a railroad, and the validity of the tax was disputed, taxpayers in the several townships may not unite as plaintiffs to test its validity. *Woodworth v. Gibbs*, 61 Iowa 398.

Where, by a city ordinance, taxes are levied by different sections in different modes in various amounts, and have no connection with each other, persons engaged in different kinds of business and thus liable to different taxes, may not unite in an action to enjoin the collection of taxes under the ordinance. *McGrath v. Newton*, 29 Kan. 364.

A code provision that "any number of persons, whose property is affected by a tax or assessment so levied, may unite in the petition filed to obtain" an injunction against the collection thereof, does not authorize different classes of persons differently affected by different sections of an ordinance to unite in such a petition. *McGrath v. Newton*, 29 Kan. 364.

A *mandamus* to compel the levy and collection of a tax to pay interest on bonds may be applied for by any bondholder. *Maddox v. Graham*, 2 Metc. (Ky.) 56.

2. Legal Actions.—When it appears from a complaint that plaintiffs are jointly interested in the cause of action stated, they are properly joined as co-plaintiffs. *Western Union Tel. Co. v. Huff*, 102 Ind. 535.

All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs in law and equity. *Loomis v. Brown*, 16 Barb. (N. Y.) 325.

An allegation in a complaint that one plaintiff holds the property in his own name, for the "joint use and benefit" of himself and the other plaintiff, sufficiently shows an interest in that other to make him a necessary party, under our practice. *Hawke v. Banning*, 3 Minn. 67.

3. Replevin.—The code provisions as

for the recovery of money only.¹ All the plaintiffs must have an interest in the subject matter of the action and in obtaining the relief demanded, and therefore two or more plaintiffs having distinct causes of action may not be joined;² nor can one be

to joinder of parties plaintiff applies to actions of replevin. *Earle v. Burch*, 21 Neb. 702; *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259.

1. Actions for Money.—It applies not only to equitable actions, but also to legal actions, including those for a recovery of money only. *Schiffer v. Eau Claire*, 51 Wis. 385. Compare *Seymour v. Carpenter*, 51 Wis. 413.

As to what constitutes such a joint interest in a common fund as will authorize the persons entitled thereto to join in a suit, see *Young v. Franklin Co.*, 25 Ind. 295.

Where several persons, joint owners of a steamboat, made a contract with one of the defendants, by which he was to have the use of the boat and pay a certain sum *per diem*, held that all the owners should be made plaintiffs, and if any refused to join as plaintiffs they should be made defendants, in an action to recover the compensation. *Coster v. New York etc. R. Co.*, 6 Duer (N. Y.) 43.

All parties entitled to bounty money may join in an action therefor. *Young v. Franklin Co.*, 25 Ind. 295.

Persons having separate interests in a trust fund may join in an action against the trustee for its loss or conversion. *Davenport v. Prince*, 41 Fed. Rep. 323.

Since a replevin bond is executed for the joint benefit of all the execution creditors interested in the goods replevied, they may unite as plaintiffs in a suit on such bond. *Thomas v. Irwin*, 90 Ind. 557.

A, at the instance of B, contracted with C for a machine, which was sent to A and by him delivered to B, who was informed of the terms of the contract and agreed to them. A then paid C for the machine. Held, that A and C were properly joined as plaintiffs in an action by ordinary petition against B for the price of machine, because B is bound to pay either A or C and as A would sue as C's assignee under the *Kentucky* Code, he was required to join C as a plaintiff or defendant. *Dean v. English*, 18 B. Mon. (Ky.) 132.

The sureties of a sheriff, who have paid a judgment against him for a

wrongful levy, may bring a joint action to recover the amount against the execution creditor to whom the sheriff delivered the property levied upon. *Skiff v. Cross*, 21 Iowa 459.

If A contracts to erect a house on land belonging to B, but mortgaged by B to C, both C and B may join as plaintiffs in suing A for a breach of contract. *Daley v. Cunningham*, 60 Cal. 530.

When A and B contract jointly to do certain work they may jointly sue on the contract, though each was to receive a certain fixed sum. *Fauble v. Smith*, 48 Iowa 462.

When in an action against several jointly liable, only a part are served, and under the provisions of the codes a judgment is obtained against those served, those not served are not proper parties defendant in an action upon said judgment. *Tay v. Hawley*, 39 Cal. 93.

Where a suit is brought against several defendants upon a judgment rendered against them jointly upon a contract upon which they were jointly liable, the same proceedings are authorized under the code, as in cases of original joint liability on contract. *Mahaney v. Penman*, 4 Duer (N. Y.) 603.

Where A and B recover a judgment neither can sue on such judgment alone without an allegation explaining the non-joinder of the other. *Gilbert v. Allen*, 57 Ind. 524.

All the grantees in a deed should join as plaintiffs in an action upon either a direct or implied covenant therein. *Lawrence v. Montgomery*, 37 Cal. 183.

2. Joinder of Plaintiffs Refused.—"Courts will not in one suit take cognizance of distinct and separate claims of different persons, but where the damage as well as the interest is several, each party injured must in that case sue separately." Code of *Georgia* (1882), § 3262.

The code provisions as to joinder of plaintiffs will not authorize two or more persons having distinct causes of action against the same defendant to unite. *Tate v. Ohio etc. R. Co.*, 10 Ind. 174, 91 Am. Dec. 309; *Peely v. Bowyer*, 7 Bush (Ky.) 513.

Distributees cannot sue jointly and

joined who is not in fact interested in the subject matter of the action, but only entitled to a part of the proceeds.¹ In *Indiana*

recover a joint judgment against the administrator for an alleged balance of their several shares of the amount found due to them by settlement. *Peely v. Bowyer*, 7 Bush (Ky.) 513.

When a life insurance policy provides for the payment of different sums to different parties, it is improper under the codes for the beneficiaries to join in one action to recover the several sums due. There is a unity of interest in the subject matter of the action, but each insured party has a separate interest in the money payable to him. *Keary v. Mutual Reserve Fund L. Assoc.*, 30 Fed. Rep. 359.

If A guarantees all the depositors in a bank that they would be paid in full, each depositor may sue alone on such guarantee. *Steadman v. Guthrie*, 4 Metc. (Ky.) 147.

If A execute two notes to B and a mortgage to secure them, and B assigns one note to C, B and C cannot join as plaintiffs in an action on the notes and mortgage. *Swenson v. Moline Plow Co.*, 14 Kan. 297.

A was executrix of a will and one of several legatees therein. A and the other legatees unite in an action against B, alleging a breach of trust by A known to B, whereby assets of the estate came into B's hands. The suit was to recover said assets. *Held*, a misjoinder of plaintiffs, the code not warranting the joinder of the principal in an alleged breach of trust with the persons alleged to have been injured thereby, in an action against the parties alleged to have been accessory to the fraud. *Paxton v. Wood*, 78 N. Car. 11.

Where the claims are such that plaintiffs could not join in an action thereon against defendants, the fact that each plaintiff has reduced his debt to judgment will not authorize a joint suit against defendants for damages caused by their conspiracy to obtain on credit and fraudulently dispose of the goods from the sale of which the debts due the several plaintiffs arose. *Sherman v. Rothschild* (Supreme Ct.), 1 N. Y. Supp. 302.

Several parties cannot unite in a suit to establish mechanics' liens, nor should their separate claims be consolidated. *Harsh v. Morgan*, 1 Kan. 293.

This has, however, been changed by

statute in many of the States. See *JOINDER*, vol. 11, p. 986.

Under these statutes no community of interest is necessary for parties to join as plaintiffs in an action to establish and enforce mechanics' liens. *Barber v. Reynolds*, 33 Cal. 497.

In an action by a creditor to have an assignment for benefit of creditors, made by his debtor, reformed in a respect which affects the plaintiff and not the creditors generally, the other creditors are not united in interest, and hence should not be joined as plaintiffs, but are properly made defendants. *Garner v. Wright*, 28 How. Pr. (N. Y.) 92.

If A makes a contract with B to superintend certain work which was to be done by C, D and E under another contract, B may sue on his contract without joining C, D or E. *Barber v. Cazalis*, 30 Cal. 92. Compare *Craig v. Fry*, 68 Cal. 363.

1. Party Entitled to Share in Proceeds of Suit.—The fact that an attorney is to receive a portion of the sum recovered as his fee does not make him a necessary party plaintiff to the suit, and he need not be joined. *McDonald v. Chicago etc. R. Co.*, 26 Iowa 124; 95 Am. Dec. 114.

An assignment by a creditor of a portion of a debt does not make the assignee a joint owner of the whole debt, and he is not a necessary party to a suit for its recovery. *Leese v. Sherwood*, 21 Cal. 151.

When the legal title to, and right of action on a note is in one person, it is improper to join with him as plaintiff one who has only an equitable right to a part of the proceeds of the note when collected. *Curtis v. Sprague*, 51 Cal. 239.

Where, however, a note was made to two payees, they must unite in an action thereon. One cannot sue without joining the other, though the note is payable to bearer and in plaintiff's possession. *McNamee v. Carpenter*, 56 Iowa 276.

It is not necessary to join as plaintiffs, persons who do not appear by the complaint to be united in interest with the plaintiff in all the relief sought thereby. *Garner v. Wright*, 28 How. Pr. (N. Y.) 92.

In an action for damages for a breach

there is a special provision by statute for the case where part of the plaintiffs are barred by the statute of limitations.¹ In construing the code provision as to plaintiffs, it must, however, be remembered that all persons having a common interest in the subject matter of the action must be joined as plaintiffs or the actual plaintiffs must sue in behalf of all.²

(b) *Defendants*.—Generally speaking all parties claiming an adverse interest, and necessary to complete relief in case the plaintiff succeeds, may be joined as defendants,³ and in *Connecticut* the

of contract, no parties need be joined in the complaint other than parties to the contract and those who have an interest in the matter in dispute. *Barber v. Cazalis*, 30 Cal. 92.

Under the codes, persons having no interest in the controversy, although they are general partners of the plaintiff, cannot properly be made parties plaintiff. *Hammer v. Barnes*, 26 How. Pr. (N. Y.) 174.

It is wholly immaterial that an uninterested party is united with the true owner as plaintiff, in an action to recover a debt, because a reception of payment by either plaintiff would be with the assent of the other. *Perkins v. Berry*, 103 N. Car. 131.

A person who, though named in a contract, does not sign it, and has no interest in it, is not a necessary party plaintiff in a suit thereon. *Harrisburgh Car Mfg. Co. v. Sloan*, 120 Ind. 156.

But parties who are not necessary parties to an action may yet be proper parties under the above provision of the code, if they have an interest in the subject matter. *McMurray v. Van Gilder*, 56 Iowa 605.

One who purchases goods for others merely as their agent, depending for the measure of his compensation upon the amount of profits realized by his employers from the transaction, is not a partner with such employers, nor has he such an interest in the goods as requires or authorizes him to be made a party plaintiff in an action to recover their value of one who has purchased them of his employers. *Lewis v. Greider*, 49 Barb. (N. Y.) 606.

Several persons injured by a nuisance may not unite in an action for damages for such injuries as are plainly distinct and unconnected. *Palmer v. Waddell*, 22 Kan. 352.

1. *Indiana Statute as to Limitations*.—"In cases where part only of the persons entitled to bring an action are barred by the statute of limitations, all

may be joined as plaintiffs; and when it shall appear to the satisfaction of the court, by admission or otherwise, that part of the plaintiffs are barred by the statute, the court, upon motion, shall order the names of such plaintiffs to be stricken from the record and the action may be prosecuted by those not barred." *Indiana*, Rev. Stat. 1881, § 267.

2. *All Parties Having a Common Interest Must Join*.—A member of a class, having a common interest in the subject matter of an action, cannot maintain an injunction suit in his own name or for his individual benefit. Thus, an artisan of a particular calling cannot sue alone to enjoin a violation of the statutes restricting prison labor, on the ground that such violation is prejudicial to his trade. All must join, or he must sue in behalf of himself and all others who are equally interested with him. *Smith v. Lockwood*, 1 Code Rep., N. S. (N. Y.) 319.

3. *Joinder of Defendants—Illustrations*.—Where the plaintiff shows that he will be entitled to final relief by injunction or otherwise against any person, although such person is not a party to the contract alleged to be violated, he is properly made a party defendant. *Hammer v. Barnes*, 26 How. Pr. (N. Y.) 174.

All parties who may be necessary to complete relief in case the plaintiff succeeds, are properly joined as defendants. *Eastman v. St. Anthony Falls Water Power Co.*, 12 Minn. 137; *Judy v. Farmers' etc. Bank*, 70 Mo. 407.

When an administrator, in the course of proceedings on the estate, gives two bonds, one when letters are issued and the other when real estate is about to be sold, and the condition of each of the two bonds is the same, and the burden of the sureties in each is the same, the sureties on the two bonds, in an action on them, may be made joint defendants in the same action. *Powell v. Powell*, 48 Cal. 234.

joinder is permissible, although the right to relief against several defendants is alleged to exist in the alternative.¹ but the defendants may not be joined even under the codes unless their liability is joint,² except where by express statutory provisions,

In an action on a claim for paving, *tc.*, the plaintiff may unite as defendants the city and owners of property fronting on the streets improved. *Louisville v. Henderson*, 5 Bush (Ky.) 516.

Under the code provision, the fraudulent vendee of goods and his assignee hereof for the benefit of creditors are liable to a joint action by the vendor to recover possession. *Nichols v. Michael*, 13 N. Y. 264; 80 Am. Dec. 259.

The complaint alleged that the judgment debtor had made a fraudulent assignment, with intent to hinder and delay creditors, and that the assignee was guilty of a breach of faith in the management of the assets, and sought to set aside the assignment and render the assignee personally liable. It also alleged that the debtor had made other conveyances, in fraud of creditors, to various persons made defendants in the action, which it also sought to have set aside. *Held*, that these facts constituted but one cause of action, and that the defendants were properly joined. *Reed v. Stryker*, 12 Abb. Pr. (N. Y.) 47; *Newbould v. Warrin*, 14 Abb. Pr. (N. Y.) 80; *S. P. Morton v. Weil*, 33 Barb. (N. Y.) 30, 11 Abb. Pr. (N. Y.) 421; *Skinner v. Stuart*, 13 Abb. Pr. (N. Y.) 442.

In ejectment, persons claiming builders' or mechanics' liens may be joined as defendants. *Jones v. Ford*, 60 Tex. 127.

Several persons in possession of separate parcels of land, may be joined as defendants in ejectment. *Woolfolk v. Ashby*, 2 Metc. (Ky.) 288.

In proceedings to enjoin the opening of a public road through plaintiff's land, the county supervisors may be joined as co-defendants with the road overseer. *Myers v. Daubenbiss*, 84 Cal. 1.

In proceedings to enjoin the payment of a number of claims allowed by a single resolution by town supervisors, all claimants may be made co-defendants, though their claims were separate and not joint. *McCrea v. Chaboon* (Supreme Ct.), 8 N. Y. Supp. 88.

"An officer holding an execution may be joined in an action to restrain the collection of the same in the county in which he resides with the person for

whose benefit the writ issued, when such person is a non-resident of the State, or has left the same to avoid the service of a summons, or order of injunction, or so conceals himself that process cannot be served upon him, and service may be made against such person by publication, as in other cases." *Ohio*, Rev. Stat. 1890, § 5015; *Wyoming*, Rev. Stat. 1887, § 2404.

1. Allegations in the Alternative.—"Persons may be joined as defendants against whom the right to relieve is alleged to exist in the alternative, although a right to relieve against one may be inconsistent with a right to relieve against the other." *Connecticut*, Rules of Const., No. 1, § 3, 58 Conn. 561.

A plaintiff cannot be described in the alternative as one or another. Who the party is must appear clearly and with certainty from the record. *Armstrong v. Durland*, 11 Kan. 15.

2. Joinder of Defendants Refused.—A mining partnership is a qualified partnership. If a part of the partners make a contract with a third party, by which he becomes entitled to a share in their interests, and a like share of the profits of their interest, they are the only necessary parties defendant in an action brought by the person they contract with to determine his right to a share in the mine and a corresponding share of the profits on their interest. *Settembre v. Putnam*, 30 Cal. 490.

Where a mechanic performed labor on A's house and A sold to B, who agreed in consideration to pay the mechanic, he can join A and B in his suit to establish a mechanics' lien, but not to obtain a personal judgment. *Mervin v. Sherman*, 9 Iowa 331.

Where A has a claim to an account of income from certain property against B down to a certain date and from that date against C, the grantee of B, he cannot follow B and C, as co-defendants in the same suit. There is no joint liability. *Patterson v. Kellog*, 53 Conn. 38.

A single action does not lie against several advertising agencies for the breach of a contract by their common agent, unless there is some statement in the complaint to connect them. *Clegg*

the common law rule as to such joinder of defendants has been changed.¹

(c) *Unwilling Plaintiff Made a Defendant*.—Under the codes, plaintiffs may join as a defendant one who should be joined as a plaintiff, but refuses to give his consent to bringing the action.² This has been held to apply to co-partners³ and co-administrators,⁴ but not to joint obligees.⁵ Unless required by the code, the reason why the party refuses to join as plaintiff need

v. Aikens, 5 Abb. N. Cas. (N. Y.) 95.

A and B each had a judgment against C, and each issued an execution, proceeding to enjoin a sale under the executions reversed for misjoinder of defendant. *Miller v. Curry*, 53 Cal. 665.

In an action by a creditor to avoid a conveyance, one who innocently accepted a deed of the property for the benefit of the alleged fraudulent grantee, and who has conveyed in accordance with the trust, is not a proper party. *Spicer v. Hunter*, 14 Abb. Pr. (N. Y.) 4.

In *Gibson v. Higdon*, 15 B. Mon. (Ky.) 205, the court by CRENshaw, J., said: "We do not suppose that the provision was intended to leave it altogether to the discretion of the plaintiff whether such person as is mentioned in said section should be made a defendant or not, but by it authority was conferred upon the courts to cause such person to be made a defendant."

1. Common-Law Rules Prevail Unless Expressly Changed.—The rule that persons only severally liable cannot be included in the same action as parties defendant, has not been altered by the codes except where there are express provisions, as in the provision for joining persons severally liable upon the same obligation or instrument, etc. The provision for joinder of actions arising out of the same transaction or transactions connected with the same subject of action only admits of a joinder when both causes of action affect all the parties defendant. *LeRoy v. Shaw*, 2 Duer (N. Y.) 626.

A code provision that in an action against several a separate judgment may be entered, does not authorize joining as defendants a contractor and one who indorsed on the contract a guarantee that the contractor would perform his contract. *Smith v. Loomis*, 72 Me. 51.

The code has not changed the law that a defendant liable upon an original

undertaking cannot be joined with one severally liable upon a collateral undertaking. *Phalen v. Dingee*, 4 E. D. Smith (N. Y.) 379.

2. Unwilling Plaintiff Made a Defendant—Illustrations.—One H having agreed to lend money to R, it was agreed between R, H, and E, a banker, that R should draw on E at sight for the amount of the loan, and that, on receipt of the draft, H should provide money to meet it. R drew on E accordingly and deposited the draft with plaintiff bank for collection. Plaintiff sent the draft to E with instructions to remit to a certain other bank for plaintiff's credit. E received the draft and money to meet it was deposited with him, but he died immediately afterwards without having remitted the proceeds. *Held*, in an action for the proceeds against E's administrator that R was a proper party plaintiff and, having refused to sue, was properly joined as defendant. *First Nat. Bank v. Hummel*, 14 Colo. 259.

In a proceeding by next of kin or legatees seeking a settlement of the estate of a decedent by the personal representative of a deceased executor, the administrator *de bonis non* must be made a party. If he refuses to join as plaintiff, he may be made a defendant. *Hardy v. Miles*, 91 N. Car. 131.

3. Co-partners.—A partner may sue and make his co-partner, who refuses to join as plaintiff, a party defendant. *Nightingale v. Scannell*, 6 Cal. 506, 65 Am. Dec. 525; *Andrews v. Moklumne Hill Co.*, 7 Cal. 330.

4. Co-administrators.—One administrator may sue and make his co-administrator, who refuses to join as plaintiff, a party defendant. *Rizer v. Gillpatrick*, 16 Kan. 564.

5. Joint Obligee.—The right to join as a defendant one who refuses to unite as plaintiff does not apply to the case of an action by joint obligees of a bond or contract. In such case all such joint obligees are necessary parties plaintiff.

ot be given,¹ and in consequence of this code provision a co-plaintiff may at any time withdraw from the action.²

(d) *One May Sue or Defend for Many.*—In all cases where the question at issue is one of a common or general interest to many persons, and their number is not definitely known, one may sue or the benefit of all,³ but it is necessary that the question be one

Lyan v. Riddle, 78 Mo. 521; *Rainey v. Smizer*, 28 Mo. 310.

1. **Reason of Refusal.**—When in an action a person is made a defendant, because he had refused to join as plaintiff, the complaint need not state the reason why he had so refused. *Wall v. Galvin*, 80 Ind. 447.

2. **Withdrawal of Co-plaintiff.**—Under these statutes, a co-plaintiff should be permitted to withdraw at will, unless his withdrawal would work injustice. *Doonan v. Orton*, 31 Wis. 265. *Contra*, at common law. See *infra*, this title, *Right to Use the Name of Co-plaintiffs*.

3. **One Suing for Benefit of Many.**—The code permits one to sue, or defend for the benefit of many, only in cases where they are so united in interest with the person who brings the action, or defends it, as to make them necessary parties under the code. *Carey v. Brown*, 58 Cal. 180.

Where the stock of a joint stock company was divided into money shares and labor shares, and certain holders of the latter description of stock brought suit against certain holders of the former description of stock without all the persons of either class being made parties, *held*, the stockholders, being numerous, and it being difficult, if not impracticable to bring them all into court, that the parties before the court were sufficient to authorize it to adjudicate upon their rights, and dissolve the company, and decree a distribution of its effects. *Von Schmidt v. Huntington*, 1 Cal. 55; *Bronson v. Wilmington etc. Ins. Co.*, 35 N. Car. 411.

An artist in a particular calling may sue in behalf of himself and all others who are equally interested with him to enjoin a violation of the statutes restraining prison labor, on the ground that such violation is prejudicial to his trade. *Smith v. Lockwood*, 1 Code Rep., N. S., (N. Y.) 319.

So in an action by or against voluntary associations, all members need not be joined. *Gorman v. Russell*, 14 Cal. 531.

A bill against the trustees holding the legal title to the property of a private association, to compel the execution of the trust, and an account and distribution, may, where the associates are numerous, be maintained by one of such associates, in behalf of himself and all the others; and it is not necessary that all the associates should be made parties. *Mann v. Butler*, 2 Barb. Ch. (N. Y.) 362.

In an action to compel payment of trust funds belonging to a voluntary association to a newly elected treasurer, said treasurer may sue the old treasurer on behalf of himself and the other members of the association. *Gieske v. Anderson*, 77 Cal. 247.

Although by provisions of the *New York Code*, actions by unincorporated associations may be brought by the president or director, some of the members may nevertheless sue in behalf of all, especially when it does not appear that the association has a president or treasurer. *Bloete v. Simon*, 1 Abb., N. Cas. (N. Y.) 88.

A legatee may sue for an accounting in behalf of himself and the other legatees. This was the rule before the adoption of the code, and is not changed by the code, which provides that when the question involved is one of "common or general interest," the action may be brought by one or more for the benefit of all who have such common or general interest, without showing that the parties are very numerous or that it would be impracticable to bring them all before the court. And the code also provides that when the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. This applies indiscriminately to all actions, whether they involve questions of common interest or not. *McKenzie v. L'Amoureux*, 11 Barb. (N. Y.) 516.

An action on an injunction bond given in a suit to restrain the funding and payment of county bonds, setting out the granting of the injunction, execution of the bond, and final judg-

of common and general interest.¹ When, however, the parties are definitely known, all must join as plaintiffs, unless such joinder is impracticable, and the question whether such joinder is or is not impracticable must depend upon the circumstances of each case.² When one is permitted to sue for the benefit of

ment dissolving the order; that the order was wrongfully obtained, and that, by reason thereof, plaintiffs and those whom they represent have been damaged, states all the conditions requisite to authorize plaintiffs to sue for the other bondholders. *Alexander v. Gish* (Ky. 1888), 9 S. W. Rep. 80r.

In a suit to subject equitable assets of a corporation to the claims of creditors, it is not necessary to make all the stockholders defendants. Any individual stockholder may be sued for the amount of his unpaid subscription, and if he is required to pay more than his proportionate share of the debts of the corporation his remedy is against the other stockholders owing unpaid subscriptions. *Thompson v. Lake*, 19 Nev. 103; *Hatch v. Dana*, 101 U. S. 210; *Marsh v. Burroughs*, 1 Woods (U. S.) 468; *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380; *Bartlett v. Drew*, 57 N. Y. 587.

1. One Not Permitted to Sue for Many.

—Persons severally charged with a tax have no such common or general interest in restraining its collection as will authorize one to sue for all. *Cutting v. Gilbert*, 5 Blatchf. (U. S.) 259; *Fleming v. Mershon*, 36 Iowa 413; *Bouton v. Brooklyn*, 15 Barb. (N. Y.) 375; *Armstrong v. Treasurer of Athens Co.*, 10 Ohio 235.

But it has been decided that separate owners of distinct pieces of real estate may sue on behalf of themselves and others similarly situated and interested to restrain the sale of the land for the purposes of an assessment for a sewer. *Keese v. Denver*, 10 Colo. 112.

In an action to reform an assignment for the benefit of creditors by changing the name of a preferred creditor mentioned therein, *held*, that the parties named in the assignment and the assignors, together with other creditors standing in a lower class than that in which such note was stated were necessary and proper parties. "The necessity of bringing in these parties, or some of them, is in no degree avoided by that provision of the code which declares that 'when the parties are very numerous, and it may

be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.' There is nothing to show that the parties in this case come within the conditions of that section either as to number or position. They occupy, or may do so, antagonistic positions and hostile interests, and are not, I think, so far properly represented, either by the plaintiff or defendant, as to exclude them from the right of being personally heard on the questions. *Garner v. Wright*, 24 How. Pr. (N. Y.) 144. See *Garner v. Wright*, 28 How. Pr. (N. Y.) 92.

A and B, if they had any title to land, were co-tenants. A sued X in trespass to try the title. Demurrer for defect of parties plaintiff. The court by HOGEBROOM, J., quoted the above provision of the code, and then continued: "The last paragraph of the section cited allowing 'one or more to sue for the benefit of others,' does not apply to such a case, but was manifestly intended for creditors of an insolvent estate and cases of that character where the interest is in common. So also as to the first paragraph in regard to making all parties who are united in interest. That does not control this case, for the reason that the interest of co-tenants are not united . . . Indulgence is extended in allowing tenants in common to join in an action against a stranger, but they are not required to do so." *Bannister v. Bull*, 16 S. Car. 220.

2. Joinder When Impracticable.—All united in interest in the cause of action, must join as plaintiffs, unless the number render it impracticable. *Tate v. Ohio R. Co.*, 10 Ind. 174; 71 Am. Dec. 309.

All the plaintiffs to an action should appear by their individual and real names, unless they are so numerous that it is impracticable for them so to do. In *Kirk v. Young*, 2 Abb. Pr. (N. Y.) 453, the court by CLARKE, J., said: "This is not a case in which it is impracticable to bring all the plaintiffs before the court; their number is thirty-five, and although perhaps too numerous not to make it somewhat inconvenient to

himself and others, their consent is presumed until the contrary is shown.¹ The parties not joined must be clearly described.²

(e) *Bringing in of New Parties.*—While there is no doubt that this provision of the code applies to equitable actions,³ whether it should or should not be held applicable to legal actions, has been disputed.⁴ Unless the defendant show cause there-

the pleader to recount their names, it is certainly not impracticable to do so; and without a very obvious necessity the court should always require that all the persons interested in the action should appear by their individual and real names."

A, suing for himself and twenty others, brought suit against B and eighteen others, to recover land. Demurrer for defect of parties, because plaintiffs named are suing in behalf of all the other heirs of X, and others, without giving any reason for not naming the said heirs. An order was entered as follows: It appearing to the satisfaction of the court, upon statements of council and inspection of the record in this action, (1) that this action involves questions of a common or general interest of many persons; (2) that the parties, both plaintiff and defendant, who have an interest in this action are very numerous, . . . and that it is impracticable to bring all the parties, either plaintiff or defendant, before the court," therefore the plaintiffs may sue and defendants defend in behalf of all others interested. Order affirmed. *Thames v. Jones*, 97 N. Car. 121.

An order allowing a portion to sue for the benefit of all is properly made when the parties are so multitudinous as to have vexatiously prolonged and probably have altogether prevented a full hearing. *Hendricks v. Money*, 1 Bush (Ky.) 306.

1. *Consent Presumed.*—The consent of the other parties will be presumed unless they show their disapprobation. *Flint v. Spurr*, 17 B. Mon. (Ky.) 499.

In like manner in *Indiana*, where an assignor of a non-negotiable instrument be joined as a defendant in an action by the assignee, it has been held in a case where one sued for the benefit of himself and others, and it appeared that several of the parties not joined had assigned their claims to the actual plaintiff, and their claims are such as are not expressly assignable by statute, a demurrer for defect of parties because said assignors were not made parties

defendant was not good, because, as the suit was prosecuted for the benefit of the persons interested, the question of the assignment was not involved. *Blair v. Shelby Co. Agricultural etc. Co.*, 28 Ind. 175.

2. *Description of Parties Not Joined.*—It is sufficient if the party bringing suit describe the parties not joined with as much certainty as the nature of the controversy will admit, and not necessary that they should be designated as an association or class. *Sourse v. Marshall*, 23 Ind. 194.

A statement that plaintiffs sue for themselves and "all holders of original and compromise bonds of X county" is sufficient. *Alexander v. Gish* (Ky. 1888), 9 S. W. Rep. 801.

3. *Equitable Actions.—Illustrations.*—When in an action to declare a resulting trust as to stock in a corporation it appeared that one not a party to the action had an interest in the stock, it is the duty of the court to order such party to be brought in, and a failure so to do is error. *O'Connor v. Irvine*, 74 Cal. 435.

Under this provision, the court may properly, of its own motion, direct to be made a party one who, as shown by the master's report, may have an interest in the controversy. *Young v. Garlington*, 31 S. Car. 290.

In an action by a sole legatee against an executor who admitted having assets in excess of decedent's indebtedness, but averred the pendency of a creditor's bill against the estate, since the pleadings show the necessity of an account, all parties interested in such accounting will be ordered to be brought in. *Southal v. Shields*, 81 N. Car. 28.

4. *Application of Code Provisions to Common Law Actions.*—In an action to recover sum covenanted to be paid in a charter party, one who advanced monies to enable vessel to perform its voyage and claimed a lien therefor on the freight moneys was made a party defendant, on motion of the defendants. "The exposition of the above section of the code appears to be that other parties are to be brought in

when it appears that their rights in the subject of the action must be settled before the rights of the parties to the suit can be determined. The court cannot definitely and correctly say what are the rights of the parties before it, in the subject matter of the suit, until the claims of others to it are determined. There are many cases in which a defendant may require other parties to be brought in, so that the judgment of the court in the action may protect him against the claims of such other parties." *Sturtevant v. Brewer*, 4 Bosw. (N. Y.) 631.

But in an action against indorsers, they alleging they were mere accommodation indorsers, moved for an order to make the drawees parties defendant or a stay of proceedings until an action by such drawees against plaintiffs and others should be determined. The court by *INGRAHAM, J.*, having first decided that no cause of action was stated against the plaintiff in the latter action, thus proceeds: "The only question, therefore, is whether the court can order a plaintiff to sue a person against his will, where it is not necessary for the decision of the action which he has brought against a third person. The more usual course would be the commencement of an action by the sureties against all the parties setting up the facts in these papers, and to ask the aid of the court in equity for this protection. I doubt, however, the power of the court by an order such as is asked for in this case, to convert an action at law for the recovery of a debt into an action in equity, to be tried in a different manner, and involving very different issues. If such an order could be made as the defendants ask for, to bring in as defendant the drawer of the note, I am at a loss to see how it could avail them. The plaintiffs would still be entitled to recover against the indorsers on the note distinct from the maker, and I know of no case where a counter claim, set up by one party to a note against the holder, can be made available for the defense of another. The statute as to suing all the parties to a note in one action has not been repealed, and that statute permits a severance of the action at any time to take judgment against any of the parties. This right cannot be taken away by a mere order of the court as to adding parties. It seems to me that the defendants have no remedy by which they can make the defense to the note in

suit except by the mode suggested before, viz.: the bringing of an action against all the parties and seeking relief for the sureties in equity." *Sawyer v. Chambers*, 11 Abb. Pr. (N. Y.) 110.

And in a very recent case *A*, as executor of *X*, sued *B*, for money alleged to have been received by *Y*, as agent of *X*, and paid to *B* to the use of *X*. *B* alleged that the money was *Z*'s, whose assignee had sued to recover it, and moved to bring in said assignee. The court by *PECKHAM, J.*, discussed at length the nature of this action, and held that though of an equitable nature, it was nevertheless an action at law, then quoting the section of the code providing that the court should bring in necessary parties, thus continues: "The decisions of our courts have been quite uniform that the section above quoted referred to parties in what, under the old practice, would have been suits in equity, and that it was never intended to make it incumbent upon a plaintiff in an action at law to sue any other than the parties he should choose. *Sawyer v. Chambers*, 11 Abb. Pr. (N. Y.) 110; *M'Mahon v. Allen*, 12 How. Pr. (N. Y.) 39; *Webster v. Bond*, 9 Hun (N. Y.) 437. . . . *JUDGE WOODRUFF*, in *M'Mahon v. Allen*, 12 How. Pr. (N. Y.) 39, gave what seems to me a correct definition of the meaning of the old code relative to 'a complete determination of the controversy.' He said that was 'where there are persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined.' Judged by that standard, the controversy between these parties can be completely determined without the presence of any other person. The plaintiff claims judgment for money which he alleges defendant received belonging to the plaintiff. The defendant sets up facts which, if proved, constitute a perfect defense to the action. The presence of no other person is required to finally determine the issue, and the determination affects no other person's rights. . . . The cases cited by defendant's counsel upon the duty and power of the court to order new parties to be brought in so that a complete determination of the controversy could be had, are all of them what would have been heretofore termed suits in equity, and upon the view we take of the scope of the section of the code referred to, are wholly

or,¹ parties whose rights will not be affected by the judgment will not be ordered to be brought in;² nor will one be required to make

applicable. Such are the cases of *Turner v. Conant*, 18 Abb. N. Cas. (N. Y.) 160; *Haas v. Craighead*, 19 Hun (N. Y.) 396; *Earle v. Hart*, 20 Hun (N. Y.) 75; *Lawton v. Lawton*, 54 Hun (N. Y.) 415." The court then distinguishes at considerable length the uses of *Derham v. Lee*, 87 N. Y. 599; *Hapman v. Forbes*, 123 N. Y. 532.

In an action for commissions on the sale of land, the defendant set up as a defense that two other persons contended that they had made the sale in question and therefore claimed the commissions, but it was held not necessary that the court should require that those persons should be made defendants. *Schischer v. Holmes*, 123 Ind. 525.

In an action for damages on an attachment undertaking by an assignee of the defendant in the attachment against the sureties, the sureties and the principal applied for an order making the principal a party defendant. Plaintiff objected. The principal had judgment⁴ against the defendant in the attachment obtained in the attachment suit in excess of the damages alleged. The motion was allowed, and on appeal the ruling was affirmed. *Morton, C. J.*, saying: "As a party defendant; Wilson [the principal] can set off his judgment against the claim of Lightbody [the defendant in the attachment] for damages now owned by the plaintiff. If Wilson were not permitted to be made a party defendant, the plaintiff would recover of his sureties, and such sureties would be entitled to be reimbursed by Wilson, and his judgment against Lightbody would be no set-off or counter claim. If this were done the rights of Wilson would be greatly prejudiced. Under some circumstances the rights of the sureties might also be prejudiced. It would be gross injustice to permit the plaintiff to recover of Hanson and Lehman, the sureties of Wilson, and then have the sureties recover of Wilson, so long as Wilson's judgment against Lightbody remains unpaid and Lightbody continues insolvent. If the district court had not permitted Wilson to be made a party defendant, it would be necessary for him to bring an original action against all the parties seeking thereby relief for his sureties. As he might do this in another action, we

think within the spirit and language of the code, the court probably permitted him to be made a defendant, and having all the parties before it, can properly dispose of the controversy between them upon its merits, without prejudice to the rights of others." The court thus refers to *Sawyer v. Chambers*, 11 Abb. Pr. (N. Y.) 110, and continues: "We cannot assent to any such conclusion, and the reasoning is not satisfactory. A part of the opinion goes upon the assumption that while a party may have no remedy at law, he may have one in equity. The civil code abolishes all distinctions between suits in equity and actions in law, and a defendant may insist upon any defense he may have. The court may permit a necessary party to come in and defend, or when the controversy between the parties before it cannot be determined without prejudice to the rights of the defendants or of others the court may order the parties to be brought in." *Gerson v. Hanson*, 34 Kan. 590.

In an action to recover purchase money for land, defendant averred that the land had been sold on execution against plaintiff and purchased by A who now holds it. He moved to make A a party defendant. *Held*, motion properly granted. "It would certainly be a hard measure for a court which adjusts equities while enforcing laws, to compel the payment of the purchase money to-day, and turn the defendant out of possession to-morrow." *Johnston v. Neville*, 68 N. Car. 177.

1. Where no objection has been made by the defendant to the non-joinder of a party having an interest in the result of the suit as plaintiff, the court is not bound to summon in such party, unless the facts of the case show that his rights will be prejudiced by the determination of the cause in his absence. *Sheldon v. Wood*, 2 Bosw. (N. Y.) 267.

2. **Parties Not Affected by Judgment.**—Parties whose rights will not be affected by the judgment of the court are therefore not necessary parties to the action. *Smith v. Lawrence*, 38 Cal. 24; *Pollard v. Lathrop*, 12 Colo. 171; *Frear v. Bryan*, 12 Ind. 343.

When in an action for commission on the sale of land, the defendant alleges that two other persons contend

a person a party who disclaims all interest in the suit.¹ When new parties are ordered to be brought in, the pleadings should be amended,² and the new parties duly summoned.³ A new party defendant will not be brought in on plaintiff's motion, without notice to the defendants then in the case.⁴ A necessary party will be ordered to be brought in, although he is a resident of another State.⁵ In some of the States there are special provisions as to bringing in new parties.⁶

(6) LAW OF TEXAS.—While the provisions of the codes have

that they had made the sale in question, such other persons need not be brought in under the code provision. *Fischer v. Holmes*, 123 Ind. 525.

1. **Disclaimer of Interest.**—A motion by defendant to bring in as a party plaintiff the plaintiff's assignor on the ground that he was the real party in interest and that the assignment was invalid, and a determination of the action between plaintiff and defendant would not conclude the assignor was properly overruled, where the assignor appeared and filed a response to the motion setting up his sale and assignment of the claim, and denying all ownership and control thereof. *Vimont v. Chicago etc. R. Co.*, 64 Iowa 513.

2. **Amendment of Pleadings.**—When, however, the answer discloses the fact that persons not parties to the action have succeeded to defendant's interest, in whole or in part, it is plaintiff's duty to amend, and bring in those parties, and if he neglects to do so, the court should order it to be done; and if it is not done at all, the supreme court will reverse. *Robinson v. Gleason*, 53 Cal. 38; *Decatur Co. v. Bright*, 57 Iowa 724; *Blakely v. Frazier*, 20 S. Car. 144. Compare *Carr v. Collins*, 27 Ind. 306.

Provision may be made in an order allowing new parties to be brought in, for the amendment of the summons and complaint, and the service of the summons upon the new parties and the service of the amended complaint upon the parties already in, specifying in detail the proper proceedings to pursue, or the order may simply allow them to be brought in, and the necessary amendments to be made to the summons and complaint, leaving the plaintiff to thereafter conduct his proceedings regularly, at his own peril. *Walkenshaw v. Perzel*, 32 How. Pr. (N. Y.) 310.

3. **Notice to New Parties.**—In *New York* a new defendant can only be

brought in by a supplemental summons, unless on his own application. *Voight v. Schenk* (Supreme Ct.), 7 N. Y. Supp. 864.

It has been held, however, that the mode of service prescribed by the code does not impair the right of the court to bring any necessary party before it by other appropriate means; *e. g.*, by amended pleadings under § 35. *Greer v. Powell*, 1 Bush (Ky.) 489.

Under the code of *Missouri* the court may order the necessary parties to be "brought in either by an amendment of the petition, or by a supplemental petition and a new summons." *Butler v. Lawson*, 72 Mo. 227.

4. The court has no power to grant a motion by plaintiffs to bring in new defendants without notice to the defendants already in the case. *Young v. Rollins*, 90 N. Car. 134.

Plaintiff sued a railroad company which was, pending the action, merged in a new company, which assumed all its liabilities. *Held*, plaintiff was entitled to an order allowing him to file a supplemental complaint bringing in the new company as defendant. *Prouty v. Lake Shore etc. R. Co.*, 85 N. Y. 272.

5. **Non-resident.**—Where it is made apparent that the rights of the plaintiffs and defendants cannot be determined as between themselves, until the claim of a third party has been ascertained, and so settled that the determination of it may be acted upon as an established fact, in the decision of the present action, the plaintiffs will be compelled to amend their summons and complaint, so as to make such third party a party to the present action. And it is no valid objection to such a course that the third party is a resident of another State. *Sturtevant v. Brewer*, 17 How. Pr. (N. Y.) 571.

6. **Special Code Provisions.**—In *Indiana* a defendant may when necessary bring in new parties. Rev. Stat. 1881, § 277.

not been incorporated into the statute law of *Texas*, the practice in that State as to the joinder of parties is in accordance therewith.¹

2. Actions Ex Delicto.—(1) PLAINTIFFS.—Two persons cannot join in suing for an injury done to one of them.² Joint owners of property must unite in an action for injuries thereto,³ or for

The new party, whom the defendant may summon in, is one against whom the defendant may have relief and judgment, and not the real party who should have been sued instead of the defendant. *Conklin v. Bowman*, 11 Ind. 254.

In an action upon an account for goods sold, the answer set up the general denial, and in another paragraph alleged that the goods in question were sold to the defendant. A and one B, his partner in trade, and not to the defendant alone; and that the plaintiff was indebted to the firm of A and B upon an account which was filed with the answer; and prayed that B should be made a party defendant, which was ordered by the court. B appeared and answered, though there was nothing alleged against him in the complaint, and also joined with A in another answer, upon which the plaintiff was required by the court to make an issue. *Held*, that the statute gave no countenance to such a proceeding. *Carr v. Collins*, 27 Ind. 306.

In *Minnesota* a plaintiff may bring in new parties. Gen. Stat. 1878, p. 712, § 43.

Irrespective of statute in *New York*, when a defendant corporation had merged in a new company which assumed the liabilities of the old, the plaintiff was allowed to file a supplemental complaint bringing in such new company as a defendant. *Prouty v. Lake Shore etc. R. Co.*, 85 N. Y. 272.

1. Law of Texas.—The same strictness of pleading in regard to joinder of parties and causes of action, does not prevail in *Texas*, as is observed in States where the distinction between law and equity forms of action is recognized. *Craddock v. Goodwin*, 54 Tex. 578.

If in an action against two defendants the plaintiff alleges that the money sued for was received by one of the defendants, as broker from his principal, and sent to the codefendant for payment to plaintiff, there is no misjoinder of parties. *Floyd v. Patterson*, 72 Tex. 202.

The equitable rule allowing one person to sue for the benefit of all when the parties are numerous, has always been the law in *Texas* in all suits. *Tunstall v. Wormley*, 54 Tex. 476.

2. Joinder of Plaintiffs in Actions Ex Delicto.—Two persons cannot join in suing for an injury done to one of them. *Winans v. Denman*, 2 N. J. L. 116.

3. Joint Owners.—A and B owned separate mills in a certain manor, at which mills it was C's duty to have his grainground. C having sent his grain to other mills, A and B brought suit against C. Demurrer because plaintiffs had joined in one action while their interests are several. Demurrer overruled. *HALE, C. J.*: "Though plaintiff's interests are several, yet the not grinding at any of their mills is an entire joint damage to both the plaintiffs for which they shall have their joint action; for otherwise the damages will be twice recovered if they bring several actions." *Coryton v. Lithebye*, 2 Saund. 115. Similar English cases are cited in the notes.

Two persons carried on business in a mill owned by one of them. *Held*, they could join as plaintiffs in an action for damages for negligent burning of it. *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449.

Injuries to Ships.—Trespass by one ship owner for running down a ship. After verdict it was moved in arrest of judgment that plaintiff was only a part owner, which fact appeared in the pleadings. Judgment entered because the objection could only be taken advantage of by a plea in abatement. *Addison v. Overend*, 6 T. R. 766; *Whitney v. Stark*, 8 Cal. 514; 68 Am. Dec. 360.

Although a vessel was insured in part, and the insurers had paid the insurance money, an action against the parties causing the loss of the vessel should be brought in the name of the owners alone. *Cable v. St. Louis etc. Dock Co.*, 21 Mo. 133.

Where one part owner of a ship recovers damages for a tort, the other owners may afterwards sue alone, and

the conversion thereof;¹ but several owners of property may not unite as plaintiffs in an action for injury to such property.² When

the non-joinder of the one who had already recovered damages may not be pleaded in abatement. *Sedgworth v. Overend*, 7 T. R. 279.

Trespass to Land.—In personal actions for trespass to lands, tenants in common must join; but if a party who ought to join be omitted, the objection can only be taken by plea in abatement, or by way of apportionment of the damages at the trial. *Gent v. Lynch*, 23 Md. 58; 87 Am. Dec. 558.

Trespass to Personalty.—Two or more joint owners of personal property should join in action of trespass. *Pickering v. Pickering*, 11 N. H. 141; *Glover v. Austin*, 6 Pick. (Mass.) 209. Even under the codes. *State v. True*, 25 Mo. App. 451. Though after the injuries, one becomes sole owner. *Gallatin etc. Turnpike Co. v. Fry*, 88 Tenn. 296.

A, the owner of a wharf, entered into a written agreement, not under seal, with B and C, that certain machinery and fixtures should be erected on the wharf at their common expense, and that the profits of the business to be carried on there should enure to their common benefit. A railroad was afterwards constructed across the flats below the wharf, and A, B and C joined in a petition for a jury to assess the damages thereby sustained by them, and alleged in their petition that they were the owners of the wharf, etc. *Held*, that if the jury believed, on all the evidence before them, that the petitioner had such an interest in the estate as entitled them to damages, and that they suffered damages jointly, then they properly joined in the petition, and were entitled to recover. *Ashby v. Eastern R. Co.*, 5 Met. (Mass.) 368; 38 Am. Dec. 426.

1. Trover and Conversion.—A sheriff entitled to possession of goods under an attachment duly levied, and the owner of the goods as whose property they had been attached may join in an action to recover damages for the conversion of the said goods, by a third party. *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379.

So may the sheriff and the execution creditor join as plaintiffs in such an action. *Schaeffer v. Marienthal*, 17 Ohio St. 183.

A sheriff and his deputy are jointly

and severally liable for the acts of the deputy, and may jointly maintain an action for the value of the property levied upon by the deputy, and taken from his possession. *Burton v. Winsor Utah S. M. Co.*, 2 Utah 240.

Two persons jointly possessing and claiming to jointly own wood, cut upon land originally owned by one of them, may sue jointly a wrongdoer for its conversion, although no deed from the original owner to his co-plaintiff is proved. *Parker v. Parker*, 1 Allen (Mass.) 245.

Joint owners of personal property must unite in an action of detinue to recover it, unless one is entitled to the entire property either general or special, in the thing sued for. *Price v. Talley*, 18 Ala. 21.

2. Several Owners.—Where several plaintiffs, severally owning adjacent tracts of land are injured in consequence of the erection of a dam, they cannot join in an action for damages therefor, because they own the properties severally, and their injuries are separate and distinct. A lengthy discussion by McGOWAN, J., of the effect of the code provisions as to joinder of parties. *Hellams v. Switzer*, 24 S. Car. 39.

Where two vessels are under a contract of mateship, there is no such joint property in a whale taken by one of them as requires the owners of both to join in an action for its tortious conversion. *Taber v. Jennie*, Sprague (U. S.) 315.

Where A, B and C are entitled to use a graveyard, A can sue alone for obstruction of his enjoyment of the privilege, if B and C are not affected by the obstruction. *Herbert v. Pue* (Md. 1890), 20 Atl. Rep. 182.

So an action for desecrating the grave of an ancestor may be brought by any heir without joining the other heirs. *Mitchell v. Thorne*, 57 Hunt (N. Y.) 405.

Two constables having levied separately by virtue of several executions have thereby no joint rights in the goods, and therefore cannot sue jointly in trover and conversion. *Warner v. Rose*, 5 N. J. L. 809.

The interest of first and second mortgagees are separate, and they must sue separately for injuries to their

their injuries are separate, two or more may not join as plaintiffs in an action of tort, though the injuries are occasioned by a single act,¹ but when a joint interest is injured the owners thereof may unite as plaintiffs.²

several interests. *Newman v. Tymes*, 13 Wis. 172; 80 Am. Dec. 735.

1. Separate Injuries.—Where their injuries are separate, two or more may not join as plaintiffs in an action of tort. *Worsley v. Chamock*, Owen 106.

Slander and Libel.—In slander, in case words are said of two persons as "Thou and thy wife" or "You and A," each party must sue separately. *Smith v. Cooker*, Cro. Car. 512; *Hinkle v. Davenport*, 38 Iowa 355.

Where slanderous words are spoken of partners respecting their trade, they may join in one action averring damages to them as a firm. *Cook v. Batchellor*, 3 Bos. & Pull. 150; *Forster v. Lawson*, 3 Bing. 452.

In such case they cannot recover in such action for injury to their private feelings. *Haythorn v. Lawson*, 3 C. & P. 196.

But each may sue also for the injury done him. *Harrison v. Benington*, 8 C. & P. 708.

When several persons have been injured by the same libel each has a separate cause of action and must sue alone. *Robinett v. McDonald*, 65 Cal. 611.

Assault and Battery.—If an assault and battery be committed on two persons they must sue separately for damages. *Stepanck v. Kula*, 36 Iowa 563.

Fraud.—A joint action for damages cannot be maintained against defendants who have conspired to obtain goods on credit, by a number of parties plaintiff, each of whom, independently of the others, has sold goods to the defendants on such fraudulent credit. *Gray v. Rothschild*, 48 Hun (N. Y.) 596.

If A buys from B a note and C buys from B another note, and in the transactions, B defrauds both A and C, they must sue him separately. *Bort v. Yaw*, 46 Iowa 323.

Persons severally signing a note as sureties cannot maintain a joint action on the case for aiding their principal fraudulently to conceal or transfer his property, even if, since the acts charged they have given a joint note to take up the original note. *Bunker v. Tufts*, 55 Me. 180.

Where A, B and C, partners, employed D and E as accountants to settle their accounts and determine balances, and A relying thereon paid B and C a large sum which was not due them, but was paid because D and E negligently incorrectly stated the accounts, A can sue D and E alone for the tort. *Story v. Richardson*, 6 Bing. N. C. 123.

Tenants in common cannot join in an action against the vendor for a fraudulent assertion of the value of the property. *Baker v. Jewell*, 6 Mass. 460; 4 Am. Dec. 162.

Each stockholder may bring a separate action against the officers for damages caused by a fraudulent over-issue of stock. *Cazeaux v. Mali*, 25 Barb. (N. Y.) 578.

Creditors of a bank defrauded by misrepresentations as to the bank's capital must sue separately. *Fouche v. Brower*, 74 Ga. 251.

The right to join in an action for damages caused by a conspiracy to defraud is not changed by the code provision that all persons interested in the subject of the action and in obtaining the judgment demanded may join as plaintiffs. *Gray v. Rothschild*, 48 Hun (N. Y.), 596.

Malicious Prosecution.—Two or more may not join in an action for damages for malicious prosecution, although they had been jointly sued. *Ainsworth v. Allen, Kirby* (Conn.) 145; *Rhoads v. Booth*, 14 Iowa 575.

Except for jointly incurred expenses. *Barratt v. Collins*, 10 Moore 446; *Pechell v. Watson*, 8 M. & W. 691.

When two of three partners are illegally arrested and imprisoned on a firm obligation, the third may not join in an action for damages, unless it appear that they are injured in their joint interest. *Leavet v. Sherman*, 1 Root (Conn.) 159.

2. Plaintiffs Injured in a Joint Interest.—Where two or more are deceived and injured in the purchase of real estate for partnership purposes, by the false and fraudulent affirmations of a third person, which are actionable, they may join in an action against him to recover damages for the deceit and injury. *Medbury v. Watson*, 6 Met. (Mass.) 246; 39 Am. Dec. 726.

(2) DEFENDANTS.—Tort feasons cannot be sued jointly unless the tort has been committed by their joint act,¹ or they are jointly guilty of the negligence or breach of duty causing the

If co-partners rely upon a false and fraudulent recommendation by other co-partners of A's solvency and trust him, and said other co-partners levy on goods so sold A on trust, said first named co-partners may sue the other co-partners jointly for the goods so lost. *Patten v. Gurney*, 17 Mass. 182; 9 Am. Dec. 141.

Two or more maliciously sued may unite in an action to recover their jointly incurred expenses. *Barratt v. Collins*, 10 Moore 446; *Pechell v. Watson*, 8 M. & W. 691.

Partners may sue jointly for a malicious prosecution on a firm obligation, if injured in their joint interest. *Leavet v. Sherman*, 1 Root (Conn.) 159.

When persons severally sign a note as sureties, they cannot maintain a joint action on the case for aiding their principal fraudulently to conceal or transfer his property, even if, since the acts charged, they have given a joint note to take up the original note. *Bunker v. Tufts*, 55 Me. 180.

Where plaintiffs owned separate lots of ground, and under a contract of exchange transferred them to defendants for a farm in which they became jointly interested, they may maintain an action jointly against the defendant to recover damages for fraud practiced in inducing them to enter into the contract without seeking to rescind the agreement, and it is immaterial which of the plaintiffs or in what proportion each of them furnished the consideration for the transfer of the farm, and the defendant cannot litigate as to the respective interests of the plaintiffs as between themselves in the consideration paid, and he has no right to require separate actions against himself. *Larsen v. Groeschel*, 98 Ind. 160.

If two persons have a joint interest in a business, whether partners or not, one can sue alone for damages caused by an interruption of the business. *Farnum v. Ewell*, 59 Vt. 327.

An action of trespass for freedom, though in form for a personal tort, is in substance a remedy to try the question of freedom or slavery, and two or more may join in it. *Coleman v. Dick*, 1 Wash. (Va.) 233. See also *Harris v. Clarissa*, 6 Yerg. (Tenn.) 227.

To the contrary, *Violet v. Stephens*, Litt. Sel. Cas. (Ky.) 147.

When the legal interest in a cause of action whether arising out of contract or *ex delicto* is joint, residing in several persons, all who are living must join in an action founded on it. In such case, however, one or more of the parties may commence and prosecute the action in the name of all or bring them in by amendment, whether willing or not, upon indemnifying them against costs. *Harris v. Swanson*, 62 Ala. 299.

Where bail call together upon an attorney, and employ him to surrender their principal, one of them cannot afterwards maintain a separate action against the attorney for neglecting to effect the surrender pursuant to his undertaking. *Hill v. Tucker*, 1 Taunt. 7.

1. Joint Defendants in Actions Ex Delicto.—If a tort has been committed "by the joint act of several defendants, co-operating with a knowledge of plaintiff's rights, and without legal excuses, they would all be liable jointly or severally for the injury thus done. The act of each of the wrongdoers would be regarded as the act of all, and the acts of all in consummation of a common purpose would be the acts of each. But for separate and distinct wrongs in nowise connected by the ligament of a common purpose, actual or imputed by law, the wrongdoers are liable only in separate actions and not jointly in the same action." *Powell v. Thompson*, 80 Ala. 51; *Heron v. Hughes*, 25 Cal. 555.

In an action to recover for injury to lands from deposits of tailings swept down a river from different mining claims, the wrong must have been jointly done to authorize an action against several co-defendants. *Keyes v. Little York Gold etc. Co.*, 53 Cal. 724.

Where A is entitled not to all, but to a certain specific amount of the water in a stream, and several parties severally divert water from the stream, so as to diminish the flow available to A, he may join all said parties as defendants in an action for damages, because, although they did not act jointly or in concert, it is evident that only by their united action could A be wronged. *Contra* if A was entitled to all the

injury.¹ The several acts of different people, though resulting

water in the stream. *Hillman v. Newington*, 57 Cal. 56.

In an action for flowage, all the owners of the dam should be joined as defendants, and all the co-tenants of the land injured by the flowing must join as plaintiffs. *Moor v. Shaw*, 47 Me. 88.

Co-partners.—An action lies by co-partners against co-partners for falsely and fraudulently recommending an insolvent person as of good credit and responsibility whereby plaintiffs trusted him with goods which defendants at once attached. *Patten v. Gurney*, 17 Mass. 182; 9 Am. Dec. 141.

Libel.—An action for a libel will lie against two or more if it be a joint act by all. *Harris v. Huntington*, 2 Tyler (Vt.) 129; 4 Am. Dec. 728.

Sheriff and Execution Creditor.—A sheriff and an execution creditor may be jointly sued for damages for an unlawful levy. *Elder v. Frevert*, 18 Nev. 446.

Principal and Agent.—Case for deceit in the nature of a conspiracy cannot be sustained against a principal and his agent jointly, for the unauthorized fraudulent acts and representations of the agent alone. *Page v. Parker*, 40 N. H. 47.

A principal and agent jointly guilty of a conversion may be jointly sued. *Sheaver v. Evans*, 89 Ind. 400.

Principal and Surety.—In an action for damages for a wrongful attachment, the plaintiff may join as defendants the plaintiff in the attachment and the sureties on the attachment bond. *Tynberg v. Cohen*, 76 Tex. 409.

When sureties on a replevin bond connive with their principal to waste and convert the property to be replevied, they may be jointly sued for the tort. *Powell v. Thompson*, 80 Ala. 51.

Trover and Conversion.—To maintain a joint action in trover, it must appear that the specific thing sued for came into the hands of the defendants successively. *Simmons v. Spencer*, 3 McCrary (U. S.) 48.

And there must have been a joint conversion by all the defendants. *Nicoll v. Glennie*, 1 M. & S. 588; *Forbes v. Marsh*, 15 Conn. 384; *Pratt v. Brewster*, 52 Conn. 65; *White v. Demary*, 2 N. H. 546; *Wehle v. Butler*, 12 Abb. Pr., N. S. (N. Y.) 139; *Cooper v. Blair*, 14 Oregon 255.

When A fraudulently converts goods and sells them, his vendee and each successive vendee purchasing with notice of the fraudulent conversion may be jointly sued therefor. *Robertson v. Hunt*, 77 Tex. 321.

Cattle Jointly Owned.—Two or more persons owning horses severally but kept together on a farm owned by them jointly and kept under joint control, are jointly liable for injuries done by said horses jointly. *Ozbum v. Adams*, 70 Ill. 291. But see cases in next notes.

1. Joint Negligence, etc.—An action may be maintained jointly against towns for an injury resulting from the insufficiency of a bridge which both towns are under obligation to maintain. *Peckham v. Burlington, Brayt.* (Vt.) 134.

A joint action may be maintained against two parties for injuries caused by the fall of a party wall which both were bound to maintain secure. *Klander v. McGrath*, 35 Pa. St. 128.

Township and borough authorities were liable to drain a public road, the borough draining within borough limits, the township beyond borough limits. Water collected in the borough was discharged on the highway in the township and subsequently flowed on A's land, who sued jointly the borough and township. "In the case in hand the borough of Bellevue collects its water and carries it along the road until it reaches the line between the borough and the township. Then the borough discharges it upon the highway in Killbuck [township]. If the latter receives it without objection, then the township becomes responsible for its further flow. I am unable to see how the borough can be held liable to the plaintiff for water poured, not upon her land, but upon Killbuck township. But as this point was not raised it will not now be decided." *Huddleston v. West Bellevue*, 111 Pa. St. 110.

An employee may sue his employer and the owner of the premises jointly when injured in consequence of the owner's failing to provide a safe structure and the employer's ordering him into the place of danger knowing it to be dangerous when they were co-operators in the work. *Consolidated Ice Mach. Co. v. Kiefer*, 26 Ill. App. 466.

in but one injury, will not authorize their joinder as defendants;¹ nor will the joint acts of dogs, cattle or horses, if owned severally and kept separately.² Joint tortfeasors are, however, liable severally as well as jointly, and therefore may be separately sued.³

A master and servant may be joined in an action to recover damages for the negligence of a servant. *Montfort v. Hughes*, 3 E. D. Smith (N. Y.) 591; *Phelps v. Wait*, 30 N. Y. 78.

A passenger injured by a collision resulting from the concurrent negligence of two railroad corporations, may maintain a joint action against both. *Colegrove v. New York etc. R. Co.*, 20 N. Y. 492; 75 Am. Dec. 418.

1. Several Acts Resulting in One Injury.—Where a vendee purchases goods *bona fide* and ignorant of a wrongful conversion by his vendor, the owner may not sue said vendor and vendee jointly for the tort. *Larkins v. Eckwuzel*, 42 Ala. 322; 94 Am. Dec. 651.

Contra when each successive vendee purchased with notice of the fraudulent conversion. *Robertson v. Hunt*, 77 Tex. 321.

One action will not lie against several persons for speaking the same words. *Chamberlain v. White*, Cro. Jac. 647.

Directors of a corporation are liable severally for acts of misfeasance unless such acts were done by such a number of the board as are competent to transact business under the act of incorporation, and they can therefore only be jointly sued in the latter case. *Franklin F. Ins. Co. v. Jenkins*, 3 Wend. (N. Y.) 130.

A sheriff and his deputy cannot be sued jointly for a tort done by the deputy alone. *Campbell v. Phelps*, 1 Pick. (Mass.) 62; *Hoye v. Raymond*, 25 Kan. 665.

A made an excavation on land adjoining B's land which was injured thereby. C purchased A's land and continued work on the excavation. *Held*, B could not sue A and C jointly, though alleging that C had ratified A's acts. *Mexican Nat. Const. Co. v. Middlegge*, 75 Tex. 634.

Where A, B and C sell goods separately to X, Y and Z on credit, and thereafter obtain judgments for their respective claims, such judgments will not authorize them to join X, Y and Z as defendants in an action for damages caused by their conspiracy to fraudulently obtain goods on credit. *Sher-*

man v. Rothschild (Supreme Ct.), 1 N. Y. Supp. 302.

2. Dogs, etc., Severally Owned.—Two or more persons owning dogs severally are not jointly liable for acts of mischief done by such dogs jointly. *Russell v. Tomlinson*, 2 Conn. 206; *Denny v. Correll*, 9 Ind. 72; *Dyer v. Hutchins*, 87 Tenn. 198.

Two or more persons owning horses severally, but kept together on a farm owned jointly by said persons, and under joint control of all owners, are jointly liable for injury done by said horses jointly. *Ozbum v. Adams*, 70 Ill. 291.

Contra when there was no such joint contract as to keeping the stock. *Cogswell v. Murphy*, 46 Iowa 44.

3. Joint Tort Feasors Severally Liable.

—Both at common law and under the codes when several persons have been jointly concerned in the commission of a tort, they may all be charged jointly as principals, or the plaintiff may sue any one of the parties separately. *Sessions v. Johnson*, 95 U. S. 347; *Gudger v. Western etc. R. Co.*, 21 Fed. Rep. 81; *Callaghan v. Myers*, 89 Ill. 566; *Wabash etc. R. Co. v. Shacklet*, 105 Ill. 364; 44 Am. Rep. 791; *Fisher v. Cook*, 125 Ill. 280; *Jarvis v. Blennerhasset*, 18 Wend. (N. Y.) 627; *Westbrook v. Mize*, 35 Kan. 299; *Buckles v. Lambert*, 4 Metc. (Ky.) 330; *Byrne v. Riddell*, 3 La. Ann. 670; *Milford v. Holbrook*, 9 Allen (Mass.) 17; 85 Am. Dec. 735; *Maudlebaum v. Russell*, 4 Nev. 551; *Graham v. Houston*, 4 Dev. (N. Car.) 232; *Creed v. Hartman*, 29 N. Y. 591; 86 Am. Dec. 341; *North Pennsylvania R. Co. v. Mahoney*, 57 Pa. St. 187.

Assessors signing a warrant to collect a wrongful tax, are liable separately as well as jointly. *Withington v. Eveleth*, 7 Pick. (Mass.) 106.

In an action against a landlord for injuries caused by failure to repair, the tenant need not be joined, though both may be liable. *Millford v. Holbrook*, 9 Allen (Mass.) 17; 85 Am. Dec. 735.

A was injured by an elevator. He sued B who pleaded in abatement that B and C owned the building jointly, and jointly employed the servant run-

When, however, the tort arises out of contract, the joinder of defendants in an action therefor depends upon the gist of the action. If that is the breach of the contract all must be joined; if it is the tort, the defendants are liable severally as well as jointly.¹

XIII. DEFECT OF PARTIES—1. Misnomer.—The misnomer of a plaintiff is pleadable in abatement only.² Error in the Christian name of one of several plaintiffs is amendable, but the contrary

ning the elevator. *Held*, the plea presented an immaterial issue because joint tort feorsers are liable severally. *Fisher v. Cook*, 23 Ill. App. 621.

Joint trespassers may be sued separately. *McGee v. Overby*, 12 Ark. 164; *Withington v. Eveleth*, 7 Pick. (Mass.) 106.

In an action *ex delicto*, it is a rule of practice coeval with our jurisprudence that a plaintiff may recover against as many and only such defendants as he proves to be guilty. *Winslow v. Newlan*, 45 Ill. 145; *Swigert v. Graham*, 7 B. Mon. (Ky.) 661.

In tort, a plaintiff may declare against one of several defendants, although there was an order to hold to bail, and though both defendants had been taken and given bail on the arrest. *Jarvis v. Blennerhasset*, 18 Wend. (N. Y.) 627.

1. Torts Arising out of Contracts.—

"The principle running through all the cases seems to be that where the action is maintainable for the tort simply, without reference to any contract between the parties, the action is one of tort purely, although the existence of a contract may have been the occasion or furnished the opportunity for committing the tort. But where the action is not maintainable without pleading and proving the contract, where the gist of the action is the breach of the contract, either by malfeasance or non-feasance—it is, in substance, whatever may be the form of the pleading, an action on the contract, and hence all persons jointly liable must be sued. 1 Ch. Pl. 87; *Pomeroy on Remedies*, § 282; *Dacey, Parties* 437; 1 *Lindley on Partnership* 482; 2 *Collyer, Partnership*, § 732; *Powell v. Layton*, 2 W. R. 365; *Max v. Roberts*, 2 Bos. & Pul. 454; *Cabell v. Vaughan*, 1 Wm. Saunders, 288 h, 291 e, 291 f; *Weall v. King*, 12 East 452; *Bretherton v. Wood*, 3 B. & B. 54; *Walcott v. Canfield*, 3 Conn. 194." *Whittaker v. Collins*, 34 Minn. 299; 57 Am. Rep. 18, n.

An action by a teacher for wrongful ejection from a school can be brought against the trustees ejecting him without joining all who united in employing him. *Hill v. Harris*, 4 Bush (Ky.) 450.

Where a person employs a firm of physicians, he may sue all members of the firm for the negligent and unskilful treatment of one of them. And if he sue a less number a demurrer for defect of parties is well taken. *Whittaker v. Collins*, 34 Minn. 299; 57 Am. Rep. 55; *Hyme v. Erwin*, 23 S. Car. 226; 55 Am. Rep. 15.

When the firm are sued and a joint contract alleged, yet plaintiff need not prove a joint contract and may recover against any one proved liable under a statute authorizing a judgment against any defendant proved liable in case he had been sued severally. *Lower v. Franks*, 115 Ind. 334.

A rented a horse to B, who loaned it to C. C overdrove and injured the horse. *Held*, notwithstanding the contract, A could sue C for the tort. *O'Riley v. Waters*, 19 Kan. 439.

In the above case A could sue both B and C. *Banfield v. Whipple*, 10 Allen (Mass.) 27; 87 Am. Dec. 618.

A joint action will not lie to recover the purchase price of goods against the purchaser and one who has received them from the purchaser and converted them to his own use. *Parker v. Rodes*, 79 Mo. 88.

2. Misnomer—Abatement.—The misnomer of a plaintiff is pleadable only in abatement. *Mayor etc. of Stafford v. Bolton*, 1 Bos. & Pul., 40; *Baltimore etc. R. Co. v. Fifth Baptist Church*, 137 U. S. 568; *President etc. of Hanover Saving Fund Society v. Suter*, 1 Md. 502; *Bank of the Metropolis v. Orme*, 3 Gill (Md.) 443; *Proprietors of Sunapee v. Eastman*, 32 N. H. 470.

Where a number of children sue as heirs and several who were married were joined as parties plaintiff in their maiden names, the error, if any, was

has been held to be the case where there was but one plaintiff.¹ The middle name is immaterial.² A misnomer of plaintiff in one part of a pleading is no ground to reverse if the correct name appear elsewhere.³ A misnomer of a defendant is ground of demurrer;⁴ but if a defendant has been duly served and fails to set up the error in his name, he will be barred by the judgment.⁵ If defendant pleads a misnomer he must state his true name.⁶ A plea of misnomer may be demurred or replied to.⁷ It is generally provided, however, by statute that all misnomers are amendable and not a ground for plea in abatement.⁸

amendable and therefore no ground to reverse. *Waltz v. Waltz*, 84 Ind. 403.

1. **Christian Name.**—It is no ground of demurrer that the Christian name of one of several plaintiffs does not appear. In *Nelson v. Highland*, 13 Cal. 74, the court by BALDWIN, J., said: "We cannot judicially know that one of the plaintiffs had either a Christian or heathen name, or that it is necessarily untrue that he has forgotten it if he had."

It is only matter in abatement and the objection may be obviated by amendment. *Peden v. King*, 30 Ind. 181; *Hahn v. Behrman*, 73 Ind. 120. *Contra*, where there is but one plaintiff. *Thanhauser v. Sarvis*, 44 Md. 410. See *infra*, this title, *Amendment of Parties*

2. **Middle Name.**—In one case a mistake in the middle name, or its entire omission, has been held to be so immaterial as not to support a plea in abatement. *Rooks v. State*, 83 Ala. 79. See also NAME, vol. 16, p. 112.

3. **Misnomer in One Place Only.**—The misnomer of a plaintiff in one part of the petition in a probate court will not be ground to reverse if the correct name is found anywhere in the record. *Alabama Conference v. Price*, 42 Ala. 39.

4. **Misnomer of Defendant.**—A misnomer of a defendant cannot be taken advantage of by a demurrer. *Rich v. Boyer*, 39 Md. 314.

A misnomer of a corporation defendant is fatal. *King v. Randlett*, 33 Cal. 318.

The names *Rooks* and *Rux* are so nearly *idem sonans* that a variance in the pleadings in that respect will not support a plea of misnomer, and the court may so decide without hearing evidence or submitting the case to the jury. *Rooks v. State*, 83 Ala. 79.

The objection that the initial only of the first name of a defendant is set out in the summons and complaint, can only

be taken advantage of by plea in abatement. *Melvin v. Clark*, 45 Ala. 285.

5. **Waiver of Misnomer.**—If a defendant is sued under a fictitious or erroneous name, and is duly served and fails to set up this error in abatement, he will be barred by the judgment entered in the case. See *infra*, this title, *Parties Must be Real and Not Fictitious*

A misnomer of defendants is cured by executing a bond for the release of property provisionally seized by the defendants in their real name. *Dongarb v. Desangle*, 10 Rob. (La.) 430.

A plea of misnomer is too late after the expiration of the rule too plead. *Brooklyn White Lead Co. v. Pierce*, 4 Cranch (C. C.) 531.

A misnomer cannot be taken advantage of by an objection to the admission of testimony. *School Dist. v. Griner*, 8 Kan. 224.

6. **Plea of Misnomer.**—If a defendant pleads a misnomer he must set forth his true name. If he does not a binding judgment may be rendered against him in the name by which he was sued. *Louisville etc. R. Co. v. Hall*, 12 Bush (Ky.) 131.

7. **Demurrer.**—A demurrer is the proper mode of testing the sufficiency of a plea of misnomer. *Rooks v. State*, 83 Ala. 79.

The replication to a plea of misnomer that a party is as well known by one name as another, is good. *Lucas v. Farrington*, 21 Ill. 31.

8. **Statutes Construed.**—Under a statutory or code provision that no plea in abatement for a misnomer shall be allowed in any action, but the declaration and summons may be amended by inserting the true name, a plea in abatement that writ names plaintiff as Callahan and declaration as Callahill is not good. *Hoffman v. Dickinson*, 31 W. Va. 142.

2. Misjoinder.—A misjoinder of plaintiff is fatal,¹ unless amendable,² not only in actions *ex contractu* but also in actions *ex delicto*.³ A misjoinder of defendants is only pleadable in abatement,⁴ except a misjoinder of surviving co-obligors and the represent-

For statutory provisions see *infra*. this title, *Amendment of Parties*.

1. Misjoinder—Plaintiffs.—A misjoinder of plaintiff is good cause of demurrer or fatal on arrest of judgment or in error. *Brent v. Tirebaugh*, 12 B. Mon. (Ky.) 87; *Lockhart v. Power*, 2 Watts (Pa.) 371; *Doremus v. Selden*, 19 Johns. (N. Y.) 213; *Ulmer v. Cunningham*, 2 Me. 117; *Waldsmith v. Waldsmith*, 2 Ohio 156; *Robinson v. Scull*, 3 N. J. L. 383; *Snell v. De Land*, 43 Ill. 323.

A misjoinder may be taken advantage of on the coming in of an auditor's report. *Goodale v. Frost*, 59 Vt. 491.

In case of misjoinder of improper plaintiffs, as well as distinct causes of action, the declaration will be bad on general demurrer, in arrest of judgment or in error. *Governor v. Webb*, 12 Ga. 189.

A demurrer for misjoinder of a plaintiff must be presented *in limine* or it is waived. *Southern L. Ins. etc. Co. v. Lanier*, 5 Fla. 110; 58 Am. Dec. 448; *De Prez v. Everett*, 73 Tex. 431.

2. Misjoinder Amendable.—In case of a misjoinder of husband and wife as plaintiffs, such a misjoinder is not fatal, but the trial court after judgment, or the supreme court, may correct the error by striking out the wife's name. *Cruchon v. Brown*, 57 Mo. 38; *Mueller v. Kaessman*, 84 Mo. 318.

So all misjoinders of plaintiffs, when amendable, are no cause to reverse a judgment. *Blessington v. Commonwealth* (Pa. 1888), 14 Atl. Rep. 416.

Since the statutes allowing amendments by changing the parties to actions, the objection of a misjoinder of plaintiffs cannot be made for the first time after trial. *Dodge v. Wilkinson*, 3 Met. (Mass.) 292. But compare the late case of *Cofran v. Shephard*, 148 Mass. 582.

3. Actions Ex Delicto.—Misjoinder of plaintiffs, in actions *ex delicto*, is equally fatal as in actions *ex contractu*, and may be taken advantage of at the trial. Thus, where A and B sued for trespass on their goods, and it was shown at the trial that the property belonged to A alone, the plaintiffs were nonsuited. *Glover v. Hunnewell*, 6 Pick. (Mass.) 222.

So where two or more join in a *qui tam* or popular action, to recover a penalty, as there can be no joint interest in a penalty, unless expressly so given by statute. *Vinton v. Welsh*, 9 Pick. (Mass.) 87; *Hill v. Davis*, 4 Mass. 137.

So where two or more sue for an injury caused by a vexatious suit brought against them jointly, their injury being, in law, several. *Ainsworth v. Allen*, Kirby (Conn.) 145.

So where three partners sue for an illegal arrest and imprisonment of two of them, unless it appears that their joint interest was injured. *Leavet v. Sherman*, 1 Root (Conn.) 159; *Read v. Sang*, 21 Wis. 678.

Misjoinder of plaintiffs in tort, not appearing in the declaration, may be taken advantage of at the trial without pleading it in abatement. *Gerry v. Gerry*, 11 Gray (Mass.) 381.

4. Misjoinder of Defendants.—Misjoinder of defendants is matter for a dilatory plea, or plea in abatement, and must be taken advantage of at the first term of the court. *Merritt v. Bagnell*, 70 Ga. 578; *Maynard v. Ponder*, 75 Ga. 664.

Where a part of the co-partners only are sued, or other parties improperly included, it must be pleaded in abatement for non-joinder or misjoinder, and if pleaded will defeat a recovery only against those who are embraced in the action, notwithstanding the provisions of *West Virginia*, Code 1860, ch. 177. *Urton v. Hunter*, 2 W. Va. 83.

A creditor of an estate sued the administrator and the widow and heirs in the same action. The widow and heirs demurred for misjoinder, etc., and the administrator demurred separately for the same reason. The demurrer of the widow and heirs was sustained, but as to the administrator, the court held that the action was properly instituted, and it was allowed to proceed against him. *Nelson v. Hart*, 8 Ind. 293.

In case of a misjoinder of a married woman as a defendant, the court may, after judgment, amend the judgment at a subsequent term by striking out the name of the married woman and permitting the judgment to stand as against the others. *HOUGH, J.*, dissenting. *Weil v. Simmons*, 66 Mo. 617.

atives of a deceased co-obligor.¹ In some States, only the parties misjoined as defendants may allege the misjoinder.² In actions *ex delicto*, a joint liability need not be proved, and therefore a misjoinder is immaterial.³ A misjoinder can be corrected by a severance⁴ or a dismissal⁵ of the action as to the parties misjoined, and in all States now a misjoinder may by statute be corrected by amendment.⁶

3. Non-joinder.—Non-joinder of a party plaintiff is fatal,⁷ except

1. Exception.—Misjoinder of defendants, surviving co-obligor and representative of deceased co-obligor, is fatal, and may be taken advantage of in error. *Eggleston v. Buck*, 31 Ill. 254.

At least when it appears in the pleadings. *Wooster v. Northrup*, 5 Wis. 245.

It is ground for nonsuit. *Stewart v. Glenn*, 5 Wis. 14.

2. Objection Limited to Parties Misjoined.—When unnecessary and improper parties, having no interest in the suit, are joined as defendants, it is an objection of which the other defendants cannot avail themselves. *Horton v. Sledge*, 29 Ala. 478; *Bragg v. Patterson*, 85 Ala. 233; *Bloomington v. Du Bell*, 1 Idaho. 33; *Richtmyer v. Richtmyer*, 50 Barb. (N. Y.) 55; *Brownson v. Gifford*, 8 How. Pr. (N. Y.) 389; *Johnson v. Davis*, 7 Tex. 173; *Emmons v. Oldham*, 12 Tex. 18.

3. Actions Ex Delicto.—While a statutory penalty is recovered in an action of debt, the action though in form *ex contractu*, is founded in fact upon a tort, and therefore it is not necessary to establish a joint liability against all the defendants sued. Judgment may be entered against those whose liability is proved, just as if the action were in form *ex delicto*. *Chaffee v. United States*, 18 Wall. (U. S.) 516.

4. Severance.—When an action has been brought against several joint defendants, who are improperly joined, the court may grant an order for the severance of the action. *Seaman v. Slater*, 18 Fed. Rep. 485.

So where the plaintiffs are improperly joined, a severance may be ordered. *Keary v. Mutual Reserve Fund L. Assoc.*, 30 Fed. Rep. 359.

5. Dismissal.—If there is a misjoinder of parties plaintiff, it is competent for one to dismiss the action as to himself, and such dismissal would not dissolve an injunction granted or render the filing of an amended petition necessary. *Hanks v. North*, 58 Iowa 396.

6. Statutes.—See *infra*, this title, *Amendment of Parties*. Although notice of an objection on the ground of a misjoinder of defendants is required by statute to be given, yet in the absence of such notice, the plaintiff is not entitled to a verdict against all defendants, unless such verdict is warranted by the evidence. He may, however, have a verdict against such as are proved to be liable. *Patterson v. Loughridge*, 42 N. J. L. 21.

But the rule requiring the *allegata* and *probata* to agree is not affected, and if a contract is declared on as joint and proves to be several, plaintiff should be nonsuited. *Fleming v. Freese*, 26 N. J. L. 263.

A statute providing that no action shall be defeated because of a misjoinder, applies to existing actions. *Grinnell v. Marine Guano & Oil Co.*, 13 R. I., 135.

7. Non-joinder.—Non-joinder of a party plaintiff who ought to be joined is good cause of demurrer or fatal on arrest of judgment or in error, may be pleaded in abatement or is ground of nonsuit. *Scott v. Godwin*, 1 B & P. 67; *Phillips v. Pennywit*, 1 Ark. 59; *Hicks v. Branton*, 21 Ark. 186; *Beach v. Hotchkiss*, 2 Conn. 697; *Bank of Wilmington v. Sharpe*, 5 Harr. (Del.) 170; *Ellis v. Culver*, 2 Harr. (Del.) 129; *Snell v. DeLand*, 43 Ill. 323; *Dement v. Rokker*, 126 Ill. 174; *Macy v. Combs*, 15 Ind. 469; 77 Am. Dec. 103; *Bell v. Laymans*, 1 T. B. Mon. (Ky.) 39; 15 Am. Dec. 83; *Holyoke v. Lond*, 69 Me. 59; *White v. Curtis*, 35 Me. 534; *Morse v. Chase*, 4 Watts. (Pa.) 456; *Clapp v. Pawtucket Sav. Institution*, 15 R. I. 489; *Gordon v. Goodwin*, 2 Nott. & M. (S. Car.) 70; 10 Am. Dec. 573; *Coffee v. Eastland*, *Cooke* (Tenn.) 159; *Galveston etc R. Co. v. Le Gierse*, 51 Tex. 189; *Holliday v. Doggett*, 6 Pick. (Mass.) 359; *Dob v. Halsey*, 16 Johns. (N. Y.) 34; *Ehle v. Purdy*, 6 Wend. (N. Y.)

actions *ex delicto*, where it is only the subject of plea in abatement.¹ A non-joinder of a plaintiff may, however, it seems, be aided.² A non-joinder of defendants can only be taken advantage of by a plea in abatement,³ except when it is apparent in the

9; *Hall v. Adams*, 1 Aik. (Vt.) 166; *Intosh v. Long*, 2 N. J. L. 256.

The want of any proper party plaintiff need not be pleaded in abatement. is fatal under the general issue, and apparent on the face of the declaration, it will be fatal in demurrer or motion in arrest of judgment. *McLean Co. Coal Co. v. Long*, 91 Ill. 617. A non-joinder of parties plaintiff may be pleaded in abatement. *Baker Jewell*, 6 Mass. 460; 4 Am. Dec. 2.

1. Actions Ex Delicto.—Non-joinder of plaintiff in action for a tort may be pleaded in abatement. *Chicago etc. R. Co. v. Todd*, 91 Ill. 70; *Pickering v. Pickering*, 11 N. H. 141; *Davis v. Willis*, 47 Tex. 154; *Weare v. Burge*, 10 ed. (N. Car.) 169; *Clapp v. Pawcket Sav. Institution*, 15 R. I. 489. If not objected to, the plaintiff suing may recover his damages. *Van Hoozer v. Hannibal etc. R. Co.*, 70 Mo. 145. Thus in an action for injuries to crops by defendant's cattle, it is no reason to dismiss the action that a party it joined as plaintiff is interested in the crops. *Washburn v. Case*, 1 Wash. er. 253.

So in a case where the landlord entitled to a share of the crop as rented without joining the tenant, and no objection was taken, he was allowed to cover. *Van Hoozier v. Hannibal etc. Co.*, 70 Mo. 145.

2. Waiver.—A reference under a rule of court is a waiver of the non-joinder of another party as plaintiff. *Austin Kimball*, 12 Cush. (Mass.) 485.

3. Non-joinder of Defendants.—It was originally held at common law that a failure to join either plaintiffs or defendants in an action of contract, was fatal, because the contract proved at trial would not be the same as that charged in the *narr.* It was however, quite early decided that the failure to join a person liable as a defendant could not be fatal. *SERGEANT WILLIAMS*, in his note to *Cabell v. Vaughan*, 1 Saund. 291 i, thus comments on this decision: "One would have thought that the same principle would be applied to the case of persons with whom the contract was made. If the

contract be still the same, notwithstanding one of the persons who ought to be enjoined is omitted, upon what principle is it that the contract is not the same if one of the persons who ought to join be omitted? Perhaps it may be objected that by this means the plaintiff and the defendant are not upon equal terms; that in an action against one only he necessarily knows all the persons liable; but in actions by one only, the defendant may often not know, nor be able to know, what persons ought to join. But in answer to this, it should always be remembered that the rule is founded upon the supposed variance between the contract proved and the contract laid, and not upon any inconvenience or convenience of the parties."

The point here raised was subsequently discussed and the distinction between plaintiffs and defendants upheld, rather, however, upon the ground of the plaintiff's necessary knowledge of any other persons entitled to sue, than upon any variance in the contract. *Snellgrove v. Hunt*, 1 Chitty 71.

Non-joinder of a defendant in an action *ex contractu* can only be taken advantage of by a plea in abatement. *Rice v. Shute*, 5 Burr. 2611; *Cabell v. Vaughan*, 1 Saunders 291.

Metcalf v. Williams, 104 U. S. 93; *Douglas v. Chapin*, 26 Conn. 76; *Hurley v. Roche*, 6 Fla. 746; *Beasley v. Allan*, 23 Ga. 600; *Lurton v. Gilliam*, 29 Ill. 577; 33 Am. Dec. 430; *Ross v. Allen*, 67 Ill. 317; *Burgess v. Abbott*, 1 Hill (N. Y.) 476; *Hine v. Houston*, 2 Greene (Iowa) 161; *Holyoke v. Loud*, 69 Me. 59; *Winslow v. Merrill*, 11 Me. 127; *Smith v. Cooke*, 31 Md. 174; 100 Am. Dec. 58; *Porter v. Leache*, 56 Mich. 40; *Stiles v. Inman*, 55 Miss. 469; *Maurer v. Miday*, 25 Neb. 575; *McArthur v. Ladd*, 5 Ohio 514; *Means v. Milliken*, 33 Pa. St. 517; *Coffee v. Eastland*, *Cooke* (Tenn.) 159; *Davis v. Willis*, 47 Tex. 154; *Willson v. McCormick*, 86 Va. 995; *Nash v. Skinner*, 12 Vt. 219; 36 Am. Dec. 338; *Hicks v. Cram*, 17 Vt. 449.

After pleading the general issue, no objection can be taken by the defendant to the non-joinder of a joint

declaration, when it has been also held to be good on demurrer, or motion to arrest or reverse the judgment, but not a ground of nonsuit.¹ In an action *ex delicto*, a non-joinder of defendants

promisor. *Reed v. Nebson*, 39 Me. 585; *Willson v. McCormick*, 86 Va. 995.

The non-joinder of one of two makers of a joint note is ground of demurrer, but is not available in bar, or defense to the action against the other. *Roop v. Clark*, 4 Greene (Iowa) 252.

In *New York*, after filing a declaration in a suit in the recorder's court of Buffalo, and serving it on one of the defendants, the plaintiff cannot treat the suit as a nullity because other defendants, not in the jurisdiction, have not been served. *White v. Smith*, 4 Hill (N. Y.) 166.

And at the trial the defendant sued cannot, after pleading the general issue, set up the non-joinder by alleging a variance between the *allegata* and *probata*, though it appears that plaintiffs had knowledge that the liability was joint before they brought the action. *Willson v. McCormick*, 86 Va. 995.

When an action of debt is brought on a joint judgment, and two of the parties only are served, the sheriff returning *non est inventus* as to the rest of the defendants, the court cannot allow the name of one of the defendants who was sued and served, to be stricken from the case; and it may be taken advantage of by plea of non-joinder, filed *instantly* by the other defendant. *Howell v. Shands*, 35 Ga. 66.

Where, in assumpsit, the defendant pleads, in abatement, that there is another joint promisor not named in the writ, and the plaintiff replies that the promise was made by the defendant alone, the burden of proof is upon the defendant. *Jewett v. Davis*, 6 N. H. 518.

1. Non-joinder Apparent.—When apparent in the declaration it is also good in demurrer, and a ground to arrest or reverse the judgment. *Bragg v. Wetzel*, 5 Blackf. (Ind.) 95; *State v. Chandler*, 79 Me. 172; *Bowie v. Neale*, 41 Md. 124; *Smith v. Miller*, 49 N. J. L. 521; *Needham v. Heath*, 17 Vt. 223.

But is not a ground of nonsuit because the obligation is none the less defendant's obligation because another was jointly bound with them. *Whelpdale's Case*, 5 Co. 119; *South v. Tanner*, 2 Taunt. 254; *Richmond v. Toothaker*, 69 Me. 451; *Neally v. Moulton*,

12 N. H. 485; *Means v. Milliken*, 33 Pa. St. 517.

A writ in assumpsit described the party defendant as "C & Co., a firm doing business in H, and consisting of C," and the declaration throughout used the term "defendants." Service was made on C alone, who alone appeared and made defense. In support of the declaration the plaintiff gave in evidence a contract signed "C & Co." On the trial, C requested the court to charge the jury that there could be no recovery against him alone, and the court refusing, and a verdict being rendered for the plaintiff, he moved in arrest of judgment on the same ground. *Held*, that as the writ stated explicitly that the firm consisted of C, it did not appear upon its face that there were other partners who should have been joined, and that therefore advantage of the non-joinder, if there were in fact other partners, could have been taken only by plea in abatement. *Douglas v. Chapin*, 26 Conn. 76.

Where the declaration discloses that there is another person who should be made a party, if living, but does not show whether he is alive or dead, the non-joinder may be taken advantage of by special demurrer. *Burgess v. Abbott*, 6 Hill (N. Y.) 135; 1 Hill (N. Y.) 477.

In an action against two of four joint and several promisors, if it is stated in the writ that four promised, it is material also to allege that the other two are dead, or otherwise incapable of being sued; or it will be bad, and may be reversed on error. *Harwood v. Roberts*, 5 Me. 441.

An action against one was brought on a judgment against two, without the suggestion of the death of one of the parties; but the defendant could not take advantage thereof under the plea of *nul tiel record*. *Gage v. Sartor*, 2 Treadw. Const. (S. Car.) 247.

Where a non-joinder of a defendant is apparent on the face of the declaration, advantage thereof must be taken by demurrer, or it is waived. *Lewis v. State*, 65 Miss. 648.

The omission of an indispensable party is an error, for which a decree may be reversed, although the objection is taken for the first time in the appel-

is no defense.¹ The defect of non-joinder of parties either plaintiff or defendant may now be amended generally by statute,² and in addition there are many special statutory provisions.³

4. Code Provisions as to Defect of Parties.—In States practising under codes, it is expressly provided that the defendant may demur if it appear on the face of the complaint that plaintiff has no capacity to sue or that there is a defect of parties plaintiff or defendant, and when such defect is not apparent the objection may be taken by answer, and the objection is waived if not taken either by demurrer or answer.⁴ The failure to take the objection

late court. *Gould v. Hays*, 19 Ala. 438.

An action for flowage is not an action at law, but *sui generis*, resembling more a process in equity; and if all the owners of the dam occasioning the flowage are not joined in the complaint, the process should not abate, but the complaint be amended and the other owners be summoned in. *Moor v. Shaw*, 47 Me. 88. See *Massachusetts* Pub. Stat., 1882, p. 1091, § 39.

1. Actions Ex Delicto.—In an action of tort the non-joinder of defendants is no defense. *Milford v. Holbrook*, 9 Allen (Mass.) 17; 85 Am. Dec. 735. *Graham v. Houston*, 4 Dev. (N. Car.) 232; *Byrne v. Riddell*, 3 La. Ann., 670.

2. See *infra*, this title, *Amendment of Parties*.

3. Statutes—Maryland.—The provision by statute for adding new parties plaintiff does not affect the common law rule applicable to the case of the non-joinder of a plaintiff. Such a non-joinder is fatal unless amended. *Smith v. Crichton*, 33 Md. 103.

New Jersey.—In *New Jersey* by statute a defendant must give five days' written notice of his intention to object to the non-joinder of a party plaintiff. If he fails to give such notice he is precluded from making the objection. *Brown v. Fitch*, 33 N. J. L. 418; *Smith v. Miller*, 49 N. J. L. 521.

Mississippi.—The non-joinder or misjoinder of a plaintiff or defendant shall not be objected to at the trial unless written notice has been given of the intended objection; and upon such notice being given, the court may at the trial, order that parties be stricken out or added. Code of *Mississippi* 1880, §§ 1511, 1512. See *Stauffer v. Garrison*, 61 Miss. 67; *Walker v. Hall*, 66 Miss. 390.

Connecticut.—"In all civil actions, where a cause of action shall be sus-

tained in favor or against only a part of the parties thereto, judgment may be rendered in favor of or against such parties only." *Connecticut* Gen. Stat. (1888), § 1108.

Texas.—The remedy for misjoinder of parties' plaintiff apparent in the petition is by demurrer. *Birmingham v. Griffin*, 42 Tex. 147.

The remedy for defect of parties in *Texas* is by answer. *Sayles' Civil Stat.*, art. 1264. See *Fears v. Albra*, 69 Tex. 437.

4. Code Provisions.—Most of the codes contain provisions that "the defendant may demur to the complaint (petition) when it shall appear on the face thereof," *inter alia*, "that the plaintiff has not legal capacity to sue or that there is a defect of parties plaintiff or defendant," and that "when such error does not appear upon the face of the complaint (petition) the objection may be taken by answer," and that "if no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same." *Arizona* Rev. Stat., 1887, § 735; *Samainego v. Stiles* (Ariz.), 20 Pac. Rep. 607; *Arkansas* Dig. of Stat., 1884, §§ 5028, 5031; *California*, Deering's C. & St., vol. 3, §§ 430-434; *Idaho*, Rev. Stat. 1887, §§ 4174-4178; *Indiana*, Rev. Stat. 1881, §§ 339-343; *Iowa*, McClain's Annot. Code, 1888, §§ 3854-3856; *Kansas*, Gen. Stat. 1889, § 4172, 4174; *Kentucky*, Code 1888, § 92, 118; *Missouri*, Rev. Stat. 1889, § 2043, 2047; *Montana*, Comp. Stat. 1887, p. 81, §§ 87-88; *Nebraska*, Comp. Stat. 1887, p. 867, §§ 94-96; *Nevada*, Gen. Stat. 1885, §§ 3062, 3066-3067; *New York*, Annot. Code, 1889, §§ 488, 498-499; *North Carolina*, Code 1883, §§ 239, 241, 242; *Ohio*, Rev. Stat. 1890, §§ 5062-5064; *Oregon*, Hill's Annot. Code 1887, § 67, 70, 71; *South Carolina*, Code, §§ 165-169; *Utah*, Comp. Laws 1888, vol. 2, pp. 244-45, §§ 3221-3225; *Washington*, Code 1881, §§

in the manner provided by the codes has been frequently held to amount to a waiver,¹ although the court may of its own motion order necessary parties to be brought in,² and should never dismiss

77-81; *Wisconsin*, Annot. Stat. (S. & B.), §§ 2649-2654, *Wyoming*, Rev. Stat. 1887, §§ 2449-2451.

The rule as to parties in actions, under the code, in the nature of suits in equity, and which, under the former system, would have taken the form of suits in chancery, is the same, substantially as before the code; and a suit which would have been defective in chancery for want of proper parties, would be defective as a civil action under the code. *Hubbard v. Eames*, 22 Barb. (N. Y.) 597.

1. Waiver.—It has been frequently decided that a failure to make the objection in the manner provided by the codes is a waiver thereof. *Samainego v. Stiles* (Ariz. 1889), 20 Pac. Rep. 607; *Gillam v. Sigman*, 29 Cal. 637; *Hastings v. Stark*, 36 Cal. 122; *Trenor v. Central Pac. R. Co.*, 50 Cal. 222; *Heinlen v. Heilbron*, 71 Cal. 557, *Womack v. McAhven*, 9 Ind. 6; *Jones v. Ahrens*, 116 Ind. 490; *Bouton v. Orr*, 51 Iowa 473; *Coulson v. Wing*, 42 Kan. 507; *Union Pac. R. Co. v. Kindred*, 43 Kan. 134; *Gaither v. O'Doherty* (Ky. 1889), 12 S. W. Rep. 306; *McRoberts v. Southern Minn. R. Co.*, 18 Minn. 108, 110, *Sandwich Mfg. Co. v. Kimberly*, 37 Minn. 214 *Rogers v. Tucker*, 94 Mo. 346; *Benne v. Schnacko*, 100 Mo. 250; *Petree v. Lansing*, 66 Barb. (N. Y.) 357; *Persch v. Simmons* (Supreme Ct.), 3 N. Y. Supp. 783, *Decker v. Decker*, 108 N. Y. 128; *Reed v. Hayt* 109 N. Y. 659; *Leak v. Covington*, 99 N. Car. 559.

Therefore if the objection is apparent on the face of the complaint, the plaintiff must demur. He cannot set up the defect by answer. *Ward v. Deane* (Supreme Ct.), 10 N. Y. Supp. 421; *Sullivan v. New York etc. Cement Co.*, 119 N. Y. 348.

The provision that objections for want of parties, not made by demurrer, are waived, applies where the service is constructive only. *Gill v. Johnson*, 1 Metc. (Ky.) 649.

The objection that an action on behalf of a voluntary association to recover a legacy payable to its treasurer, was brought in the name of the president instead of the treasurer, need not be taken by demurrer or answer, but may be taken on the trial on the ground that the facts do not constitute a cause of

action. *DeWitt v. Chandler*, 11 Abb. Pr. (N. Y.) 459.

An objection that the plaintiff does not sue on behalf of others as well as of himself, is not a mere objection for defect of parties. *Greene v. Breck*, 10 Abb. Pr. (N. Y.) 42.

When there is a non-joinder of parties defendant, and the defect does not appear on the face of the complaint, the objection must be taken by answer or it is waived. It cannot be taken by a motion for a nonsuit. *Parisich v. Bean*, 48 Cal. 364.

The objection of non-joinder of parties plaintiff cannot be raised on a motion for nonsuit. *Baldwin v. Second St. Cable R. Co.*, 77 Cal. 390.

When from the evidence it appears that a party not joined was a necessary party plaintiff, the defect may be taken advantage of by a motion for a nonsuit. If overruled it will be considered on appeal. *M'Gilvery v. Moorhead*, 3 Cal. 267; *McDonald v. Bear River etc. Water etc. Co.*, 13 Cal. 220. *Macy v. Combs*, 15 Ind. 469; 77 Am. Dec. 103.

A non-joinder which could have been set up by demurrer or answer may not be set up in error. *Beard v. Knox*, 5 Cal. 252; 63 Am. Dec. 125; *Tissot v. Throckmorton*, 6 Cal. 471; *Dunn v. Tozer*, 10 Cal. 167.

Nor can any defect of parties. *Collins v. Lightle*, 50 Ark. 97.

Misjoinder of plaintiffs cannot be excepted to in the first instance on appeal. *Allen v. Buffalo*, 38 N. Y. 280; *Rates v. James*, 3 Duer (N. Y.) 45.

The code does not allow the defendant to object to a non-joinder of a plaintiff, unless he pleads or gives notice of the defect. *Abbe v. Clark*, 31 Barb. (N. Y.) 238.

A judgment recovered in ejectment against a portion of several co-tenants will not be reversed because all the co-tenants are not made parties defendant. *Colman v. Clements*, 23 Cal. 245.

A non-joinder of a defendant whose interest in suit was unknown to plaintiff until suit is tried, is not ground for objection in error. *Tomlinson v. Spencer*, 5 Cal. 291.

2. Court May Bring in Parties.—The omission of a defendant to set up a defect of parties in the way directed by the code, does not affect the power of

an action for defect of parties.¹ A demurrer is only proper when the defect is apparent.² The code provision only applies to cases of non-joinder, and the remedy for a misjoinder, except under express code provisions, is by a motion to strike out,³ or perhaps a

the court under a code provision, from directing other parties to be brought in, if it finds that it cannot completely determine the case in their absence. *Grain v. Aldrich*, 38 Cal. 514; 99 Am. Dec. 423.

If, however, it does not appear that the rights of all parties could be definitely determined without bringing in the parties not joined, the non-joinder will not defeat the plaintiff's right to recover. *Reed v. Hoyt*, 109 N. Y. 659.

On appeal it was assigned for error that A was a necessary party plaintiff, and it was argued that notwithstanding the waiver through failure to allege the non-joinder in the court below, it was the duty of the trial court to have brought in A under the code provision requiring such action when the matter could not be completely determined without their presence. *Held*, that this last provision of the code required an enquiry whether the rights of the absent party will be prejudiced, and not whether the rights of the party before the court, who has waived the objection, will be prejudiced, and therefore if A was not prejudiced the court could not reverse though the rights of the appellant were prejudiced. *Sheldon v. Wood*, 2 Bosw. (N. Y.) 267.

1. Dismissal of Action.—Under the code practice a motion to dismiss the action for defect of parties is not allowable. The court should not dismiss the action for such defect, but order that the necessary parties be brought in. *Butler v. Lawson*, 72 Mo. 227.

Where a demurrer is filed alleging a non-joinder or a misjoinder apparent in the complaint, and the demurrer is overruled, the court may not, if subsequently convinced of its error, dismiss the action on that account. The proper practice would be to first set aside the order overruling the demurrer and then permit the demurrer to be again presented for consideration. *Tennant v. Pfister*, 45 Cal. 270.

Error in overruling a demurrer to a complaint because of defect of parties may be cured by a subsequent amendment properly allowed, making such persons parties. *Morningstar v. Cunningham*, 110 Ind. 328; 59 Am. Rep. 211.

2. Demurrer.—*Waters v. Dumas*, 17 Cal. 685.

A demurrer for defect of parties held properly sustained, where the complaint shows on its face that a third party named owns the claim the payment of which by the defendant the plaintiff seeks to enjoin. *Graham v. Minneapolis*, 40 Minn. 436.

Where a complaint against A and B, trading as A and Co., alleged that there were other individuals comprising the firm of A and Co. other than A and B, on demurrer, *held*, that the other individuals are necessary parties, and demurrer sustained. *Green v. Lippincott*, 53 How. Pr. (N. Y.) 33.

But where a statute requires that a corporation should have three trustees, it has been held that an allegation in a complaint that the corporation defendant is duly organized and existing does not include an allegation as to the existence of any particular number of trustees, and therefore if only two are sued, the defect must be alleged by answer and not by demurrer. *Botsford v. Dodge*, 65 How. Pr. (N. Y.) 145.

So in any case where the defect is not apparent in the complaint it must be taken advantage of by answer. *Morningstar v. Cunningham*, 110 Ind. 328; 59 Am. Rep. 211.

3. Misjoinder.—Under the codes the words "defect parties" have been construed to apply only to a non-joinder of parties who should have been joined as plaintiff or defendant, and therefore it has been held that a misjoinder is no ground for demurrer, arrest of judgment or error. It may be set up in answer or corrected by motion to strike out. *Little Rock etc. R. Co. v. Dyer*, 35 Ark. 360; *Oliphint v. Mansfield*, 36 Ark. 191; *Fry v. Street*, 37 Ark. 39; *Long v. DeBevois*, 31 Ark. 480; *Yonley v. Thompson*, 30 Ark. 399; *Collins v. Lightle*, 50 Ark. 97; *Bennett v. Preston*, 17 Ind. 291; *Hill v. Marsh*, 46 Ind. 218; *Grayson v. Willoughby*, 78 Iowa 83; *Miller v. Keokuk etc. R. Co.*, 63 Iowa 680; *McKee v. Eaton*, 26 Kan. 226; *Yates v. Walker*, 1 Duv. (Ky.) 84; *Dean v. English*, 18 B. Mon. (Ky.) 132; *Matney v. Gregg Brothers Grain Co.*, 19 Mo. App. 107; *Davey v. Dakota Co.*, 19 Neb. 721; *Richtmyer v. Richtmyer*,

demurrer that the complaint does not state facts sufficient to constitute a cause of action.¹ There is, however, a strong tendency apparent in the code States to consider a misjoinder or non-joinder of parties immaterial unless some one is prejudiced thereby.² When a defendant desires to object on the ground of defect of parties, the demurrer or allegation in the answer must refer directly

50 Barb. (N. Y.) 55; *Churchill v. Trapp*, 3 Abb. Pr. (N. Y.) 306; *Palmer v. Davis*, 28 N. Y. 245; *Neil v. Board of Trustees*, 31 Ohio St. 15; *Lowry v. Jackson*, 27 S. Car. 318; *Great Western Compound Co. v. Ætna Ins. Co.*, 40 Wis. 373; *Murray v. McGarigle*, 69 Wis. 483.

Contra under express provisions of Code, *California*, Deering's C. & Lb., vol. 3, § 430; *New York*, Annot. Code, 1889, § 488; *Utah*, Comp. Laws, 1888, vol. 2, p. 244, § 3221; *Wisconsin* Rev. Stat., 1887, § 2449. And see *Goodnight v. Goar*, 30 Ind. 418.

1. **Demurrer.**—Where too many parties are brought in, a demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action, in favor of or against the improper parties, would be the proper remedy. *Cohen v. Ottenheimer*, 13 Oregon 220.

2. **Misjoinder Immaterial.**—Under the code practice the failure to join a proper party is an important matter, but the joinder of unnecessary parties, either as plaintiffs or defendants, is immaterial, save only as it may affect the question of costs, which may be adjusted. *Rowland v. Gardner*, 69 N. Car. 53; *Buie v. Mechanics' Bldg. & L. Assoc.*, 74 N. Car. 117; *Burns v. Ashworth*, 72 N. Car. 496.

A misjoinder of parties plaintiff is not a ground for dismissal of the complaint as to all the plaintiffs, if either has shown that he has a good cause of action. In such case the motion must be for a dismissal of the complaint of the plaintiff in whom no right of action appears. *Simar v. Canaday*, 53 N. Y. 298; 13 Am. Rep. 523; *Arts v. Guthrie*, 75 Iowa 674.

Nor will the misjoinder of a party plaintiff affect the rights of the real party in interest. *Beckwith v. Seborn*, 31 W. Va. 1. Nor can a misjoinder be taken advantage of by a demurrer to the evidence. *Pettingill v. Jones*, 21 Mo. App. 210.

Nor by objecting to the introduction of evidence. *Matney v. Gregg Bros. Grain Co.*, 19 Mo. App. 107.

Therefore an instruction that if the jury find that one of two plaintiffs had no interest in the suit, neither of them can recover, is erroneous. *Pettingill v. Jones*, 21 Mo. App. 210.

Under the codes a request to instruct the jury that the action could not be maintained jointly by the plaintiff is improper. The misjoinder must be taken advantage of in the manner provided in the codes. *Lass v. Eisleben*, 50 Mo. 122.

An issue as to a misjoinder is immaterial, when a nonsuit is granted as to defendants, alleged to be improperly joined. *Heinlen v. Heilbron*, 71 Cal. 557.

When unnecessary and improper parties having no interest in a suit, are joined as defendants, it is an objection of which the other defendants cannot avail themselves. *Bloomington v. Du Bell*, 1 Idaho 33; *Richtmyer v. Richtmyer*, 56 Barb. (N. Y.) 55; *Brownson v. Gifford*, 8 How. Pr. (N. Y.) 389; *Johnson v. Davis*, 7 Tex. 173; *Emmons v. Oldham*, 12 Tex. 18.

No one can demur for defect of parties to an action, unless his own interest requires that the defect should be cured. *Newbould v. Warrin*, 14 Abb. Pr. (N. Y.) 80; *Stockwell v. Wager*, 30 How. Pr. (N. Y.) 271.

A and B had judgments against C. On execution land was sold and purchased by A and B. A and B joined in an action to recover the same. *Held*, no misjoinder, "although the plaintiffs might have sued severally, yet as their interests are to a certain extent common, and they seek a common relief, they were at liberty to join. The joinder does not prejudice the defendants." *Wall v. Faisley*, 73 N. Car. 464.

When defendants improperly joined disclaim all interest in the subject matter of the litigation, and their disclaimer is acted upon by the court and accepted by the plaintiffs, the overruling a demurrer because of the misjoinder will not be cause for reversal. *Pfister v. Dasey*, 65 Cal. 403.

And a nonsuit will not be entered as to such of the plaintiffs as show them-

to the defect,¹ and the defendant must give the plaintiff a better writ,² and the plaintiff may thereupon bring in the necessary parties,³ or accept the issue raised by the demurrer or answer.⁴ When a judgment is entered for plaintiffs on a demurrer for defect of parties the defendant may appeal.⁵ No party causing a defect of parties is entitled to object thereto.⁶ If a defect of par-

ties is entitled to recover. *Rowe v. Weigalluppi*, 21 Cal. 633.

Where, from all that is shown by the record, it appears that the plaintiff is the only person interested in the subject of the action, the court will not entertain the objection that other persons who had been associated with him ought to sue. *Salmon v. Hoffman*, 2 Cal. 138; 5 Am. Dec. 322.

1. Form of Objection.—The demurrer allegation in the answer must refer directly to the defect in the parties. Thus in forcible entry and detainer a denial in the answer that plaintiffs were in possession does not present the issue of a misjoinder. *Gillam v. Sigman*, 29 Cal. 637.

A demurrer that plaintiff had no legal capacity to act as relator and that certain other people were the only proper relators, presents the issue of defect of parties. *Maxedon v. State*, 24 Ind. 370.

A demurrer that the complaint does not state facts sufficient to constitute a cause of action does not present the issue of a non-joinder. *Grain v. Aldrich*, 38 Cal. 514; 99 Am. Dec. 413; *Tennant v. Pfister*, 51 Cal. 511; *Whipperman v. Dunn*, 124 Ind. 349.

But it does present the issue that the plaintiff is not the party entitled to sue. *People v. Huggin*, 57 Cal. 579.

And also the issue of a misjoinder. *Goodnight v. Goar*, 30 Ind. 418; *Tellams v. Switzer*, 24 S. Car. 39.

But see *Whipperman v. Dunn*, 124 Ind. 349.

2. Defendant Must Give Plaintiff a Better Writ.—The rule of the old system of pleading that a defendant who sets up a non-joinder of parties defendant must give the plaintiff a better writ is in force under the codes, and therefore a demurrer should be disregarded unless it specifies in what the defect consists, and to which of the defendants it relates. *Irvine v. Wood*, 7 Colo. 477; *Gaines v. Walker*, 6 Ind. 361; *Fultz v. Walters*, 2 Mont. 65; *Skinner v. Stuart*, 13 Abb. Pr. (N. Y.) 442; *Fowler v. Kennedy*, 2 Abb. Pr. (N. Y.) 347.

A demurrer that a firm should be made a party defendant is sufficient, although the Christian names of the members of the firm are not stated in the demurrer, if their names appear in the complaint. *Durham v. Bischof*, 47 Ind. 211.

3. Defect of Parties Corrected.—A defect of parties may be corrected after demurrer by bringing in a new party as a co-defendant. *Lewin v. Wright*, 31 Hun (N. Y.) 327.

4. Issue Tendered by an Objection for Defect of Parties.—An answer alleging a defect of parties plaintiff is in the nature of a plea in abatement, and tenders an issue to be tried; it does not authorize a dismissal upon a refusal to make new parties. *McCormick v. Blossom*, 40 Iowa 256.

When, however, a defendant sets up the non-joinder of a party plaintiff, and alleges that the party not joined was alive when the suit was brought, the plaintiff may prove that the party was dead at that time, if by such death he became authorized to sue alone on the cause of action. *Groot v. Agens*, 107 N. Y. 633.

A demurrer for a defect of parties does not question the sufficiency of the complaint to state a cause of action in favor of all the persons who are joined as plaintiffs. *Evans v. Schafer*, 119 Ind. 49.

5. Appeal.—When under the provisions of a code, a demurrer lies for non-joinder of parties necessary to the action, and such demurrer is made, and judgment for plaintiffs given thereon, the defendants may appeal, and if it appear that a substantial right is affected by the omission to join such party the judgment will be reversed. *Burgoyne v. Perry*, 3 Cal. 50.

In like manner, when a demurrer on the ground of misjoinder is overruled, and at trial evidence is excluded because of such misjoinder, and on appeal the supreme court reverses on the ground that the evidence should have been admitted, this is not a decision that there is not such a misjoinder. *Tennant v. Pfister*, 51 Cal. 511.

6. Party Causing Defect Cannot Allege

ties is occasioned by matters which have occurred pending the action, it must be set up by a supplemental answer or it is waived.¹

XIV. AMENDMENT OF PARTIES.—Whatever right may have existed at common law to amend by adding or striking out parties to actions,² the power of the court to permit such amendments is now in all States recognized and regulated by statutory³ or

It.—When a plaintiff moves to amend by striking out a party improperly joined, and adding another in his place, and on defendants' objection the motion is denied, the ruling of the court will be considered as made at defendant's instance, and he cannot subsequently complain of a misjoinder or non-joinder of such parties. *Fulton v. Cox*, 40 Cal. 101.

When the defendant municipal corporation has joined improperly several parties in an assessment, it cannot allege a misjoinder if they unite in an appeal therefrom. *Thompson v. Keokuk*, 61 Iowa 187.

Where, on objection of defendant, plaintiff amended by omitting a party plaintiff or defendant, the defendant was not allowed to assign for error the non-joinder of such party plaintiff. *Powell v. Ross*, 4 Cal. 197; *James v. Leport*, 19 Nev. 174.

The misjoinder, as a party plaintiff in an action of trespass *quare clausum*, of one who has no cause of action, will defeat the suit, although he is joined by amendment upon the defendant's pleading his non-joinder in abatement. *May v. Slade*, 24 Tex. 205.

1. Defect Occurring Pendente Lite.—The objection, if it be one, that there is a misjoinder of parties plaintiff, owing to matters which have occurred pending the action, must be taken by a supplemental answer or it is waived. *Calderwood v. Pyser*, 31 Cal. 333.

2. Amendments at Common Law.—By the common law, amendments by striking out the names of existing plaintiffs or defendants, or by inserting those of new and additional ones, were not allowable in actions of assumpsit or contract. *Ayer v. Gleason*, 60 Me. 207; *Roach v. Randall*, 45 Me. 438; *Winslow v. Merrill*, 11 Me. 127; *Redington v. Farrar*, 5 Me. 379; *Wilson v. Wallace*, 8 S. & R. (Pa.) 53; *McWilliams v. Anderson*, 68 Ga. 772.

The doctrine of amendments at common law independent of any statutes, seems based upon the discretion of the court, and applications for amendments are in nature of appeals to the equitable

side of the court. Parties defendant may be stricken out even at common law at any time prior to judgment. *Stewart v. Bennett*, 1 Fla. 437.

3. Statutory Provisions.—Alabama.—“The courts . . . must permit the amendment of the complaint by striking out or adding new parties plaintiff, or by striking out or adding new parties defendant, upon such terms and conditions as the justice of the case may require.” Code of *Alabama*, 1886, § 2833.

Any mistake in the Christian or surname of either party . . . in the summons, complaint or other pleading, the same being right in any part of the record or proceedings, must, after judgment, be considered as having been amended whilst the cause was in progress. Code of *Alabama*, 1886, § 2834.

Arizona.—Additional parties may be brought in by proper process either by plaintiff or defendant upon such terms as the court may prescribe. *Arizona*, Rev. Stat., 1887, § 689.

Connecticut.—“No action shall be defeated by the non-joinder or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the court, at any stage of the cause, as it may deem the interests of justice to require.” *Connecticut* Gen. Stat. 1888, § 888.

Florida.—Parties plaintiff may be added or stricken out, but only with their consent. Parties defendant may be stricken out at the discretion of the court, and added also, provided they are either duly notified or consent. The provisions are quite lengthy. *McClellan's Digest*, 1881, pp. 827–829, §§ 65–69.

Georgia.—“No amendment adding . . . new and distinct parties, shall be allowed unless expressly provided for by law.” *Georgia*, Code 1882, § 3480.

Some of the parties plaintiff or defendant may be stricken out. *Georgia*, Code 1882, §§ 3485–86.

“All misnomers, whether in the Christian or surname, made in writs, petitions, bills or other judicial proceedings on the civil side of the court, shall,

code¹ provisions. Under these code and statutory provisions the names of parties plaintiff or defendant may be added or stricken

on motion, be amended and corrected *instantly*, without working unnecessary delay to the party making the same." *Georgia Code*, 1882, § 3483.

Illinois.—"At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant," etc.

"In case another defendant is added, summons may issue against such defendant, returnable to the next term of the court, and he may be proceeded against in the same manner as if he had been made a defendant at the commencement of the suit." *Illinois*, Rev. Stat. 1889, (Hurd), p. 1014, §§ 24, 25.

New defendants may be added in justice's court and names of parties amended. *Illinois*, Rev. Stat. 1889 (Hurd), p. 862 §§ 37, 38.

Misnomers may be corrected under these statutes. *Scheel v. Eidman*, 77 Ill. 301.

Louisiana.—New parties may be made at any time pending the trial of a case, provided the trial is not delayed or the issue changed. *Guilbean v. Melancon*, 28 La Ann. 627.

Maine.—"In all civil actions the writ may be amended by inserting additional plaintiffs, or by striking out one or more plaintiffs when there are two or more, and the court may impose terms.

"When there are two or more defendants, the writ may be amended by striking out one or more of them, on payment of costs to him to that time. A writ founded on contract, express or implied, may be amended by inserting additional defendants; and the court may order service to be made on them, and their property to be attached, as in case of original writs; and on return of due service, they become parties to the suit, but are not liable to costs before service." *Maine*, Rev. Stat. 1881, p. 696, §§ 11, 13.

Maryland.—In *Maryland*, a non-joinder or misjoinder of plaintiffs or defendant may be amended at any time before retiring to make up verdict or judgment on demurrer. If a new defendant is brought in, he must be summoned and given time to plead. Entire new parties plaintiff or defendant cannot be introduced. These provisions are not

to affect any plea of limitations, in abatement, to the jurisdiction or other dilatory plea. *Maryland*, Pub. Gen. Laws, p. 1120-31, §§ 37-44.

"No writ or action shall abate because of the misnomer of any plaintiff or defendant therein, but the court," on certain proof, "that by mistake the plaintiff has sued in a wrong name, or that the party summoned in virtue of said writ or action is in fact the party intended to be sued, . . . may, at any time before judgment," direct amendments. *Maryland*, Pub. Gen. Laws, p. 1119, § 36.

Massachusetts.—At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant. *Massachusetts*, Pub. Stat. 1882, p. 970, § 42.

Mississippi.—Parties may be stricken out and new parties added by amendment. All errors and mistakes in the name of a party may be corrected by amendment. *Mississippi*, Code 1880, §§ 1511, 1512, 1581.

New Hampshire.—Parties plaintiff or defendant may be added or stricken out. *Gen Laws*, 1878, p. 527, §§ 16, 17.

New Jersey.—*New Jersey* Revision, 1877, p. 853, §§ 37-40.

Pennsylvania.—Mistakes in names may be amended and new parties may be added or parties may be stricken out. *Brightly Dig.*, p. 93, §§ 2-4.

Tennessee.—New parties may be added or stricken out. *Tennessee*, Code 1884, §§ 3495, 3580.

Texas.—New parties may be added. *Sayles' Civil Stat.*, art. 1209. Parties may be stricken out. *Andrus v. Pettus*, 36 Tex. 108.

West Virginia.—Misnomers corrected by amendment. *West Virginia*, Code 1887, § 14.

1. Code Provisions.—"The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party or by correcting a mistake in the name of a party." *California*, *Deering's C. & St.*, vol. 3, § 473; *Colorado* Code Civ. Proc., § 78; *Dakota*, *Comp. Laws*, 1887, § 4938; *Idaho*, Rev.

out whenever necessary to secure justice,¹ not only before the trial, but also at the trial,²

Stat. 1887, § 4229; *Indiana*, Rev. Stat. 1881, § 396; *Iowa*, McClain's Annot. Code, 1888, § 3895; *Kansas*, Gen. Stat. 1889, § 4222; *Kentucky* Code, 1888, § 134; *Missouri*, Rev. Stat. 1889, § 2098; *Montana*, Comp. Stat. 1887, p. 88, § 116; *Nebraska*, Comp. Stat. 1889, p. 872, § 144; *Nevada*, Gen. Stat. 1885, § 3090; *New York*, Annot. Code, 1889; *North Carolina* Code, 1883, § 273; *Ohio* Rev. Stat. 1890, § 5114; *Oregon*, Hill's Annot. Laws, 1887, § 101; *South Carolina* Code, § 194; *Utah*, Comp. Laws, 1888, vol. 2, p. 352, § 3256; *Virginia* Code, 1887, §§ 3258, 3263; *Washington* Code, 1881, § 109; *Wisconsin*, Annot. Stat. (S. & B.), § 2830; *Wyoming*, Rev. Stat. 1887, § 2501.

1. **Statutes Construed.**—The district court may at any time strike out or add the names of any parties necessary to secure justice to all. *Oro Fino etc. Co. v. Cullen*, 1 Idaho T. 127.

Under the codes a co-defendant may be added during the trial, and a judgment against him will be sustained if allegations supporting it appear in the record. *Noonan v. Caledonia Gold Min. Co.*, 121 U. S. 393.

Under the statutes a plaintiff may amend his writ by adding new plaintiffs or defendants whenever his action would fail without such new parties, in whatever form the objection might be liable to be taken. *Pitkin v. Roby*, 43 N. H. 138; *Richter v. Cummings*, 60 Pa. St. 441.

It is necessary, however, that no defenses are thereby taken away, which could be set up in a new action commenced when the amendment was asked for. *Kron v. Smith*, 96 N. Car. 389.

Unless by consent of the parties, only such new parties can regularly be admitted, by amendment to the action as are necessary to its proper determination; but, where defendants do not object to such amendment introducing new plaintiffs, their assent is to be taken as implied. *Richards v. Smith*, 98 N. Car. 509; *Lee v. Eure*, 92 N. Car. 283. A person entitled to share in the proceeds of a suit may be added as a party plaintiff at any time before judgment. *Cole v. Gilford*, 63 N. H. 60.

Plaintiffs barred by statute of limitations may be stricken out. *McBrayer v. Cariker*, 64 Ala. 50.

If survivors of joint obligees and the representatives of a deceased obligee unite as plaintiffs, the irregularity is amendable. *Sanders v. Knox*, 57 Ala. 80.

If surviving joint obligors and the representatives of deceased obligors are united as defendants, the error is amendable. *Reed v. Summers*, 79 Ala. 522.

In an action at law an amendment may be allowed making a third party a defendant upon proper notice to him, if justice requires it, and a trilateral controversy may be conveniently tried in one suit. *Owen v. Weston*, 63 N. H. 599; 56 Am. Rep. 547.

New defendants may be made parties, though there was no cause of action against the original defendants. *Hilton v. Osgood*, 49 Conn. 110.

If A and B are sued as joint contractors, the plaintiff may dismiss as to A and recover against B, although B had filed a plea denying joint liability. *McDermott v. Gubbing*, 25 Ill. App. 541; *Fisk v. Henarie*, 19 Oregon 29. If, however, A and B are sued as partners, the plaintiff may not strike out A's name and recover against B individually. *Peck v. Sill*, 3 Conn. 157.

A plaintiff was stated to be "A and —, of, etc., co-partners under the style and firm name of A and Co." An amendment inserting the name of the other members of the firm was refused. *Ayer v. Gleason*, 60 Me. 207.

Statutes authorizing amendments generally do not authorize the striking out the name of one of the defendants in the affidavit of the plaintiff, or in the warrant of the justice of the peace in proceedings by attachment against non-resident debtors. *Halley v. Jackson*, 48 Md. 254.

New parties defendant, who were not liable to be sued when the action was commenced, although they may have afterwards rendered themselves liable to the same action, may not be added by amendment. *Burns v. Campbell*, 71 Ala. 271; *Mexican National Const. Co. v. Meddlege*, 75 Tex. 634.

2. **Amendments at Trial.**—An improper party plaintiff may be stricken out. *Hinkle v. Davenport*, 38 Iowa 355.

In an action *ex delicto* improperly joined, defendants may be stricken out.

l even after verdict.¹ The only limit to the right to like out and add parties is that there shall not be an entire change of the parties². The name of the plaintiff may be amended.³

recovery had against those remain-
Heinlen v. Heilbron, 71 Cal. 557.

. **After Verdict.**—A person entitled any part of the damages for which judgment is about to be entered may joined as plaintiff by amendment, l. have judgment for his part. auncy v. German Am. Ins. Co., 60 H. 428.

A misjoinder of plaintiffs or defend- s may be amended by striking out se erroneously joined. Demeritt v. lls, 59 N. H. 18.

When, in an action against two, the dict has been against plaintiff be- se a joint contract was not proved, connot amend by striking out one of : defendants. Griffin v. Simpson, 45 H. 18.

On Appeal.—Error in Christian name v be amended. Chappell v. Smith, Ga. 68.

The English statute of 1852, author- ing the court in case of a misjoinder a defendant in an action on a contract, amend such misjoinder, "as a varice at the trial," does not authorize an endment where the plaintiff joined lefendant, not by mistake or inad- rrence, but for the purpose of fixing liability upon him; and an application amend under that section cannot be tertained after the verdict has been urned. Wickens v. Steel, 2 C. B., S. 488.

2. Limitations as to Amendments.— e only limit to the right to strike out d add parties is that there shall not an entire change of the parties. rry v. Ferguson, 58 Ala. 314.

The name of a sole plaintiff cannot be icken out and another person substi- ed. Leaird v. Moore, 27 Ala. 326; bbsers v. Goux, 51 Cal. 153; Gresham Webb, 29 Ga. 320; Strickland v. idges, 21 S. Car. 21. *Contra.* Hubler Pullen, 9 Ind. 273; 68 Am. Dec. 0; Hanlin v. Baxter, 20 Kan. 134.

After new plaintiffs are added by endment, original plaintiff may not stricken out by subsequent amend- ent. Tarver v. Smith, 38 Ala. 135. Even under the codes, the original rties to a suit, either as plaintiffs or fendants, cannot be entirely with- awn by adding and striking out par-

ties. Taylor v. Taylor, 43 Ala. 649; Steed v. McIntyre, 68 Ala. 407.

The name of a sole defendant may not be stricken out and the names of others inserted in lieu thereof. New York etc. Milk Pan Assoc. v. Remington Agricultural Works, 89 N. Y. 22; rev. 25 Hun (N. Y.) 475.

3. Name of Plaintiff.—An amend- ment is permissible, inserting the Christian name, in place of the initial letter of the plaintiff. Beggs v. Well- man, 82 Ala. 391.

Also by inserting Christian name of a plaintiff when entirely omitted. Jerni- gan v. Carter, 60 Ga. 131.

An amendment is permissible strik- ing out the wrong Christian name of plaintiff and inserting the true one. South & N. Ala. R. Co. v. Small, 70 Ala. 499; Woodson v. Law, 7 Ga. 105; Murphy v. Peabody, 63 Ga. 522; Fer- guson v. Ramsey, 41 Ind. 511; Brace v. Benson, 10 Wend. (N. Y.) 213; Weaver v. Young, 37 Kan. 70; Dewey v. Mc- Lain, 7 Kan. 83; 21 Am. Rep. 418; Ward v. Stevenson, 15 Pa. St. 21.

A plaintiff's middle name may be inserted by amendment. Fink v. Man- hattan R. Co., 15 Daly (N. Y.) 479.

The surname of a plaintiff may be amended. Final v. Backus, 18 Mich. 218; Ward v. Stevenson, 15 Pa. St. 21.

An action *ex contractu* by Justus Crafts was amended by substituting Justus Stark as plaintiff, on proof that the attorney who purchased the writ was employed by Stark, and inserted Crafts' name by mistake, there being a person of each name residing in the same town. Crafts v. Sikes, 4 Gray (Mass.) 194; 64 Am. Dec. 62.

An action is not fictitious in which there are real parties in interest, a real matter in controversy, a real prosecu- tion, a real defense, and a real action, although it be prosecuted by the real plaintiff under a fictitious name. M'Nair v. Toler, 21 Minn. 175.

Since, however, it is always necessary that some person must sue, it has been held where suit was brought in name of S. M. Moore, an amendment changing plaintiff's name to Morse is inadmissi- ble, because nothing in the record au-

The use plaintiff may be changed¹ and the nominal or use plaintiff may be stricken from the record.² The nominal plaintiff may be added by amendment,³ and so may the use plaintiff, if the original plaintiff had the legal title to the chose in action, and the defendant was not thereby deprived of any de-

thorized such an amendment. *Lake v. Morse*, 11 Ill. 587.

The word "name" as used in the statute does not refer to something inanimate or having no legal existence, but to something that can sue or be sued, as persons or corporations, and that, as such, can have an interest in a suit. Therefore a steamboat cannot be a party plaintiff in an action on a note payable to the "steamboat and owners." *Steamboat Pembina v. Wilson*, 11 Iowa 479.

A mistake in the name of a corporation plaintiff may be corrected by amendment. *Smith v. Tallassee Branch of Cent. Plank Road Co.*, 30 Ala. 650.

So as to a firm plaintiff. *Paine v. Waterloo Gas Co.*, 69 Iowa 211.

A complaint can be amended by adding an averment that the plaintiff is a body corporate and sues in his corporate capacity. *Southern L. Ins. Co. v. Roberts*, 60 Ala. 431; *St. Louis etc. R. Co. v. Camden Bank*, 47 Ark. 541.

1. Change of Use Plaintiff.—A suit by "A for use of B," may be amended so as to be a suit by "A for use of C." *Demington v. Douglass*, 43 Ga. 359; *Johnson v. Little*, 45 Ga. 106; *Waterman v. Dockray*, 79 Me. 149.

Such amendment was made after judgment and by the supreme court in *Cranston v. Wilsey*, 71 Mich. 356.

2. Striking Out Nominal or Use Plaintiff.—When a suit is brought by "A for use of B," the nominal party may be stricken from the record and suit may continue in the name of B, the use plaintiff, if he has a legal right to sue. *Wilson v. First Presbyterian Church*, 56 Ga. 554; *Whitaker v. Pope*, 2 Woods (U. S.) 463; *Martin v. Lamb*, 77 Ga. 252; *McDowell v. Town*, 90 Ill. 359; *Griffin v. Sheley*, 55 Iowa 513; *Fenwick v. Phillips*, 3 Met. (Ky.) 87; *Buckland v. Green*, 133 Mass. 421; *Ansonia India Rubber Co. v. Wolf*, 1 Handy (Ohio) 236; *Miller v. Pollock*, 99 Pa. St. 202; *Smyth v. Carden*, 1 Swan (Tenn.) 28; *Martel v. Somers*, 26 Tex. 551.

If an action is brought by A to use of B in a case where by the codes B must sue in his own name, the defend-

ant may demur. *Dwyer v. Kennemore*, 31 Ala. 404.

If any action which must be brought by the legal owner or party be brought in his name for the use of the party really interested, the words "for the use of," etc., may be stricken out under the code provisions as to striking out parties improperly joined. *Dwyer v. Kennemore*, 30 Ala. 404; *Dane v. Glennon*, 72 Ala. 160; *Caldwell v. Smith*, 77 Ala. 157.

If the use plaintiff is found to have no interest his name may be stricken out. *Katz v. Moessinger*, 110 Ill. 372.

The words "for the use of," etc., will be treated as surplusage on demurrer. *State v. Butterworth*, 2 Iowa 158; *Northrop v. McGee*, 20 Ill. App. 108.

3. Nominal Plaintiff Added.—So when it has been brought by the party really interested, an amendment adding the name of a legal plaintiff with the words "for the use of" the original plaintiff is admissible. *Harris v. Plant*, 31 Ala. 639; *American Union Tel. Co. v. Daugherty*, 89 Ala. 191; *Code of Georgia*, 1882, § 3486; *Winter v. Matthews*, 41 Ga. 652.

A suit brought in the name of a person to whom a note not negotiable has been passed, may be amended by inserting the name of the payee for the use of such person. *Hayne v. Perry*, 25 Ga. 400.

So in actions on all non-negotiable liabilities. *Holcombe v. Richmond etc. R. Co.*, 78 Ga. 776; *United States Ins. Co. v. Luding*, 108 Ill. 514; *Costello v. Crowell*, 134 Mass. 280; *Robertson v. Reed*, 47 Pa. St. 115; *Barnhill v. Haigh*, 53 Pa. St. 165; *Clement v. Commonwealth*, 95 Pa. St. 107; *Downey v. Gardard*, 24 Pa. St. 52.

If the assignee of a judgment sues thereon in his own name and the complaint discloses the name of the plaintiff in the judgment, the suit may be amended to make it an action by said plaintiff to the use of said assignee. *Johnson v. Martin*, 54 Ala. 271.

When an action is brought on a bond in the name of the person injured under the code procedure, the complaint may be amended by inserting the name of the person to whom the bond is made

1se.¹ Both at common law and under the codes a plaintiff may sue generally and declare in any particular right;² but he may not sue in a particular character and declare generally or in another capacity³ except under special statutory provisions.⁴ A mere error in stating the capacity in which one sues seems to be amendable, however.⁵ In like manner the name of a defendant may be

changed for the use of the party injured. *Warriss v. Plant*, 31 Ala. 639; *State v. Shelby*, 75 Mo. 482.

1. **Use Plaintiff Added.**—An amendment adding use plaintiff's name is refused where the original plaintiffs could have no legal title to sue. *Jones v. Watson*, 63 Ga. 679.

An amendment adding a use plaintiff's name refused where the effect would be to deprive defendant of a set-off or proof of payment. *Morrow v. Merchants' & Planters' Bank*, 35 Ga. 7; *Cobb v. Lowry*, 60 Ga. 637.

A party sued as a judgment creditor of X, set aside a voluntary conveyance by X.

This judgment was of record in X's name as plaintiff. At trial A testified as a witness for X that he had once signed the note on which the judgment had been entered, but had assigned it to B as collateral; that he no longer owned the note, and did not authorize the suit, but knew that it had been brought, and before made any objection to its being in his name; now, however, he denied it dismissed. The attorney for B then moved to amend by making B an additional party plaintiff. Motion granted. On appeal, judgment affirmed, the court, by McGOWAN, J., distinguishing this case from the case of substitution for a sole plaintiff, saying: "Without considering whether there was a necessity for the amendment, we think that L. J. Jones [B], being within the rule allowing 'all persons having an interest in the subject of an action' to be joined as plaintiffs, and at the order permitting him to be made party plaintiff was not such abuse of discretion by the circuit judge as to require us to declare that it was error law." *Guber v. Chandler*, 28 S. Car. 7.

2. **Amendment as to Character of Plaintiff.**—At common law a plaintiff may sue generally and declare in any particular character or right, and amendments may be made if necessary; but he may not sue in a particular character or right and declare generally. *Wyllor v. Taylor*, 43 Ala., 649; 1 Ch. Decad. 251; *Gilbert v. Hardwick*, 11

Ga. 599; *Laughter v. Butt*, 25 Gay 177.

Under the codes a suit brought by A individually may be amended to show that he sues in a particular capacity as administrator. *Crimms v. Crawford*, 29 Ala. 623; *Agee v. Williams*, 30 Ala. 636; *Ikelheimer v. Chapman*, 32 Ala. 676; *Reed v. Cooper*, 30 Kan. 574; *Haddow v. Haddow*, 3 N. Y. Super. Ct. 777; aff. 59 N. Y. 320; *Smith v. Anderson*, 39 Tex. 496.

Or guardian. *Longmire v. Pilkington*, 37 Ala. 296.

So a suit brought by A in a particular capacity, an amendment further and more accurately describing his representative capacity is permissible. *Humphries v. Dawson*, 38 Ala. 199.

3. See cases at beginning of preceding note.

A plaintiff having sued in one capacity cannot amend so as to sue in another and different capacity. *Wright v. Gilbert*, 51 Md. 146.

A suit brought by one as heir-at-law may be amended so as to become a suit by him as executor. *Hines v. Rutherford*, 67 Ga. 606.

4. **Statutes.**—"In an action by or against an executor, administrator, or other representative, the declaration may be amended by striking out the representative character of such plaintiff or defendant. And in an action by or against an individual, the pleadings may be amended by inserting his representative character." Code of Georgia, 1882, § 3487; *Poole v. Hines*, 52 Ga. 500; *Tift v. Towns*, 63 Ga. 237.

5. **Error in Stating Plaintiff's Capacity.**—In a policy of life insurance on the husband's life, the wife and minor children were beneficiaries. They sued jointly. The mother was not designated as next friend of the children. *Held*, no ground to abate suit. She was natural guardian after husband's death, and her appointment as next friend would be a mere formality. The court should have allowed an amendment so designating her. *Sick v. Michigan Aid Assoc*, 49 Mich. 50.

A suit by "A as next friend of B" in-

amended.¹ Whether a plaintiff, having sued defendants in a particular capacity, may amend to sue them in a different capacity, is

stead of by B, by his next friend A, is an irregularity without prejudice. *Wilson v. Me-ne-chas*, 40 Kan. 648.

A suit by "A, guardian of B," may not be amended to make the plaintiff "B by his next friend C." *Fowlkes v. Memphis etc. R. Co.*, 38 Ala. 310; *Shealy v. Toole*, 64 Ga. 519; *McWilliams v. Anderson*, 68 Ga. 772. *Contra Morford v. Dieffenbacker*, 54 Mich. 593; *Kinney v. Hawett*, 46 Mich. 87. A bill in equity may. *Higdon v. Heard*, 14 Ga. 255. It has been held that the next friend of infant plaintiffs is a new party. *McWilliams v. Anderson*, 68 Ga. 772.

"If an executor be named as administrator, or conversely in any pleading, it may be amended." *Delaware Rev. Code*, 1874, § 2508, ch. 112, § 7.

A suit by A and B as partners may be amended by striking out B's name, and suit continued by A alone as an individual and not a partner. *Hamill v. Ashley*, 11 Colo. 180.

The heirs of A, the proper parties plaintiff, being before the court, but claiming as the heirs of B, they should be allowed to amend by giving to themselves their proper description. *Reams v. Spann*, 28 S. Car. 530.

1. Name of Defendant.—An amendment is permissible striking out a wrong Christian name of a defendant and inserting the true one. *New York etc. Contracting Co. v. Meyer*, 51 Ala. 325; *Welch v. Hull*, 73 Mich. 47.

The Christian name of a defendant may be inserted when entirely omitted. *Porter v. Hildebrand*, 14 Pa. St. 129.

A summons and complaints may be amended by striking out the middle initial of a defendant's name. *Griel v. Solomon*, 82 Ala. 85; *Wentworth v. Sawyer*, 76 Me. 454.

Or by adding such middle initial. *Dietrich v. Wolffsohn*, 136 Mass. 335. The surname may also be corrected. *Arbuckle v. Bowman*, 6 Iowa 70.

Irrespective of the statute allowing a plaintiff to sue an unknown defendant by a fictitious name, a court may, under its powers to amend, allow an amendment of a complaint after the evidence is in, when a defendant has been sued by a wrong name and discloses his true name in his answer. *Ramsey v. Cortland Cattle Co.*, 6 Mont. 498.

On a motion to vacate a judgment

obtained by default, the court may allow plaintiff to amend the complaint by changing the name of defendant and entering judgment against him in his correct name. *McDonald v. Swett*, 76 Cal. 257.

A mistake in the name of a corporation defendant may be corrected by amendment. *Rome R. Co. v. Sullivan*, 14 Ga. 277; *Marsh v. Wilkesbarre*, 1 Luz. Leg. Reg. (Pa.) 173.

An amendment by substituting the word "railway" for "railroad" as part of defendant's name is not an entire change of the name of a sole party, and is therefore allowable. *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518; *Mobile etc. R. Co. v. Yeates*, 67 Ala. 164.

A suit against a corporation as the T. C. Co. may be amended so as to be a suit against certain individuals as co-partners doing business under the name of the T. C. Co. *Anglo-American Packing etc. Co. v. Turner Casing Co.*, 34 Kan. 340; *Leatherman v. Tunis Co.*, (Ky. 1889), 11 S. W. Rep. 12; *New York etc. Milk Pan Co. v. Remington's Agricultural Works*, 25 Hun (N. Y.) 475; reversed in 89 N. Y. 22. A suit against X as president for the time being of Y Co. (which would have been proper if defendant had been an unincorporated joint stock company under a special statute) was amended by striking out X's name leaving as defendant Y company, in a case where service on the president bound a corporation, and the suit was to enforce a corporation liability. *Kimball etc. Mfg. Co. v. Vroman*, 35 Mich. 310.

Where, however, the defendant is styled the "Atlanta and West Point Railroad and Western Railway of Alabama Company, a foreign corporation incorporated under the laws of Georgia," an amendment cannot be allowed changing the name to the "Western Railway of Alabama Company, a corporation incorporated under the laws of Alabama." *Western R. of Ala. v. McCall*, 89 Ala. 375.

To the same effect is *Little v. Virginia etc. Water Co.*, 9 Nev. 317, except that the defendant was called a Nevada corporation instead of a California corporation, but there was a Nevada corporation of the same name.

An amendment to a complaint by adding an averment that the defendant

disputed.¹ While in a number of States it has been decided that if an action has been brought by one who is incompetent to sue, the person who is competent to bring the action may be substituted as plaintiff,² yet the decisions are not unanimous, and in

is a body corporate, and sued in its corporate capacity neither introduces a new party nor works a departure nor variance, and is, therefore, allowable. *Western R. of Ala. v. Sistrunk*, 85 Ala. 352.

Compare Barbour v. Albany Lodge, 73 Ga. 474.

1. Amendment of Defendant's Capacity.—When a person is sued in a particular capacity the plaintiff may not amend so as to sue him in his individual capacity. *Taylor v. Taylor*, 43 Ala. 649; *Christian v. Morris*, 50 Ala. 585; *Smith v. Ardis*, 49 Ga. 602.

Contra McDonald v. Ward, 57 Conn. 304; *Tighe v. Pope*, 16 Hun (N. Y.) 180; *Maxwell v. Harrison*, 8 Ga. 61, 52 Am. Dec. 385.

Omission to sue a municipal officer by his official title is not a substantial objection if his liability is shown. *Hart v. Port Huron*, 46 Mich. 428.

In an action against several as individuals an amendment is permissible under the codes, charging them as partners. *Williams v. Bowdin*, 68 Ala. 126.

A suit against A and B as partners may not be amended by striking out B's name and continuing the suit against A individually. *Peck v. Sill*, 3 Conn. 157.

Contra, if sued as joint contractors. *Peck v. Sill*, 3 Conn. 157.

2. Substitution of Party Entitled to Sue for Incompetent Plaintiff.—The reason for allowing substitution has been thus expressed in *Iowa*. Suit was brought in the name of a township. It had no capacity to sue. The application was to substitute the clerk, and the court, by *SEEVERS, C. J.*, said: "It is claimed there was no plaintiff named in the original petition, and, therefore, none could be substituted; that an amended petition could not be filed because there was nothing to amend. But we think when there is an appearance to the action and the defendant tests the right of the named plaintiff to maintain the action by a demurrer and the latter is sustained the names of the proper parties plaintiff may be substituted in the action by an amended petition, subject, of course, to an apportionment of the costs and the

right of the defendants to a continuance, if taken by surprise. If this is not the rule, the action must abate and another be brought. This, under the statute, should not be the rule unless substantial justice so demands." [The court then quotes the code provision and continues]: "The defendants could make their defense in this action as well as in a new one, and they could not have been prejudicially affected by the amendment. The right to make it, we think, existed." *Wells v. Stombaek*, 59 Iowa 376.

When any action has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it has been so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff. *Connecticut Gen. Stat.* 1888, § 889.

Where a foreign bank sued in a corporate name by which it was known, and the defendant pleaded that it was not a body corporate, the court allowed an amendment under the Common Law Procedure act of 1852 by inserting the name of a director of the bank as nominal plaintiff, it appearing that by the law of the country where the bank was in operation, the bank was entitled to sue in his name. *La Banca Nazionale Sede di Torino v. Hamburger*, 2 H. & C. 330.

Where a suit is brought by the real party in interest, but under a misnomer, as by an individual banker in the name of his bank, the error can be corrected by motion, and the objection is not a fatal one, but may be remedied before or after judgment. *Bank of Havana v. Magee*, 20 N. Y. 355.

If, in a suit by a married woman, it appears in evidence on the trial that the true name of the plaintiff is not that in which she is sued, the court, on motion, is warranted by the statute in allowing her true name to be substituted. *Abshire v. Mather*, 27 Ind. 381.

When an indorsee sues on a non-negotiable instrument, it is in the discretion of the court to allow the writ to be amended by striking out the name of

some States such substitution has been denied.¹ In like manner, when it appears in course of an action that the defendant is not

the plaintiff and inserting the name of the payee, although such amendment is after the expiration of two years from the appointment of the administrator defendant. *Costelo v. Crowell*, 134 Mass. 280.

If a payee in a note who has transferred the note sues thereon, the court may allow the substitution of the proper plaintiff, on proper terms. *Clawson v. Cone*, 2 Handy (Ohio) 67.

Contra, where the note was negotiable and sued upon by the holder to whom it had not been endorsed. *Eakin v. Burger*, 1 Sneed (Tenn.) 417.

Where in action is brought upon a cause of action belonging to a co-partnership in the name of one partner, the court may at any time permit an amendment by inserting the name of the firm as plaintiff. *Dixon v. Dixon*, 19 Iowa 512.

An action commenced by a *femme covert* in her former name as a *femme sole* may, on leave of the court, be amended by the substitution of her proper name. *Glick v. Hartman*, 10 Iowa 410.

A suit by a lunatic may be amended by substituting his guardian. *Roop v. Clark*, 4 Greene (Iowa) 294.

A suit by a corporation after dissolution may be amended by making the plaintiff the party authorized by statute to sue in such case. *Paola Town Co. v. Krutz*, 22 Kan. 725.

A writ of entry by A and B, his wife, in right of B, may, after verdict, be amended by striking out B and inserting a claim by A as tenant by the curtesy, it appearing that B died before the date of the writ. *Emery v. Os-good*, 1 Allen (Mass.) 244.

If a legatee sues, and an administrator should have been plaintiff, the court will order the administrator to be brought in. *Shove v. Shove*, 69 Wis. 429.

A suit brought by an administrator in a case where the widow and heirs should have sued, the widow and heirs were substituted. *Teutonia L. Ins. Co. v. Mueller*, 77 Ill. 22.

And a suit brought by A, receiver of X company, was allowed to be amended to make X company the plaintiff. *Chandler v. Frost*, 88 Ill. 559.

A suit brought by the assignees of a life insurance policy was allowed to be

amended by making the administrator of the deceased plaintiff. *United States Ins. Co. v. Ludwig*, 108 Ill. 514.

Suit having been brought by a township having no legal capacity to sue, the clerk of the township was substituted. *Wells v. Stomback*, 59 Iowa 376.

The English statute of 1852 allows the addition by amendment of the names of the trustees in whom is the legal title to real estate when an action has been brought in the name of the *cestui que trust*. *Blake v. Done*, 7 H. & N. 465.

When in appeal from a suit against a decedent's estate, it is decided who is the proper party to sue, such party may be substituted as plaintiff on a re-trial. *McCall v. Lee*, 120 Ill. 261.

When a suit on an executor's bond is commenced by a guardian *ad litem*, in a case where by statute the suit should be brought in the name of the Territory to the use of an infant devisee by his attorneys lawfully authorized, substitution of the proper plaintiff may be made. *Territory v. Cox*, 3 Mont. 197.

A town may be substituted as plaintiff in place of its board of health in an action to remove a nuisance. *Winthrop v. Farrar*, 11 Allen (Mass.) 398.

In an action on a promissory note, the plaintiff filed an amended petition, in which he stated that he was only the nominal plaintiff and sued as agent of W & Co., and W & Co. then go on to aver that the notes are theirs, etc. *Held*, that this was not properly the making of a new party, but that if it were, the defendant could not object on that ground alone, unless he were thereby deprived of some substantial defense. *Price v. Wiley*, 19 Tex. 142; 70 Am. Dec. 323.

1. Substitution Denied.—It has, however, been held that if a suit was commenced in the name of an agent, the principal cannot, by amendment, be substituted as plaintiff. *Crescent Furniture etc. Co. v. Raddatz*, 28 Mo. App. 210.

When the members of a voluntary association, a lodge under one name, become incorporated under a different name, and a suit is brought in the name of the voluntary association, an amendment substituting the corporate name is not allowable. *Marsh River Lodge of Masons v. Brooks*, 61 Me. 585.

the person liable, in some States the plaintiff may amend by substituting the party who is liable,¹ but in other States he may

Where a suit is brought by a co-partnership or unincorporated association in the name under which they did business, which is neither the name of a natural or artificial person recognized by the law, the proceeding cannot be amended by substituting the proper plaintiff. *Proprietors of the Mexican Mill v. Yellow Jacket Silver Min. Co.*, 4 Nev. 40; 97 Am. Dec. 510.

The court cannot permit a person to be substituted as plaintiff in place of the then plaintiff, on the ground that the person substituted was the real party in interest at the commencement of the action. *Leaird v. Moore*, 27 Ala. 326; *Dubbers v. Goux*, 51 Cal. 153.

Especially when the defendant would be prejudiced by the introduction of testimony not otherwise admissible. *Skews v. Dunn*, 3 Utah 186.

When the code authorizes the substitution of the real party in interest, it must be done before final judgment. *Hicklin v. Nebraska City Bank*, 8 Neb. 463.

Where the holder of a negotiable instrument which has not been assigned to him brings suit in his own name, an amendment substituting the name of the payee is not admissible under the statutes. *Eakin v. Burger*, 1 Sneed (Tenn.) 417.

Contra, where the indorsee sued in his own name on a non-negotiable instrument. *Costelo v. Crowell*, 134 Mass. 280.

Where the payee of a check sued a bank for non-payment the drawer cannot be substituted as plaintiff after his right of action has been barred by the statute of limitations. *First Nat. Bank v. Shoemaker*, 117 Pa. St. 94.

While the name of a sole plaintiff may not be stricken out and another substituted, a plaintiff's middle name can be inserted to distinguish him from another person having same first and last names. *Louis F.*, and *S. E. F.*, his wife, owned land as tenants by entireties. They had a son *Louis E. F.* In 1882, *Louis F.* died. In 1888 an action was brought for damage to said land in the names of *S. E. F.* and *Louis F.* *S. E. F.* died before service of the summons and complaint. On motion an amendment was allowed striking out the name of *S. E. F.* and allowing *Louis E. F.* to continue the action in his

proper name. "The amendment allowed does not introduce a new party plaintiff. It merely permits the action to be continued by a person claiming to be plaintiff in his proper name. The presence or omission of the initial letter of *Louis E. Fink's* middle name is of no importance; and no presumption can arise therefrom either in favor of or against the identity of *Louis E. Fink* with *Louis Fink*, the person named as plaintiff. The similarity of the names, however, presumptively establishes the identity of the persons." Further, the title of *Louis E. F.* and his right to sue when the action was brought can only be determined at the trial. *Fink v. Manhattan R. Co.*, 15 Daly (N. Y.) 479.

Where a sole plaintiff amends by substituting another person plaintiff for himself, and such amendment was stricken out on defendant's objection, the effect of such action has been held to be to restore the case to its first condition, and therefore to make the original plaintiff become plaintiff again. *Bealle v. Day*, 28 Ga. 435. Compare *Brockett v. Bradford*, 53 Ga. 274.

1. Substitution of Party Liable to be Sued for One Not Liable.—Under a code provision authorizing a plaintiff in ejectment to make the time claimant defendant, a landlord can be substituted in an action against, although the plaintiff and original defendant are both dead, and that without joining the representatives of the deceased tenant. *Blalock v. Newhill*, 78 Ga. 245.

Where, in an action against *A*, he pleads in abatement facts which are held sufficient to relieve him from liability and put the liability on other parties, the plaintiff was allowed by amendment to bring in such other parties. *Hilton v. Osgood*, 49 Conn. 110.

The court will direct an amendment of the pleadings by substituting a party as defendant, when it appears, at any stage of the proceedings, that such amendment will further the ends of justice. *Fuller v. Webster F. Ins. Co.*, 12 How. Pr. (N. Y.) 293.

A sued the receiver of a corporation. An order was made striking out the name of the receiver and substituting the corporation who was duly served with an amended summons and com-

not.¹ When the right to sue or liability to be sued changes pending the action, a suitable amendment may be made.² Whether a defendant can compel a plaintiff to amend by adding new parties is not clear.³

plaint. The corporation appealed. The court said: "There may be a question in reference to the power of the court to make the order appealed from. We have, however, not thought it necessary to determine or decide this question for the reason that the appellant was not prejudiced by the order and has no right to review. If anyone has suffered by reason of the order it was Jewett (the receiver) . . . but he has not appealed." Divided court. *Abbot v. New York etc. R. Co.*, 120 N. Y. 652; *aff. 25 Hun (N. Y.) 603*.

1. Substitution of Defendant Denied.—The English statute of 1852, authorizing amendment of "all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not . . . and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be made," does not allow an amendment adding a wife as defendant in an action against the husband, and alleging goods were sold her *dum sola*. *Garrard v. Guibillei*, 11 C. B., N. S. 616.

A complaint against a sole defendant who is not competent to be sued cannot be amended by adding or substituting the name of another person who is competent. *Ex parte Collins*, 49 Ala. 69.

In an action *ex contractu* against one defendant, the plaintiff cannot, under the statute, summon in as additional defendants, joint promisors, unless he intends to prosecute his action against the party originally sued. Otherwise it would not be a summoning in of additional defendants, but an entire change of parties defendant—a substitution of one defendant for another. *Duly v. Hogan*, 60 Me. 351.

2. Change in Capacity to Sue or Liability to be Sued, Pendente Lite.—Irrespective of the statutory provision as to assignments *pendente lite*, the court, under its statutory power to amend "by adding the name of any party," etc., could amend the record and pleadings by allowing the assignee to be added as a party to the record. *Wellman v. Dismukes*, 42 Mo. 101.

If, pending a writ of entry by several demandants, the tenant purchase the share of one of them, the writ may be amended by striking out that one's name. *Chadbourn v. Rackliff*, 30 Me. 354; *overruling Treat v. McMahon*, 2 Me. 120.

Although a supplemental complaint may not set up a new and independent cause of action on which a recovery might be had without regard to or being directly connected with the facts set up in the original complaint, yet where, after the commencement of an action, a third party becomes interested in the litigation by assuming the liabilities of the defendant in respect to the claim plaintiff is seeking to enforce, as where a defendant railroad company is merged in a new company, the latter assuming all the contracts, liabilities and obligations of the former, it is proper to allow a supplemental complaint bringing in such third party as a co-defendant. *Prouty v. Lake Shore etc. R. Co.*, 85 N. Y. 272.

3. Right of Defendant to Compel Plaintiff to Amend.—Under the Code Procedure in *England*, it is expressly provided, Order XVI, Rule II, that "the court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

So in an action by A on a several covenant made by D with A, B and C, the court in D's application, ordered B and C to be made parties as plaintiff, if they consented; otherwise, as defendants. *Dix v. Great Western R. Co.*, 55 L. J. Ch. 797.

It has, however, been held that although a defendant has a set-off to an assigned demand sued upon by the

New parties must be brought in by an amendment.¹ An amendment of parties may be a ground for continuance.² Notice of the amendment should be given.³ An amended complaint need not be filed.⁴ When a new defendant is added, the suit is only considered commenced as to him when he is duly made a defendant.⁵ When a plaintiff is substituted, that is not the bringing of a new suit such as will authorize the defendant to plead the Statute of Limitations.⁶ The dismissal of an improper plaintiff does not deprive the court of a jurisdiction acquired and not dependent upon such plaintiff.⁷ When plaintiff files an

assignee, which set-off is greater than the demand, that does not entitle him to have the assignor joined as a party to the action. *Davis v. Sutton*, 15 Minn. 307.

An order to bring in additional parties will not be granted on the defendant's motion until the necessity for making them parties clearly appears. *Lee v. Eure*, 92 N. Car. 283.

See *supra*, this title, *Bringing in of New Parties*.

1. New Parties Must be Added by Amendment.—The adding new parties defendant must be done by amendment. An *ex parte* order to make such new party a defendant, and that he appear and answer, is error. There should first be an amendment. *Penfield v. Wheeler*, 27 Minn. 358.

2. Continuance.—An amendment of parties is only ground for continuance when defendant has been misled. *First Nat. Bank v. Tappan*, 6 Kan. 456; 7 Am. Rep. 568.

3. Notice.—If without notice to them an action is discontinued as to certain defendants, they may apply to be reinstated. *Morse v. Stockman*, 65 Wis. 36.

The original defendants are entitled to notice of a motion to add a new party defendant, and a notice of such motion need not be given to said new party. *Young v. Rollins*, 90 N. Car. 134.

4. Amendment of Pleadings.—The amendment of a complaint by striking out of the caption the name of certain of the defendants who were not proper parties, without filing an amended complaint, while not commendable as a method of amending, is without prejudice to other defendants who are properly parties. *Doane v. Houghton*, 75 Cal. 360.

An amendment may be made: 1st. By interlineation. 2nd. By writing the amendment on a separate piece of paper and referring to the original. 3rd. By

rewriting the original and incorporating the amendment. *Fitzpatrick v. Gebhart*, 7 Kan. 35.

Where new parties plaintiff are added, a failure to actually insert their names in the papers in the case is only a technical omission, and is, after verdict, cured by statute of amendments and jeofails. *Lockwood v. Doane*, 107 Ill. 235; *Aylesworth v. Brown*, 131 Ind. 270.

Where a new plaintiff is substituted, the action should be continued in his name, but a failure to change the name in the caption of the petition is, after verdict, also cured by statute of amendment and jeofails. *Paola Town Co. v. Krutz*, 22 Kan. 725.

Notwithstanding an amendment of parties if the cause of action remain the same, there is no occasion for refileing the declaration or for any further plea. *Dickson v. Chicago etc. R. Co.*, 81 Ill. 215.

Nor is it necessary that the jury be re-sworn. *Hinkle v. Davenport*, 38 Iowa 355.

5. Beginning of Suit as to Added Defendant.—When a suit is amended by bringing in a new party defendant, the suit cannot be considered as having been commenced as against such party until he is made a party defendant. *Dunphy v. Riddle*, 86 Ill. 22; *Crowl v. Nagle*, 86 Ill. 437.

6. Limitations.—An amendment substituting one party plaintiff for another is not a change of the cause of action, or the bringing of a new suit as of the date of the amendment so as to admit of the statute of limitations being a bar. *Thomas v. Fame Ins. Co.*, 108 Ill. 91; *United States Ins. Co. v. Ludwig*, 108 Ill. 514; *McCall v. Lee*, 120 Ill. 261.

Do. as to substitution of individual defendants in place of supposed corporation. *Leatherman v. Times Co.* (Ky. 1889) 11 S. W. Rep. 12.

7. Jurisdiction Not Lost by Amendment Striking Out Party.—Where an

amended complaint as to part only of the defendants, this is equivalent to a dismissal of the suit as to the omitted defendants.¹

XV. SUBSTITUTION OF PARTIES—(See also, *infra*, this title, *Intervention*).—Whether one plaintiff or defendant may be substituted for another plaintiff or defendant has been discussed *supra* this title, *Amendment of Parties*. There remains to consider the question of substitution of parties in case of death, insolvency or other disability. That a cause of action no longer abates on the death of a party has long been universal law. (See also *DEATH*, vol. 5, p. 125.) In all cases it is provided by statute that the party's personal representatives or heirs may be substituted.² But the personal representatives of a party who was dead at the commencement of the action, may not be substituted.³ In case of a party's death, there must be a substitution or the judgment is void,⁴ and the record must show such substitution.⁵ The right to make a substitution

improper party plaintiff is dismissed from a suit, the court does not thereby lose a jurisdiction previously acquired and not dependent upon said party, and the cause of action remaining the same, there is no occasion for refileing the declaration, or for any further plea. *Dickson v. Chicago etc. R. Co.*, 81 Ill. 215.

1. Amended Complaint Against Only a Part of the Defendants.—Where, after a demurrer is sustained to a declaration against all the defendants, the plaintiff, under leave to amend, files a declaration against part of the original defendants, this is equivalent to a dismissal of the suit as to the omitted defendants. *Black v. Woomer*, 100 Ill. 328.

2. The New York Law of 1879, ch. 542, allowing an action on motion to be continued on decease, etc., by the party's representatives or successors in interest, only applies to the case of a sole plaintiff or sole defendant. *Coit v. Campbell*, 20 Hun (N. Y.) 50.

In a special proceeding before a surrogate, the acknowledged representative of a decedent, who asks as such for leave to intervene, should be allowed to do so. *Merritt v. Jackson*, 2 Dem. (N. Y.) 214.

3. Party Must Die Pending the Action.—The English statute of 1852 does not authorize the substitution of the representatives of a plaintiff who was dead at the time the action was commenced. *Clay v. Oxford*, L. R., 2 Ex. 54.

It has, however, been held under the *Maine* statutes that a suit is commenced when a writ is actually made with intention of serving it, and therefore,

although the defendant die before service, his personal representatives may be substituted, if he was alive when the writ was made. *Hubbard v. Johnson*, 77 Me. 139.

4. Substitution Necessary.—The successors to a deceased plaintiff must be brought in or the judgment will be reversed. *Gamble v. Daugherty*, 71 Mo. 599.

A judgment rendered after the death of the original defendant is void unless his representatives or successors have been brought in. *Lynn v. Lowe*, 88 N. Car. 478.

When a widow is erroneously cited to appear, as an heir to her husband who died pending an action against him, and not as widow in community, it was held that a valid judgment could not be entered. *Dinneer v. O'Hern*, 39 La. Ann. 961.

5. Substitution must appear of record, and the record must show that such representatives or successors have been brought in. *Clayton v. Preston*, 54 Tex. 418.

The death of a party *pendente lite* should be made known by suggestion of that fact to the court, and the action continued by order of the court against the representative of the party deceased. *Judson v. Love*, 35 Cal. 463.

Where the record does not show that the substitution [of administrators of the defendant] was done at the instance of the administrators or their counsel, it should show that they were brought on the record by some sort of notice or process. *Townsend's Appeal*, 117 Pa. St. 320; *Hill v. Truby*, 117 Pa. St. 320.

may be lost by laches.¹ The court need not have jurisdiction over the substituted party.² Whether a defendant can compel the substitution of a plaintiff depends on the wording of the statute.³ In case of substitution an amended complaint need not be filed, but the subsequent proceedings must be properly entitled.⁴ The Statute of Limitations is no bar as against a substituted

Where the record shows that a party through his counsel assumed the defense of an action as administrator, the regularity of his admission as a party in place of his intestate is sufficiently established, though the death of the intestate is having occurred during the process of the cause was not suggested, and no service of the notice issued to him appeared to have been made. *Alexander v. Patton*, 90 N. Car. 557.

Where, pending an appeal, a party dies, and his personal representatives are substituted in the appellate court, and the case is remanded for another trial, and tried and again appealed, a failure to suggest in the lower court the death of said party and to enter the appearance of his representatives was held no cause to render judgment void. *Stackhouse v. Zuntz*, 36 La. Ann. 529.

Where an administrator, who, as such, has been a party to an action resigns and another is appointed, and both present their petition to the court, setting out those facts, and the latter is for a number of years recognized by the court and opposing parties as a party to the action, though no formal order of substitution has been made until recently, his opponents will not be heard thereafter to complain that he has not been made a party to all proceedings. *Preston v. Breckinridge*, 86 Ky. 619.

Appeals.—When a party to an appeal dies, his legal representative must be substituted before any further proceeding has been had. *Louisiana Mut. Ins. Co. v. Costa*, 32 La. Ann. 1.

When a party dies after judgment and then an appeal is taken, in the absence of an express statutory provision the appellate court may not order a substitution, but the lower court may make such order as may appear necessary. *Thomas v. Thomas*, 57 Md. 504.

1. Time.—An administrator died after bringing suit; the parties in interest failed for eight years to substitute a new plaintiff, though all that time they were *sui juris*. Held, that it was too late then to do so. *Wilcher v. Outz*, 67 Ga. 401.

If an heir is guilty of laches in mov-

ing for substitution in his ancestor's stead as plaintiff in an ejectment suit, his motion should only be granted on terms. *Van Horne v. France*, 32 Hun (N. Y.) 504.

Under the *New York Code* the right to continue an action against the representatives of a deceased party is not affected by the plaintiff's laches in making the motion. *Greene v. Martine*, 21 Hun (N. Y.) 136.

When a statute limits the time in which the personal representatives of a deceased defendant may be brought in, it is sufficient if proceedings have been taken within that time to bring them in, though not completed until afterwards. *Keyser v. Fendall*, 5 Mackey (D. C.) 47.

2. Jurisdiction Over Substituted Party.—If a defendant dies, his personal representatives may be substituted, although the court would have had no original jurisdiction against such representatives in the first instance. *People v. Marine Ct. Justices*, 59 How. Pr. (N. Y.) 413, overruling 18 Hun (N. Y.) 333.

3. Substitution, When and When Not Compulsory.—When a statute simply permits a plaintiff to bring in the personal representatives of a deceased co-defendant, it has been held that he cannot be compelled to do so, nor can such representatives be substituted without his consent, nor can the surviving defendants claim delay until such representatives are substituted. *Ash v. Gull*, 97 Pa. St. 493; 39 Am. Rep. 818.

Contra where the statute is construed to require that such personal representatives of a deceased co-defendant should be made a party. *Gill v. Young*, 82 N. Car. 273.

4. Amendment of Pleadings.—On the substitution of an administrator, he need not file an amended complaint, his claim being identical with that set out in the original complaint. *Hamilton v. Lamphear*, 54 Conn. 237.

An order substituting an executor upon the death of a plaintiff does not require an amendment of the complaint, though all subsequent proceedings should be in the name of the substituted

plaintiff, unless it was a bar as against the original plaintiff.¹ An order of substitution is not appealable.² It seems that a decedent's representatives may be substituted by an *ex parte* order without notice.³ There can be no substitution made by a court to whom a feigned issue has been awarded for trial,⁴ and when a substitution is permitted, only those persons can be substituted who succeed to the party's interest.⁵ Before substitution of an administrator it seems it is not necessary to prove his appoint-

party; and a judgment in favor of the substituted executor is supported by the order of substitution, without any amendment of the complaint, or any service of the amendment upon any of the defendants. *Kittle v. Bellegarde*, 86 Cal. 556.

The suggestion of a party's death upon the record is enough, if undisputed, to have all the proceedings construed with it without amending the declaration. But the later proceedings must be properly entitled. *People v. Judge*, 41 Mich. 3.

Where, on the death of the plaintiff in a suit, his administrator is summoned in, all subsequent proceedings should be in his name. *Thorpe v. Starr*, 17 Ill. 199.

1. Limitations.—The substitution of an administrator as plaintiff on death of original plaintiff and the filing of an amended complaint by him are but steps in continuation of the original action, and not the commencement of a new one, and therefore if the amended complaint sets up no new right, the statute of limitations is not a bar unless a bar to the original complaint. *Evans v. Nealis*, 69 Ind. 148.

2. Order of Substitution Not Appealable.—An order substituting a party plaintiff is not a final judgment, as between the contesting parties, nor is it appealable. *Welsh v. Allen*, 54 Cal. 211.

When, however, in case of the death of an official plaintiff it is provided by statute that the court may "in a proper case" substitute his successor, the substitution does not rest wholly in discretion and is therefore appealable. *Farnham v. Benedict*, 29 Hun (N. Y.) 44.

3. Notice of Substitution.—On the death of a party plaintiff, his representative may be substituted as plaintiff by an *ex parte* order. *Taylor v. Western Pac. R. Co.*, 45 Cal. 323.

If a defendant argues a demurrer after an order of revivor and substitution, he thereby waives any right he may have to notice before the making of such order. *Brooks v. Northey*, 48 Wis. 455.

No notice of such substitution need be given to defendants in default. *Farrell v. Jones*, 63 Cal. 194.

If a party die while a suit is pending, his executor or administrator may appear after a suggestion on the record of the death of the party, and prosecute or defend the suit, and no order of revival is necessary for this purpose. *Moor v. Rand*, 1 Wis. 245.

4. Feigned Issues.—It is the business of the court which awards a feigned issue to name the parties to it. The court to which the issue is referred for trial has no right to substitute a new party plaintiff, when the one named came into the case voluntarily, and subsequently declines to act as such plaintiff. *Sheets v. Whitaker*, 13 Phila. (Pa.) 29.

Nor in the absence of a statutory provision can the court trying the issue substitute the personal representative of a deceased party. *Diffenderffer v. Griffith*, 57 Md. 81.

5. Who May be Substituted.—On the death of a party to an action, the only persons who can be substituted in his place are those who, upon his death, succeed to the interest he then had. *Barribeau v. Brant*, 17 How. (U. S.) 43.

In case of the death of the plaintiff in an action pending, the person entitled to his interest in the subject of litigation may, upon motion, be substituted for the plaintiff, although the title to the subject matter of the litigation, as well as the person entitled, may be disputed. *Landis v. Olds*, 9 Minn. 90.

A brought suit for the use of B. B's name was stricken out. A died pending suit. *Held*, that A's administrator was properly substituted. *Katz v. Moessinger*, 110 Ill. 372.

When a plaintiff, in an action of trover, dies bequeathing all his property to his wife, *held* she could not sue in her own name, although no letters of administration were taken out. *McLean Co. Coal Co. v. Long*, 91 Ill. 617.

A recovered judgment against B on an agreement to release A from a debt

ment.¹ In case of an assignment *pendente lite* the assignee may be substituted for the original plaintiff, although he has died.² All successors in trust are entitled to be substituted in actions brought by their predecessors in trust,³ and this rule applies to

5 C. A. died. C, without notice to A's administrator, was substituted as plaintiff and brought suit on said judgment. *Held*, error. *Morris v. Buckeye Engine Co.*, 78 Ind 86.

An agent, having sold property of A is principal, and taken a note therefor in his own name, and having died pending a suit by the principal against him and the maker for the proceeds, he principal, administering upon his estate, moved to be made a party plaintiff's administrator, to which motion the surviving defendant objected. *Held*, that although the plaintiff was not a proper person to represent the interest of the deceased defendant, yet the court might have made him a party as administrator, and protected the surviving defendant by its decree. *Hill v. Clay*, 6 Tex. 650.

In an action to recover damages for malicious trespass and for an injunction against maintaining brickstacks on the defendants' land, the defendants died. *Held* a trustee of one of the defendants could not be made a party to the suit. *Equitable Life Ass. Soc. v. Schermerhorn*, 60 How. Pr. (N. Y.) 477.

An action for damages for interfering with an easement may be continued by the personal representatives of the deceased plaintiff, though not interested in the real estate, nor entitled to the injunction sought by the plaintiff. *Mathews v. Delaware etc. Canal Co.*, 20 Hun (N. Y.) 427.

An appraisal for land damages having been confirmed, the land owner appealed and then died. His administrator was substituted. *Conklin v. Keokuk*, 73 Iowa 343.

A sued to recover damages for false representations in the sale of land. One of the defendants died. *Held*, in the absence of allegation or proof that his widow had participated in the transaction, received any property from her husband's estate, or held any community property, it was error to make her a party. *Bailey v. Hix*, 49 Tex. 536.

The heir of a party who dies pending an action affecting the title to realty should be substituted rather than the administrator. *Walker v. Schreiber*, 47 Iowa 529.

If the heir delays in making his motion, it should only be granted on terms. *Van Horne v. France*, 32 Hun (N. Y.) 504.

If a grantor sues, and the land is the subject matter of the action his grantees may be substituted in case of his death under the *California Code*. *Plummer v. Brown*, 64 Cal. 429.

1. Proof of Right to Substitution.—Before substitution of an administrator, it is not necessary to prove his appointment. *Hamilton v. Lamphear*, 54 Conn. 237.

If a defendant is entitled to have proof of a substituted party's representative character, he waives that right by arguing a demurrer after such substitution without moving to set the order aside. *Brooks v. Northey*, 48 Wis. 455.

2. Assignees *Pendente Lite*.—By statute in many States it is provided that an assignee *pendente lite* may be substituted for the original plaintiff in the action, the cause of which has been assigned. For a discussion of substitution under these statutes, see *infra*, this title, *Assignments Pendente Lite*. When plaintiff dies after an assignment *pendente lite*, the assignee should not be substituted without notice to plaintiff's personal representatives, but the defendant may by acquiescing, lose his right to object to such substitution without notice. Where a defendant asked that plaintiff's administrator and the assignee should both be substituted, and the assignee alone appeared, obtained a change of venue, and two years having elapsed, and the case being set down for trial, it was held that the defendant had lost the right to object on the ground that the administrator was not a party. *Howard v. McKenzie*, 54 Tex. 171.

When no administration is had on the estate of the deceased plaintiff, the assignee *pendente lite* may be substituted on notice to the plaintiff's widow and next of kin. *Schell v. Devlin*, 82 N. Y. 333.

3. Successors in Trust.—New trustees, guardians, executors, etc., may be substituted as plaintiff in actions brought by the old trustee, etc., in the fiduciary

successors in public office.¹ A ward attaining his majority may be substituted for his guardian.² An assignee in bankruptcy may be substituted for the bankrupt,³ but it seems the receiver of a

capacity. *Lindsey v. Lindsey*, 28 Ga. 169; *Cobb v. Edmondson*, 30 Ga. 30.

If an executor brings suit and dies, an administrator with the will annexed will be substituted on motion. *Wood v. Flynn*, 30 Hun (N. Y.) 444.

Where a trustee obtained a judgment and died, it was held that his successor was properly made a party to an appeal by the defendant. *Losey v. Bond*, 81 Ind. 510.

A wife under her power to administer the community estate cannot be substituted as her husband's successor in an action brought by or against him as an assignee for creditors. *Woessner v. Crank*, 67 Tex. 388.

Where, however, the title to the chose in action was in the guardian, etc., and he had an interest in the suit, on his death, his legal representative should be substituted. *Zellner v. Cleveland*, 69 Ga. 631.

So where a guardian is sued for the board of his wards and dies it was held that his executor was properly substituted. *Lewis v. Allen*, 68 Ga. 398.

In *Georgia* in an action by trustees to recover real property and mesne profits, on the death of the trustee, the *cestui que trust* can be substituted as plaintiff as the real party in interest. The trustee is a proper though not a necessary party. *Blalock v. Newhill*, 78 Ga. 245.

An executor was removed pending an action brought by him. A legatee applied to be substituted on the ground that the executor's successor refused to prosecute. Substitution refused, because the removed executor was still nominal plaintiff and therefore the substitution was unnecessary. *Place v. Hayward*, 55 N. Y. Super. Ct. 208.

1. Officers.—Plaintiff's successor in office is properly substituted in case plaintiff's term of office expires pending the action or appeal. *Smith v. Inge*, 80 Ala. 283.

When, however, by statute a court may "in a proper case" substitute plaintiff's successor in office at the expiration of plaintiff's term, pending the action, the substitution should be refused if apparently desired for the defendant's purposes. *Farnham v. Benedict*, 29 Hun (N. Y.) 44.

When a statute provides that no suit commenced by or against the officers

therein named shall be abated or discontinued by their death, resignation, or removal from office, or the expiration of their term of office, it is optional with their successors to apply or not for such substitution. If no application is made the case will be continued by or against the original parties. *Manchester v. Herrington*, 10 N. Y. 164.

In an action for a *mandamus* against a State officer, upon his going out of office, his successor does not become a party to the suit and is not affected by the proceedings unless substituted. *Ex parte Tinkum*, 54 Cal. 201.

2. Ward Attaining His Majority.—If a ward attains majority, pending a suit brought by his guardian, or next friend, he may be substituted as party plaintiff in his guardian's place. *Sims v. Renwick*, 25 Ga. 58; *Blalock v. Newhill*, 78 Ga. 245; *Phillips v. Taber*, 83 Ga. 565.

It is error to join the minor as plaintiff with his guardian; he should be substituted. *Ricord v. Central Pac. R. Co.*, 15 Nev. 167.

3. Assignees in Bankruptcy.—If a plaintiff becomes a bankrupt pending an action brought by him, his assignee will, on motion, be substituted as plaintiff. *Gates v. Goodloe*, 101 U. S. 612; *Peck v. United States*, 15 Ct. of Cl. 364.

If a defendant has any right to object to such a substitution he waives it by going to trial on the merits. *Chicago Legal News v. Browne*, 103 Ill. 317.

If a defendant becomes bankrupt pending an action, his assignees are properly made parties defendant on their own motion. *Lee v. Pfeffer*, 25 Hun (N. Y.) 97.

The assignee is the proper person upon whom to serve a citation for the revival of a judgment against a bankrupt. *Grayson v. Norton*, 33 La. Ann. 1018.

Where one obtains an injunction to the collection of a judgment, which is dissolved on the answer of the defendant, and the cause continued, and after the collection of the money, the complainant becomes bankrupt, the assignee in bankruptcy is a necessary party complainant. *Brandon v. Cabiness*, 10 Ala. 155.

corporation or individual may not be so substituted.¹

XVI. INTERVENTION—(See also INTERPLEADER, vol. II, p. 194).—Interpleaders, whereby third parties are brought into an action, have been discussed in the article Interpleader. There is another proceeding by which new parties may be introduced into an action known as an Intervention. At common law a third party is not entitled to intervene in an action,² but in equity a right of intervention has been always recognized.³ Irrespective

If, in a creditor's bill, the defendant becomes a bankrupt *pendente lite*, and his assignee was counsel in the case and one of the commissioners appointed to sell defendant's realty under a judgment recovered in the suit, the sale will not be set aside because the assignee was not made a party to the suit. *Merchants' Bank v. Campbell*, 75 Va. 455.

Where, pending a bill, some of the complainants and defendants became bankrupt, and the same person is appointed assignee of both, he is properly made party defendant by supplemental bill of the remaining complainants. *Toulmin v. Hamilton*, 7 Ala. 362.

1. Receivers of Corporations.—After default of the maker, in a suit by a bank against the maker and indorser of a note made jointly, in which the maker alone was served, the bank passed into the hands of receivers, who served a summons upon the indorser, and moved to be substituted as plaintiff in the action. *Held*, that it could not be granted under § 221 of the code. *East River Bank v. Cutting*, 1 Bosw. (N. Y.) 636.

When the receiver of a corporation is appointed pending an action against the corporation, it is not necessary that he should be substituted as defendant in order to enable plaintiff to obtain judgment. *Knauer v. Globe Mut. L. Ins. Co.*, 46 N. Y. Super. Ct. 370.

Although by statute "a person aggrieved who is not a party" may be substituted. This does not entitle a receiver appointed in supplementary proceedings against an execution debtor to be substituted in place of such debtor in other actions brought against him. *Ross v. Wigg*, 100 N. Y. 243. See also *Honegger v. Wettstein*, 94 N. Y. 252; 13 Abb. N. Cas. (N. Y.) 393; rev., 47 N. Y. Super. Ct. 125.

2. Intervention at Common Law.—At common law one creditor of a common debtor has no right to be made a party to or to intervene in a suit brought by another creditor for the re-

covery of a debt. *Askew v. Carswell*, 63 Ga. 162. But at common law a third party not a party to the suit may file affidavits and other evidence to show that there is no real dispute between the plaintiff and defendant, and that on the contrary their interests are one and the same, and adverse to the interests of the parties filing the affidavits. *Lord v. Veazie*, 8 How. (U. S.) 251.

At common law a trustee or assignee for the benefit of creditors may not intervene. *Waterman v. Sprague Mfg. Co.*, 14 R. I. 43.

In a suit on a mortgage a third person claiming a title not derived from either, and who cannot be affected by the judgment, may not dispute the mortgage. *Dorr v. Leach*, 58 N. H. 18.

Where, however, a sheriff's vendee allows the execution debtor to remain in possession, he may be made a party defendant in an action of ejectment against such debtor. *Bell v. Caldwell*, 107 Pa. St. 46.

A person who has no interest, in a legal sense, in the subject matter of a suit *in personam*, and who is not a party to it, cannot compel the plaintiff to make him a party to it. *Coleman v. Martin*, 6 Blatchf. (U. S.) 119.

3. Intervention in Equity.—In equity a party having a beneficial interest in the decree sought to be obtained has a right to intervene by petition filed for that purpose at any stage of the proceedings. *Robertson v. Baker*, 11 Fla. 192.

Assignees *pendente lite* may make themselves parties to a suit in equity by a supplemental bill, but cannot be admitted to take a part as a party defendant. *Daniels' Ch. Plead. & Prac.* (5th ed.) 281, 1516; *Lunt v. Stephens*, 75 Ill. 507; *Chickering v. Fullerton*, 90 Ill. 520.

A person, though not a party to a suit, but having an interest in the subject matter thereof, may bring a bill to

of any express provisions upon the subject of intervention, it has been held in some States that various provisions of the modern legislation upon the general subject of practice and procedure empower the courts to authorize an intervention.¹ In many States, however, there are express statutes upon the subject. In some States the right is given to a defendant in an action for money or chattels to suggest that a third party claims an interest therein, whereupon said third party will be duly served with process and

review the decree in said suit if his interest is affected by said decree. *Paul v. Frierson*, 21 Fla. 529.

It may be that under some circumstances a mortgagee might intervene in equity in case of insufficient security to prevent the payment of insurance money to the mortgagor or its misappropriation. *Heilmann v. Westchester F. Ins Co.*, 75 N. Y. 7.

"If in the progress of any proceeding in equity the court perceives the necessity for parties to interplead, it may order such interpleader as collateral and ancillary to the main case." *Georgia Code*, 1882, § 3236.

In equity a third party may intervene, if in his absence the court would be compelled to order the case to stand over until he was brought in or his rights protected. *Carter v. New Orleans*, 19 Fed. Rep. 659.

When a person in possession of property, or claiming title to it, is engaged in a *bona fide* litigation in equity concerning it, a simple contract creditor can in no case become a party to the suit, or be heard to make averments in opposition to the judgment rendered in it. *Postal Telegraph Cable Co. v. Snowden*, 68 Md. 118.

1. Intervention Under Procedure Acts.—Irrespective of any statute allowing intervention, the administrator of a party who could have joined as plaintiff was allowed to intervene on his own petition, and was made a co-plaintiff under the statutory power of the court to summon in new parties. *Hamilton v. Lamphear*, 54 Conn. 237.

And in *Indiana* the court, under its power to order new parties to be brought in, has admitted parties on their own application to be joined as plaintiffs. *Alyesworth v. Brown*, 31 Ind. 270; *Clark v. Brown*, 70 Ind. 405. And as defendants. *Gibson v. Higdon*, 15 B. Mon. (Ky.) 205.

A by action quieted his title as against his infant son and then sold the land to B. When the son came of age

he appealed, and A filed a confession of errors. *Held*, B was entitled to have such confession set aside and be permitted to defend in A's name. *Roszell v. Roszell*, 105 Ind. 77.

A county may intervene and join in an action by its treasurer upon notes given by an agent of the treasurer on account of county funds misapplied by said agent. *Lauderdale Co. v. Alford*, 65 Miss. 63.

When by statute joint defendants are authorized to raise the question of suretyship as between themselves upon a written complaint duly filed, such complaint is not a mere cross complaint but is a new and original proceeding, and can only be decided upon new notice to the other defendants, and not upon the original summons. *Joyce v. Whitney*, 57 Ind. 550.

When by statute it is provided that one who purchases property which is the subject of litigation, subsequent to the filing of the notice of *lis pendens*, shall be bound by all proceedings thereafter had to the same extent as if he were made a party thereto. It has been held that such a person is entitled to intervene in the action. *McIVER, J.*, said: "If a person in such a situation is to be subjected to all the burdens and disadvantages of being a party, it would seem to be nothing more than right that he should if he desires it, and can make a proper showing for that purpose, be entitled to the privileges of a party." *Ex parte Mobley*, 19 S. Car. 337.

But the code provision permitting any person having an interest in the controversy adverse to the plaintiff to be made a party does not authorize a person to interfere in a cause without leave of court, and the court will not permit persons to become parties, whose interests are represented by an existing party. *McLaughlin v. McLaughlin*, 16 Mo. 242.

Although by the Judicature act of 1873 the form of objection to the non-joinder

substituted as a party defendant.¹ Again it has been provided sometimes, that in actions against sheriffs and other officers to recover property taken under attachment or execution proceedings, the defendant is entitled to have the party for whose benefit the process had issued substituted in his place.² In a few States a

For a defendant—viz., a plea in abatement is abolished, yet the effect of a judgment against several joint contractors as a bar to a subsequent action against either joint contractors remains the same, and therefore a defendant joint obligee is entitled of right to an order to join his co-obligees as defendants. *Sendall v. Hamilton*, L. R., 4 App. Cas. 504; *Pilley v. Robinson*, L. R., 20 Q. B. Div. 155.

1. **Intervention in Actions for Money or Chattels.**—The defendant may suggest by affidavit that a third party claims an interest in the money or chattels on suit, and an order issues notifying said third party to come in and defend. If he does not come voluntarily, a summons will issue for him, and he will be substituted as party defendant. Code of *Alabama*, 1886, §§ 2610, 2611. To same effect, *Arkansas*, Dig. of Stat. 1884, §§ 4947-48; *California*, Deering's C. & St., vol. 3, § 386; *Dakota*, Comp. Laws, 1887, § 4887; *Idaho*, Rev. Stat. 1887, § 4109; *Indiana*, Rev. Stat. 1881, § 273; *Iowa*, McClain's Annot. Code, 1888, § 3777; *Kentucky*, Code, 1888, § 30; *Minnesota*, Gen. Stat. 1878, p. 725, § 131. See *Hooper v. Balch*, 31 Minn. 276; *Mississippi*, Code of 1880, §§ 1578, 1580; *Nebraska*, Comp. Stat. 1889, p. 858, § 48; *New York*, Annot. Code, 1889, § 820; *North Carolina*, Code, 1883, § 189; *Ohio*, Rev. Stat. 1890, § 5016; *South Carolina*, Code, § 143; *Tennessee*, Code, 1884, § 3497; *Utah*, Comp. Laws, 1888, vol. 2, p. 233, § 3188; *Washington*, Code, 1881, § 22; *Wisconsin*, Annot. Stat. (S. & B.), § 2610; *Wyoming*, Rev. Stat. 1887, § 2405. After an intervention under the above act it is not competent for the plaintiff thereafter to participate in the litigation between such contesting defendants. *St. Louis L. Ins. Co. v. Alliance Mut. L. Ins. Co.*, 23 Minn. 7.

The admission of a third party upon defendant's suggestion and the application of said third party who is a proper but not a necessary party to the suit, is a matter in the discretion of the court to which the application is made. *Stewart v. Ludwick*, 29 Ind. 230.

The above provision applies only to actions at law. *Lane v. New York L. Ins. Co.* (Supreme Ct.), 9 N. Y. Supp. 52.

The power given to the courts to interplead parties by the old *New York* Code does not exist under the Code of Civil Procedure. *Ahrens v. Burke*, 63 How. Pr. (N. Y.) 50.

On a motion by a defendant to substitute a third party, it is only necessary to show that the person not a party to the action, makes a demand for the same debt or property without collusion with the defendant, and no proof as to the validity or sufficiency of his claim is required. "The effect of the section is to create a distinction under its provisions and an action, in the nature of an interpleader, for the reason that in the latter it is necessary to show that the claim interposed is substantial and will probably be successful, in order to entitle the plaintiff to maintain his action." *Dreyfus v. Casey*, 52 Hun (N. Y.) 95.

Under the above provision one sued for the contract price of logs is not entitled to an order substituting, as defendants, persons who set up title to the logs adverse to the plaintiff. *Baxter v. Day*, 73 Wis. 27.

A on behalf of B sold a note to C and gave B a check for the proceeds. C learning the note was not good demanded the money of A, who stopped payment of his check to B, whereupon B sued A. *Held*, that under the above provision, the court properly substituted C for A as defendant, on A's paying the money into court; and notwithstanding that after the application for substitution C sued A in a State court the federal court properly made the order. *Harris v. Hess*, 20 Blatchf. (U. S.) 253.

2. **Intervention in Actions Against Sheriffs, etc.**—In an action against a sheriff or other officer for the recovery of property taken under an attachment or execution, the court may, upon application of the defendant and of the party in whose favor the process issued, permit the latter to be substituted as defendant, sureties for the costs being

third party, disputing the validity of an attachment or claiming the property attached, or an interest therein, or a lien thereon, may intervene on his own petition¹. In *Massachusetts* the right to intervene seems to be limited to actions brought to recover depos-

given." *Iowa*, McClain's Annot. Code, 1888, § 3779; *Kansas*, Gen. Stat. 1889, § 4122; *Kentucky*, Code, 1888, § 32; *Nebraska*, Comp. Stat. 1889, p. 859, § 50; *New York*, Annot. Code, 1889, § 142; *Ohio*, Rev. Stat. 1890, § 5018; *Tennessee*, Code, 1884, § 3498; *Wyoming*, Rev. Stat. 1887, § 2407.

This does not permit of the substitution of an attachment plaintiff for the sheriff in an action against the sheriff for trespass in serving the writ. *Sperry v. Ethridge*, 70 Iowa 27.

In so far as these statutes provide for discharge of the sheriff they are unconstitutional. *Sunberg v. Babcock*, 61 Iowa 601; *Maish v. Littleton*, 62 Iowa 105.

The application for substitution may be made at any time, even after answer filed. *Bixly v. Blair*, 56 Iowa 416.

After such an intervention, the judgment entered in the suit designating the rights of the parties is conclusive upon all of the parties, as well between the plaintiff and the intervenor as between plaintiff and the original defendant. *Witter v. Fisher*, 27 Iowa 9.

The application for substitution is in the discretion of the court. *Wafer v. Harvey Co. Bank*, 36 Kan. 292; *Gifford v. Beaty*, 12 Ohio St. 189.

The above provisions of the codes so seriously modify the ordinary common law rule of liability as to require a very clear case to be made out before the court will direct substitution. *Berg v. Grant*, 18 Abb. N. Cas. (N. Y.) 449.

In an action upon a replevin undertaking, the entry and order of the court in the replevin suit are proof of a substitution of defendants. *Leslie v. Eastman*, 17 Ohio St. 158.

A sued a constable to recover a horse levied on by him as B's property, B having possession when the levy was made. *Held*, the plaintiff in the execution could be substituted as defendant on his own motion. *Conklin v. Bishop*, 3 Duer (N. Y.) 646.

1. Intervention of Third Party in an Attachment.—"Any person other than the defendant may, before the sale of any attached property or before the payment to the plaintiff of the proceeds

thereof, or any attached debt, present his petition, verified by oath, to the court, disputing the validity of the attachment, or stating a claim to the property or money, or to an interest in or lien on it under any other attachment or otherwise, and setting forth the facts upon which such claim is founded; and the petitioner's claim shall be in a summary manner investigated. The court may hear the proof or order a reference, or may impanel a jury to enquire into the facts. If it is found that the petitioner has title to, a lien on, or any interest in such property, the court shall make such order as may be necessary to protect his rights. The costs of such proceedings shall be paid by either party at the discretion of the court." *Iowa*, McClain's Annot. Code, § 4241.

To same effect *Kansas*, Gen. Stat. 1889, § 4123; *Kentucky*, Code, 1888, § 29; *Massachusetts*, Pub. Stat. 1882, p. 1055, § 35.

Though such person has replevied the goods he may nevertheless intervene under the above statute. *Tuttle v. Wheaton*, 57 Iowa 304.

When realty is attached one claiming to be the owner cannot intervene. *Loring v. Edes*, 8 Iowa 427. *Contra* under *Kentucky*, Code 1888, § 29.

A mortgagee thereof can intervene. *Bodwell v. Heaton*, 40 Kan. 36.

Creditors claiming under a deed of trust made by defendant in the attachment, after service upon him, have such an interest as will authorize their intervention under the above statute. *Bamberger v. Halberg*, 78 Ky. 376.

A claimant having acquired the legal title to the property attached may, by intervention, recover the property by showing either the invalidity of the attachment or that it had been dissolved after levy by operation of law. *Bank of Columbia v. Overstreet*, 10 Bush (Ky.) 148.

In *Kentucky* at least the practice under such a statute does not require any answer to the claimant's petition—it is to be regarded as traversed by all parties. The issue raised is a separate and distinct issue to be tried by different proceedings and in a different man-

s in savings banks,¹ while in several of the States it is provided that in an action for the recovery of real or personal property a third party having an interest in the subject of the action, may be made a party on his own application,² but in this latter case it is necessary that the plaintiff have an interest in the subject of the suit as distinct from the thing which is the subject of the controversy.³ In *Louisiana* third parties have always had the right

er. There is to be no summons awarded, and the claimant is not a party to the original litigation. Taylor v. Taylor, 2 Bush (Ky.) 118. By the present code of *Kentucky* (1888, § 29) the claimant is made a party defendant.

1 Actions to Recover Deposits in Savings Banks.—In actions to recover deposits in savings banks "if it appears that the same fund is claimed by another party than the plaintiff . . . the court . . . may order the proceedings to be amended by making such claimants parties defendant thereto." *Massachusetts*. Pub. Stat. 1882, p. 664, § 1. See *Underwood v. Boston Five Cents Sav. Bank*, 141 Mass. 305.

2. Actions to Recover Real or Personal Property.—In *Indiana* it is provided that, "When in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof makes application to the court to be made a party, it may order him to be made a party by the proper amendment." *Indiana*, Rev. Stat. 1881, § 272; *New York*, Annot. Code 1889, § 452; *North Carolina*, Code 1883, § 189; *Ohio*, Rev. Stat. 1890, § 5014; *Tennessee*, Code 1884, § 3496.

Under the above provision a subsequent purchaser and his grantees of and against which is sought to be specifically enforced an alleged agreement by the former owner to execute a mortgage thereon, are properly made defendants. *Ladd v. Stevenson*, 112 N. Y. 325.

Where common carriers having in their charge for transportation certain property of which the title is disputed, and which is stowed in their vessel underneath other articles of freight, are sued by one of the claimants just before the vessel is to sail, a motion to substitute the rival claimant as defendant will be granted, with costs. *Schuyler v. Hargous*, 3 Robt. (N. Y.) 673.

Under the above code provision a person interested in the subject matter of the action at the time of filing the

lis pendens has an absolute right to be made a party if he so elects. But after the filing, his right to come in and defend, rests in the sound discretion of the court. *Earle v. Hart*, 20 Hun (N. Y.) 75.

No supplemental summons need be served when one is made a party to a suit on his own petition. *Haas v. Craighead*, 19 Hun (N. Y.) 396.

3. Intervenor Must be Interested in the Subject of the Action.—The plaintiff must have an interest in the subject of the suit. It is not sufficient that he have an interest in the thing which is the subject of the controversy. Therefore a claimant to land in dispute, between other parties to a suit, who is not interested in that controversy, but claims by a different title, may not intervene. *Asheville Division v. Aston*, 92 N. Car. 588.

The above provision is confined to the recovery of real or personal property. An action to recover moneys claimed to be due, cannot be considered as an action for the recovery of personal property, and therefore third parties cannot, under the above provision, ask to be brought in as parties to such action. *Kelsey v. Murray*, 18 Abb. Pr. (N. Y.) 294.

A, as executor of Y, sued B for moneys received by X as agent for Y. B. alleged the money belonged to Z, whose assignee had sued to recover it, and that the money belonged to Z subject to certain equities in B. B moved to make Z a party. "The subject of the action is to obtain payment of the debt due plaintiff from defendant. The facts upon which the debt is based may be of an equitable nature, but the action is to recover a debt. The defendant, by way of defense, denies the existence of the alleged facts upon which the plaintiff bases his claim. That defense, if proved, is a good one. He need show nothing further than that the money was not the money of the plaintiff. Whose money it was, if it did not belong to the plaintiff, is a matter in which the plaintiff has not

to intervene in any suit,¹ and the same practice has always existed

the slightest interest, nor is such an investigation the subject of his action. The plaintiff does not seek a judgment in this action for any money of the assignor which he deposited with the defendant. And a judgment in plaintiff's favor has absolutely no effect upon any rights which the assignee may have against the defendant. The assignee, therefore, cannot have an interest in the subject of this action within the meaning of the code. It is impossible to see how the assignee can have such interest when no judgment that the court can give can in any way affect his claim against the defendant, and where a complete determination of the controversy between the plaintiff and defendant can be had without first ascertaining or selling the rights of any other person. . . . If the amendment in this case were allowed, the defendant would succeed in converting a plain action at law into a suit in equity, and thereby instituting an investigation as to the ownership of a fund in the hands of a trustee, and obtaining a decree in relation thereto." *Chapman v. Forbes*, 123 N. Y. 532.

Under the above provision an assignee for creditors may not intervene in an attachment proceeding brought against his assignor before the assignment was recorded. His right must be asserted in an independent suit. *Haynes v. Rizer*, 14 Lea (Tenn.) 246.

A sued an assignee for the benefit of creditors claiming a lien which, if allowed, would exhaust the fund. *Held*, a preferred creditor under the assignment had no right to intervene if the assignee was guilty of no misconduct. *Davies v. Fish*, 47 Hun (N. Y.) 314; rev. 19 Abb., N. Cas. (N. Y.) 24.

When a grantee of land sues to compel the reformation of his deed, judgment creditors of the grantor cannot interfere to prevent the grantor from waiving the right to contend that the mistake was one of law and not of fact. *Boyd v. Anderson*, 102 Ind. 217.

The above provision does not apply to the case of one who claims the right to receive from plaintiff a part of the money which plaintiff may recover, when it is admitted that the legal title to the cause of action is in the plaintiff. *Palmer v. Mutual L. Ins. Co.*, 55 N. Y. Super. Ct. 352.

In an action against a town overseer

of the poor for medical services rendered at the request of defendant, the town has no right to be made a party defendant on its own request. *Christman v. Thatcher*, 48 Hun (N. Y.) 446.

In an action of divorce, it seems that a co-respondent cannot intervene, or if he can, he will not be permitted to do so when guilty of laches in making his application. *Quigley v. Quigley*, 45 Hun (N. Y.) 23. The writer is informed that in *New York* co-respondents have been allowed to intervene in an action of divorce, but has found no reported case to that effect.

After the levy of an attachment by the sheriff, an action was brought by him, under § 238 of the code, to recover a debt due to the defendant in the attachment suit. The defendant in the second suit admitted the cause of action, but claimed a set-off, and upon a reference the same was allowed by the referee, and judgment was about to be rendered in favor of the sheriff for the balance. *Held*, that the attaching creditors ought not at this point to be made parties on motion, and could not be substituted as defendants for the purpose of determining their respective priorities. *Glennville Woolen Co. v. Ripley*, 6 Robt. (N. Y.) 530.

In action brought against trustees to recover property alleged not to be part of the trust, the *cestui que trust* may intervene. *Haas v. Craighead*, 19 Hun (N. Y.) 396.

When a mortgagor had died leaving a will but no children, his brother was permitted to intervene to contest the fact of the indebtedness, in an action to foreclose the mortgage. *Zundel v. Tacke*, 47 Hun (N. Y.) 239.

1. *Louisiana*.—"Third persons, not originally party to the suit, may intervene in the same, and like the defendant, institute demands incidental to the main action, either before judgment or on exception; and these demands are called the intervention and opposition of third persons."

An intervention or interpleader is a demand by which a third person requires to be permitted to become a party in a suit between other persons, by joining the plaintiff in claiming the same thing, or something connected with it, or by uniting with the defendant in resisting the claims of the plain-

n *Texas*.¹ In quite a number of the States it is provided by statute that any person may intervene in an action, or proceeding who has an interest in the matter in litigation, in the success of either of the parties or an interest against both.² What interest is necessary in an intervenor under these statutes and the practice of *Louisiana* and *Texas* has been frequently defined and the definitions are not entirely consistent.³ In the construction of this statute and practice the

iff, or, when his interest requires it, by opposing both."

In order to be entitled to intervene, it is enough to have an interest in the success of either of the parties in the suit, or an interest opposed to both.

One may intervene either before or after issue has been joined in the cause, provided the intervention does not retard the principal suit.

Louisiana, Rev. Code 1875, §§ 364, 389, 391, and following sections which authorize interventions in case of executions.

1. *Texas*.—"We have no statute providing for the right of intervention, but our practice on this subject . . . is probably derived through the ecclesiastical courts in *England* and the modifications of the civil law as found in the State of *Louisiana*, and rests upon the principle that a party should be permitted to do that voluntarily which, if known, a court of equity would require to be done." Pool v. Sanford, 52 Tex. 633. See also *Whitman v. Willis*, 51 Tex. 425.

2. **General Intervention by Statute**— "Any person who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both, may, before the trial, intervene in an action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared who may answer or demur to it as if it were an original complaint." *California*,

Deering's C. & St., vol. 3, § 387; *Dakota*, Comp. Laws 1887, § 4886; *Idaho*, Rev. Stat. 1887, § 4111. To same effect *Colorado*, Code Civ. Proc., ch. 1, § 22; *Iowa*, McClain's Annot. Code, 1888, §§ 3889-3891; *Minnesota*, Gen. Stat. 1878, p. 725, § 131; *Montana*, Comp. Stat. 1887, p. 64, § 24; *Nebraska*, Comp. Stat. 1889, p. 859, §§ 50 a, b, c; *Nevada*, Gen. Stat. 1885, §§ 3621-3624; *New Mexico*, Comp. Laws, 1884, §§ 1890-1892; *Utah*, Comp. Laws, 1888, vol. 2, p. 233, § 3190; *Washington*, Code, 1881, §§ 23, 24.

3. **Interest of Intervenor Defined.**—

"The interest mentioned in the statute which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. The provisions of our statute are taken substantially from the code of procedure of *Louisiana*." The opinion then quotes the language of the *Louisiana* Code on that point and the definition of the term interest in *Gasquet v. Johnson*, 1 La. 431, and then continues: "To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit or a claim to, or lien upon the property or some part thereof, which is the subject of litigation." *Horn v. Volcano Water Co.*, 13 Cal. 70; 73 Am. Dec. 569.

Quoted with approval in *Bennet v. Whitcomb*, 25 Minn. 148. See *Lewis v. Harwood*, 28 Minn. 428; *Harlan v. Eureka Min. Co.*, 10 Nev. 92.

"The broad interpretation given to the statute relating to intervention in *California* may, we think, be said as intimated in *Speyer v. Ihmels*, 21 Cal. 281, to rest on the doctrine of *stare decisis*, rather than on the natural strength and meaning of the language as ably expounded in *Horn v. Volcano Water Power Co.*, 13 Cal. 62; 73 Am. Dec. 569." *Lewis v. Harwood*, 28 Minn. 428.

following principles have been laid down: The right of intervention is not compulsory,¹ nor is it such an adequate remedy as will prevent an application to a court of equity to enjoin the suit.² A party may intervene although he has another remedy.³ The statutes only apply to actions that are purely civil in their character and therefore do not authorize an intervention in a *quo warranto* proceeding.⁴ An intervenor must bring himself

"The code does not attempt to specify what or how great that interest (entitling one to intervention) shall be, in order to give a right to intervene. Any interest is sufficient. The fact that the intervenor may or may not protect that interest in some other way is not material." *Coffey v. Greenfield*, 55 Cal. 382.

"The intervenor's interest must be such that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought; or, if the action had first been brought against him as the defendant he would have been able to defeat the recovery, in part at least. His interest may be either legal or equitable." Pom. "Remedies and Rem. Rights" (2nd ed.), § 430.

This rule has been adopted in *Texas*. *Pool v. Sanford*, 52 Tex. 621; *Del Rio Bldg. & L. Assoc. v. King*, 71 Tex. 729; *subtit.*, *King v. Olds* (Tex. 1888), 12 S. W. Rep. 65.

"Although due regard should be had to the advantages of the proceeding by intervention in preventing a multiplicity of suits, yet we should also, as far as practicable, guard against its disadvantages. It is a practice liable to abuse; has a tendency to multiply the issues; imposes frequently great additional labor and responsibility upon the presiding judges below to properly present in the charge these issues to the comprehension of the jury, and tends to confusion in the trial of causes." *Whitman v. Willis*, 51 Tex. 421.

A person must have an interest that is direct and closely connected with the object in dispute, founded on some right, claim or lien, either conventional or legal, to be allowed to intervene. *Brown v. Saul*, 4 Mart., N. S. (La.) 434; annotated in 16 Am. Dec. 175.

It is only necessary to have an interest in the success of either party to authorize an intervention. *Boyd v. Heine*, 41 La. Ann. 393.

1. Statutes Not Compulsory.—One having a right to bring a separate action to recover property is not bound to intervene in a suit between other parties involving the property. *Lannes v. Courege*, 31 La. Ann. 74; *Le Blanc v. Dashiell*, 14 La. 274; *Hazard v. Agricultural Bank*, 11 Rob. (La.) 326.

In an action as to land, between devisees of a testator and parties deriving title from the executor, the executor may not be compelled to intervene. *Bennett v. Kiber*, 76 Tex. 385.

2. Adequacy of Remedy by Intervention.—The right to intervene is not such an adequate remedy as will prevent an application to a court of equity to enjoin the suit. *Mann v. Flower*, 26 Minn. 479.

Where a stranger desires to enjoin an action in a court where he seeks his remedy, he must do so by a separate proceeding. *Mann v. Flower*, 26 Minn. 479.

Where, however, a stranger desires to enjoin the execution of process by the sheriff, he may apply by petition in the original cause for an order. *Platto v. Deuster*, 22 Wis. 482; *Ender v. Lennon*, 46 Wis. 299. See also *Smith v. American L. Ins. Co.*, *Clarke Ch. (N. Y.)* 307; *Lane v. Clark, Clarke Ch. (N. Y.)* 309.

3. Existence of Another Remedy No Bar to Intervention.—Any interest is sufficient to authorize a party to intervene. The fact that he has another means of protecting that interest is immaterial. *Coffey v. Greenfield*, 55 Cal. 382.

When the right to personal property levied upon is involved in a suit, it is, as a general rule, the proper practice to require a claimant to resort to the statutory remedy for trial of the right of property. *Whitman v. Willis*, 51 Tex. 422.

4. Quo Warranto.—The right of intervention given by statute exists only in actions which are purely civil in their character. The statutory proceeding in the nature of a *quo warranto* is *quasi* criminal in character, and in such ac-

within the provisions of the statutes or he is a mere interloper.¹ A party may not interplead in a proceeding by intervention,² nor may he seek in such a proceeding to be substituted for either the plaintiff or defendant in the original action.³ In actions affecting real property, one claiming title may intervene, if the title to the real estate is directly involved in the suit,⁴ and the intervenor

on the right to intervene does not exist. *People v. Green*, 1 Idaho 235.

1. Intervenor Must Bring Himself Within the Statutes.—One who attempts to intervene in an action pending between other parties without bringing himself within the provisions of the statute is a mere interloper, who acquires no rights by his unauthorized interference, unless objection thereto is raised. His pleadings are unknown to the law and can have no legal effect.

Thus where one creditor sues to set aside a fraudulent conveyance, and another creditor comes in and alleges the conveyance is also fraudulent as to him, and asks for similar relief, he is not an intervenor, but a mere interloper, and therefore his petition gives no constructive notice under the doctrine of *is pendens*. *Des Moines Ins. Co. v. Kent*, 75 Iowa 522.

So where a petition of intervention does not state facts entitling the petitioner to intervene, the petition must be treated the same as a complaint which fails to state facts sufficient to constitute a cause of action, and therefore an objection to its sufficiency can be taken at any time, even in the supreme court. *Harlan v. Eureka Min. Co.*, 10 Nev. 92.

Where there is no privity of contracts between the plaintiff and an intervenor in a suit, and the matter of complaint or cause of action sought to be enforced by the latter against the defendant is a contract between such intervenor and the defendant, distinct from that which is the subject of litigation between the plaintiff and defendant, the petition of the intervenor cannot be maintained. *Burditt v. Glasscock*, 25 Tex. Supp. 45.

2. Interpleader.—A proceeding termed an intervention, for which the effect of an interpleader is claimed, is irregular.

Therefore where a purchaser at judicial sale buys incumbered property he cannot clear it from incumbrances by a petition in intervention, but by an action against all concerned in them. *Morris v. Cain*, 34 La. Ann. 657.

3. Substitution.—The statutes admitting intervention authorize a party to unite with the plaintiff or defendant and do not give the intervening person the right to be substituted for either plaintiff or defendant. *Britton v. Des Moines etc. R. Co.*, 59 Iowa 540; *Mayer v. Stahr*, 35 La. Ann. 57; *Clapp v. Phelps*, 19 La. Ann. 461; 92 Am. Dec. 545.

Where the plaintiff brought suit as the mother of the real parties in interest, asserting no right in herself and subsequently the children by their guardian *ad litem* filed a complaint setting up the same cause of action, the subsequent appearance was not an intervention but merely a substitution. *Temple v. Alexander*, 53 Cal. 3.

An intervenor cannot, without the consent of the plaintiff, substitute himself in the place of the defendant. He stands before the court in the character of plaintiff as to the nature of the title and the object of his demand, and is governed in his pleadings by the rules of practice which apply to plaintiffs in principal demands. *Clapp v. Phelps*, 19 La. Ann. 461; 92 Am. Dec. 545.

4. Title to Realty Must be Directly Involved.—When the title to real estate is directly involved in a suit pending, any one who has an interest in the property at the time of the commencement of the action has a right, on application made at the proper time and manner, to intervene. But when the title is not directly involved (as where land has been levied on under attachment to satisfy a debt), then a third party in possession, in order to intervene, should allege such facts as would authorize a court of equity to grant him an injunction. *Whitman v. Willis*, 51 Tex. 421.

A party who is the legal owner of real estate, attached as the property of another person, who is a non-resident, has no right to be made a party defendant to the suit, on his own motion; nor is he a proper party in order to oust the court of jurisdiction as to the other defendant. *Loving v. Edes*, 8 Iowa 427.

If A has leased to B, and sues for

claims through the defendant, or is responsible for his title.¹ In a proceeding to enforce a lien against real property, parties claiming title thereto and prior lien creditors may intervene,² but simple creditors may not.³ Mortgagees of personalty may intervene in actions to recover the property mortgaged or its proceeds or value.⁴ In attachment proceedings subsequent purchasers,

rent, C cannot intervene on claiming to own the property and setting up an ouster by A. *Limberg v. Higginbotham*, 11 Colo. 316.

Contra, *Hunter v. Dunham*, 26 La. Ann. 141.

In ejectment, a third person cannot intervene for the purpose of getting the court to quiet his title, as against the plaintiff, to another tract of land not in dispute between the plaintiff and defendant. *Rosecrans v. Ellsworth*, 52 Cal. 509.

In suits by *Empresarios* against the government, others than those contemplated by the statute may become parties, when such intervention may serve to protect their rights. *Herndon v. Robertson*, 15 Tex. 593.

1. Intervenor Must Claim Under Defendant, etc.—Subsequent purchasers may intervene in ejectment. *Mastick v. Thorp*, 29 Cal. 444. But a person in no way connected with plaintiff's right of possession, but alleging title in himself paramount to both, cannot. *Porter v. Garrissino*, 51 Cal. 559. In petitory actions in *Louisiana* he may. *Haydel v. Bateman*, 2 La. Ann. 755.

In an action of trespass to try title, brought by a vendee of a purchaser at sheriff's sale against the heir of the judgment debtor, the purchaser who has executed a deed with warranty may have his rights adjudicated. *Jones v. Smith*, 55 Tex. 383.

In an action of trespass to try title brought by a purchaser at sheriff's sale, one claiming title under foreclosure of a mortgage against the execution debtor, but not proving notice to plaintiff of intervenor's lien at time his title vested, has no such interest as would have entitled him to recover had he brought the action originally against plaintiff, or to defeat recovery had it been brought against him, and therefore a petition of intervention by him is demurrable. *King v. Olds* (Tex. 1888), 12 S.W. Rep. 65; *Del Rio Bldg. & L. Assoc. v. King*, 71 Tex. 729.

2. Proceedings to Enforce Liens.—A married woman, being a necessary party to an action to foreclose a mortgage

upon property claimed as a homestead, is entitled to intervene therein. *Sargent v. Wilson*, 5 Cal. 504; *Moss v. Warner*, 10 Cal. 296; *Mabury v. Rinz*, 58 Cal. 11.

In proceedings to establish a mechanic's lien, a prior mortgagee of the premises will, on his application, be admitted as defendant to contest the lien. *Walker v. Hauss-Hijo*, 1 Cal. 183; *Whitney v. Higgins*, 10 Cal. 551, 70 Am. Dec. 748. *Contra*, under subsequent statute. *Van Winkle v. Stow*, 23 Cal. 457. So will an owner of the land, although not a party to the contract under which the lien was claimed. *Thaxter v. Williams*, 14 Pick. (Mass.) 49.

A subsequent mortgagor may not intervene. *Hocker v. Kelley*, 14 Cal. 164.

In a suit to establish a mechanic's lien, other parties claiming liens may intervene. *Mars v. McKay*, 14 Cal. 127. See also *JOINDER*, vol. 11, p. 986.

In a suit to declare void a judicial sale, the holder of a mortgage given by the purchaser has such an interest in the result of the controversy as to entitle him to intervene. *Webb v. Keller*, 26 La. Ann. 596.

3. Simple Creditors May Not Intervene in Proceedings to Enforce Liens.—A simple contract creditor of a common debtor may not intervene in a suit to foreclose a mortgage. *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569. Nor in an action between lien holders and owners of chattels. *Welborn v. Eskey*, 25 Neb. 193. But subsequent purchasers of the property, and lien and judgment creditors may. *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569; *Coster v. Brown*, 23 Cal. 142; *Dyer v. Harris*, 22 Iowa 268.

An opponent is without interest to litigate the correctness of a judgment as between plaintiff and defendant. *Wright v. Steed*, 10 La. Ann. 238.

4. Mortgagees of Personalty.—A mortgagee of personalty may intervene in an action by a third party against the mortgagor to recover the specific property. *Martin v. Thompson*, 63 Cal. 3.

rs or lien creditors may intervene, but simple creditors may not.¹ Assignor retaining an interest may intervene in an action brought by the assignee,² and assignees may intervene in actions brought by their assignors.³ A party claiming to be the owner of a claim sued upon, or entitled to the proceeds of litigation, or

1. mortgagee of personalty may intervene in an action brought by the assignor against a third person to recover the value of the mortgaged property which had been destroyed by such third party's negligence. *Wohlwend v. J. I. Case Dressing Machine Co.*, 42 Minn. 500.

2. **Attachment Proceedings.**—Subsequent purchasers, heirs, lien creditors, may intervene in an attachment suit against their debtor. *Davis v. Eppinger*, Cal. 378, 79 Am. Dec. 184; *Speyer v. Wells*, 21 Cal. 280; *Coghill v. Marks*, Cal. 673.

3. In an attachment of A's interest, A's mortgagee who has been found to have an interest in the property, cannot intervene to contest the attachment. *Phillips v. H.*, 56 Iowa 499.

4. A plaintiff in a subsequent action brought by an attachment may not intervene in a prior action brought against the defendant by a third party and brought by an attachment, on an allegation that the attachment is based on a claim not considered, is collusive, etc. *vis v. Harwood*, 28 Minn. 428. *Ultra*, *Bateman v. Ramsey*, 74 Tex. 327; *Nenney v. Schluter*, 62 Tex. 327. 5. On the ground of any defect in the first attachment. *Gasquet v. Johnson*, 1 La. 425; *Bateman v. Ramsey*, 74 Tex. 389; *Nenney v. Schluter*, 62 Tex. 327.

6. When horses were seized for rent of a stable, a third party claiming to be the owner of the horses seized and that he paid rent to the lessee of the stable may intervene. *King v. Harper*, 33 La. n. 496.

7. A statutory provision that "grantees appear and defend suits against grantors in which the real estate attached," does not apply where the conveyance was prior to the attachment. *Sprague v. Sprague Mfg. Co.*, Me. 417.

8. **Assignor Retaining an Interest.**—The owner of a claim assigns it absolutely, but retains an interest in it, he may intervene to protect his interest in an action brought by the assignee to effect the same. *Gradwohl v. Harris*, Cal. 150.

3. **Assignees.**—An assignee of an insurance policy may intervene in an action by the insured. *Stevens v. Citizen's Ins. Co.*, 69 Iowa 659. When a claim for negligent injury has been assigned absolutely, and the assignee has brought suit therefor, assignor is not entitled to intervene, as he cannot be prejudiced whatever be the result of the suit. *Vimont v. Chicago etc. Co.*, 64 Iowa 513. One to whom a pledge has been assigned, pending litigation concerning it, may intervene. *Loughborough v. McNevin* (Cal. 1887), 15 Pac. Rep. 773; *aff'd* 74 Cal. 250.

An assignee pending the action will be allowed to intervene on his own application. *Brooks v. Hager*, 5 Cal. 281; *Fleming v. Seeligson*, 57 Tex. 524.

An assignee for the benefit of creditors may intervene on his own petition. *Dunham v. Greenbaum*, 56 Iowa 303.

In an action on a draft against the acceptor, his assignee under a prior assignment for creditors is not a person having an interest "in the matter in litigation," and not entitled to intervene even though part of the property assigned has been attached in the suit. *Meyer v. Black*, 4 N. Mex. 190.

A made an assignment for the benefit of creditors after a suit had been brought against him by attachment. *Held* his assignee could intervene and set up a claim against the plaintiff in the attachment suit for damages to A by reason of the wrongful suing out of the attachment. *Dunham v. Greenbaum*, 56 Iowa 303.

A sued for work done, B sued as A's assignee to recover for the same work, and the actions were consolidated. Defendant was found liable for an amount less than the amount assigned. Other assignees of A sought to intervene after the time limited by statute for the presentation of claims such as theirs had expired. *Held*, their application should be refused for that reason and also because of their laches in remaining silent during B's prosecution of his action. *Ritchie v. District of Columbia*, 18 Ct. of Cl. 78.

In case the intervenor is an assignee of the plaintiff, it is not necessary for

to have a lien thereon, may intervene.¹ Sureties and warrantors have been permitted to intervene.² In an action by one of several surviving partners, the others may intervene, but the personal representative of the deceased partner may not.³ Tax-payers may intervene in proceedings by and against a municipality,⁴ and in proceedings by tax-payers to enjoin the collection of taxes, etc., the municipality and the beneficiary of the tax may intervene.⁵ Simple creditors may not intervene in actions against their debtor except in case of fraud or collusion, or where the proceeding is in the nature of a creditor's bill.⁶ In an action against an officer to

such intervenor to file a supplemental complaint. He takes the place of the original plaintiff. *Virgin v. Brubaker*, 4 Nev. 31.

1. Owner of Claim Sued Upon, etc.—

In a suit upon a promissory note by the holder against the maker, a third person claiming to be the rightful owner of the note has the right to intervene. *Stich v. Dickinson*, 38 Cal. 608; *Taylor v. Adair*, 22 Iowa 279; *Holland v. Commercial Bank*, 22 Neb. 585; *Price v. Wiley*, 19 Tex. 142, 70 Am. Dec. 323.

Where a suit was brought on a promissory note given for the hire of certain slaves by an administrator, *held*, that a third party had a right to file a petition, in intervention, alleging that when said slaves were hired they belonged to petitioner. *Eccles v. Hill*, 13 Tex. 65.

On a rule on sheriff to pay over proceeds of an execution, a party claiming a prior right may intervene. *Cobb v. Depue*, 23 La. Ann. 244.

A county claiming a lien on a fund for taxes assessed thereon may intervene in an action brought to determine right of ownership of said fund. *Yuba Co. v. Adams*, 7 Cal. 35.

Pending litigation as to title to land a receiver was appointed. Prior to that time the parties in possession had executed an agricultural lien to A. The suit resulted against them but no order was made as to rents and profits in the receiver's hands. *Held*, A could intervene to assert his rights in that fund. *McNair v. Pope*, 104 N. Car. 350.

2. Sureties and Warrantors.—Sureties in defendant's undertaking in replevin may intervene, if the defendant is insolvent, and the action is not being defended in good faith. *Coburn v. Smart*, 53 Cal. 742.

A party called in warranty cannot intervene in the suit under the answer of defendant making the call. If he wishes to intervene, he must do so by petition, with due service of notice

and issue. *Barker v. Bank of Louisiana*, 20 La. Ann. 567.

3. Partners.—If after dissolution of a partnership by the death of a partner a suit is commenced by one of the partners to recover a debt due the partnership, the other parties have a right to intervene, except where they have an interest directly opposed to any judgment being rendered against the defendants. *Norris v. Ogden*, 11 Mart. (La.) 455.

The executor of a deceased partner may not intervene in an action by the surviving partner to collect a partnership debt, when the only object of the intervention is to join in the recovery, for the surviving partner is legally entitled to recover the debt. *Watson v. Miller*, 55 Tex. 289.

4. Tax Payers.—A tax payer may intervene in a proceeding by the city to forbid the erection of houses on public places. *Mayor etc. of New Orleans v. Gravier*, 11 Mart. (La.) 620.

A tax payer may intervene in a proceeding on bonds of county, etc., and set up their illegality. *Richards v. Lyon Co.*, 69 Iowa 612. Or to prevent a judgment by collusion between the county officers and the defendant. *Greeley v. Lyon Co.*, 40 Iowa 72. *Contra*, in the absence of all collusion or fraud. *Cornell College v. Iowa Co.*, 32 Iowa 520.

5. Proceedings by Tax Payers.—In a proceeding to enjoin the collection of a tax voted in aid of a railroad company, the railroad company may properly intervene for the purpose of interposing a defense. *Brown v. Bryan*, 31 Iowa 556.

In an action by tax payers to set aside a sale of county real estate, the county is entitled to intervene to sustain the sale on the ground that it is advantageous. *McConnell v. Hutchinson*, 71 Iowa 512.

6. Creditors.—A creditor whose claim.

recover the value of property attached, the plaintiff in the attachment may perhaps be permitted to intervene in the absence of an express statute when he has given a bond of indemnity to the officer, but a refusal of such a petition for intervention has been held not to be erroneous.¹ An intervenor is bound by the record

has not been liquidated by a judgment has no right to intervene in an action between his debtor and a third person. *Brown v. Saul*, 4 Mart., N S. (La.) 434; Annot., 16 Am. Dec. 175.

But a creditor may not intervene in an action against his debtor on the ground that if the plaintiff in that action should win, it would take all the debtor's assets to pay him. This rule will be modified, however, in the case of fraud. *Mayes v. Woodall*, 35 Tex. 687.

Creditors may intervene in an action on an allegation that the plaintiff is about to abandon it in order to defraud them. *Succession of Baum*, 11 Rob. (La.) 314.

In a proceeding in the nature of a creditor's bill, any creditor of the common debtor may intervene. *Fagan v. Boyle Ice Mach. Co.*, 65 Tex. 324.

In a suit against a donee to revoke a donation commenced December 13th, 1865, a curator *ad hoc* was appointed to represent the absent defendant who was served with process on March 21st, 1866. No issue was joined by him until November 19th, 1866, when he filed an answer, and two days afterwards interventions were filed by the creditors of the donee, and, being dismissed, a trial took place and judgment was rendered on the 24th of the same month. *Held*, that the court erred in refusing to admit the creditor's intervention. *Perkins v. Perkins*, 20 La. Ann. 257.

An executor having brought proceedings in partition and having asked that an heir's share should be settled on his wife and children as the will directed, a creditor of the heir was allowed to intervene. *Ex parte Crawford*, 27 S. Car. 159.

When a wife had sued to recover the proceeds of land sold for her by the defendant, creditors of plaintiff's husband were not permitted to intervene to set up a claim of fraud in the conveyance of the land to the plaintiff. *Van Gorden v. Ormsby*, 55 Iowa 657.

1. Actions Against Officers for Property Attached.—Suit was instituted against a United States marshal to re-

cover the value of property seized under attachment. Plaintiffs in the attachment sought to intervene on the ground that they had given the marshal a bond of indemnity, and that he had desired them to defend the suit, and given notice that he would hold them liable on their bond for any judgment rendered against him. Leave to intervene refused. On appeal, *STAYTON, J.* said: "We are of the opinion that there was no error in this. According to their [intervenor's] petition, they were but joint wrongdoers with the officer who executed, at their request, the process which they had sued out. The plaintiff was under no obligation to sue them all. If there had been no objection urged against their intervention, to have permitted it would have done no harm. Such a course, where no objection is urged, has frequently been allowed, but the question now is, was it their legal right so to intervene.

"When one will be liable over to a party to an action, in case it is decided against him, as in case of warranty of title to land, the statute frequently gives to the defendant the right to have the party who will be liable to him, in case the action goes against him, made a party defendant, or the right is sometimes given to the person so liable so to make himself. In the case before us no such facts are shown as give them any statutory right to become parties to the action. They claim the right to become parties, solely upon the ground that to induce the defendant to do a wrongful act they executed to him a bond which the law recognizes as valid, whereby they have agreed to indemnify the defendant against any liability that may be fixed upon him or discharged by him on account of the act which they induced. This gives them no legal right to intervene in this case. Their own statement is that they have been notified of the pendency and nature of the action, called upon to defend it, and notified that they will be held responsible upon their indemnity bond in case judgment goes against the person to whom they gave that bond. No right of theirs is imperilled

of the case at the time he intervenes.¹ He may not object to the regularity of the proceedings,² nor change the form of the proceedings, nor raise new issues,³ nor delay the suit,⁴ nor exercise any

by refusing to permit them to intervene. They are at liberty, by their own showing, in the name of the party to whom they may become liable, to make every defense they could make, were they parties to the record. They could employ counsel to manage the case, and bring forward all the evidence attainable. There was no fact stated which would make their intervention necessary to the protection of any right they claimed to have." *McKee v. Coffin*, 66 Tex. 304, 310.

In a number of the States there is a special statute allowing such an intervention. See *supra*, this section, p. 635, n. 2.

1. Intervention Bound by Record.—The statements of facts in the record are not binding on an intervenor, but where the intervenor adopts the allegations of the plaintiff and prays for the same relief, the judgment affects alike both plaintiff and intervenor. *Hudson v. Morriss*, 55 Tex. 595.

An intervenor cannot object to the admissibility of evidence regularly taken prior to his being made a party to the suit. *Late v. Armorer*, 14 La. Ann. 838.

A party to the record may admit any adverse allegation and thus dispense with proof of it, though if the admission be not of a conceded fact, any other party, other than the one originally making the allegation, may make proof in opposition. *Dorn v. O'Neale*, 6 Nev. 155.

A third party must intervene in the court where the main action lies, and must follow that jurisdiction, although such court has not original jurisdiction of his claim in intervention. *Succession of Hoover*, 30 La. Ann. 752.

2. Intervenor May Not Allege Irregularities.—An intervenor cannot raise the issue whether the proceedings are regular, that being a matter between the parties to the action. *Gasquet v. Johnson*, 1 La. 425; *Blair v. Puryear*, 87 N. Car. 101; *Bateman v. Ramsey*, 74 Tex. 589; *Nenney v. Schluter*, 62 Tex. 327.

An intervenor in an attachment proceeding has only the right to show that the property attached is his. He may not show any irregularity in the suit in which he intervenes. *Lee v. Brad-*

lee, 8 Mart. (La.) 20, 55; *Emerson v. Fox*, 3 La. 178.

3. Intervenor May Not Raise New Issues.—An intervenor cannot insist upon a change in the form of proceedings, or delay in the trial of the action. *Van Gorden v. Ormsby*, 55 Iowa 657.

When a cause has been submitted to the court upon an agreed statement of facts, it is not error to deny a third party the privilege of intervening, where such intervention would raise new issues and require a continuance of the main cause for the purpose of hearing testimony. *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75 Iowa 722.

An intervenor cannot raise new issues. *Mayer v. Stahr*, 35 La. Ann. 57. Nor change the nature of the action. *Carraby v. Morgan*, 5 Mart., N. S. (La.) 499. Nor demand security against the appearance of a lost mortgage note when the defendant had not asked it. *Mayer v. Stahr*, 35 La. Ann. 57.

Whether an intervenor can litigate any greater interest than that set up by the original parties was suggested, but not decided in *Fleming v. Seeligson*, 57 Tex. 524.

4. Intervenor May Not Delay the Suit.—See *Van Gorden v. Ormsby*, 55 Iowa 657; *Teachout v. Des Moines Broad Gauge St. R. Co.*, 75 Iowa 722.

While an intervenor may not retard the principal suit, yet if he intervenes after issue joined, time must be allowed him to issue the proper citations and for the entry of the answers required by the code. *Perkins v. Perkins*, 20 La. Ann. 257.

When an intervention is allowed, a trial before service of the petition of intervention on the adverse party is premature, but an erroneous procedure in that respect does not affect the question of jurisdiction. *Ah Goon v. Superior Ct.*, 61 Cal. 555.

An intervention which in its consequences, if the intervenor should prove successful, would result in postponing the determination of the cause as between the original parties, will not be allowed. Hence, one who claims a small undivided interest in the land involved in a suit, and also an interest besides in the survey of which it formed a part, not involved in the litigation, and

rights limited to the parties to the action.¹ A third party may intervene after issue joined, but not after the trial has commenced, or the case has been duly dismissed or settled.² If the original plaintiff was not barred by the Statute of Limitations, an intervenor may intervene after the expiration of the statutory limit.³ A third party intervenes by a petition.⁴ An intervention may be allowed

in which the plaintiff claims no interest, should not be allowed to intervene. To allow it would result in complicating the case by producing new parties and causes of action. Since the judgment could not affect the rights of the intervenor, he should resort to an independent action. *Ragland v. Wisrock*, 61 Tex. 391.

An intervenor must be at all times ready to exhibit his evidence and to proceed with the trial of the issue, which he has brought into the action. *Walker v. Dunbar*, 6 Mart. (La.) 627, 18 Am. Dec. 248; *Gaines v. Page*, 15 La. Ann. 108; *Taylor v. Boedecker*, 22 La. Ann. 79.

1. An objection to the amount of the judgment in the main action by the intervenor will not be considered in the appellate court if not made in the court below and it is doubtful if the intervenor is entitled to make such an objection. *Phillips v. Both*, 58 Iowa 499.

An intervenor cannot be permitted to bond property in the custody of the sheriff under a sequestration, such right being only given by law to the parties to the action. *Clapp v. Phelps*, 19 La. Ann. 461, 92 Am. Dec. 545.

2. Time When Party May Intervene.—

A party entitled to intervene may do so even after issue joined, provided he does not retard the principal suit. *Brooks v. Hager*, 5 Cal. 281; *Coburn v. Smart*, 53 Cal. 742; *Boyd v. Heine*, 41 La. Ann. 393.

A petition of intervention in a suit will not be admitted after the trial of the action has commenced. *Lincoln v. Ball*, 6 La. 685.

When a petition was not filed until the day before the trial, nor brought to the notice of the court until the case was called for trial, and this neglect was not accounted for, the court is not bound to receive it. *Van Bibber v. Geer*, 12 Tex. 15.

After judgment new parties cannot intervene to prevent the enforcement of the judgment. *Laugenour v. Shanklin*, 57 Cal. 70.

When the people are not a party to the record and the case has been ap-

pealed, the attorney general will not be allowed to intervene in the supreme courts. Such intervention should begin in the court having original jurisdiction. *Blatchford v. Newberry*, 100 Ill. 484.

After appeal from a justice to the circuit court a petition of intervention in the circuit court was refused. *Cowan v. Lowry*, 7 Lea (Tenn.) 620.

In a cause brought to an appellate court none save such as are parties to the record in the appellate court have a right to be heard. If there are interests such as would make it proper for other parties to intervene in the cause, such intervention must begin in the court of original jurisdiction and cannot be allowed in the appellate court. *Blatchford v. Newberry*, 100 Ill. 484.

Where defendant has filed no counter claim or set off, and the plaintiff has dismissed the suit and paid the costs, no intervention can be allowed. *Harris v. Cronk*, 17 Neb. 475.

After an agreement is made between the parties to an action by which the controversy is settled, third parties may not intervene. The court may not, by allowing an intervention at that time, transform proceedings by intervention into original proceedings. If the proposed intervenors have rights requiring protection, they should commence an original action in the ordinary way for that purpose. *Henry v. Cass Co. Mill & Elevator Co.*, 42 Iowa 33; *Palmer v. Albee*, 50 Iowa 429.

3. **Statute of Limitations.**—A suit brought on a promissory note before the bar of limitation was complete will enure to the benefit of an intervenor interested in the recovery, who intervened in the action after the expiration of the four years from the time when the statute began to run. *Foote v. O'Rourke*, 59 Tex. 215.

4. **Petition.**—Under the codes, new parties may only be brought into an action by intervention or by an order of court, and one before the court in a particular capacity, *e. g.*, executor can only become a party in his individual capacity by one of these methods.

by an *ex parte* order, but notice should be given.¹ If the intervenor's petition is defective it may be demurred to.² If it fails to show a right to intervene, the remedy is by a motion to dismiss.³ If it shows a right to intervene and is not defective, the intervention is not discretionary with the court, but must be granted.⁴ If refused, it seems, however, an appeal does not lie.⁵ The right to object to an intervention may be waived, as may also the error of the court in refusing an intervention.⁶ If no issue is raised as

Stockton Bldg. & L. Assoc. *v.* Chalmers, 75 Cal. 332.

A stranger to an action cannot make any motion or application in it except to be admitted as a party. Mann *v.* Flower, 26 Minn. 479.

It is impossible by one petition to intervene in three distinct and unconsolidated actions. Rosenbaum *v.* Adams, 61 Iowa 382.

A principal may not intervene in an action by a petition filed by an agent in his own name. Rosenbaum *v.* Adams, 61 Iowa 382.

In a suit for an injunction commenced by sworn petition, an inventor's petition need not be verified by affidavit. Smith *v.* Allen, 28 Tex. 497.

If a person is entitled to intervene under the statutes relating to intervention, he may intervene as a claimant in a replevin suit, without filing oath or claim bond as required by a statute providing for trial of right to property. Irvin *v.* Ellis, 76 Tex. 164.

1. Notice of Intervention.—An *ex parte* order may be made allowing an intervention to be filed. Spanagel *v.* Reay, 47 Cal. 608.

But unless parties have been duly cited he cannot offer evidence on the trial of the case in which he intervened. Chism *v.* Ong, 33 La. Ann. 702.

Parties properly before the court are required to take notice of a petition of intervention, filed by leave of the court, and though at the time of such intervention and judgment for intervenor, one of the defendants, against whom judgment was rendered, was dead and another temporarily insane, yet, the court having acquired jurisdiction over them, and they having appeared and answered, being represented by counsel, and no suggestion being made of record of the death or insanity, the judgment rendered was not a nullity, but was only voidable. Fleming *v.* Seeligson, 57 Tex. 524.

2. Demurrer.—If a petition of intervention shows a cause of action, but

defectively stated, the remedy of an adverse party is to demur. Ragland *v.* Wisrock, 61 Tex. 391.

A petition to intervene may be demurred to its failure to state a cause of action or ground of intervention under the statute. Shepard *v.* Murray Co., 33 Minn. 519.

3. Motion to Dismiss.—If the cause of action, however, is well stated, but does not authorize an intervention, then the objection should be taken by a motion to dismiss. Ragland *v.* Wisrock, 61 Tex. 391.

The petition will be dismissed on motion, if it fails to show an interest in the subject of litigation. Noyes *v.* Brown, 75 Tex. 458.

The petition for intervention in an attachment proceeding must show that the interest of the parties complaining in the attached property had suffered, or was likely to do so, from the alleged fraudulent transactions between the original parties to the suit. Nenney *v.* Schluter, 62 Tex. 327.

4. Intervention Not Discretionary.—The right to intervene is a privilege granted by law which the court cannot refuse when the right is legally exercised. Bowman *v.* McElroy, 15 La. Ann. 663.

5. Appeal.—A denial of a motion for leave to intervene is not a final judgment and therefore in the absence of express provisions therefor no appeal lies therefrom. Wenborn *v.* Boston, 23 Cal. 321; Bennett *v.* Whitcomb, 25 Minn. 148. *Contra*, Stich *v.* Dickinson, 38 Cal. 608.

A motion for leave to intervene in an action made at any stage of the proceedings presents a judicial question, the decision of which cannot be reviewed or controlled by an appellate court by *mandamus*, however erroneous it may be. People *v.* Sexton, 37 Cal. 532.

6. Waiver.—If a party is permitted to intervene, and no objection taken, the propriety of the intervention is not to be

against the intervenor he may dismiss his petition.¹ If issues are raised in consequence of the intervention, the suit cannot be dismissed to the intervenor's prejudice.²

XVII. NECESSARY AND PROPER PARTIES DISTINGUISHED.—For the distinction between necessary and proper parties in proceedings in equity, see *EQUITY PLEADINGS*, vol. 6, p. 724. Under the modern code procedure this distinction must also be made. The codes provide that a plaintiff may join as defendants all persons claiming an interest adverse to him. He must, therefore, join all necessary parties and may join all proper parties. Necessary parties are those without whom no decree can be effectively made. Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy and conclude the rights of all the persons who have any interest in the subject matter of the litigation.³ In the notes will be found a

inquired into in the appellate court. *Mc-Kenty v. Gladwin*, 10 Cal. 227; *Smith v. Penny*, 44 Cal. 161; *Donner v. Palmer*, 51 Cal. 629; *People v. Reis*, 76 Cal. 269; *Sanxey v. Iowa City Glass Co.*, 63 Iowa 707.

In an action by a bank against the makers of a note indorsed to plaintiff by A, A asked to intervene claiming to own the note. Petition refused. The bank subsequently sued A as indorser, and A pleaded conversion of the note by the bank. *Held*, A thereby waived the error of the court in refusing to allow him to intervene. *Holland v. Commercial Bank*, 22 Neb. 585.

1. Dismissal of Petition of Intervention.—An intervenor against whom no relief is prayed can dismiss his complaint in intervention; and this right is not affected by the fact that one of the plaintiffs in the action has died and his successors in interest have not been brought in as parties. *Sheldon v. Gunn*, 56 Cal. 582.

And he will not be estopped by the judgment rendered in the case from subsequently insisting upon the matters contained in his petition of intervention. *Dalhoff v. Coffman*, 37 Iowa 283.

An intervenor against whom no affirmative relief is asked by the pleadings of the other parties to the cause, occupies so much the position of a plaintiff that the only proper action to take with regard to him when he fails to appear, is to dismiss his suit for want of prosecution. *Noble v. Meyers*, 76 Tex. 280.

2. Dismissal of Suit.—A party who

has intervened in an action for foreclosure of a mortgage to which there are several parties defendant, will not, upon the rendering of a decree and the dismissal of all the parties save one, from whom he claims judgment for a sum due him, lose his standing in the action. He is entitled to have his claim adjudicated therein. *Joliet Iron etc. Co. v. Chicago etc. R. Co.*, 51 Iowa 300.

When a party is allowed to intervene, and by answer issues are duly raised on the intervention between the intervenor and both plaintiff and defendant, and thereafter the plaintiffs dismissed the suit, or the court, on defendant's motion, nonsuits the plaintiff, such nonsuit does not operate to dismiss the issues raised by the intervention, but the court should proceed and try them. *Poehlmann v. Kennedy*, 48 Cal. 201; *Elliott v. Ivers*, 6 Nev. 287; *Nix v. Dukes*, 58 Tex. 96.

The discontinuance of an attachment operates as a release of the property attached, even though claimed by an intervenor, and if he wishes to be quieted in his title, he must have recourse to a direct action. *Meyers v. Bivotte*, 41 La. Ann. 745.

3. Necessary and Proper Parties Distinguished.—"In all equitable actions, a broad and most important distinction must be made between two classes of parties defendant; namely, (1) those who are "necessary," and (2) those who are "proper." Necessary parties, when the term is accurately used, are those without whom no decree at all can be effectively made determining

number of cases classified by parties, illustrating the distinction.¹

the principal issues in the cause. Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject matter of the litigation. Confusion has frequently arisen from a neglect by text writers, and even judges to observe this plain distinction. Parties are sometimes spoken of as necessary when they are merely proper. Thus, because a decree cannot be rendered which shall determine the rights of certain classes of individuals without making them defendants in the action, they are not unfrequently called necessary parties; or, in other words, because they must be joined as defendants in a particular suit, in order that the judgment therein may bind them, they are denominated "necessary" parties absolutely. Such persons are "necessary" *sub modo*—that is, they must be brought in if it is expected to conclude them by the decree; but to call them "necessary" absolutely is to ignore the familiar and fundamental distinction between the two classes of parties which has just been mentioned. This inaccurate use of language would make every person a necessary party, who should actually be joined as a co-defendant in an equitable action." Pom. Remedies and Rem. Rights (2nd ed.), § 329.

The Supreme Court of *Louisiana* will not dismiss a suit for want of a necessary party, but will remand the same for further proceedings in the court below. *Seixas v. King*, 39 La. Ann. 510.

Notwithstanding, it might be better practice to make certain persons parties to the suit, yet if they are not necessary parties, the portion of an answer alleging such a defect of parties is properly stricken out. *Rosina v. Trowbridge*, 20 Nev. 105.

There should always be a competent party representing every interest that is litigated in court, in order that the process of the court may have some one to operate upon. *Columbus v. Monti*, 6 Minn. 568.

All the parties in interest, to be in any way affected by the decree or judgment sought to be obtained, ought, if known, to be made parties defendants

or plaintiffs in the suit. *Denison v. League*, 16 Tex. 399; *O'Shea v. Twohig*, 9 Tex. 336.

A person against whom the plaintiff has a right to any final relief in his action against other principal defendants, is properly made a party defendant. *Hammer v. Barnes*, 26 How. Pr. (N. Y.) 174.

The rights of persons not made parties to a suit cannot be directly affected by the proceedings therein; and the fact that their rights are similar to those of the parties does not make it necessary that they should be made parties. *Valette v. Whitewater Valley Canal Co.*, 4 McLean (U. S.) 192.

One against whom no judgment in any form can be rendered, is not a necessary, nor even a proper, party to a proceeding. *Conklin v. Thurston*, 18 Ind. 290.

A person is not properly made defendant in a suit for a cause of action in which he has no interest, and as to which no relief is sought against him. *Lexington etc. R. Co. v. Goodman*, 25 Barb. (N. Y.) 469.

Whether a proper but not necessary party to the determination of a suit shall be made a party, lies in the discretion of the court to which application therefor is made. *Stewart v. Ludwick*, 29 Ind. 230.

1. Illustrations; Executors and Administrators.—In an action to subject land in possession of the heir to the lien of a decedent's debts, his administrator is a proper party. *Lowry v. Jackson*, 27 S. Car. 318.

In proceedings to compel an account by executors, all the executors are necessary parties. *Howth v. Owens*, 29 Fed. Rep. 722.

Under a statutory provision as to proper parties in actions to enforce street assessments, an executor is not a necessary party to such an action against a devisee for an assessment made after testator's death, although the estate has not been finally settled, if the personality is sufficient to pay all debts and claims. *Phelan v. Dunne*, 72 Cal. 229.

In an action by legatees to compel a settlement by the executor of an executor, an administrator *de bonis non* is a necessary party. *Hardy v. Miles*, 91 N. Car. 131.

Heirs.—The heirs of the vendor who

have made no conveyance of land sold, are necessary parties to a proceeding in which the administrator seeks by attachment to sell the land to pay the purchase money. *Anderson v. Sutton*, 2 Duv. (Ky.) 480.

So in any proceeding to compel payment of such purchase money. *Grubb v. Lookabill*, 100 N. Car. 267; *Perry v. Roberts*, 23 Mo. 221.

Heirs are necessary parties to an action to set aside the deed of their ancestor. *Snyder v. Voorhes*, 7 Colo. 296.

The heirs of a co-tenant of property who died after the construction of an elevated railroad, are necessary parties to an action to restrain the operation and maintenance of the road, and to recover damages. *Shepard v. Manhattan R. Co.*, 117 N. Y. 442.

In an action for breach of warranty in a deed made by a decedent, his personal representatives are alone competent to defend, and absent heirs are not necessary parties. *Cassidy's Succession*, 40 La. Ann. 827.

A statutory provision that heirs should be made parties to a suit involving the title to their ancestor's land does not apply to a suit against the executor by a creditor of the ancestor's estate to enforce a lien on the land. *Howard v. Johnson*, 69 Tex. 655.

Where the heirs make a partition of the estate among themselves, certain of them agreeing to hold the others harmless against demands upon the estate, the latter need not be made parties to a suit to recover a debt due from the estate. *Montgomery v. Culton*, 18 Tex. 736; *Montgomery v. Jones*, 18 Tex. 751.

Where the sole object of a suit is to charge the sureties on an administration bond, where the principal has died, his heirs are not necessary parties to the suit, but the devisees of the estate are, for they are directly interested in defeating the claims of the creditors, in order to increase their claim against the sureties. *People v. White*, 11 Ill. 341.

An action cannot be maintained by the heirs of a deceased legatee to recover his share in an estate, but the administrator of such deceased legatee is the proper party plaintiff. *Gale v. Nickerson*, 151 Mass. 428.

Trustees.—In an action to divest the title of a married woman, *cestui que trust*, her trustee must, if the legal title be vested in him, and should, as a mat-

ter of precaution at all events, be enjoined as co-defendant. *Sutton v. Hayden*, 62 Mo. 101.

Where a deed of trust has been executed to secure the payment of a promissory note, the trustee should be made a party to a suit to recover judgment upon the note and for the sale of the real estate so conveyed as security. *Shelby v. Burtis*, 18 Tex. 644.

To a petition for the recovery of real property purchased on execution sale, the title to which is in a trustee as security for a debt due from the defendant in execution, such trustee should be made a party, even although such debt may have been paid off by the debtor. *Ballard v. Anderson*, 18 Tex. 377.

When a trustee under a chattel mortgage sues the mortgagor to recover the property, a trustee, claiming under a prior mortgage, who was also surety for the defendant on a bond executed to retain possession of the property, is a necessary party. *Smith v. Moore*, 49 Ark. 100.

In an action to have a deed of trust declared a prior lien, the trustee is not a necessary party. *Rogers v. Tucker*, 94 Mo. 346.

In *Georgia*, a trustee is a proper but not a necessary party to an action to recover real estate and mesne profits. *Bialock v. Newhill*, 78 Ga. 245.

When the holder of railroad bonds secured by a deed of trust, sues to compel the company to fulfill its contract as set out in the deed of trust, but not seeking to reach the security provided in said deed, or the income of the road, through the trustee's powers, the trustee is not a necessary party. *Spies v. Chicago etc. R. Co.*, 30 Fed. Rep. 397.

One who is described in an instrument as the attorney in fact of another, does not hold the character of a trustee, and is not a necessary party to represent the interest of the principal. *Powell v. Ross*, 4 Cal. 197.

Cestuis que Trustent.—In an action to enforce demands against a trust property the *cestuis que trustent* are necessary parties, without whom it would be impossible to settle the controversy. *Covington v. Lexington R. Co. v. Bowler*, 9 Bush (Ky.) 468.

In an action to set aside a trust deed alleged to be illegal, all beneficiaries under the trust deed must be made parties. *Hamilton Nat. Bank v. Halstead*, 56 Hun (N. Y.) 530.

Where one of several *cestuis que trustent* brings an action to declare and

enforce an implied trust in relation to land, all parties are properly and necessarily joined as defendants who are entitled, or claim to be entitled, to the trust estate. *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134.

In a proceeding to enjoin the sale of land conveyed in trust for the payment of the debts of the grantor, such grantor is a necessary party. *Abrahams v. Vollbaum*, 54 Tex. 226.

Two of three *cestuis que trustent* filed a bill against their trustee for an account and delivery of property. *Held*, that the other *cestui que trust* should be joined, in order that complete justice might be done. *Dill v. McGehee*, 34 Ga. 438.

A notary, with whom a vendee deposits money and notes as the price of sale, cannot be compelled to deliver them unless the vendor be made a party. *Dean v. Clark*, 5 La. Ann. 105.

A *cestui que trust* is a proper but not ordinarily a necessary party in proceedings to foreclose a mortgage given by his trustee. *Harlem Co-op. Bldg. & L. Assoc. v. Quinn* (Supreme Ct.), 10 N. Y. Supp. 682.

A *cestui que trust* is not a necessary party to a suit to enjoin a city from improving, as a street, private property belonging to the trust. *Smith v. Portland*, 30 Fed. Rep. 734.

A *cestui que trust* is not a necessary party to an action for the breach of a covenant running with the land, the legal estate being vested in a trustee. *Keteltas v. Penfold*, 4 E. D. Smith (N. Y.) 122.

Assignors and Assignees.—The assignor of a chose in action is not a necessary party to a bill in equity filed by the assignee thereof to recover the amount due thereon, if the assignment is absolute and the assignor retains no interest in the thing assigned. *Robinson v. Springfield Co.*, 21 Fla. 203.

The holder of a note holding also collateral security as pledge for its payment, assigned the securities to a third party. *Held*, that the holder of the note, as well as such assignee of the securities, was a necessary party to the debtor's action for an account. *Lewis v. Varnum*, 12 Abb. Pr. (N. Y.) 305.

An assignee of a portion of a debt is not a necessary party to a suit of the assignors to recover the unassigned portion. *Leese v. Sherwood*, 21 Cal. 151.

The assignor of an account assigned as collateral security is not, under

§ 35 of the code, a necessary party to a suit brought against the debtor by the assignee upon the account. *Allen v. Miller*, 11 Ohio St. 374.

A party through whose hands a bond for the conveyance of land has passed by assignment, is a necessary party to a suit for specific performance. *Hancock v. Beckham*, 5 Litt. (Ky.) 135.

Where an action is brought, on a judgment recovered in a sister State, to subject certain property alleged to have been assigned by the debtor without consideration, the debtor is a necessary party. *Weaver v. Cressman*, 21 Neb. 675.

After an assignment of a non-negotiable note to a *mala fide* purchaser, an intermediate indorser is neither a necessary nor a proper party to an action to procure the cancellation of said note on the ground of fraud. *Campodonico v. Grossini*, 66 Cal. 358.

Partners.—Where two or three partners in a mine make a contract with a person having no interest, under which he becomes entitled to a share of their interest and the profits, the two are the only parties necessary to be joined in an action to establish the rights of the party contracting, and to obtain a conveyance. If, however, an account of the mining partnership and a dissolution and severance of the interests of the several partners are sought for, all owning interests in the partnership are necessary parties, and the court may of its own motion order them to be brought in before a final disposition of the case. *Settembre v. Putnam*, 30 Cal. 490.

In an action against A to enforce a lien for labor on real estate the legal title to which is in A, in trust for the firm of A & Co., the other members of said firm are proper, but not necessary parties to the suit. *Rosina v. Trowbridge*, 20 Nev. 105.

Where by statute all joint contracts are joint and several in a suit on a judgment recovered against a partnership, all the partners are not necessary parties. *Belleville Savings Bank v. Winslow*, 30 Fed. Rep. 488.

Dormant partners are not necessary partners. *Boehm v. Calisch* (Tex. 1887), 3 S. W. Rep. 293. See also *supra*, this title, *Joinder of Parties*.

"When a non-resident associate in a joint enterprise dies, without leaving property in this State, his personal representatives appointed in another State are not necessary parties to an action by one of his associates for an account-

ing. *Angell v. Lawton*, 76 N. Y. 540.

A and B were partners. A died and B was appointed his executor. Then B died. C was appointed administrator of A and D of B. In a special proceeding by C to procure a judicial settlement of his account, B is a proper and necessary party. *Welte v. Bosch*, 6 Dem. (N. Y.) 364.

Agents.—One who is merely an agent is not a necessary party to an action against his principal for fraud and deceit perpetrated through said agent. *Newbery v. Garland*, 31 Barb. (N. Y.) 121.

An agent who buys in property at an executor's sale for the executor is not a necessary party in a proceeding to set it aside. *Stilly v. Rice*, 67 N. Car. 178.

Receivers.—Where a creditor recovered a judgment, and docketed it before the appointment of a receiver in supplementary proceedings—*held*, that he could maintain an action to set aside a fraudulent mortgage, held by the judgment debtor, of land on which the judgment was a lien; and that the receiver was a proper defendant. *Gere v. Dibble*, 17 How. Pr. (N. Y.) 31.

A receiver of a railroad company is not a necessary party defendant in an action against the company to recover a rebate alleged to be due on freight paid under a special contract with the receiver, when it appears that the receiver was discharged prior to the commencement of the action. *Bayles v. Kansas Pac. R. Co.*, 13 Colo. 181.

A partnership receiver is not a necessary party to a suit by creditors to set aside alleged fraudulent transfers of the firm property, made before his appointment, or to establish the prior right of such creditors to the assets in his hands. *Mechanics' Bank v. Landauer*, 68 Wis. 44.

Third Parties Not Liable to Plaintiff, Though Liable to Defendant.—In an action against an executor for the recovery of a legacy which the defendant alleges has been paid by him to a stranger for the benefit of the legatees, the stranger need not be made a party defendant. "The fact that the defendants have, by agreements *inter sese* or with strangers, and without the privity of the plaintiffs, contracted obligations toward each other, or imposed duties upon the strangers, with respect to the subject of the action, cannot compel the plaintiffs to introduce those strangers into the action,

or to be at the trouble, expense or delay, of settling the rights and obligations of the defendants as between themselves, or between them and the strangers." *Gleason v. Thayer*, 24 Barb. (N. Y.) 82.

When a receiver sues the managers of a savings bank for losses resulting from an improper loan of bank funds to third parties, such third parties are not necessary parties to the suit. *Wilkinson v. Dodd* (N. J. 1886), 7 Atl. Rep. 337.

Corporations and Stockholders.—In an action brought by a corporation whose stock has been over issued, to test the validity of the claims of the holders of such stock, it is desirable, but not absolutely necessary, that all holders of spurious stock should be joined. *New York etc. R. Co. v. Schuyler*, 38 Barb. (N. Y.) 534.

A corporation is not a necessary party to a suit between its stockholders as to the ownership of certain shares of its stock. *King v. Barnes*, 109 N. Y. 267; affirmed 42 Hun (N. Y.) 657.

When a stockholder sues in behalf of a corporation, the corporation is a necessary party either plaintiff or defendant. The failure to make the corporation a party is not mere defect of parties but leaves the stockholder without a cause of action, and the action should be dismissed. *Shawhan v. Zinn*, 79 Ky. 300.

Creditors.—Where the object of the suit is to restrain the administrator from selling real estate to pay the debts of the intestate, and to set up a lost deed, the creditors need not be made parties to the bill, it being sufficient to bring before the court the administrator and the heirs, who fully represent the property, and are liable for all demands upon it. *Kennerly v. Shepley*, 15 Mo. 640, 57 Am. Dec. 219.

When a trustee for the benefit of creditors sues to obtain possession of assets of the trust, creditors of the assignor whose claims are contested are not necessary parties. *Warren v. Howard*, 99 N. Car. 190.

Parties to Contracts.—A, claiming a quantity of land, contracts with B, that, if he obtains a grant therefor, he shall be entitled to one-half, and agrees that he may sell, etc. B, having obtained the grant, contracts for himself, and, as attorney for A, with C, for the sale or part thereof, and brings suit against C for the whole purchase money. *Held*,

that it was not necessary to join A in such action. *Harper v. Hampton*, 1 Har. & J. (Md.) 622.

In an action by one of the depositors of a banker against the defendants, upon an alleged agreement by them, to guarantee the depositors of such banker in the payment in full of their demands against him on account of money deposited with him, the plaintiff alone being entitled to the money claimed by him, *held*, that the other depositors, having no interest in it, nor in the action, are not necessary parties. *Steadman v. Guthrie*, 4 Metc. (Ky.) 147.

Where the payee of a note is made a party defendant with the maker, in an action by the assignee, and does not object, and, upon the answer of his co-defendant, the maker, it appears that there is a question as to the maker's right to deductions for claims and payments against the payee, which, under the code, may be settled by the court, the payee is a proper party. *Swift v. Ellsworth*, 10 Ind. 205, 71 Am. Dec. 316.

In an action by an administrator *de bonis non* against his predecessor for transferring a note in payment of his own debt, neither the maker of the note nor the sureties on defendant's bonds are necessary parties defendant. *Williams v. Verne*, 68 Tex. 414.

A submission provided among other things that the award should fix the counsel fees. *Held*, that the counsel need not be held parties to a motion to set aside the award, nor to a writ of error to the ruling on that motion. *South Carolina R. Co. v. Moore*, 28 Ga. 398, 73 Am. Dec. 778.

In an action against a railroad company on time checks and due bills given to employees of said company, it was alleged that they were executed by the contractor, and were his obligations, and these allegations are not controverted, sub-contractors who in fact executed them, are not necessary parties. *San Antonio etc. R. Co. v. Cockvill*, 72 Tex. 63.

Notes were held by A under contract to hold them "subject to the joint order and direction" of the attorneys of adverse claimants to the notes. A disposed of them. In an action for the proceeds, *held* that all the adverse claimants and their respective attorneys were necessary parties to the suit, and that, although beyond the jurisdiction of the court, they must be made parties, the provision that where persons, otherwise

necessary or proper parties, are beyond the jurisdiction of the court, the court may proceed to a decree not prejudicing the rights of such persons, without making them parties being inapplicable. *Gregory v. Stetson*, 133 U. S. 579, aff. *Gregory v. Swift*, 39 Fed. Rep. 708.

Rescission of Contracts.—A mortgagee is not a proper party to a suit to rescind a contract of sale made by the mortgagor. *Orendorff v. Tallman*, 90 Ala. 441.

A husband contracted to purchase realty, paid part of the purchase money and received a conveyancer. His wife gave her notes for the balance secured by a trust deed of her property. *Held*, she is not a necessary party to a suit by the husband to rescind the contract on the ground of fraud. *Wheeler v. Dunn*, 13 Colo. 428.

In an action brought by a receiver of a judgment debtor to set aside, as fraudulent, contracts made by such debtor, the judgment debtor has an interest in the action, and may be made a party thereto. *Palen v. Bushnell*, 18 Abb. Pr. (N. Y.) 301.

In a suit to cancel purchases of land under the *Texas* "Land Fraud act" of April 14, 1883, all persons in whose names the purchases were made, when the charge is that many purchases were made for the benefit of one or more of the defendants, are necessary parties. *State v. Rhomberg*, 69 Tex. 212.

In a suit to revoke a sale on the ground of simulation, the party whose title is attacked is a necessary party. *Trownstine v. Ware*, 39 La. Ann. 939.

Suits to Remove Clouds on Title, Set Aside Deeds, etc.—In a suit to remove a cloud upon a title, persons may be made parties who are not necessarily such, in order to complete the settlement of the questions involved. *Beckwith v. Dargets*, 18 Iowa 303.

A vendee of grantees is not a necessary party to a suit by the grantors to set a deed aside. *Silberberg v. Pearson*, 75 Tex. 287.

In a proceeding to set aside a conveyance the holder of the legal title to the land, whether cognizant of the fraud on which the suit is founded or not, is a necessary party. *Rasmussen v. Mc Knight*, 3 Utah 315.

To a bill brought to set aside certain deeds alleged to be a cloud on the complainant's title, *held*, that two railway companies to whom the complainant had made a deed, were not necessary parties, it not appearing that the defend-

ant had delivered to them the deed, or that they had purchased the land or procured the execution thereof. *Radcliff v. Noyes*, 43 Ill. 318.

In an action to declare void certain conveyances alleged to have been made by a debtor to several different persons in fraud of grantor's creditors, all the grantees are necessary and proper parties. *Dawson Bank v. Harris*, 84 N. Car. 206.

A member of a firm transferred stock held by him in a certain insurance company to his son, for the benefit of the transferrer's daughter. The insurance company failed, and the proceeds of the stock were paid to the son, who on the same day loaned the money to the firm. The firm executed an assignment for benefit of creditors, in which the son was preferred for the amount of the loan. *Held*, in an action to set aside the assignment, and to recover of the son the amount of the preference which had been paid to him by the assignee, that the gift of the stock could not be impeached without the presence of the daughter as a party defendant. *Hamilton Nat. Bank v. Halsted* (Supreme Ct.), 9 N. Y. Supp. 852.

All judgment debtors are necessary parties to a proceeding to set aside a satisfaction of the judgment. *Blackburn v. Clarke*, 85 Tenn. 506.

Suits to Reform Deeds, Mortgages, etc.—Under *Iowa Rev.*, § 2765, in a suit to quiet title and reform a description in the deeds of several prior grantors, such grantors or, if dead, their heirs, should be made parties. *Flanders v. McClanahan*, 24 Iowa 486.

No court of equity should undertake to reform a written instrument conveying title to property in an essential matter, without having before it all the parties to be affected by the proposed reformation. *Wyche v. Green*, 32 Ga. 341.

In a suit to correct a description in a deed, the wives of parties need not be joined on the theory of a right of dower subsisting in them. *Stevenson v. Polk*, 71 Iowa 278.

D bought of K certain land, took a deed mis-describing it, and afterwards executed a voluntary conveyance thereof to his daughter, K's wife, with the same mistake in the description. After D's death, S obtained a judgment against K, under which the land was levied on and sold to T, who then brought an action against K and wife to quiet his title. *Held*, that D's heirs

were not necessary parties thereto. *Thomas v. Kennedy*, 24 Iowa 397, 95 Am. Dec. 740.

In a proceeding to reform a deed made to a wife and her bodily heirs so as to be in favor of her husband and his child by a former marriage, the children are necessary parties. *Grimes v. Grimes* (Ky. 1888), 9 S. W. Rep. 840.

In a proceeding to reform a mortgagor, the mortgagors must be parties. *Jewell v. Simpson*, 38 Kan. 368.

Enforcement of Liens.—A creditor who seeks to subject to his debt property paid for, as alleged, by the debtor, though bought in his minor child's name to screen it, need not make the vendor a party; he has no interest in the question. *Bronsema v. Rind*, 2 La. Ann. 959.

In a suit to subject to sale a contract for the sale and purchase of land held as collateral security for the payment of promissory notes, the owner of the legal title to the land is not a necessary party defendant. *Vaughn v. Cushing*, 23 Ind. 184.

In an action by the holder of one of the notes given for the purchase money of a tract of land, to enforce the vendor's lien, all the incumbancers or holders of the notes are necessary parties. They may assert their liens in their answers, where they are defendants; and service of process upon such answers is not necessary. In such case formal interpleading is not necessary. *Jenkins v. Smith*, 4 Metc. (Ky.) 380.

If A sells land to B, who disposes of the same to other parties with notice of A's lien, B is not a necessary party to a bill brought by A to enforce his lien against B's vendees. *McLaurie v. Thomas*, 39 Ill. 291.

A purchaser of land at sheriff's sale under execution against the owner, has an interest justifying the joining him as defendant in proceedings to foreclose a tax title to the same, alike whether his purchase was made before or after the tax sale, and though the sheriff's deed was given him after he had filed his answer as defendant. *Byington v. Walsh*, 11 Iowa 27.

A bond was given by a railroad company to indemnify the village from damages sustained in building the road. The village brought suit on the bond. Subsequently suit was brought to foreclose a mortgage given by the road to secure a series of its bonds. *Held*, the village was not a necessary party to this last suit. *Farmers' L. & T. Co. v.*

New Rochelle etc. R. Co. (Supreme Ct.), 10 N. Y. Supp. 810.

In a suit to foreclose a mortgage on real estate, the holder of a mechanic's lien attaching prior to the mortgage may be a proper party, but he is not a necessary party to pass the title to a purchaser under the decree. *Re Smith*, 4 Nev. 254, 98 Am. Dec. 531.

In a mortgagor's suit to recover an alleged surplus arising on a mortgage sale by advertisement, the defendant being the mortgagee and purchaser at the sale, the sheriff, who made the sale, but to whom no moneys were paid over, is not a necessary party defendant. *Bailey v. Merritt*, 7 Minn. 159.

The purchaser at a sale on foreclosure of a mortgage brought suit to recover the surplus arising from the sale claiming an equitable right thereto under the provisions of the decree of foreclosure. *Held*, that the mortgagor was a necessary party to the action. *Day v. New Lots*, 107 N. Y. 148.

Proceeding to Avoid a Lien.—When a vendor of real estate conveys it by a full covenant warrantee deed, and a prior outstanding mortgage, unsatisfied of record, is discovered, which the holder declares is valid, and the grantor declares is paid, the grantee may bring an action to have it satisfied of record on paying what may be found due. He may make his grantor a defendant, so that a complete determination of the controversy may be had in one action. To that end, he is not only a proper but a necessary party. *Wandle v. Turney*, 5 Duer (N. Y.) 661.

All the defendants in a joint judgment are necessary parties to a petition filed by one of their number to reverse it, and may be made so as plaintiffs or defendants, in conformity with the provisions of *Ohio Code*, §§ 34, 35 and 36, as to parties to civil actions. *Smetters v. Rainey*, 14 Ohio St. 287.

To the action of nullity none can be parties, except those who were parties to the judgment sought to be annulled. *Winn v. Dickson*, 15 La. Ann. 273.

Injunctions.—After a tax on school lands has been returned delinquent to the county treasurer, the county is properly made a party defendant to an action to restrain its collection. *Lefferts v. Calumet Co.*, 21 Wis. 688.

In a proceeding to compel the removal of a turn-out built by a railroad company into A's premises, at A's request, A is a necessary party. Appeal of *River Front R. Co.*, 133 Pa. St. 134.

Some of the persons to whom county bonds are to be issued under the act of April 20th, 1858, must be made parties to a suit to enjoin the issuing. *Hutchinson v. Burr*, 12 Cal. 103; *Patterson v. Yuba Co.*, 12 Cal. 105.

Action Against Holder of Moneys Converted.—Where one holding a specific fund belonging to another, who is entitled thereto on demand, delivers the money without the consent of the owner to a third person, and the latter refuses to pay it over on demand, an action as for money had and received is maintainable against him, and for the purpose of relief it is not necessary to join as plaintiff the one who made the delivery. *Mason v. Pendergast*, 120 N. Y. 536.

Proceeding to Test Legality of Proceedings.—The police jury, having authorized a dam to carry a public road across a water course, is a necessary party to any proceeding to test the legality of its proceedings. *Egan v. Russ*, 39 La. Ann. 967.

Generally.—An action commenced against several defendants served with process may proceed against those surviving without joinder of the representatives of those deceased. *Sanders v. Etcherson*, 36 Ga. 404.

One who holds a mortgage of a slave sold, with his consent, under another mortgage, and who has received a part of the proceeds of the sale, is not a necessary party to a bill filed by the grantees of the slave, under deed of gift, against the mortgagee who made the sale. *Twelves v. Nevill*, 39 Ala. 175.

In a contest between two litigants respecting the sum awarded by the commissioners under the French treaty, it is not necessary to make all other claimants under the convention, parties to the suit. *Dutilh v. Coursault*, 5 Cranch (C. C.) 349.

In proceedings against a holder of county bonds, which were issued in payment of a subscription to railroad stock, to compel him to receive in satisfaction of the bonds the amount he paid for them, the county treasurer having sold them to him below par, contrary to law, it is not necessary to make the railroad company a party defendant. *Armstrong Co. v. Brinton*, 47 Pa. St. 367.

That one of the parties to an action of trespass to try title claims under a deed alleged to be void, has never been deemed sufficient to require that the

XVIII. COMPETENCY OF PARTIES AS WITNESSES.—(See also WITNESSES).—At common law a party to an action was not permitted to testify,¹ but by statute in all the States this disability has been removed, and a party is not only permitted to testify,² but there are in many of the States statutory provisions by which he can be compelled to testify.³

vendor in the deed be made a party. *Cox v. Shropshire*, 25 Tex. 113.

The collector, who has in his possession goods entered at the custom house, is not a proper party to an action, to determine the title to the goods between rival claimants, where there is no allegation that he has acted wrongfully and without authority of law. *Rateau v. Bernard*, 3 Blatchf. (U. S.) 244.

To an action by a purchaser of land at an execution sale, against the judgment debtor, the complaint alleging that, by reason of a mis-description of the land in the sheriff's levy and advertisement of sale, the sale was void, the sheriff—held, not to be a necessary party defendant. *Coan v. Grimes*, 63 Ind. 21.

In a suit for damages for diverting water, one who has diverted the water, but returned it undiminished, is not a necessary party. *Smith v. Logan*, 18 Nev. 149.

The fact that seamen have an interest in the cargo does not make them necessary parties to the action against the carrier. *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206.

A, under order of court, conveyed lands purchased at a judicial sale. The purchaser sued the beneficiaries of the sale to recover the purchase price paid, on account of the nullity of the decree of sale. Held, neither A nor one who had purchased at the sale, but had conveyed to plaintiff all his interest, are proper parties to the suit. *Abernathy v. Phillips*, 82 Va. 769.

1. Parties as Witnesses at Common Law.—A party to a suit could not testify at common law. *Bridges v. Armour*, 5 How. (U. S.) 91; *Wooten v. Nall*, 18 Ga. 609.

In some cases it has been held that the exclusion was on the ground of interest, and if disinterested he was competent. *Worrall v. Jones*, 7 Bing. 395; *Safford v. Lawrence*, 6 Barb. (N. Y.) 566.

2. Party May Testify by Statute.—The statutes of the various States provide that no person shall be incompetent to testify because he is a party to a suit or proceeding, with various excep-

tions, as in actions against or affecting a decedent's estate, etc. See Code *Alabama*, 1886, § 2765; *Arizona*, Rev. Stat. 1887, §§ 1863, 1865; *Arkansas*, Dig. of Stat. 1884, § 2857; *California*, Deering C. & St., vol. 3, §§ 1879–1881; *Connecticut*, Gen. Stat. 1888, §§ 1098, 1094; *Dakota*, Comp. Laws, § 5260; *Florida*, McClellan's Dig. 1881, p. 518, § 24; *Georgia*, Code, 1882, § 3854; *Illinois*, Rev. Stat. (Hurd, 1889), p. 681, § 2; *Indiana*, Rev. Stat. 1881, § 496; *Iowa*, Const. 1857, art. 1, § 4, and McClain's Code, 1888, §§ 4888, 4889; *Kansas*, Gen. Stat. 1889, §§ 4414–4417; *Kentucky*, Code, 1888, §§ 605, 606; *Maine*, Rev. Stat. 1881, p. 707, §§ 93, *et seq.*; *Maryland*, Pub. Gen. Laws 1888, p. 685, §§ 1–4; *Massachusetts*, Pub. Stat. 1882, p. 987, § 18; *Michigan*, How. Annot. Stat. 1882, §§ 7544, 7545; *Minnesota*, Gen. Stat. 1878, p. 792, §§ 3, *et seq.*; *Mississippi*, Code of 1880, §§ 1599, 1602; *Montana*, Comp. Stat. 1887, § 648; *Nebraska*, Comp. Stat. 1889, §§ 899–901; *Nevada*, Gen. Stat. 1885, § 3399; *New Hampshire*, Gen. Laws 1878, p. 531, § 13; *New York*, Annot. Code 1889, § 828; *North Carolina*, Code 1883, § 589, 590; *Ohio*, Rev. Stat. 1890, §§ 5240, *et seq.*; *Oregon*, Hill's Annot. Laws, 1887, § 701; *Pennsylvania*, Brightly's Dig., p. 727, § 20; *Rhode Island*, Pub. Stat. 1882, p. 587, § 33; *South Carolina*, Code, § 400; *Tennessee*, Code, 1884, § 4563; *Utah*, Comp. Laws, 1888, vol. 2, p. 427, § 3876; *Virginia*, Code, 1887, § 3345; *Washington*, Code, 1881, § 389; *West Virginia*, Code, 1887, p. 806, § 23; *Wyoming*, Rev. Stat. 1887, §§ 2588–2590.

In *Delaware* the party may be examined "as if under cross-examination." Rev. Code 1874, ch. 107, p. 552; act of Feb. 18th, 1859.

3. Party Compelled to Testify by Statute.—"Either party to a suit may examine the opposing party as a witness and shall have the same process to compel his attendance as in the case of any other witness. His examination shall be conducted and his testimony shall be received under the same rules applicable to other witnesses." Rev. Stat. *Arizona*, 1887, § 1831.

XIX. CONFLICT OF LAWS AS TO PARTIES—(See also CONFLICT OF LAWS, vol. 3, p. 499).—Questions as to who are the proper parties to actions are determined by the *lex fori*.¹ The *United*

In *Alabama* this is permissible under certain limitations by interrogatories and answers. Code 1886, §§ 2816-2822.

To the same effect as in *Arizona*, Dig. of Stat. *Arkansas*, 1884, § 5099; *Connecticut*, Gen. Stat. 1888, § 1099; *Dakota*, Comp. Laws 1887, § 5253; *Illinois* Rev. Stat. (Hurd. 1889), p. 683, § 6; *Kansas*, Gen. Stat. 1889, § 4416; *Kentucky*, Code, 1888, § 606, par. 10; *New Mexico*, Comp. Laws, 1884, § 2083; *Ohio*, Rev. Stat. 1890, § 5243; *Pennsylvania*, Brightly's Dig., p. 727, § 17; *South Carolina*, Code, § 391; *Texas*, Sayles Civ. Stat., art. 2216.

"In all cases where a party to any suit, action or other proceeding shall be examined by any opposing party, the testimony given on said examination may be rebutted by adverse testimony and by proof of admissions made by the party so examined." *Maryland*, Pub. Gen. Laws 1888, p. 688, § 4.

"A party to a cause who calls the adverse party as a witness, shall be allowed the same liberty in the examination of such witness as is allowed upon cross examination." *Massachusetts*, Pub. Stat. 1882, p. 987, § 20.

Under the statute making parties competent witnesses, each party may be compelled to testify in favor of the adverse party, the same as any other witness. *Dogge v. State*, 21 Neb. 272.

1. Proper Parties Determined by Lex Fori.—The proper party to sue on a contract (a note) is determined by the *lex fori*, at least, unless the *lex loci contractus* is sufficiently alleged in the pleadings. *Wilson v. Clark*, 11 Ind. 385.

Questions as to who are the proper parties to suits, relate rather to the form of the remedy than to the right and merit of the claim, and are therefore to be determined by the law of the forum. Storey's Conflict of Laws (8th ed.), § 565; *Smith v. Chicago etc. R. Co.*, 23 Wis. 267; *Kirkland v. Lowe*, 33 Miss. 423; 69 Am. Dec. 355.

Although an assignee is entitled in the country where the assignment was made to sue in his own name, he may not sue on such assignment in another country where the common-law rule prevails. *Wolfe v. Oxholme*, 6 M. & S. 92; *Jeffrey v. M'Taggert*, 6 M. & S. 126; *Folliott v. Ogden*, 1 H. Bl. 131; *Innes v. Dun-*

lap, 8 T. R. 595. Compare *Smith v. Buchanan*, 1 East 11; *Alivon v. Furnival*, 1 C., M. & R. 277.

So, where by the *lex fori* the assignment must be in writing to authorize the assignee to sue, it was held that an assignee under the insolvent laws of *Louisiana*, could not sue in his own name. *Tully v. Herrin*, 44 Miss. 626.

If an action is brought in the name of the assignor and judgment recovered, an action on such judgment in a State where the real party in interest must sue, must be brought in the name of the assignee. *Greene v. Germania Fire Ins. Co.*, 51 How. Pr. (N. Y.) 73.

At common law an administrator appointed in one State cannot sue as such administrator in another State. *Goodwin v. Jones*, 3 Mass. 514; 3 Am. Dec. 573. See also, FOREIGN EXECUTORS AND ADMINISTRATORS, vol. 8, p. 414.

At common law, an assignee, under the insolvent laws of one State cannot sue in his own name on a note coming to him by virtue of such assignment alone and without endorsement. *Brush v. Curtis*, 4 Conn. 312; *Raymond v. Johnson*, 11 Johns. (N. Y.) 488; *Kirkland v. Lowe*, 33 Miss. 423; 69 Am. Dec. 355.

Nor an assignee for the benefit of creditors. *Orr v. Amory*, 11 Mass. 25.

Since at common law, assignments under foreign bankrupt laws are recognized, therefore an assignee under a foreign bankrupt law may sue in his own name. *Bird v. Caritat*, 2 Johns. (N. Y.) 342; 3 Am. Dec. 433. *Contra*, *Byrne v. Walker*, 7 S. & R. (Pa.) 483; *Blane v. Drummond*, 1 Brock (U. S.) 62. Except as authorized by statute. *Perry v. Barry*, 1 Cranch (C. C.) 204.

A, of Pennsylvania, was indebted to B and C of New York; B and C assigned their claims to X, who sued A in Pennsylvania in his own name. *Held*, while he could not do so under the law of Pennsylvania, yet as by the law of New York he could, he would be permitted to sue in his own name in Pennsylvania. *Levy v. Levy*, 2 W. N. C. (Pa.) 117.

If the law of the State where the deceased payee of a non-negotiable promissory note resided, authorized his administrator to assign it, and vested in

tes courts, by act of Congress, follow the practice prevailing in courts of the State where they are sitting;¹ and even without h statute, it seems, the practice of State courts should be owed by the *United States* courts sitting therein.²

IX. PARTIES TO ACTIONS IN EQUITY.—See also EQUITY PLEAD-
is, vol. 6, p. 724.

XXI. PARTIES TO ACTIONS IN CRIMINAL PROCEDURE.—See also
IMINAL PROCEDURE, vol. 4, p. 729.

XXII. PARTIES TO ACTIONS IN APPELLATE COURTS.³—See also
PEAL, vol. 1, p. 616; CERTIORARI, vol. 3, p. 606; ERROR, WRIT
vol. 6, p. 810.

assignee the right to sue upon it in his
name, such an assignment will be
gnized and enforced in a sister State.
rett v. Gillard, 10 Tex. 69.

egotiable notes executed in *Indi*-
were assigned to an unauthorized
king institution in *Pennsylvania*,
ch assignment, by the laws of the
er State, was void. *Held*, that the
gnee could not sustain an action on
notes in *Indiana*, the *lex loci* gov-
ing the contract of assignment.
Clintick v. Cummins, 3 McLean (U.
158.

Statutes.—"It shall not be neces-
r in any of the courts of the several
ritories of the United States to ex-
se separately the common law and
ncery jurisdictions vested in said
rts; and that the several codes and
s of practice adopted in said terri-
es, respectively, in so far as they
norize a mingling of said jurisdic-
is or a uniform course of proceeding
ll cases whether legal or equitable,
confirmed; and that all proceedings
etofore had or taken in said courts
onformity with said respective codes
rules of practice so far as relates to
form and mode of proceeding be
the same are hereby validated and
firmed." Act of Congress. April
1874, Supp. to U. S. Rev. Stat. of
74-1881), vol. 1, p. 12. *Compare*
Act of June 1st, 1872, 17 Stat. at
ge, U. S., p. 197, § 5; Sawin v.
ny, 93 U. S. 289.

Where a State code of procedure
not been adopted by the United
tes courts sitting in that State, the
it of an assignee to sue in the
ited States courts is determined by
rules of the common law and not
the code, and this applies as well to
sremoved to the United States courts
to cases originally brought there.
dam v. Ewing, 2 Blatchf. (U. S.) 359.
Practice in United States Courts

in Absence of Statutes.—It would seem,
however, that no adoption of the code
is necessary, it being binding upon the
United States courts sitting within the
State. *United States v. Lawrence*, 14
Blatchf. (U. S.) 229, 231; *Sawin v.*
Kenny, 93 U. S. 289; U. S. Rev. Stat.
1878, § 914; *Deloach v. Dixon*, Hempst.
(U. S.) 428; *United States v. Tracy*, 8
Ben. (U. S.) 1; *Delaware Co. v. Die-*
bold Safe & Lock Co., 133 U. S. 473;
Albany etc. Iron etc. Co. v. Lund-
berg, 121 U. S. 451; *Benedict v. Wil-*
liams, 20 Blatchf. (U. S.) 276.

If by the law of a State an assignee
of a chose in action may sue thereon
in his own name, the assignee of a
cause of action for infringement of
patents may sue thereon in his own
name in a United States court sitting in
that State. *May v. Logan Co.*, 30 Fed.
Rep. 250.

3. Parties in Appellate Courts.—Par-
ties interested in result allowed to ap-
pear by counsel in supreme court,
though not parties to the record. *Lies*
v. Daniel, 82 Ga. 272.

Use plaintiffs may not appeal. *Flem-*
ing v. Mershon, 36 Iowa 413.

Where plaintiff sued "for himself
and others," and on motion the words
"and others" are stricken out, such
other persons cannot appeal from the
ruling on such motion because they are
not parties, neither could plaintiff ap-
peal, because not prejudiced by it.
Yarish v. Cedar Rapids etc. R. Co., 72
Iowa 556.

Where there is no community of in-
terest, parties cannot join in an action;
and therefore the obligors in two sev-
eral bonds, who had incurred different
liabilities, may not join in a writ of
error. *Jones v. Etheridge*, 6 Port. (Ala.)
208.

When a party to a judgment dies
before commencement of proceedings
on appeal, one who becomes a privy to

PARTITION—(See also JOINT TENANTS AND TENANTS IN COMMON, vol. 11, p. 1057; JUDICIAL SALES, vol. 12, p. 208; PARCENARY (Estate in); PARTNERSHIP).

- I. Definition and Divisions, 661.
- II. Partition by Act of the Parties, 661.
 1. *What May be Partitioned*, 662.
 2. *Who May Make Partition*, 662.
 3. *How Effected*, 665.
 - a. *By Conveyance*, 665.
 - b. *By Arbitration*, 666.
 - c. *By Parol*, 667.
 4. *Delegation of Authority to Make Partition*, 671.
 5. *Agreement for Partition*, 672.
 6. *Validity and Effect*, 673.
 - a. *As to Warranty of Title*, 674.
 - b. *As to Rights, Claims and Incumbrances*, 676.
 7. *How Established*, 677.
- III. Partition by Judicial Proceedings, 677.
 1. *Progress and History of Partition by Action*, 677.
 2. *What May be Partitioned*, 681.
 - a. *Of the Different Kinds of Property*, 688.
 - b. *Of the Different Estates in Property*, 690.
 - c. *Effect of Agreement Not to Partition*, 693.
 3. *Who May Enforce Partition*, 694.
 - a. *The Applicant*, 698.
 - b. *Joinder of Several Applicants*, 704.
 4. *What Courts Have Jurisdiction*, 705.
 - a. *Of What Locality*, 707.
 - b. *Effect of Title Coming in Question*, 709.
 - c. *Jurisdiction of Probate Courts*, 712.
 5. *Commencement of Action*, 715.
 - a. *Within What Time*, 715.
 - b. *How Commenced*, 715.
 - (1) *Guardians for Infant Defendants*, 717.
 - (2) *Notice of Pendency of Action* (See LIS PENDENS), 717.
 6. *Parties Defendant*, 717.
 - a. *Who Are Necessary*, 717.
 - (1) *Holders of Particular Estates and Interests*, 720.
 - (2) *Persons Under Disability*, 725.
 - (3) *Unknown Owners*, 727.
 - (4) *Persons Not In Esse*, 728.
 - b. *Parties in Probate Court*, 730.
 7. *Pleadings in Partition*, 730.
 - a. *The Bill, Petition, or Complaint*, 731.
 - (1) *Particular Allegations*, 731.
 - (2) *Multifariousness*, 736.
 - b. *Answers and Defenses*, 737.
 - c. *Replication*, 743.
 8. *Matters of Procedure*, 743.
 - a. *Change of Parties*, 743.
 - b. *Amendments*, 744.
 - c. *Procedure on Default*, 745.
 - d. *Disposition of Issues*, 745.
 - (1) *Evidence*, 747.
 - (2) *Variance Between Pleadings and Proof*, 748.
 9. *Interlocutory Judgment*, 748.
 - a. *Questions Determined*, 749.
 - b. *Directions as to Manner of Making Partition*, 749.
 - c. *Not a Final Judgment*, 750.
 10. *Equitable Relief Incidental to Partition*, 751.
 - a. *Matters Preliminary to Partition*, 752.
 - b. *Partial Partition*, 752.
 - c. *Adjustment of Claims and Equities Between Co-tenants*, 753.
 - d. *Owelry of Partition*, 755.
 - e. *Disposition of and Allowances for Improvements*, 758.
 - f. *Rents and Profits, Use and Occupation*, 762.
 - g. *Conveyances of Part by Metes and Bonds*, 763.
 - h. *Compelling Conveyance*, 763.
 11. *Management of the Property Pending Suit*, 764.
 - a. *The Appointment of a Receiver*, 764.
 - b. *Injunctions*, 765.
 - (1) *Injunction to Stay Waste*, 765.
 - (2) *Injunction Against Proceeding at Law*, 765.
 12. *Actual Partition*, 766.
 - a. *Appointment of Commissioners*, 766.
 - b. *Their Powers and Duties*, 768.
 - c. *Their Report*, 775.

- d. *Vacating or Setting Aside the Report*, 777.
- e. *The Division in Probate Court*, 780.
- f. *The Effect of Actual Partition*, 783.
13. *Sale Instead of Division*, 785.
 - a. *When a Sale Will be Ordered*, 786.
 - b. *The Order*, 791.
 - c. *Conduct of the Sale*, 792.
 - d. *Confirmation of the Sale*, 794.
 - e. *Setting Aside the Sale*, 795.
- f. *Rights and Obligations of the Purchaser*, 798.
- g. *The Conveyance and Its Effect*, 803.
- h. *Distribution of the Proceeds*, 805.
14. *The Final Judgment or Decree*, 808.
 - a. *When Valid and Binding*, 810.
 - b. *Costs*, 812.
15. *Appeal and Review*, 816.
16. *Conclusiveness and Effect of Partition*, 817.
 - a. *Effect in Probate Court*, 823.

I. DEFINITION AND DIVISIONS.—Partition is the division which is made between several persons of lands, tenements, or hereditaments, or of goods and chattels which belong to them as co-proprietors. The term is more technically applied to the division of real estate made between co-parceners, tenants in common, or joint tenants.¹ Partition may be effected by act of the parties or by judicial proceedings.

II. PARTITION BY ACT OF THE PARTIES.—Partition by act of the parties is that made by the owners by mutual consent. It is usually effected by mutual conveyances or releases to each person of the share which he is to hold, executed by the other owners², and this may be done without recourse to law in any

judgment by operation of law may be a petition in error without being it made a party by revivor, averring his petition the facts upon which the operates in creating such privy. *inover v. Sperry*, 35 Ohio St. 244; *itt v. Linton*, 35 Ohio St. 282.

.. Bouv. Law Dict., tit. Partition. Partition signifies allotment of res, division. In jurisprudence it usually used in speaking of the ht, or of proceedings to enforce the ht, which either of the joint owners joint property has to demand a ision and that his share be set off him in severalty. Abb. Law Dict., rtition.

Partition is a division of lands or ements by co-parceners, joint tens, or tenants in common, so as to put end to co-tenancy and to vest in h person a sole estate in a specific erty or allotment of the lands or ements. Partition, in its primitive l technical import, signifies such a ision of co-parceners or co-heirs lands descended by common law by custom; and the books, when y speak of partition generally, l without alluding to a particular

species of undivided estate in the parties making it, appear invariably to mean a partition of co-parceners; but the term has long since become equally applicable to division of lands of joint tenants or tenants in common. Allnatt on Part.

2. Bouv. Law Dict., tit. Partition; Allnatt on Part. 2; Co. Litt. 165 b.

“Voluntary partition between co-parceners at common law was accomplished by one of four different methods. By the first method, the parceners by direct agreement between one another made their partition, and each took a particular part to hold in severalty. Littleton intimates that each part must be of equal value, *citing* Littleton, § 243, but in commenting upon this LORD COKE observes: ‘If co-parceners make partition at full age, and unmarried, and of sane memorie, of lands in fee-simple, it is good and firme for ever, albeit the values be unequal; but if it be of lands entailed, or if any of the parceners be of non sane memorie, it shall bind the parties themselves, but not their issue unless it be equal; or if any be covert, it shall bind the husband but not the wife or her

case in which it is within the power of the parties, by application to a court of competent jurisdiction, to compel a partition.¹

1. What May be Partitioned.—It would seem that any article of property or thing of value, whether real or personal, or whether corporeal or incorporeal, if it can be made the subject of contract, when owned in co-tenancy, can be made the subject of voluntary partition,² restricted only by such limitations as may exist upon the power of the parties concerned to contract with reference to the subject matter,³ or by considerations of public policy.⁴ Homesteads, community property, and estates by entirety, however, cannot be partitioned.⁵

2. Who May Make Partition.—A valid and binding agreement for partition can, of course, be made by co-tenants, all of whom are competent to contract.⁶ So infants, married women, and other persons under disability to contract may usually make a partition and it will be upheld for the reason that they are com-

heires, or if any be within age, it shall not bind the infant.' Co. Litt. 166 a. By the second method, the co-parceners first appointed some of their friends to divide the lands into equal parts. After such division had been made, each of the co-parceners selected one of these parts to hold in severalty. In this selection, the eldest had the first choice and the others chose after her according to their seniority. *Citing* Litt., § 244; 2 Cruise 394. When the third method was employed, the eldest sister was chosen to make division of lands into equal parts. In this case, to assure the impartial exercise of her judgment, 'it is said the eldest sister shall choose last for her part, and after every one of her sisters.' *Citing* Litt. § 245; 2 Cruise 394. 'The rule of law is *cujus est divisio, alterius est electio*. And the reason of the law is, for avoiding partiality.' *Citing* Co. Litt. 166 b. The fourth method of voluntary 'partition or allotment is, as if there were four parceners, and after partition of the lands be made, every part of the land by itself is written in a little scrowle and is covered all in waxe in manner of a little ball, so as none may see the scrowle, and then the four balls are put in a hat to be kept in the hands of an indifferent man, and then the eldest daughter shall first put her hand into the hat, and take a ball of waxe with the scrowle within the same ball for her part, and then the second shall put her hand into the hat and take another, the third sister the third ball, and the fourth sister the fourth ball, etc.,

and in this case every one of them ought to stand to their chance and allotment.' *Citing* Litt. 246; 2 Cruise 395." Freem. Part., § 394.

1. *Mellon v. Reed* (Pa.), 8 Atl. Rep. 227.

2. *Stedman v. Weeks*, 2 Strobb. (S. Car.) Eq. 145; s. c., 49 Am. Dec. 660, in speaking of the subject of partition said: "It does not seem very material to inquire what is the character of the complainants' estate, whether real or personal, whether tenement or hereditament, whether savoring of the realty, or altogether personal." This, however, was a case of partition by judicial proceeding.

Partition has been permitted in cases in which the division would nearly, if not completely, destroy the value of the property. See *Warner v. Baynes*, Ambl. (Eng.) 589; *Parker v. Gerrard*, Ambl. (Eng.) 236; *Norris v. Le Neve*, 3 Atk. (Eng.) 83. See further on this subject, *infra*, this title, *Partition by Judicial Proceeding*, subtit. *What May be Partitioned*.

3. See *infra*, this title, *Who May Make Partition*.

4. See *Brown v. Lutheran Church*, 23 Pa. St. 500; *Coleman v. Coleman*, 19 Pa. St. 100; s. c., 57 Am. Dec. 641; *Railway Co. v. Railroad Co.*, 38 Ohio St. 614; Freem. Part., § 438; Co. Litt. 165 a.

5. See *supra*, this title, *Homestead and Community Property*, and *Estates*, subtit. *Estates by Entirety*.

6. *Mellon v. Reed*, 114 Pa. St. 647; *Bompart v. Roderman*, 24 Mo. 385; *Jones v. Carter*, 4 Hen. & M. (Va.) 184.

pellable by law to make partition;¹ and for the same reason, where the partition is actually carried into effect, formal defects in the execution of the partition agreement will not affect its validity;² though in such case where any unfairness was exercised, those not *sui juris* cannot be held, even though they may have performed acts of ownership after the removal of their disability;³ but only a reasonable time can be taken after the removal of such disability to disaffirm the partition, and when not so disaffirmed it

1. See *Wardlaw v. Miller*, 69 Tex. 395; *Williard v. Williard*, 56 Pa. St. 119; *Darlington's Appropriation*, 13 Pa. St. 130; *McMahan v. McMahan*, 13 Pa. St. 376; s. c., 53 Am. Dec. 431; *McConnell v. Carey*, 48 Pa. St. 345; *Jones v. Carter*, 4 Hen. & M. (Va.) 184; *Wetherill v. Mecke*, Bright's Rep. (Eng.) 140; *Allnatt on Part.* 21-23; *Co. Litt.* 171 a, 171 b.

A woman, married a second time, holding by descent an undivided third of the lands of the former husband, may, without suit, make fair partition with the children of her former husband, and deeds executed by her and her second husband to carry out such partition are not an alienation prohibited by a statute rendering her incompetent to convey lands received by her by descent from a deceased husband, the partition not being a conveyance of land, but a mere allotment to each of the owners in severalty of the same interest which he or she before held in common. *Bumgardner v. Edwards*, 85 Ind. 117.

"A *prochein ami* may make partition on behalf of an infant parcener, and it will bind the infant, if equal, for the *prochein ami* is appointed by law to take care of the inheritance of the infant; and this separation and division of his part from what belongs to another is so far from being a prejudice to the infant, that it is really for his benefit and advantage." *Allnatt on Part.* 29.

The fact that infants and a married woman owned proprietary rights in townships does not prevent their being bound by the acts of the proprietors in making divisions at legal meetings, or by subsequent acquiescence in such a division. *Townsend v. Downer*, 32 Vt. 183.

A partition of lands among joint tenants or tenants in common, made by parol agreement, is not within the statute of frauds, nor the statute regulating conveyances of land by mar-

ried women, and is not affected by the registration law. *Aycock v. Kimbrough*, 71 Tex. 330.

In *Jones v. Reeves*, 6 Rich. (S. Car.) 132, however, it was held that no parol partition of land can avail against a married woman, unless it be sanctioned by a possession sufficient to give title under the statute of limitations.

Under Louisiana Code, 1323, there can be no division of a movable owned in indivision by several co-owners, where minors are interested, except by judicial partition. *Ware v. Vignes*, 35 La. Ann. 288.

2. *Hardy v. Summers*, 10 Gill & J. (Md.) 316, s. c., 32 Am. Dec. 167; *Calhoun v. Hays*, 8 W. & S. (Pa.) 127; s. c., 42 Am. Dec. 275.

A brother and sister, both of whom were married, owned a tract of land jointly. In 1802, the brother and his wife and the sister and her husband united in a deed of partition, and from thence the land was held in severalty by the parties respectively, and those claiming under them. Held, that the partition was valid, though no certificate of the privy examination of the wives was annexed to the deed. *Bryan v. Stump*, 8 Gratt. (Va.) 241; s. c., 56 Am. Dec. 139.

3. *Hemmich v. High*, 2 Watts (Pa.) 159; s. c., 27 Am. Dec. 295; *Allnatt on Part.* 21; *Litt.*, § 258.

In speaking of parceners, *Allnatt* (Part. 21) says: "But if the partition be unequal, though it shall be good during the lives of the husbands, yet the woman who has the lesser part may defeat the partition by entry, after her husband's death. In this case, the partition is not actually void, but voidable; for if, after the husband's decease, the wife enters into the unequal part and agrees to it, this shall bind her. And it may be observed that when a partition is defeated for inequality, it shall not be defeated for the surplusage only, but in toto."

becomes irrevocable.¹ A person having no interest in the subject matter cannot, of course, join in an agreement for partition,² and a division made by less than the whole number of co-tenants is invalid, though effect will be given it so far as possible consistently with the rights of the others.³ The right to make partition is not confined to co-heirs but extends to all co-owners;⁴ and a partition of a whole or part of his estate may be made by a person among his descendants in his lifetime, though such partition must be executed with all the formalities, and would be subject to all the conditions of donations *inter vivos*.⁵ *Cestuis que trustent* may divide their estates without the consent of the trustee, and hold their interests in severalty though they cannot give each other a complete legal title.⁶ Such partition made by tenants in tail or for life is binding only during the life of such tenant, and may be

1. Williard *v.* Williard, 56 Pa. St. 119; Darlington's Appropriation, 13 Pa. St. 430; Hemmich *v.* High, 2 Watts (Pa.) 159; s. c., 27 Am. Dec. 295; Bavington *v.* Clark, 2 P. & W. (Pa.) 115; s. c., 21 Am. Dec. 432; Calhoun *v.* Hays, 8 W. & S. (Pa.) 127; s. c., 42 Am. Dec. 275; Allnatt on Part. 27; Co. Litt. 171 a; Vin. Ab., tit. Partition.

In Doe *d.* Estabrooks *v.* Harris, 2 Allen (N. B.) 42, it was held that a delay of six years after the death of her husband was so unreasonable that the widow was estopped from making the objection to the partition that she might have made at the time of his death.

2. A person who once had an interest as joint tenant with others in land, and whose interest has passed from him, cannot effectually unite with his former co-tenants in a deed of partition; and such deed, for want of mutuality and consideration, will not bar the representative of a co-tenant from afterwards having a partition under the law. Patterson *v.* Martin, 33 W. Va. 494.

A contract entered into by several parties owning land in common, for a partition of the same, must bind all the tenants in common, or it binds none. Gates *v.* Salmon, 46 Cal. 361.

3. Where several heirs had made a voluntary partition of the whole of the estate among themselves to the exclusion of the complainants, and the court found upon inquiry into the amount and condition of the estate that it was practicable to assign to the complainants their share of equal value in a shape equally advantageous to them by setting it off ratably from the respective shares of each of the defend-

ants, as fixed by them on the pretended amicable partition, such repartition was decreed, although theoretically the first was treated as absolutely void. Campau *v.* Campau, 19 Mich. 116.

4. See Paul *v.* Lamothe, 36 La. Ann. 318; Folger *v.* Mitchell, 3 Pick. (Mass.) 396; Corbett *v.* Norcross, 35 N. H. 99; Coburn *v.* Ellinwood, 4 N. H. 99. And see further *infra*, this title, *Partition by Judicial Proceedings*, subtit. *Who May Make Partition*.

A purchaser of one-fourth interest in a tract of land may partition with the owners of the other three-fourths, notwithstanding his vendor retained a lien for the purchase money on the fourth interest conveyed to him, and thereafter the vendor cannot assert his lien for purchase money on an undivided fourth of the whole, but must assert it on the one-fourth allotted to his vendee. Hall *v.* Morris, 13 Bush (Ky.) 322.

Where a joint owner of slaves, subject to division, sold one of them, it was held to be a partition *pro tanto*, and not a conversion to his own use. Seay *v.* White, 5 Dana (Ky.) 555.

5. Martin *v.* Martin, 15 La. Ann. 585. Where land was sold under a will for partition, and a daughter of the testator purchased a specific part, to the extent of her life interest, no money being paid, although she might sell this part to a third party having notice by the court record, yet, upon her death, the remainder-men might recover their interest from the purchaser. Swan *v.* Finney, 4 Baxt. (Tenn.) 26.

6. Strode *v.* Churchill, 2 Litt. (Ky.) 75.

disaffirmed by the heir in tail or tenant in remainder or reversion;¹ and the legal unity of husband and wife prevents them from making a partition of an estate held by them in co-tenancy,² though it would undoubtedly be possible to accomplish this result by conveyance to a third party and reconveyance in separate parcels.³

3. How Effectuated—*a.* BY CONVEYANCE.—The most usual manner of accomplishing a voluntary partition of lands is by conveyance by each co-tenant to the other of the part respectively agreed to be taken by him in severalty.⁴ Mutual deeds of partition must be taken and construed together as one instrument in the light of all the surrounding circumstances to which they obviously point,⁵ it being a general rule of law and equity that when a purchaser

1. *Buxton v. Bowen*, 2 W. & M. (Eng.) 365; *Swan v. Finney*, 4 Baxt. (Tenn.) 26.

A partition between parties holding a conditional fee, or an estate for life, does not enlarge the estate, but merely severs the tenancy or possession during its continuance. *Jackson v. Christman*, 4 Wend. (N. Y.) 277.

2. *Frissell v. Rozier*, 19 Mo. 448. On the other hand it is stated in *Viner's Abridgment* (tit. Partition) that, "partition between husband and wife of lands, if it be equal, shall bind the makers because they are compellable to make partition; but secus of an use because they are not compellable."

The power of husband and wife to make partition, under the statutes of the different States, undoubtedly depends upon the question of the ability of a married woman to contract with her husband. See *MARRIED WOMEN*, vol. 14, p. 604, *et seq.*

3. *Freem. Part.*, § 413.

4. *Freem. Part.*, § 406. And see *Walter v. Walter*, 1 Whart. (Pa.) 292; *Knevals v. Prince* (Supreme Ct.), 10 N. Y. Supp. 676; *Yancey v. Radford*, 86 Va. 638.

A testator devised to his sons his farm in fee-simple, and directed that it should be divided by running a certain line. Upon the death of the testator they entered into possession and occupied the premises for some years as tenants in common, and during that time purchased 15 acres adjoining, and then made a division by a line running nearly as indicated in the will, agreed upon their choice of parts, and executed and delivered, each to the other, a deed conveying such part to him and wife. It was held that the making

of deeds, respectively, the one to the other and wife, was a partition under the will and not a purchase and sale of the land. *Taylor v. Birmingham*, 29 Pa. St. 306.

In England, "by far the more usual and convenient mode of making partition, whether by co-parcenary, joint-tenants, or tenants in common, is for all the co-tenants to join in conveying the entirety of the estate to be divided to a trustee and his heirs, and on this seisin to limit the use of each particular allotment to the party for whom it was intended. By this arrangement, the parties may, if they wish it, have their allotments limited to a different set of uses from those to which their undivided shares stood subject. It is obvious, however, that this mode can only be resorted to where the lands are held by such a tenure as will admit of their being conveyed to uses by force of the statute: therefore, in the case of joint-tenants and tenants in common of a term of years, the analogous and equivalent mode of assignment and re-assignment should be adopted. *Alnatt on Part.* 131, 132.

5. *Rountree v. Denson*, 59 Wis. 522; *Norris v. Hill*, 1 Mich. 202. And see *Simmons v. Spratt*, 22 Fla. 370; *Dawson v. Lawrence*, 13 Ohio 543; s. c., 42 Am. Dec. 210; *Staples v. Bradley*, 23 Conn. 167; s. c., 60 Am. Dec. 630.

If partition be made between tenants in common, who are *femes covert*, and mutual releases are executed to the husbands, they do not vest absolute estates in them, but only in trust for their wives. But if such releases do not recite the partition, but a moneyed consideration only, a purchaser without notice would take an absolute

cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact.¹

Where there are two tenants in common, each owning an undivided half of a tract of land, neither can make a partition binding upon the other by assuming to convey specifically one half of the tract,² but where the other tenant acquiesces and subsequently conveys the other part, it will be a complete and binding partition.³ Where the deeds or other conveyances effecting a partition are ambiguous in any respect, the actual intent, if it can be ascertained from all the facts, will control,⁴ the conveyances being simply a ratification of the partition previously made.⁵

b. BY ARBITRATION.—An agreement or deed of partition whereby each is to receive a several portion of a common estate, appointing commissioners to make the division, is founded upon

estate. *Weeks v. Haas*, 3 W. & S. (Pa.) 520, s. c., 39 Am. Dec. 39.

1. *Norris v. Hill*, 1 Mich. 202; citing 1 Story's Eq. Jur., § 400; 3 Mason 531; 2 Ch. Cas. 240; Ambler 311; 2 Font. Eq., bk. 3, ch. 3, § 1, note b.

2. *Eaton v. Tallmadge*, 24 Wis. 217; *Markoe v. Wakeman*, 107 Ill. 251; *Hamilton v. Phillips* (Ga. 1889), 9 S. E. Rep. 606.

"Neither could invest the other with a separate title to a portion of the tract without the formality of a deed." *WESTON. C. J.*, in *Duncan v. Sylvester*, 16 Me. 388.

3. In *Eaton v. Tallmadge*, 24 Wis. 217, the court said: "Where there are two tenants in common each owning an undivided half of land, neither can make a partition that will be binding upon the other by assuming to convey either half specifically. But if one does so convey, we think the other would be at liberty to acquiesce, and to accept the remaining half. And if he should do so, by conveying that specifically the two conveyances would operate as a complete and binding partition." In *Duncan v. Sylvester*, 16 Me. 388, the opposite doctrine was adopted on this point.

4. *Mitchell v. Smith*, 67 Me. 338. And see *Goodman v. Winter*, 64 Ala. 410. See *Hathaway v. DeSoto*, 21 Cal. 191.

A partition of land by deed, by joint tenants capable of contracting, according to an old survey, the accuracy of which is equally unknown to both, is binding upon them, and those claiming under them, however unequal the division may be, there being no fraud or misrepresentation. *Jones v. Carter*, 4 Hen. & M. (Va.) 184.

A partition deed, by A and B, recited "that they were owners of two lots, whereon stood a house; through said house there was an entry, which, being near the middle of said lots, had made a line, running with said entry across both lots, the dividing line." The parties then surrendered their claims to the land, one on the east side of said line, the other on the west, A binding himself to let the entry remain open and free to both parties. It was held, that B could not claim, under this deed, an alley across the lots, of the width of the entry. *Baker v. Talbott*, 6 T. B. Mon. (Ky.) 179.

If partition deeds are free from ambiguity so that the intention of the grantors, whether clearly expressed or not, can be made certain by an examination of the papers themselves, then extrinsic evidence, whether consisting of the acts and declarations of the parties at the time of the delivery of the deeds or the mode of subsequent occupancy under them, cannot be received to modify their legal effect. *Mitchell v. Smith*, 67 Me. 338.

5. See *Wadhams v. Gay*, 73 Ill. 415; *Simmons v. Spratt*, 22 Fla. 370.

Deeds of partition passing between two tenants in common convey no title, but simply define the boundaries of the land owned by each; and, where one of the parties has no title to the premises, the deed of the other to him is without consideration and void, and a covenant of warranty therein contained inoperative. *Davis v. Agnew*, 67 Tex. 206.

But this doctrine does not go to the extent of permitting the use of a parol agreement to deprive one of the es-

mutual releases and is upon the performance of all the conditions, effectual as a partition and release.¹ Such a partition is held to be incomplete, however, until confirmed by conveyances in accordance with the award, even though the submission may have been by deed,² but equity will compel such transfer of the legal title in case of refusal by any of the co-tenants to do so.³ In case of mistake by the arbitrators, whereby an inequitable division is made, a re-allotment cannot be had after valuable improvements have been made, damages only can be recovered,⁴ and all relief may be denied in case of laches on the part of the complainant.⁵

c. BY PAROL.—By the common law co-parceners and tenants in common might make partition by parol, but joint tenants, being already seised of the whole, could only testify a partition by deed, and in both cases the conveyance must have been perfected by livery of seisin;⁶ but where joint tenants held an estate for years only, a parol partition was good.⁷ Under a great majority of the English authorities, however, the statute of

tate conveyed to him by deed, even though such conveyance may have been obtained by fraud or mistake. *Farmers' etc. Nat. Bank v. Wallace*, 45 Ohio St. 152.

1. *Tewksbury v. Provizzo*, 12 Cal. 23; *Knight v. Burton*, 6 Mod. (Eng.) 231; *Allnatt on Part.* 17. And see *Cheatham v. Crews*, 83 N. Car. 313; *Beavor v. Trittipio*, 24 Ind. 41; *Johnson v. Wilson, Willes* (Eng.) 248.

In *Tewksbury v. Provizzo*, 12 Cal. 21, the court said: "We apprehend that when parties go into a partition of property upon certain terms and conditions, each to receive a several portion of a common estate, the instrument of partition, founded upon mutual releases itself, is such affirmation of interest and title on the part of each as to estop him to deny that he did have interest and ownership in the premises; and the release and conveyance of his interest to his parceners is evidence of title in his grantees which he cannot dispute. He takes, by virtue of the deed, of their interest and cannot be allowed to say that he holds possession of what he conveyed and released by title paramount to that which he conveyed."

In *New York* a division of real estate, by arbitrators, is void, under a statute which provides that no submission to arbitration "shall be made respecting the claim of any person to any estate, in fee or for life, to real estate," *Wiles v. Peck*, 26 N. Y. 42.

2. *Johnson v. Wilson, Willes* (Eng.) 248.

3. *Knight v. Burton*, 6 Mod. (Eng.) 231.

4. *Cheatham v. Crews*, 83 N. Car. 313.

5. See *Tewksbury v. Provizzo*, 12 Cal. 20, in which the court refused to set aside an award, which had been acted upon for many years, because of the failure of the arbitrators to divide a tract of marsh land connected with the divided premises.

Two parties, desiring to make a partition of lands, employed a third person to appraise the lands and make the division, agreeing to abide by his determination. Under the partition as made by him, in consequence of an error of computation innocently made, one of the parties got land worth less than his share according to the appraisement. It was held, that a court of equity would grant no relief to him where he doubted the correctness of the computation and was put upon inquiry at the time. *Beaver v. Trittipio*, 24 Ind. 41.

6. 2 Black. Com. 517, Litt. 250; Co. Litt. 169, 2 Cruise 410; Vin. Ab., tit. Partition (c). And see *Lavalle v. Strobel*, 89 Ill. 370.

If two be tenants in common, and they make partition by parol and execute the same in severalty by livery, this is good and sufficient in law. Co. Litt. 169 a.

It would seem that in a parol partition between co-parceners, no livery of seisin was necessary. See 2 Cruise 295.

7. 2 Black. Com. 517, *Allnatt on*

frauds now renders a partition by deed necessary in every case,¹ and while there has always been a conflict of authority, the rule formerly prevailing in the United States was that public policy, security of titles, and the peace of society rigidly required a strict adherence to the rule that all partitions of freehold estates should be by deed or writing;² but the contrary doctrine that a parol partition carried out and followed by actual possession in severalty of the several parcels is valid and will be enforced notwithstanding the statute of frauds, on the theory that it has been removed from its operation by part performance, is growing in favor, and now seems to have been adopted by a large majority

Part. 130; 1 Chitty's Gen. Pr. 313; 13 Petersdorff's Ab. 141; Brown, St. Frauds, § 68; Ireland v. Rittle, 1 Atk. (Eng.) 541; Johnson v. Wilson, Willes (Eng.) 248; Whaley v. Dawson, 2 Sch. & Lef. (Eng.) 367.

1. Co. Litt. 187 a; Vin. Ab., tit. Partition (d); 2 Cruise 384; 13 Petersdorff's Abr. 137.

2. Den v. Longstreet, 18 N. J. L. 414; Duncan v. Sylvester, 16 Me. 390; Chenery v. Dole, 39 Me. 164; Medlin v. Steele, 75 N. Car. 154; Goodhue v. Barnwell, Rice Eq. (S. Car.) 198; Jones v. Reeves, 6 Rich. (S. Car.) 132; Porter v. Hill, 9 Mass. 34; s. c., 6 Am. Dec. 22; Craig v. Taylor, 6 B. Mon. (Ky.) 459; Lacey v. Overton, 2 A. K. Marsh. (Ky.) 442; Porter v. Perkins, 5 Mass. 233; s. c., 4 Am. Dec. 52; Ballou v. Hale, 47 N. H. 347; Wood v. Griffin, 46 N. H. 230; Richman v. Baldwin, 21 N. J. L. 395; Gratz v. Gratz, 4 Rawle (Pa.) 411; Wright v. Cane, 18 La. Ann. 579; McPherson v. Segnine, 3 Dev. (N. Car.) 154; Dow v. Jewell, 18 N. H. 340; s. c., 45 Am. Dev. 371; Anders v. Anders, 2 Dev. (N. Car.) 529.

In Den v. Longstreet, 18 N. J. L. 405, there had been a several possession for six years. In Duncan v. Sylvester, 16 Me. 390, the tenants had been severally possessed for fifteen years. And in the case of Porter v. Perkins, 5 Mass. 235; s. c., 4 Am. Dec. 52, in which the several possession had been continuously maintained for twenty-six years, the court made the general statement that "partition by parol is void," though the case was decided on other grounds.

While a parol partition of lands between co-tenants is invalid by reason of the statute of frauds, there is no good reason why, if it is followed by twenty years' continuous, adverse, exclusive possession by each of their respective shares in severalty, such possession will not operate as a bar to the

claim of either upon the other for the share so occupied. John v. Sabattis, 69 Me. 473.

Where A and B make an oral partition of land, the legal title to which is in B and take possession according to their agreement, A has no defense in an action by B. to recover the land, unless his possession has been long enough to effect a bar under the statute of limitations; but he has a right enforceable in equity, which is not barred by a judgment recovered by B. Yarborough v. Avant, 66 Ala. 526.

Freeman in his work on Partition (§ 397), in commenting on this doctrine, said: "It must not however be inferred that, even under these authorities parol evidence may not, under certain circumstances, be competent to establish a partition; but it can only be so when its purport is such as to directly establish that a partition was made in some valid method, the written evidence of which cannot now be produced. If a jury be called upon to determine, as an issue of fact, whether or not a partition of lands once held in co-tenancy had been effected, and the undivided estates of the co-tenants thereby changed into estates in severalty, evidence might properly be admitted showing a several occupation of some specified part by each of the co-tenants for a long period of time, and the jury might be justified from such evidence in inferring that a valid partition has been made. But if this long continued possession in severalty be explained, and be shown to have existed in pursuance of a parol partition made by the co-tenants, the inference, which might otherwise be indulged, is rebutted, and the jury would, according to the authorities to which we have referred, not be justified in finding that a valid partition had been consummated."

of the courts.¹ A parol agreement for partition, however, of

1. *Brown v. Wheeler*, 17 Conn. 345; s. c., 44 Am. Dec. 550; *Shepard v. Rinks*, 78 Ill. 188; *Grimes v. Butts*, 65 Ill. 347; *Hank v. McComas*, 98 Ind. 460; *Manly v. Pettie*, 38 Ill. 131; *Piatt v. Hubbell*, 5 Ohio 245; *Compton v. Mathews*, 3 La. 128; s. c., 22 Am. Dec. 167; *Walker v. Bernard, Cam. & N.* (N. Car.) 82; *Slice v. Derrick*, 2 Rich. (S. Car.) 629; *Bolling v. Teel*, 76 Va. 487; *Natches v. Vanderwelde*, 31 Miss. 706; s. c., 66 Am. Dec. 581; *Pipes v. Buckner*, 51 Miss. 848; *Taylor v. Millard*, 118 N. Y. 244; *Wood v. Fleet*, 36 N. Y. 499; s. c., 93 Am. Dec. 528; *Conkling v. Brown*, 57 Barb. (N. Y.) 265; *Mellon v. Reed*, 114 Pa. St. 647; *Wardlow v. Miller*, 69 Tex. 395; *Mitchell v. Allen*, 69 Tex. 70; *Simmons v. Spratt*, 22 Fla. 370; *Goodman v. Winter*, 64 Ala. 410; s. c., 38 Am. Rep. 13; *Johnson v. Johnson*, 65 Tex. 87; *McKnight v. Bell*, 135 Pa. St. 358; *Kennemore v. Kennemore*, 26 S. Car. 251; *Bruce v. Osgood*, 113 Ind. 360; *Welchel v. Thompson*, 39 Ga. 559; *Brazee v. Schofield*, 2 Wash. Ter. 209; *Piper v. Buckner*, 51 Miss. 848; *Hamilton v. Phillips* (Ga. 1889), 9 S. E. Rep. 606; *Wright v. Jones*, 105 Ind. 17; *Hazen v. Barnett*, 50 Mo. 506; 1873, *Gates v. Salmon*, 46 Cal. 361; *Le Bourgeoise v. Blank*, 8 Mo. App. 434; *Bompart v. Roderman*, 24 Mo. 385; *Jackson v. Horder*, 4 Johns. (N. Y.) 202, s. c., 4 Am. Dec. 262; *Ebert v. Wood*, 1 Binn. (Pa.) 216; s. c., 2 Am. Dec. 436; *Rider v. Maul*, 40 Pa. St. 376; *Stuart v. Baker*, 17 Tex. 417; *Ryerss v. Wheeler*, 25 Wend. (N. Y.) 434; s. c., 37 Am. Dec. 243; *Jackson v. Christman*, 4 Wend. (N. Y.) 277; 1875, *Dement v. Williams*, 44 Tex. 158; *Mount v. Morton*, 20 Barb. (N. Y.) 123; *Pomerooy v. Taylor*, *Brayt.* (Vt.) 174; *Cooles v. Wooding*, 2 Patt. & H. (Va.) 189; *Calhoun v. Hays*, 8 W. & S. (Pa.) 127; s. c., 42 Am. Dec. 275; *Haughabaugh v. Donald*, 3 Brev. (S. Car.) 97; s. c., 5 Am. Dec. 548; *Otis v. Cusack*, 43 Barb. (N. Y.) 546; *Hunter v. Morse*, 49 Tex. 219; 1874, *Moore v. Kerr*, 46 Ind. 468; *Maul v. Rider*, 51 Pa. St. 377; *Darlington's Appropriation*, 13 Pa. St. 430; *McConnell v. Carey*, 48 Pa. St. 345; *Grimes v. Butts*, 65 Ill. 347; *Lavalle v. Strobel*, 89 Ill. 370; *Aycock v. Kimbrough*, 71 Tex. 330; *Wildly v. Bonney*, 31 Miss. 644; *Gillespie v. Johnston*, *Wright* (Ohio) 232.

The entry of a tenant on all the land set off to him under partition was such a part performance as would take the case out of the statute of frauds, although he had, during the lifetime, and with the permission of the last owner, occupied a part of the land afterwards allotted to him by the parol partition. *McMahan v. McMahan*, 13 Pa. St. 376; s. c., 53 Am. Dec. 431.

A voluntary partition, not evidenced by writing, in order to defeat a right to a partition under the law, must be clearly proven, and must be followed by actual possession in severalty of the several parcels, pursuant to such voluntary partition. *Patterson v. Martin* 33 W. Va. 494.

A parol agreement for exchange of parts of lots, in performance of which the parties have taken possession, agreed upon dividing lines, and erected a division fence, and one party has made street improvements in front of the land received by him in exchange, is a valid parol partition, and not within the statute of frauds; and the party who originally owned the lots so improved is also estopped to assert the invalidity of the agreement. *Tate v. Fashee*, 117 Ind. 322.

In a suit for partition, where the cause is referred to a master, who finds that 10 years before there was an oral partition between the tenants, when each was placed in the exclusive possession of the parcel assigned to him, and the court concurs in this finding, the complaint is properly dismissed. *Rountree v. Lane*, 32 S. Car. 160.

The same rule applies to a partition long acquiesced in, wherein the steps prescribed by statute were not followed. *Brazee v. Schofield*, 2 Wash. Ter. 209; *Wardlow v. Miller*; s. c., 69 Tex. 395.

In *Texas* this doctrine is placed upon the difference between its statute of frauds and the English one, the Texan statute only requiring a contract for the sale of lands to be in writing, while the English statute embraces not only sales of lands, but any interest in or concerning them. *Hunter v. Morse*, 49 Tex. 219.

"It is evident that the proposition that a parol partition of the lands of co-tenants, when followed by possession taken or regained in pursuance of it, is binding upon them, is gaining rather

such a character as to render possession under it an impossibility is void,¹ as is a mere unexecuted oral agreement for partition;² nor will a parol partition operate to transfer title where the whole right and title of the party setting up the tenancy is denied and, in fact, abandoned.³ A parol partition, where possession under it has not been held sufficiently long to justify the presumption of a deed, as a general rule, confers no legal title,⁴ but either co-tenant can compel the other to convey the legal title in accordance with the terms of the partition,⁵ and such conveyance when made, unless otherwise intended, will relate back to the time of the parol partition.⁶

The proprietaries of common and undivided lands, as they formerly existed in the New England States, could partition their lands by vote without a deed or other writing and without a coresponding possession in severalty, and the interest of one could be set off to him, the legal title vesting in him as perfectly

than losing ground. There may be some difference of opinion respecting the reasons on which the proposition ought to rest; some may regard the parol partition consummated by such possession as sufficient to vest the parties with full legal title; others may treat it as giving rise to an estoppel against which either party is powerless to deny that a partition has been made, while the third reason may be urged that each co-tenant is vested with the equitable title to the lands set apart to him, and that its aid is able to defend his possession and to control the legal title to prevent its assertion against him and to compel its transfer to him if he desires to be vested with it also. Practically, it makes little difference which of these several views prevails, for under either, each co-tenant is entitled to retain the land so partitioned to him." *Freem. Part.*, § 398.

1. *Lanterman v. Williams*, 55 Cal. 60; *Vasey v. Board of Trustees*, 59 Ill. 188.

2. *Woodbeck v. Wilders*, 18 Cal. 131; *Snively v. Luce*, 1 Watts (Pa.) 69; *Slice v. Derrick*, 2 Rich. (S. Car.) 627.

3. *Jackson v. Vosburgh*, 9 Johns. (N. Y.) 270; s. c., 6 Am. Dec. 276; *Bompart v. Roderman*, 24 Mo. 385.

4. *Tomlin v. Hilyard*, 43 Ill. 300; s. c., 92 Am. Dec. 118; *Shepard v. Rinks*, 78 Ill. 188; *Grines v. Butts*, 65 Ill. 347; *Simmons v. Spratt*, 22 Fla. 370; *Buzzell v. Gallagher*, 28 Wis. 678.

Although a parol partition is good

between the parties when accompanied by possession, yet the equitable title only passes, which by adverse possession may ripen into a legal estate. *Hazen v. Barnett*, 50 Mo. 506.

A parol agreement for a partition of land does not constitute a legal title, but only an equity, of which a party cannot have the benefit in an action of partition without pleading it. And the purchasers of undivided interests in land are not bound by such an agreement, made by all the tenants in common, and of which they had no notice when they bought. *Gates v. Salmon*, 46 Cal. 361.

5. *Tomlin v. Hilyard*, 43 Ill. 300; s. c., 92 Am. Dec. 118; *Hazen v. Barnett*, 50 Mo. 507; *Dawson v. Lawrence*, 13 Ohio 543; s. c., 42 Am. Dec. 210; *Goodhue v. Barnwell*, *Rice Eq. (S. Car.)* 198; *Buzzell v. Gallagher*, 28 Wis. 678; *Eaton v. Tallmadge*, 24 Wis. 221. And see *Massey v. McIlwain*, 2 Hill Eq. (S. Car.) 421; *Kennedy v. Kennedy*, 43 Pa. St. 417; *Pope v. Henry*, 24 Vt. 560; *Ireland v. Rittle*, 1 Atk. (Eng.) 542; *Whaley v. Dawson*, 2 Sch. & Lef. (Eng.) 372; *Weed v. Terry*, 2 Doug., (Mich.) 344; s. c., 45 Am. Dec. 257; *McMahan v. McMahan*, 13 Pa. St. 376; s. c., 53 Am. Dec. 481.

6. *Gage v. Bissell*, 119 Ill. 298; *Buzzell v. Gallagher*, 28 Wis. 681; *Nichols v. Padfield*, 77 Ill. 257.

But a valid parol partition of real estate, though it may not be within the operation of the registration laws, does not bind a purchaser at execution sale, for value, without notice. *All-day v. Whittaker*, 66 Tex. 669.

as though based on a deed of conveyance.¹ The conveyance of an undivided tract of land situated within the limits of a larger tract, with the right to elect on what part of the larger tract to locate, followed by selection and corresponding occupation, constitutes a valid parol partition of a tenancy in common,² and a parol partition of a land certificate before its issuance, determining the respective interests of the parties, is binding where acted upon.³ So trust estates, particularly where arising by implication of law, or within the express exception of the statute, no writing being necessary to create it, may be partitioned by parol.⁴

The doctrine of the power of co-tenants to make parol partition of their lands obtains under Mexican and Spanish law, subject to the same requirements with reference to several possession as exist in the United States.⁵ It also applies to lands held by an equitable title,⁶ and such a partition, when valid as between the parties to it, may be ratified by other interested parties.⁷

4. Delegation of Authority to Make Partition.—The power which every co-tenant has of joining with his companions in making a partition of the common property may be delegated to an agent and exercised by him as effectually as it could be exercised by the principal.⁸ A simple power of sale, however, will not authorize a partition,⁹

1. Coburn v. Ellinwood, 4 N. H. 99; Folger v. Mitchell, 3 Pick. (Mass.) 396; Corbett v. Norcross, 35 N. H. 99; Springfield v. Miller, 12 Mass. 415; Adams v. Frothingham, 3 Mass. 352; s. c., 3 Am. Dec. 151; Atkinson v. Bemis, 11 N. H. 47.

If a petition for partition is discontinued, it will not defeat a voluntary partition made by the proprietors themselves while it was pending. Folger v. Mitchell, 3 Pick. (Mass.) 396.

2. Corbin v. Jackson, 14 Wend. (N. Y.) 625; s. c., 28 Am. Dec. 550; Jackson v. Livingston, 7 Wend. (N. Y.) 136.

3. Parker v. Spencer, 61 Tex. 155.

Where a parol partition provided for a right of way over one of two lots, without specifying where it should be located, or the width thereof, a decree, fixing its width at four feet, and its location at the end of the lot, will not be disturbed, as it did not prejudice the owner. Frederick v. Frederick, 31 W. Va. 566.

4. Dow v. Jewell, 18 N. H. 354; s. c., 45 Am. Dec. 371; Maul v. Rider, 51 Pa. St. 377.

Cestuis que trustent are competent to make a division of their estate without consent of the trustee, and to hold, in severalty, a separate interest, though

they cannot give each other a complete legal title, and such separate interest is liable to execution. Strode v. Churchill, 2 Litt. (Ky.) 75.

A and B agree to purchase a certain piece of land, and individually furnished the money therefor, but had the deeds from the vendor of an undivided half of the land run to A as guardian of his children, and to B as trustee of his wife, and afterwards, by prior agreement, partitioned to each other by deed the land so bought. In a suit by A as guardian against B, as trustee for partition, it was held that each was estopped from denying the validity of the partition already made between themselves. Thomas v. Payton, 78 Ga. 459.

5. Long v. Dollarhide, 24 Cal. 222; Elias v. Verdugo, 27 Cal. 418; Lynch v. Baxter, 4 Tex. 131; s. c., 51 Am. Dec. 735.

6. Maul v. Rider, 51 Pa. St. 377.

7. Dow v. Jewell, 18 N. H. 340; s. c., 45 Am. Dec. 371.

8. Freem. Part., § 417.

9. Brassey v. Chalmers, 16 Beav. (Eng.) 223; McQueen v. Farguhar, 11 Ves. (Eng.) 467.

A power authorizing the attorney to sell lands and do whatever is necessary to carry the power into execu-

but partition is in effect an exchange,¹ and, therefore, a power to sell and exchange, in the United States at least (though there has been a conflict of authority), includes a power to make partition.² So a power to dispose of conferred by will upon a trustee authorizes a partition.³

5. Agreements to Partition.—A mere agreement to partition lands without words of conveyance or release, while it is not a conveyance of the legal title, will be enforced in equity and a transfer of the title will be compelled,⁴ and, if the division be unequal, an allowance may be made for the difference in value,⁵ but after long acquiescence it will not be altered on account of small inequalities.⁶ A provision in an agreement for partition that it shall be irrevocable is, in the absence of mistake or fraud, bind-

tion does not authorize the attorney to make a partition of the lands. *Borel v. Rollins*, 30 Cal. 409.

It is to be noted in this case that the attorney had an interest in the lands attempted to be partitioned, as tenant in common.

1. See *Phelps v. Harris*, 101 U. S. 370.

2. *Phelps v. Harris*, 101 U. S. 370; *Abel v. Heathcote*, 4 Bro. C. C. (Eng.) 278; 2 Ves. Jr. 98; *In re Frith*, L. R., 3 Ch. Div. (Eng.) 618.

There is a hesitation, if not a positive refusal, to adopt this view in *Attorney General v. Hamilton*, 1 Madd. (Eng.) 214, *Brassey v. Chalmers*, 16 Beav. (Eng.) 223; *Doe v. Spencer*, 2 Exch. (Eng.) 752, *McQueen v. Farguhar*, 11 Ves. (Eng.) 467.

How Effected.—It is not a valid objection to the partition that the trustee authorized to make it did not give his personal attention to it, but, by agreement with one of the heirs demanding it, submitted it to disinterested persons, whose arbitrament he confirmed by executing the necessary indenture. *Phelps v. Harris*, 101 U. S. 370.

3. *Phelps v. Harris*, 101 U. S. 370; *In re Frith*, L. R., 3 Ch. Div. (Eng.) 618.

4. *Norwood v. Norwood*, 4 Har. & J. (Md.) 112; *Masterson v. Finnigan*, 2 R. I. 316; *Pringle v. Sturgeon*, Litt. Sel. Cas. (Ky.) 112.

An agreement in writing to make partition will have the same effect in equity as an actual partition at law. 2 Cruise 410; Co. Litt. 169a. But either party may rescind an agreement for oral partition until it is actually executed. *Woodbeck v. Wilders*, 10 Cal. 131.

A written agreement between the

undivided owners of certain real estate to make a partition of the same by dividing it in certain described lots, does not become an actual partition, and vest any separate part of the property in any one of them, until the formation of the lots, in accordance with the agreement. *Metcalf v. Alter*, 31 La. Ann. 389.

Although a tenant in common cannot release to his co-tenant, and thus enlarge his estate, yet an agreement for mutual releases, between the parties about to make partition, would, in equity, after such partition, be enforced between them. *Coates v. Street*, 2 Ashm. (Pa.) 12.

The remedy to enforce a special contract between tenants in common for a partition is not by resort to the statutory proceedings for a partition, but by a suit for specific performance. *Keener v. Den*, 73 N. Car. 132.

5. *Norwood v. Norwood*, 4 Har. & J. (Md.) 112. Evidence of an understanding, at the time of the division among a testator's children, that, if any of them should be dissatisfied with the portion that fell to them, some one of the other children would exchange with the dissatisfied party, is properly excluded, such agreement not amounting to a contract. *Crawley v. Blackman*, 81 Ga. 775.

6. *Fleming v. Kerr*, 10 Watts (Pa.) 444.

Where a parol contract for the division of land has been made, and acquiesced in for a number of years, and one of the parties has made considerable improvements on his part, a court of equity may adopt it as a safe and equitable mode of division. *Pringle v. Sturgeon*, Litt. Sel. Cas. (Ky.) 112.

Where property was given, by will,

; upon the parties,¹ and the co-tenants are at liberty to bind their respective shares by covenants and conditions to be regarded fundamental and perpetual and running with the land.² Partition agreements, however, are to be liberally construed.³

6. Validity and Effect.—A deed or agreement of partition, which, by reason of lack of, or defective execution or otherwise, some of the parties, fails to bind them, is void as to all,⁴ and the same rule would undoubtedly apply to a case in which the partition was inoperative as to a part of the tract intended to be

the children of the testator, and one of them died intestate, and not indebted, leaving the surviving children his sole distributees, a partition by agreement, among the surviving children, without administration upon the estate of the deceased child, could not, after a lapse of nearly 30 years, be impeached by such children. *Love v. Love*, 3 Ired. Eq. (N. Car.) 104.

.. *Morris v. Harrel*, 14 La. Ann.

.. *Savage v. Mason*, 3 Cush. (Mass.)

.. *Moore v. Eagles*, 1 Murph. (Car.) 302; *Appleton v. Fullerton*, 3 Gray (Mass.) 186. And see *Walton Ambler* (Neb. 1890), 45 N. W. Rep. ; *Massy v. Davenport*, 23 S. Car.

Division Line.—Where lands lying each side of a river were owned by tenants in common, who made partition of the same by assigning the land on one side of the river to one, and on the other to another, the two tracts were to be considered as separated by the thread or central line of the river. *King v. King*, 7 Mass. 496. Where tenants in common on land, including a town road passing through the same, made a partition by mutual deeds of release, in which the bounds of the tracts so released were described "beginning at, and running by, and the side of the road," the road itself is not included in the partition, and the parties still remain tenants in common thereof, subject to the public use. *Sibley v. Holden*, 10 Pick. (Mass.) 249; s. c., 20 Am. Dec. 529.

Reservations.—If two tenants in common of land embracing a mill privilege make the partition thereof by mutual deeds of release, with a reservation in each "of one half the mill privileges on said land, with the right using the same," the effect is to divide the land, but to leave the mill

privilege as before. *Bailey v. Rust*, 15 Me. 440.

Passes Growing Crops.—Where one of several tenants in common of land, without leave or objection from his co-tenants, occupied it exclusively, and sowed it with grain, and partition of the land was made while the grain was growing, the grain growing on the purparty of each owner of the land became the property of each in severalty. *Calhoun v. Curtis*, 4 Met. (Mass.) 413; s. c., 38 Am. Dec. 380.

4. *Emeric v. Alvarado*, 64 Cal. 529; *Tewkesbury v. O'Connell*, 21 Cal. 60; *Gates v. Salmon*, 46 Cal. 361; *Morris v. Richardson*, 11 Humph. (Tenn.) 389. See *Phelps v. Foote*, 13 Gray (Mass.) 423.

An agreement made between co-heirs does not preclude a partition at any time, on the part of heirs not joined in the agreement. *Helms v. Mynatt*, 6 Coldw. (Tenn.) 215.

Where a testator directed his lands to be divided equally among his five children, and two gave their consent to its being sold for partition, in form and manner legally binding on them, and two others, being married women, gave their consent, but without the formalities prescribed in such case to pass real estate, and the fourth, being absent from the State, did not give consent—the sale was void, as to the whole of the lands. *Douglass v. Harrison*, 2 Sneed (Tenn.) 382.

Where a moiety of a farm was conveyed by the husband, who was insolvent, to A, in trust for his wife and children, and several creditors having levied on a moiety of the farm, they and A made partition, after which another creditor levied on the part assigned to A, the deed being void as against creditors, for want of consideration, the partition was of no effect, and A took no title. *Williams v. Thompson*, 13 Pick. (Mass.) 298.

included;¹ but a partition defective in form and therefore voidable may be ratified by word or deed so as to become conclusive.² A partition properly made is conclusive and a bar to judicial proceedings for the partition of the same property,³ and it may be set up and relied upon as a defense, though no deeds were ever executed and passed.⁴ So several possession by each co-tenant, following a parol partition, constitutes notice, as to third parties, that the partition has been made.⁵

a. AS TO WARRANTY OF TITLE.—The more prevalent rule is that a voluntary partition without express warranty gives to each the rights and interest in the lands set off in severalty which he and the others then had, only no warranty arising by implication,⁶

1. Where commissioners appointed to make partition of a Mexican grant include in their attempted partition a much larger quantity of land than the United States survey shows to exist, their proceedings are void. *Emeric v. Alvarado*, 64 Cal. 529.

2. *Bacon v. Shultz*, 35 La. Ann. 1059.

3. *Hardy v. Summers*, 10 Gill & J. (Md.) 316; s. c., 32 Am. Dec. 167; *Rountree v. Lane*, 32 S. Car. 160.

This applies only to partitions regular in form, as in Louisiana donations *inter vivos* or *mortis causa*, and not to a mere division of property without writing. Such divisions can only give rise to collations among the heirs, whenever a definitive partition is made. *Lacour v. Lacour*, 12 La. Ann. 724.

A voluntary partition, not evidenced by writing, in order to defeat a right to a partition under the law, must be clearly proven, and must be followed by actual possession in severalty of the several parcels, pursuant to such voluntary partition. *Patterson v. Martin*, 33 W. Va. 494.

4. *Nichols v. Padfield*, 77 Ill. 253; *Grimes v. Butts*, 65 Ill. 347. And see *Pattison v. Martin*, 33 W. Va. 494; *Rountree v. Lane*, 32 S. Car. 160.

5. *Maully v. Pettie*, 38 Ill. 128.

Where the co-tenants have made warrantee deeds to each other which have been recorded, they will afford constructive notice to a person subsequently purchasing of either an interest in the part conveyed to the other, sufficient to put him on inquiry as to the fact that a partition had been made by the tenants in common before their several conveyances. *Markoe v. Wakeman*, 107 Ill. 251.

Though a deed, containing operative words both of a partition and an orig-

inal deed, may be good as a partition deed merely, the interest of the parties appearing on the face of the deed, or, in fact, to be a common interest; yet, if it does not so appear, it will pass the interest of the several grantors, as an original deed, if they have any such interest as may be covered by the words describing the subject-matter. *Jackson v. Tibbitts*, 9 Cow. (N. Y.) 241.

6. *Carpenter v. Schermerhorn*, 2 Barb. (N. Y.) Ch. 314; *Jones v. Chiles*, 2 Dana (Ky.) 25; *Dawson v. Lawrence*, 13 Ohio 543; s. c., 42 Am. Dec. 210; *Yancey v. Radford*, 86 Va. 638; *Rountree v. Denson*, 59 Wis. 522; *Beardsley v. Knight*, 10 Vt. 185; s. c., 33 Am. Dec. 193. See *Weiser v. Weiser*, 5 Watts (Pa.) 280; s. c., 30 Am. Dec. 313; *Picot v. Page*, 26 Mo. 398; Co. Litt. 712 b; *Rawle on Cov.* 476.

A further interest in the land set off to others, which one of the parties afterwards acquires as the heir at law of some of his children who had a remainder in fee in the premises, not being either a vested or contingent interest in him, at the time of the partition, but a mere chance of his succeeding to the same, as an heir at law of his children, does not inure to the benefit of the other parties to the partition in respect to the lands set off to them. *Carpenter v. Schermerhorn*, 2 Barb. Ch. (N. Y.) 314.

In *Dawson v. Lawrence*, 14 Ohio 546; s. c., 42 Am. Dec. 210, the court said: "The parties did not intend to acquire new rights but to regulate the manner in which subsisting rights were to be enjoyed. Smith did not contemplate acquiring any title from Houston, nor to communicate any of his own, nor to share with Houston nor with Houston's grantees the benefit of

though covenants of warranty incorporated in partition deeds bind the parties making them the same as in other conveyances.¹ In Pennsylvania voluntary partition deeds, in the absence of express warranty, implies none, except in cases in which the parties became tenants in common by descent from a common ancestor.²

Some of the States, however, in analogy with partitions by judicial proceedings, hold that there is an implied warranty of title sufficient to estop a co-tenant from claiming by title paramount to the one conveyed,³ and bind him to make just contribution in case of eviction of the other from his share.⁴ When this rule prevails, an express warranty displaces the implied one and con-

warranties from his own grantors, but a simple partition by release was all the parties meant as they specified in the recital and no one is liable to be misled by the nominal money consideration or by the use of the words, "bargain and sale" in this connection. The parties to these deeds lost nothing and acquired nothing except defined boundaries to the land which they previously held in common. The purchasers from Houston therefore are not authorized to rely upon this act as anything except a partition defining boundaries and conferring no title."

Where a man dies leaving community property in which his surviving wife owns one-half interest, but the entire property is partitioned *equally* among his nine children, including seven by a former wife and two by the surviving wife, the two children of the surviving wife may afterwards have a re-partition, by which the one-half belonging to their father is divided equally between the nine children, but the one-half belonging to their mother, the surviving wife, is divided between them to the exclusion of the other seven children. The rule that upon partition each parcener impliedly warrants the title of his co-parceners does not apply in such a case. *Grigsby v. Peak*, 68 Tex. 235.

1. *Rountree v. Denson*, 59 Wis. 522; *Gittings v. Worthington*, 67 Md. 139; *In re Lauve* (La. 1887), 1 So. Rep. 830.

Where a general warranty deed recites that the grantors therein named, having received their portion in division of lands with a third person, and at the request of said person, who also signs the deed, convey "the remaining one-third of said land" to the grantee named, the legal title vests in the grantee, notwithstanding the grantors had the legal title to only an undivided

two-thirds of the property. *Hargis v. Ditmore* (Ky. 1888), 7 S. W. Rep. 141.

Where one of the parties has no title to the premises, the deed of the other to him is without consideration and void, and a covenant of warranty in such deed is inoperative. *Davis v. Agnew*, 67 Tex. 206.

Where an agreement for the partition of real estate contained the clause, "said T to fence said lot, and for ever maintain the same at his own expense," the obligee could only require a covenant recorded, and not a mortgage upon the obligor's land, as security for the performance of the agreement, such covenant being binding upon heirs and assigns. *Thayer v. Smith*, 7 R. I. 164.

2. *Patterson v. Lanning*, 10 Watts (Pa.) 135; s. c., 36 Am. Dec. 154; *Feather v. Strohoecker*, 3 P. & W. (Pa.) 505; s. c., 24 Am. Dec. 342.

3. *Tewksbury v. Provizzo*, 12 Cal. 25; *Morris v. Harris*, 9 Gill (Md.) 19.

In *Tewksbury v. Provizzo*, 12 Cal. 25, the court said: "When parties go into a partition of property upon certain terms and conditions, each to receive a several portion of the common estate, the instrument of partition founded on mutual releases itself is such affirmation of interest and title on the part of each as to estop him to deny that he did have interest and ownership in the premises; and the releases and conveyances of his interest to his parceners is evidence of title in his grantees which he cannot dispute,—he takes by virtue of the deed of their interest and cannot be allowed to say that he holds possession of title paramount to that which he conveyed."

4. *Rogers v. Turley*, 4 Bibb (Ky.) 356; *Morris v. Harris*, 9 Gill (Md.) 19; *Venable v. Beauchamp*, 3 Dana (Ky.) 321; s. c., 28 Am. Dec. 74.

finest the remedy to the covenant actually contained in the deed.¹ Such a partition, however, estops the co-tenants from denying the validity of the common title.²

b. AS TO RIGHTS, CLAIMS AND ENCUMBRANCES.—In case of a fair and impartial voluntary partition of land, any liens or encumbrances upon the undivided interest of one co-tenant will, as a general rule, be transferred to the portion of the premises set off to that co-tenant in severalty, that portion becoming the primary security;³ but if there is any fraud or unfairness affecting the interests of the encumbrancer, he will not be bound.⁴

A fair and equal partition between co-tenants, some of whom are under disability, remains binding and good, even though by unforeseen circumstances the shares afterwards become unequal;⁵ and in case of a valid voluntary partition the right of dower to which the wife of a co-tenant is entitled is divested from the shares of the other co-tenants and confined to that set apart to her husband;⁶ but if the husband makes partition by taking a less valuable share with compensation for the difference, or otherwise proceeds in such manner as to defraud the wife or injure her

1. *Morris v. Harris*, 9 Gill (Md.) 19; *Rogers v. Turley*, 4 Bibb (Ky.) 356.

2. *Rogers v. Turley*, 4 Bibb (Ky.) 356; *Venable v. Beauchamp*, 3 Dana (Ky.) 321; s. c., 28 Am. Dec. 74; *Tewksbury v. Provizzo*, 12 Cal. 21; *Patterson v. Lanning*, 10 Watts (Pa.) 135; s. c., 36 Am. Dec. 154; *Feather v. Strohoecker*, 3 P. & W. (Pa.) 505; s. c., 24 Am. Dec. 342.

3. *Webb v. Rowe*, 35 Mich. 58; *Bavington v. Clark*, 2 P. & W. (Pa.) 115; s. c., 21 Am. Dec. 432; *Long's Appeal*, 77 Pa. St. 151; *Mauly v. Pet-tee*, 38 Ill. 120. And see *Staples v. Bradley*, 23 Con. 167; s. c., 60 Am. Dec. 630; *Re Howe*, 1 Paige (N. Y.) 125.

A partition between tenants in common by mutual deeds of release wherein a party joins, to whom one had mortgaged an undivided half of the whole land, has the effect to substitute therefor the whole of the portion set off to the mortgagor in severalty. *Torrey v. Cook*, 116 Mass. 163.

But see to the contrary *Emson v. Polhemus*, 28 N. J. Eq. 439, in which it was held that a voluntary partition made by tenants in common will not prevail over the lien of a judgment against one of such co-tenants, rendered prior to such partition. Nor can it be validated in equity against a purchaser at the sheriff's sale under such judgment.

Where tenants partition land sub-

ject to a rent charge giving conveyances subject to the claim of the lessor, it apportions the rent if the lessor concurs. *Van Rensselaer v. Chadwick*, 22 N. Y. 32.

4. *Long's Appeal*, 77 Pa. St. 151. And see *Illinois etc. Loan Co. v. Bonner*, 91 Ill. 114; *Bienvenu v. Factors etc. Ins. Co.*, 33 La. Ann. 213.

Where land descended to several children, one of whom was indebted to the intestate, and they made partition by deed, assigning to the debtor less than an equal part by the amount of the debt, and a creditor of such debtor, without notice of the partition, attached all his undivided share, the partition will not defeat the lien created by the attachment. *M'Mechan v. Griffing*, 9 Pick. (Mass.) 537.

5. *McMahan v. McMahan*, 13 Pa. St. 380; 53 Am. Dec. 431; *Jones v. Carter*, 4 Hen. & M. (Va.) 190; *Wetherill v. Mecke*, Bright Rep. 140; *Allnatt on Part. 21*; *Có. Litt.* 171 a; *Vin. Ab.* tit. Partition (E.).

6. *Potter v. Wheeler*, 13 Mass. 504; *Lee v. Lindell*, 22 Mo. 203; 64 Am. Dec. 262; *Lloyd v. Conover*, 25 N. J. L. 51; *Jackson v. Edwards*, 22 Wend. (N. Y.) 512; *Wilkinson v. Parish*, 3 Paige (N. Y.) 658; *Huntington v. Huntington*, 9 Civ. Proc. Rep. (N. Y.) 182. To the contrary, see *Fris-sell v. Rozier*, 19 Mo. 448.

The dower rights of the wives of co-tenants will be restricted, both at

in her right of dower, she will not be bound by his action;¹ nor will she be bound by partition made by her husband's grantee in the conveyance to whom she did not join.²

7. How Established.—The possession and occupation in severalty, for more than twenty years, of a portion of the common estate is sufficient to raise a presumption of a valid partition.³ It is competent to prove a parol partition which has been carried out by taking possession in severalty.⁴ And any evidence of facts or circumstances, as several occupation, the recognition of each other's sole interest, exercising rights of sole ownership, etc., directly tending to establish that a partition had been made, is admissible for that purpose.⁵

III. PARTITION BY JUDICIAL PROCEEDINGS.—Partition by judicial proceedings is that effect by a court in the exercise of a proper jurisdiction upon application of one or more of the co-owners without regard to the wishes of the others.⁶

1. Progress and History of Partition by Action.—At common law, the relationship of joint tenancy and tenancy in common, being

law and in equity, to the allotments of their husbands, and they will be estopped from seeking to have dower assigned in undivided shares of other parceners. By confining them to the equal shares which their husbands take in the partition, they have all the dower the law gives them. *Totten v. Stuyvesant*, 3 Edw. Ch. (N. Y.) 503.

Homestead.—Where the tenants in common obtained title simultaneously, the consent of defendant's wife to partition was unnecessary, as defendant's right of homestead was subject to plaintiff's right of partition. *Reed v. Howard*, 71 Tex. 204.

The same rule applies to a right of curtesy, the wife having made a partition of her lands in her lifetime. *Furgusson v. Tweedy*, 56 Barb. (N. Y.) 168.

1. *Mosher v. Mosher*, 32 Me. 412; *Potter v. Wheeler*, 13 Mass. 504.

The right of a husband by voluntary partition to prescribe limits to the wife's inchoate right of dower does not vest in his grantee. *Rank v. Hanna*, 6 Ind. 20.

2. *Rank v. Hanna*, 6 Ind. 20.

3. *Goodman v. Winter*, 64 Ala. 410; 38 Am. Rep. 13; *Campbell v. Wallace*, 12 N. H. 362; 37 Am. Dec. 219.

4. *Willey v. Bonney*, 31 Miss. 644; *Gillespie v. Johnston, Wright* (Ohio) 232.

5. See *Livingston v. Ketcham*, 1 Barb. (N. Y.) 592; *Adie v. Cornwell*, 3 T. B. Mon. (Ky.) 283; *Vasey v. Board of Trustees*, 59 Ill. 191; *Tom-*

lin v. Hilyard, 43 Ill. 302; 92 Am. Dec. 118; *Markoe v. Wakeman*, 107 Ill. 251; *Walker v. Frazier*, 2 Rich. Eq. (S. Car.) 111; *Booth v. Adams*, 11 Vt. 156; 34 Am. Dec. 680; *Pope v. Henry*, 24 Vt. 560.

If one entitled to two-thirds of three lots sells two lots, the sale is evidence of a partition. *Slade v. Green*, 1 Tayl. (N. Car.) 111.

Where a tract of land held in common has been sub-divided into lots and one of the lots has long been known and called by the name of one of the tenants in common, and there is no evidence of any subsequent claim of tenancy in common, it may fairly be inferred that there has been a partition and that such lot was set off to him by whose name it is known. *Jackson v. Miller*, 6 Wend. (N. Y.) 228, 22 Am. Dec. 316.

In *Louisiana* an agreement for the extra-judicial partition of land cannot be established by parol evidence. *Bach v. Ballard*, 13 La. Ann. 487.

A deed of one tenant in common of a part of the common estate described by metes and bounds is not a severance beyond the boundaries mentioned in the deed, but it may be evidence of a partition. And in case of wild land, payment of taxes has been received as equivalent to proof of possession in connection with ancient deeds, as tending to show partition. *Glasscock v. Hughes*, 55 Tex. 461.

6. See *Bouv. Law Dict.*, tit. Partition.

one voluntarily entered into, could only be dissolved by a disposition of the moiety of the person seeking the division, or by a voluntary partition.¹ The relationship of co-parceners, however, being an involuntary one, was permitted to be dissolved by a partition of their estates in the reign of Henry VIII, as early as the year 1272, and it is thought for a long time previous to that date.² This right was confined to co-parceners exclusively, and while it existed in favor of a co-parcener against a third person claiming by virtue of the title of a co-parcener, it could not be invoked by such person against a co-parcener.³ The hardship imposed by the inability of voluntary co-tenants to separate their holdings without the consent of all, however, gave rise to the statute of 31 Henry VIII empowering joint tenants and tenants in common to compel partition of estates of inheritance, which was closely followed by the statute of 32 Henry VIII, which included not only estates of inheritance, but also all estates

1. Roscoe Real Actions, 131; 2 Black. Com. 185; Co. Litt. 175 a; Com. Dig., Parcener c; Bac. Abr., tit. Joint Tenants; Allnatt Part. 55; Baring v. Nash, 1 Ves. & B. 555; Miller v. Warmingington, 1 Jac. & W. 493.

2. Freeman, Part., § 420, citing Reeves Hist. Eng. Law (2nd Dublin ed.) 312, (Finalson's ed.) 335.

Freeman (Part., § 420), in commenting upon the statement of Reeves as to the time the action of partition was first known, said: "As the same author spoke of this reign as the period in which, after having travelled through the profound darkness of the Saxon times, and the obscure mist in which the Norman constitutions are involved, we approach the confines of known and established law, it is probable that the proceedings for partition of which he wrote, though not mentioned before the reign of Henry III, were in existence at an earlier period, but are concealed from view by the 'darkness' and the 'obscure mist' of the more remote times."

3. See Litt., § 264; Co. Litt. 165 a, 167 a; Allnatt on Part. 55; Bacon Abr., tit. Joint Tenants (1).

A writ of partition lies at common law for one of more parceners against the other or others, and if one parcener after issue had, dies, whereby her husband is tenant by curtesy, a writ of partition will lie against her husband; so, if one parcener aliens in fee, the other may, at common law, after writ against the alienee; and if there are three parceners and the eldest marries, and the husband purchases the

interest of the youngest, though the husband be in respect of his part a stranger, yet he and his wife may have a writ by partition at common law against the middle sister after he is seised of one part in the writ of his wife. If one parcener make a lease for life, no writ of partition lies at common law for she and her co-parcener do not then hold a freehold *insimul et pro indiviso*, according to the words of the writ, so if the lease be for years only, the writ lies for the freehold and then continues in parcenary; so if one co-parcener disseises another, no writ of partition can be held during disseising, and neither the tenant by the curtesy nor the alienee of the parcener was entitled to this writ at common law. Roscoe on Legal Actions, 130.

Practice.—When an inheritance descended to more than one heir, and they could come to no agreement among themselves concerning the division of it, a proceeding might be instituted to compel a partition. A writ was for this purpose directed to four or five persons, who were appointed justices for the occasion, and were to extend and appraise the land by the oaths of good and lawful persons chosen by the parties who were called *extensores*; and this extent was to be returned under their seals, before the king or his justices; when partition was made in the king's court in pursuance of each extent, there is issued a *seisinam habere facias*, for each of the parceners to have possession. Reeves Hist. Eng. Law (2nd Dublin ed.) 312, (Finalson's ed.) 335.

for life or lives, or for years, and estates held in a different manner by different tenants.¹

The inadequacy and inefficiency of these remedies, or the entire absence of remedy, there being a conflict of authority as to whether it was before or after the remedy at law was given, led courts of chancery to assume jurisdiction in partition,² though never empowered to do so by act of Parliament,³ at first acting only in aid of the common law courts, afterwards assuming a concurrent jurisdiction, which has since grown to be almost exclusive.⁴ This rapid growth is due to the greater ease and efficiency with which courts of equity deal with complicated titles,⁵ their ability to require an accounting for rents and profits,⁶ to decree the payment of a pecuniary compensation for owelty

1. 31 St. Henry VIII, ch. 1; Henry VIII, ch. 32. And see Co. Litt. 175 a; 2 Black. Com. 185; Com. Dig., tit. Partitioner; Miller v. Warmington, 1 Jac. & W. 473; Baring v. Nash, 1 Ves. & B. 555; 2 Black. Com. 187; Brom. & H. Com. 71; Allnatt on Part. 56.

31 Henry VIII, ch. 1, is given in full in note 4 to § 421 of Freeman on Partition, and 32 Henry VIII, ch. 32, very fully and ably digested in that section.

Practice.—In proceedings at law for partition, the first step was to sue out a writ of partition whereby the sheriff was commanded to summon the other co-tenants and then before the justices on the return day specified in the writ, to show wherefor they denied partition. If the defence appeared in the action, the next step consisted in the filing of the plaintiff's declaration. To this declaration the defendant might plead the general issue, but he could not interpose any plea in abatement. If the action was confessed or if the issue was found for the plaintiff, there was entered in his favor an interlocutory judgment designating the persons between whom partition should be made, and also the moieties to which each was entitled. Upon this judgment a judicial writ issued to the sheriff, reciting the writ of partition and the judgment entered thereon commanding him together with twelve men of the vicinity to go to the lands to be divided, and there, in the presence of the parties, by their oaths to make an equal and fair partition, and to allot to each co-tenant his full and just share, and then return the inquisition annexed to the writ under the seals of the sheriffs and jurors whose names

were likewise to be returned. Upon such return by the sheriff, the court, upon motion, granted the final judgment. Freem. Part., § 422.

2. Story Eq. Jur., § 651; Bacon Abr., tit. Joint Tenants (1), Co. Litt. 169 a; 1 Fonb. Eq., ch. 1, § 3, note f.

Hargrave, in his notes to Co. Litt. 169 a, refers to Drury v. Drury, 1 Ch. Rep. 26, coming before the courts in the time of the reign of Queen Elizabeth, as the first case in which equity had assumed to exercise jurisdiction in partition, and in this opinion the majority of the writers on the subject seem to coincide. See 1 Fonb. Eq., ch. 1, § 3, note f; Freem. Part., § 423. Though Story (Eq. Jur. § 647) and Chitty (2 Gen. Pr. 42) seem to have entertained the opinion that jurisdiction was assumed by chancery, while joint tenants and tenants in common were still unable to obtain partition at law.

In Kildare v. Eustace, 1 Vern. 421, it was held that chancery jurisdiction in partition was based upon the grounds that the statute had made co-tenants accountable to each other and that they thereby became trustees for one another. And in Mundy v. Mundy, 2 Ves. Jr. it was also held to be in consequence of the statutes of 31 and 32 Henry VIII.

The court of chancery issues commissions to make partition by analogy to its jurisdiction in cases of dower. Agar v. Fairfax, 17 Ves. 552. And see Watson v. Northumberland, 11 Ves. 155.

3. Bac. Abr., tit. Joint Tenants (1).

4. Bac. Abr., tit. Joint Tenants (1).

5. 1 Fonb. Eq., ch. 1, § 3, note f. Story's Eq. Jur., § 658.

6. Story's Eq. Jur., § 656.

or equality of partition¹ to set off to one co-tenant the part improved or made more valuable by him,² and to compel the conveyance of the legal title in accordance with the division, thus furnishing each with a permanent and satisfactory muniment of title,³ and it is settled that the jurisdiction of equity in partition is now such that when a clear legal title exists the claimant is entitled as a matter of right to the action of the court,⁴ which

1. Story's Eq. Jur., § 654. And see *Hall v. Pidcock*, 21 N. J. Eq. 314.

2. Story's Eq. Jur., § 656; *Hall v. Pidcock*, 21 N. J. Eq. 314.

In *Hall v. Pidcock*, 21 N. J. Eq. 314, the court, by ZABRISKIE, Ch., said: "The peculiarities of an equitable partition are that such part of the lands as may be more advantageous to any party on account of its proximity to his other land, or for any other reason, will be directed to be set off to him if it can be done without injury to the others."

Where third persons have purchased shares of the tenants by metes and bounds, a court of chancery will, if it can be done without prejudice to the rights of the co-tenants not joining in such sale, set off to such purchasers in severalty the part originally conveyed to them. Story's Eq. Jur., § 656 c.

3. Story Eq. Jur., § 651. And see *Gay v. Parpart*, 106 U. S. 679; *Whaley v. Dawson*, 2 Sch. & Lef. 371.

"By the final judgment entered in proceedings for partition at common law, the title to each allotment was vested in the person to whom such allotment had been made. No conveyance from any of the co-tenants was necessary to divest him of his title to the portions not allotted to him. The judgment itself operated as a conveyance, and no other or further muniment of title was necessary or possible, as the consummation of a compulsory partition of law. There were interests which could not be bound by compulsory partition at law. As to these interests, the final judgment had no effect, but as to the interests and the parties against which the judgment could operate, it operated as a final and effective partition, needing for its validity and effect no further transfer or ratification. The courts of the common law proceeded on the theory that by their judgment they could, as to all the parties before them, deal with the title to the land. But the courts of equity never professed to act directly on the title. Their decrees operated

in personam only. A decree of partition did not purport to invest the parties with title to their several allotments. The final action of a court of equity in reference to a partition was based upon the hypothesis that it was just and equitable that a certain allotment should be made between the parties. The court therefore directed that the parties should do that which it had determined they ought to do—in other words, that they should make partition between one another by executing mutual conveyances. Without such conveyances, the legal title to the property remained unaffected. A partition in chancery, like a voluntary partition made by the parties, must be consummated by mutual conveyances." *Freem. Part.*, § 427.

The difference between partition in equity and at law is that the latter operates by way of delivery of possession and estoppel, while the former only transfers the title upon the execution of deeds between the parties, which may be compelled by the decree. *Gay v. Parpart*, 106 U. S. 679.

4. *Wiseley v. Findlay*, 3 Rand. (Va.) 361; *Smith v. Smith*, 10 Paige (N. Y.) 473; *Straughan v. Wright*, 4 Rand. (Va.) 493; 15 Am. Dec. 712; *Parker v. Gerard*, Amb. 236; *Lucas v. King*, 2 Stock. Ch. 280; *Baring v. Nash*, 1 Ves. & B. 555; *Vint v. King*, 2 Am. L. Reg., O. S. 729; *Scovil v. Kennedy*, 14 Conn. 349; *Holmes v. Holmes*, 2 Jones Eq. (N. Car.) 334; *Ledbetter v. Gash*, 8 Ired. L. (N. Car.) 462; *Mitchell v. Starbuck*, 10 Mass. 5; *Potter v. Wheeler*, 13 Mass. 504; *Witherspoon v. Dunlap*, Harp. (S. Car.) 390; *Bradshaw v. Callaghan*, 8 Johns. (N. Y.) 558; *Donnell v. Mateer*, 7 Ired. Eq. (N. Car.) 94; *Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339; *Higgenbottom v. Hunt*, 25 Miss. 160; 57 Am. Dec. 198. But see to the contrary *Danvers v. Dorrity*, 14 Abb. Pr. (N. Y.) 206.

A lessee of real estate, the reversion of which is in tenants in common, may, by purchasing and taking an assign-

will by its decrees adjust all the equitable rights of the parties interested in the estate.¹

Neither the common law nor the statutes authorizing partitions had any applicability to personal property,² and there was an entire absence of remedy for the total exclusion from possession of one tenant by another.³ The reason for the assumption of jurisdiction by chancery of the partition of such property is, therefore, much stronger than in cases of real estate; and this want of an adequate remedy at law has led to the universal exercise of such jurisdiction both in *England* and the *United States*.⁴ Equity will go further, however, in cases of personal than in cases of real property, there being no method by which titles can be litigated between co-tenants of personal property; that question, where arising, will be disposed of in connection with the partition.⁵

2. What May be Partitioned.⁶—It may be stated as a general proposition that only such property as is held in co-tenancy can

ment of a part of the reversion, demand a partition in chancery as a matter of right, even though such partition will necessarily result in a sale of the premises. *Hill v. Reno*, 112 Ill. 154, 54 Am. Rep. 222.

No Demand Necessary.—Partition is a matter of right between joint tenants or tenants in common of land, and no demand is necessary before bringing suit for that purpose. *Willard v. Willard*, 6 Mackey (D. C.) 559.

1. *Story v. Johnson*, 1 Y. & C. Ex. 538; 2 Y. & C. 586; *Haywood v. Judson*, 4 Barb. (N. Y.) 228, *Story Eq. Jur.*, § 656 c, *Freem. Part.*, § 425.

The claims of the ancestor's creditors may be adjusted in the action between the heirs for partition. *Gatewood v. Toomer*, 14 Rich. Eq. (S. Car.) 39.

2. *Allnatt on Part.* 48.

3. *Freem. Part.*, § 426. And see also *JOINT TENANTS*, vol. II, p. 1057.

4. *Smith v. Smith*, 4 Rand. (Va.) 102; *Marshall v. Crow*, 29 Ala. 279; *Conover v. Earl*, 26 Iowa 167; *Tripp v. Riley*, 15 Barb. (N. Y.) 334; *Fobes v. Shattuck*, 22 Barb. (N. Y.) 568. See *Gassenheimer v. Huguly*, 64 Ala. 83.

"A court of equity is competent to give relief in such cases, by decreeing a partition of the property, or a sale thereof where partition is impracticable, and a division of the proceeds. The powers of a court of equity were conferred and exist to meet just such cases, where no adequate remedy exists at law." *Tinney v. Stebbins*, 28 Barb. (N. Y.) 290; *Swain v. Knapp*, 32 Minn. 431; *Spaulding v. Warner*, 59 Vt. 646.

5. *Weeks v. Weeks*, 5 Ired. Eq. (N. Car.) 118; 47 Am. Dec. 358; *Smith v. Dunn*, 27 Ala. 316, *Edwards v. Bennett*, 10 Ired. (N. Car.) 363.

Equity has exclusive jurisdiction of suits for the partition of personal property, even though defendant denies plaintiff's title. *Godfrey v. White*, 60 Mich. 443.

6. Most, if not all of the *United States* have adopted statutory regulations as to what property may be partitioned. The following is a summary of such regulations.

In *Alabama*, any property, real personal or mixed, held by joint owners or tenants in common, may be divided among them. *Code of Alabama* 1875, § 3477. In *Arkansas*, any lands, tenements or hereditaments held in joint tenancy, tenancy in common or in co-parcenary, however derived or acquired and whether in fee for years or for life, may be partitioned. *Arkansas* Dig. 84, § 3789. In *California*, real property held by joint tenants, tenants in common or co-parcenary, in which one or more of them have an estate of inheritance for life or for years, may be divided between them. *California* Code. Civ. Proc., § 752. In *Colorado*, land, tenements, or hereditaments, held in joint tenancy, tenancy in common or in co-parcenary, whether any or all of such titles be derived by purchase, devise, or descent may be partitioned. *Colorado* Code Civ. Proc. 280. In *Connecticut*, a partition may be ordered of any real estate, held in joint tenancy, tenants in common or

co-parcenary, also of any real estate held by tenants entail. *Connecticut* Rev. Sts. 1875, 480, § 1. In *Delaware*, the superior court may partition real estate held in joint tenancy, or tenancy in common. *Delaware* Rev. Sts. 1874, 527, § 3. In *Florida*, a partition may be had of joint tenancies, tenancies in common and estate in co-parcenary. McClellan's Dig. 101, §§ 1 & 2. Personal property may also be partitioned. McClellan's Dig. 105, § 13. In *Georgia*, partition may be made in all cases where two or more persons are owners in common of lands and tenements. Code of *Georgia* 1882, § 3996. In *Illinois*, all joint tenancies, tenancies in common or estates in co-parcenary however acquired, and whether in fee for years or for life may be partitioned. Star & Curtis, Sts. 1720, § 14. In *Indiana*, lands held as joint tenants or tenants in common may be partitioned. *Indiana* Rev. Sts. 1186. In *Iowa*, no provision is made, except that partition shall be by equitable proceedings. *Iowa* Code 1873, § 3277. No provision is made in *Kansas*. In *Kentucky*, lands held jointly with others may be partitioned. *Kentucky* Code Civ. Proc. 499. In *Maine*, persons seised or having a right of entry in fee simple or for life as tenants in common, joint tenants or co-parceners, may be compelled to divide the same. *Maine* Rev. Sts. 1883, 749, §§ 1 & 2. In *Maryland*, any lands or tenements or any right, interest or estate therein, either legal or equitable, held in joint tenancy, tenancy in common or co-parcenary or by any concurrent ownership, may be partitioned. *Maryland* Pub. Gen. Laws, 1860, 91, § 99. In *Massachusetts*, joint tenancies, tenancies in common or co-parcenaries may be compulsorily divided. *Massachusetts* Gen. Sts. 1882, 1029, §§ 1 & 2. In *Michigan*, all lands held by joint tenants or tenants in common may be partitioned. *Michigan* Compiled Laws, 1882, §§ 7850, 7852. In *Minnesota*, joint property in which two or more persons are interested as joint tenants or tenants in common, in which one or more of them have an estate of inheritance for life or years, may be partitioned. *Minnesota* Sts. 1879, 807, § 1.

In *Mississippi*, lands held by joint tenants, tenants in common and co-parceners having an estate in possession or a right of possession and not in reversion or remainder, whether the joint interest be in the freehold or

in any term of years not less than five, may be partitioned. *Mississippi* Rev. Code, 1880, § 553. In *Missouri*, lands, tenements or hereditaments held in joint tenancy, tenants in common or co-parcenary, including the estates in fee for life or for years, tenancy by the curtesy and in dower, may be divided. *Missouri* Rev. Sts. 1879, 571, §§ 33, 39. In *Nebraska*, any estate in land held in tenancy in common or joint tenancy may be divided. *Nebraska* Code Civ. Proc., § 802.

In *Nevada*, joint property held by parceners, joint tenants or tenants in common, in which one or more of them have an estate of inheritance for life or for years, may be partitioned. *Nevada* Com. Laws, 1873, § 1327. In *New Jersey*, joint tenancies, tenancies in common and estates in co-parcenary may be partitioned. *New Jersey* Sts. 1874, 555, § 1. In *New Hampshire*, real estate held by one or more persons with others, either in possession, reversion or remainder, after an estate of freehold, if such remainder is vested and not contingent, may be partitioned. *New Hampshire* Gen. Sts. 1878, 566, § 1. In *New York*, real property held by joint tenants, tenants in common or co-parceners in which one or more of them have an estate of inheritance for life or for years, may be divided. *New York* Code Civ. Proc. 532. In *North Carolina*, partition may be made of any real estate held by persons claiming as tenants in common and also personal property held by tenants in common. Code *North Carolina* 1878, 334. In *Ohio*, any estate in lands, tenements or hereditaments held by joint tenants, tenants in common or co-parceners may be compulsorily divided. Williams Rev. Sts. 1883, § 5754; in *Oregon* any real property held as tenants in common, joint tenants co-parcenary, in which one or more of them have an estate of inheritance for life or lives or for years, may be divided. Deady's Gen. Laws, 1864, 255, § 419.

In *Pennsylvania*, joint tenancies, tenancies in common and estates in co-parcenary may be partitioned. Bright. Dig. 1885, 1289, § 1132. In *Rhode Island*, any lands, tenements or hereditaments held by joint tenants, tenants in common or co-parceners either in their own right or in the right of their wives, may be partitioned. *Rhode Island* Gen. Sts. 1882,

be partitioned, and that where the parties are neither joint tenants, tenants in common nor co-parceners, but each owns for himself in distinct portions, neither equity nor law has power to effect a change,¹ neither can a division be enforced as between co-tenant and others holding or owning distinct portions in severalty.² So

641, §§ 1 to 5. In *South Carolina*, any joint estates in which joint tenants or tenants in common have an estate of inheritance for life or for years, may be partitioned. *South Carolina Rev. Sts.* 1873, 230, §§ 1 & 4. In *Tennessee*, any estate of inheritance for life or years in land held and possessed as tenants in common or otherwise, with others, may be partitioned. Code of *Tennessee* 1884, § 3993. In *Texas*, any real estate or any interest therein, in which several persons are joint owners, may be divided. Rev. Sts. *Texas* 1879, § 3465.

In *Vermont*, any real estate held by several as joint tenants, tenants in common or co-parceners may be divided. *Vermont Gen. Sts.*, § 1275. In *Virginia*, property held by tenants in common, joint tenants and co-parceners are subject to partition. Code *Virginia* 920, § 1. The *West Virginia* provision is the same as that of *Virginia*. Rev. Stat. *West Virginia* 1879, 840, § 1. In *Wisconsin*, all lands held in joint tenancy or tenancy in common may be partitioned. Rev. Sts. *Wisconsin*, § 3101.

1. Corbitt v. Corbitt, 1 Jones Eq. (N. Car.) 114; McConnel v. Kibbe, 43 Ill. 12. And see Prentice v. Janssen, 79 N. Y. 478; Prentiss' Case, 7 Ohio (pt. 2) 129; Inman v. Prout, 90 Ala. 362; Simmes v. Simmes (Ky. 1889), 11 S. W. Rep. 665.

A purchased at execution sale so much of B's cellar as was not used by B for the storage of his provisions and vegetables. A could not have partitioned his interest, that of B's being several and not joint. Johnson v. Moser, 72 Iowa 523.

The provision in *Mississippi* Code, § 1809, for partition of estate held by joint tenants, co-tenants or co-parceners does not apply to a case where one party owns in fee simple one distinct part of a lot and the reversion in the other part, and another party owns in the latter part an estate *pur autre vie*; and the former is not entitled to a sale of the lot for division of the proceeds. Belew v. Jones, 56 Miss. 342.

Buildings owned in common, but

standing on land to which the partitioners claim no title, are not the subject of partition. Rice v. Freeland, 12 Cush. (Mass.) 170.

Who are Tenants in Common.—The deed under which defendants in an action for partition claim conveyed to each of the grantees a one-eighth share in an acre of land, and one-eighth share in the mineral waters found thereon. It was held that there was nothing in the conveyance of the mineral to prevent a sale of the land in partition—the grantees took an absolute estate as tenants in common. Foreman v. Hough, 98 N. Car. 386.

Where a tract of land was conveyed by warranty deed excepting twenty acres, which reserved parcel was not described, and the grantor afterwards acquired the title thereto, the covenant of warranty did not embrace the exception, he was not estopped from asserting title thereto, and might have it set apart to him on petition for partition. Gill v. Grand Tower Min. etc. Co., 92 Ill. 249.

2. Russell v. Beasley, 72 Ala. 190; Soutter v. Atwood, 34 Me. 153; 56 Am. Dec. 647. And see Simmes v. Simmes (Ky. 1889), 11 S. W. Rep. 665.

A father, during his life, gave to two of his children certain portions of his real estate, of which they took possession, and on which they made large improvements. Subsequently the father died intestate. The other children instituted proceedings against those two for partition of all the real estate of which the father died seised, which they resisted. It was held, that no partition should be decreed of the lands given. Haines v. Haines, 4 Md. Ch. 133.

The heirs of the lessor cannot have partition of the leased premises during the term of a lease to a portion of them. Cannon v. Lomax, 29 S. Car. 369.

If no interest in any of the tracts of land in controversy appears to be owned by the defendant, and there is no other party to the suit with whom partition can be made, it is error for

a writ of partition will not lie at law for the division of a purely equitable estate,¹ but in a court of equity such titles are recognized and enforced and given full force and credit as well as legal ones,² and where jurisdiction is assumed for the purpose of settlement of equities between the parties, it may be retained and partition ordered for the purpose of doing complete justice between them.³ Equity may make partition between owners of equitable titles without bringing the owner of the legal title into court.⁴

Where, however, it is evident that in the creation of the trust no division was contemplated, it will not be permitted. Partition cannot be made in contravention of a will,⁵ nor can lands charged

the court to order it. *Lindsay v. Jaffray*, 55 Tex. 626.

1. *Coal v. Barney*, 1 Gill & J. (Md.) 324. And see *Ross v. Cobb*, 48 Ill. 111; *Strettell v. Ballou*, 2 Cal. L. Rep. 122; *McCabe v. Hunter*, 7 Mo. 356; *Hopkins v. Toel*, 4 Humph. (Tenn.) 46; *Stryker v. Lynch*, 11 N. Y. Leg. Obs. 116. To the contrary in *Pennsylvania*:

Willing v. Brown, 7 S. & R. (Pa.) 466.
2. *Hitchcock v. Skinner*, 1 Hoffm. Ch. (N. Y.) 24; *Welch v. Anderson*, 28 Mo. 293; *Herbert v. Smith*, 6 Lans. (N. Y.) 493; *Byers v. Wackman*, 16 Ohio St. 440; *Willing v. Brown*, 7 S. & R. (Pa.) 467; *Owens v. Owens*, 25 S. Car. 155. And see *Almony v. Hicks*, 3 Head (Tenn.) 39; *Faust v. Moorman*, 2 Ind. 20; *Swan v. Swan*, 8 Price 518; *Cartwright v. Pultney*, 2 Atk. 380; *Watson v. Sutro*, 86 Cal. 500.

A mixed trust-estate is partible in equity, if good reason be shown for so doing, and if the real estate can be partitioned without prejudice to the interests of the owners. *Terry v. Smith*, 42 N. J. Eq. 504.

A trustee of land, under a valid trust to receive the rents and profits of said land and apply them to the use and support of an infant until such infant arrives at the age of twenty-one years, with an absolute power to sell the land and invest the proceeds thereof for the benefit of such infant, may institute a suit in equity to partition the lands held by her in common with other persons of adult age. *Galileo v. Eagle*, 65 Barb. (N. Y.) 583.

Pleading Equitable Title.—On a bill for partition, the defendant may set up an equitable title in his answer, and a cross-bill for that purpose is not necessary. *Coxe v. Smith*, 4 Johns. Ch. (N. Y.) 271.

3. *Carter v. Taylor*, 3 Head (Tenn.)

30; *Campbell v. Lowe*, 9 Md. 500; 66 Am. Dec. 339; *Lucas v. King*, 10 N. J. Eq. 277; *Hosford v. Merwin*, 5 Barb. (N. Y.) 51; *Dameron v. Jameson*, 71 Mo. 100; *Rozur v. Griffith*, 31 Mo. 171; *Scott v. Guernsey*, 60 Barb. (N. Y.) 163; *Howey v. Goings*, 13 Ill. 108; 54 Am. Dec. 427; *Overton v. Woolfolk*, 6 Dana (Ky.) 373.

In a suit to settle conflicting equitable titles, a court of equity may exercise jurisdiction to settle the equities; and, having done so, may decree a partition under the same bill. *Leverton v. Waters*, 7 Cold. (Tenn.) 20.

The fact that in *Pennsylvania* recovery may be had in ejectment upon an equitable title does not prevent parties in whose favor a trust *ex malefficio* has been declared by the court, and to whom a conveyance has been decreed, but not executed, from proceeding in equity for partition, against one in possession of the land, and holding the legal title. *Church's Appeal* (Pa. 1886), 7 Atl. Rep. 751.

4. *Selden v. Vermilya*, 2 Sandf. (N. Y.) 577; 9 N. Y. Leg. Obs. 83; *Coxe v. Smith*, 4 Johns. Ch. (N. Y.) 276. But see *Harris v. Larkins*, 22 Hun (N. Y.) 489; *Thebaud v. Schemerhorn*, 10 Abb. N. Cas. (N. Y.) 72.

A trustee having an interest in real estate which he holds in common with others, and having a power to sell such interest, may institute a partition suit to divide the estate. *Galileo v. Eagle*, 1 Thomp. & C. (N. Y.) 124.

5. *Cabbage v. Franklin*, 62 Mo. 364; *Williams v. Hassell*, 74 N. Car. 434; *Outcalt v. Appleby*, 36 N. J. Eq. 73; *Gerard v. Buckley*, 137 Mass. 475; *Hill v. Jones*, 65 Ala. 214. And see *Spaulding v. Woodward*, 53 N. H. 573; 16 Am. Rep. 392.

A conveyance by a trustee to his

with an active trust in favor of several tenants in common be partitioned without the consent of all,¹ though where the object of the trust will not be contravened, and owing to changes in conditions and circumstances unforeseen at the time of its creation, a division will be to the advantage of all concerned, it may be so partitioned as to be held for the beneficiaries in severalty instead of in common.² Where property is devoted to a particular use, which use enters into the consideration of the contract creating it, especially if it be a charitable or religious one, the joint purpose cannot be defeated by a partition without the consent of all the co-tenants;³ and where the public has an interest in a use

cestui que trust, which does not extinguish the trust, gives the *cestui que trust* no status to maintain an action for partition. *Thebaud v. Schemerhorn*, 10 Abb. N. Cas. (N. Y.) 72.

Land devised to two persons in fee, with the condition that it shall be improved in common by them, is subject to partition; for the partition of the fee would not destroy the right to have it improved in common. *Richardson v. Merrill*, 21 Me. 47.

Land conveyed to one in trust to permit the grantor's wife after his death, she surviving him, to occupy, possess, and enjoy the same, and the rents, issues and profits thereof during her life, for her support and the sustenance of her children, and after her death for the benefit of her children, is not subject to partition at the instance of said children after the death of such grantor and before the death of his wife, she being entitled to the whole income from the lands during her life. *Seibel v. Rapp*, 85 Va. 28.

Upon showing good cause, partition may be ordered at the instance of a creditor holding an absolute deed from one of the tenants in common as security for a debt; but, without good cause, partition in opposition to the will of the debtor of such creditor should be denied. *Welch v. Agar*, 84 Ga. 583.

1. *Selden v. Vermilya*, 2 Sandf. (N. Y.) 568; *Morse v. Morse*, 85 N. Y. 53; *Taylor v. Grange*, 13 L. J., Ch. D. 223; *Briggs v. Peacock*, 20 L. R., Ch. D. 200; 51 L. J., Ch. D. 555, 46 L. T., N. S. 582.

A receiver in supplementary proceedings cannot maintain an action for the partition of the lands coming to his hand by virtue of his receivership. *Dubois v. Cassidy*, 75 N. Y. 298.

2. *Wetmore v. Zabriskie*, 29 N. J. Eq. 62; *Marshall v. Reuch*, 3 Del. Ch. 239; *Sawyer v. Sawyer*, 61 N. H. 50; *Richardson v. Merrill*, 21 Me. 47; *Rawle's Appeal*, 119 Pa. St. 100; *Latshaw's Appeal*, 122 Pa. St. 142.

3. See *Coleman v. Grubb*, 23 Pa. St. 393; *Coleman v. Coleman*, 19 Pa. St. 100; 57 Am. Dec. 641; *Gaselys v. Separatists Soc.*, 13 Ohio St. 144.

A church and burial-ground, belonging to two societies as tenants in common and used by them as such for a whole generation, cannot be divided in an action for partition. *Brown v. Lutheran Church*, 23 Pa. St. 495.

Where the legislature granted a township of land, taking security from the grantee that he should assign a certain proportion thereof in fee to the first settled minister, and a similar proportion for the use of the ministry forever, a minister afterwards settled could not demand partition of the proportion so to be assigned, as a tenant in common with the other proprietors of the township. *Rice v. Osgood*, 9 Mass. 38.

Land purchased for the purpose of a parsonage and glebe, for the joint benefit of five congregations, is devoted to a charitable use; and one of the congregations cannot sue for partition, especially where the property is vested in trustees for the benefit of the "ministerial charge," such a trust being an active one. *Latshaw's Appeal*, 122 Pa. St. 142.

"The Lord Mountjoy, seised of the manor of Canford in fee, did by deed indented and inrolled bargain and sell the same to Browne in fee, in which indenture this clause was contained: Provided alwayes, and the said Browne did covenant and grant to and with the said Lord Mountjoy, his heires and assignes, that the Lord Mountjoy, his heires and assignes, might dig for

to which property has been perpetually devoted, it cannot be partitioned to the detriment of such interest.¹

A few early cases adopted the rule that a partition should be denied when the result would be a practical, if not a total destruction of the property;² but it is well settled, both in *England* and the *United States*, that a partition of real estate held in common is a matter of right,³ and the difficulty or impracticability of making partition, or the inconvenience or hardship resulting to the other tenants, furnish no sufficient reason for denying it. That a co-tenant no longer wishes to remain so is sufficient

ground in the lands (which were great wastes) parcell of the said manor, and to dig Turfe also for the making of allome. And in this case three points were resolved by all judges. First, that this did amount to a grant of an interest and inheritance to the Lord Mountjoy to digge, etc. Secondly, that notwithstanding this grant, Browne his heires and assignes might dig also, and like to the case of common *sanns nomber*. Thirdly, that the Lord Mountjoy might assign his whole interest to one, two or more; and then, if there be two or more, they could make no division of it, but work together with one stock; neither could the Lord Mountjoy assigne his interest in any part of the waste to one or more, for that might work a prejudice and a surcharge to the tenant of the land; and therefore if such an uncertain inheritance descendith to two co-parceners, it cannot be divided betwene them." Co. Litt. 165 a.

1. *Railway Co. v. Railroad Co.*, 38 Ohio St. 614. So decided in a case in which it was sought to partition a railroad between two co-owners.

Lands set apart for salt works by the State are not the subject of partition between heirs of the person to whom they were set apart. *Newcomb v. Newcomb*, 12 N. Y. 603.

Before *Massachusetts* Stat. 1854, ch. 74, a bill in equity could not be maintained by one tenant in common against another, for a partition of a wharf and appurtenant rights, and for an account of the profits received by the defendant while in possession of the estate; but might for an account, on striking out the prayer for a petition. *Hodges v. Pingree*, 10 Gray (Mass.) 14.

But where a railroad company duly appropriated the life estate of A in one undivided half of the lot and appropriated also the other half of the lot in fee, and A died, his heirs, owners of the

remainder, could maintain proceedings in equity for a partition; that they were not limited to proceedings at law for damages regulated by the *Veremont* statute. *Austin v. Rutland F. Co.*, 17 Fed. Rep. 466.

2. The court will not order a partition of an ore bed held in common nor of a saw mill, mill yard, mill pond, etc. *Conant v. Smith*, 1 Aik. (Vt.) 615 Am. Dec. 669; *Brown v. Turner*, Aik. (Vt.) 350; 15 Am. Dec. 696; *Miller v. Miller*, 13 Pick. (Mass.) 237.

3. See *Scovil v. Kennedy*, 14 Conn. 349; *Smith v. Smith*, 10 Paige (N. Y.) 471; *Vanarsdale v. Drake*, 2 Barl. (N. Y.) 599; *Harrison v. Willard*, 1 Me. 146; 28 Am. Dec. 162; *Higginbottom v. Short*, 25 Miss. 160; 57 Am. Dec. 198; *Turner v. Morgan*, 8 Ves. 143; *Baring v. Nash*, 1 Ves. & B. 554; *Parke v. Gerard*, Ambl. 236; *Norris v. L. Neve*, 3 Atk. 83; *Manton v. Squire*, Ch. Cas. 237; *Earl of Clarendon v. Hornby*, 1 P. Wms. 446; *Agar v. Fairfax*, 17 Ves. 543. And see *infra*, this title, *Progress and History of Partition by Action*.

A suit for partition may be brought although it was well known that an amicable partition could be had, and that the plaintiff has never asked for it. *Lake v. Jarrett*, 12 Ind. 395.

4. *Scovil v. Kennedy*, 14 Conn. 349; *Cooper v. Cedar Rapids Water-power Co.*, 42 Iowa 398; *Hanson v. Willard*, 12 Me. 147; 28 Am. Dec. 162; *Smith v. Smith*, 10 Paige (N. Y.) 471; *Wood v. Little*, 35 Me. 110; *Ledbetter v. Gash*, 8 Ired. (N. Car.) 462; *Dornell v. Mateer*, 7 Ired. Eq. (N. Car.) 54; *Steedman v. Weeks*, 2 Strobb. Eq. (S. Car.) 146; 49 Am. Dec. 660; *Crompton v. Ulmer*, 2 Nott & M. (S. Car.) 432; *Ferriss v. Lewis*, 2 Tenn. Ch. 292; *Warner v. Baynes*, 5 Baynes v. Warner, Ambl. 589; *Allnutt on Part.* 85; *Danl. Ch. Pr.* (5th ed. 1157.

entitle him to relief;¹ and if the nature, character or situation of the property is such that a division will greatly prejudice the parties in interest, a sale and division of the proceeds must be ordered.² A division, however, is deemed preferable in law to a sale,³ and where the property is not capable of an actual several occupation, the use and enjoyment may be regulated in such manner as to most nearly effect justice and equality between the parties in interest, as by alternate occupation,⁴ a division of profits,⁵ or a separation and division of a flow of water.⁶ Thus, as a general rule, a mine cannot be actually severed,⁷ but must be

Turner v. Morgan, 8 Ves. 143, was an action brought for the partition of a house which was specially valuable to the plaintiff because it was contiguous to other estates, and to the defendant because it was specially fitted for his use, as a shopkeeper, and it was so situated that a division would be ruinous. A partition was ordered, and exception was taken by the defendant on the ground that the commissioners allotted to the plaintiff the whole stock of chimneys, all the fire-places, the only staircase in the house and all the conveniences in the yard. The LORD CHANCELLOR overruled the exception on the ground that he did not know how to make a better partition for the parties, saying that "it must be a strong case to induce the court to withhold partition, as the parties ought to agree to buy and sell."

1. *Bradley v. Harkness*, 26 Cal. 77; *Lake v. Jarrett*, 12 Ind. 395.

2. *Higginbottom v. Short*, 25 Miss. 160; 57 Am. Dec. 198; *Hartmann v. Hartmann*, 59 Ill. 103; *Royston v. Royston*, 13 Ga. 425.

The court cannot make a mechanical division of the water running in a ditch owned by tenants in common, and used for mining purposes. The only partition which will definitely and permanently end the dispute of the parties and do justice between them, is to order a sale, and distribute the proceeds. *McGillivray v. Evans*, 27 Cal. 92.

In *South Carolina*, interests in real or personal property may be severed by the court of equity, and the share of each owner ascertained and set off, where the subject matter is not susceptible of division. The justice or practicability of any mode of partition is a matter for the commissioners; and if, in their judgment, no division can be made without manifest injustice, they are at liberty to recommend a

sale for the purpose, and the court will judge of the propriety of confirming such return. *Steedman v. Weeks*, 2 Strobb. Eq. (S. Car.) 145, 49 Am. Dec. 660.

3. *Lake v. Jarrett*, 12 Ind. 395; *Wood v. Little*, 34 Me. 107.

4. See *Adams v. Briggs Iron Co.*, 7 Cush. (Mass.) 365; *Bemis v. Upham*, 13 Pick. (Mass.) 169; *Bardwell v. Ames*, 22 Pick. (Mass.) 333.

5. See *Hanson v. Willard*, 12 Me. 142; 28 Am. Dec. 162; *Adams v. Briggs Iron Co.*, 7 Cush. (Mass.) 365; *Bishop of Salisbury v. Phillips*, 1 Salk. 43.

6. *Munroe v. Gates*, 48 Me. 463; *Cooper v. Cedar Rapids Water-power Co.*, 42 Iowa, 398; *Doan v. Metcalf*, 46 Iowa 120; *Smith v. Smith*, 10 Paige, (N. Y.) 470. And see *McGillivray v. Evans*, 27 Cal. 93; *DeWitt v. Harvey*, 4 Gray (Mass.) 486.

A committee, appointed to make partition of a mill privilege, made partition by assigning to each of the owners so much water as would run through a gate of certain dimensions. It was *held*, that partition might be legally made in that manner, unless shown to be very injurious to the estate. *Morrill v. Morrill*, 5 N. H. 134.

In *New York*, it was *held* that the court had the power to decree a partition by directing a regulation of the use of the water, or by allowing the parties to use it for alternate periods; but, as a way was provided by law for separating such tenancy by a sale, the parties should be left to that remedy. *Smith v. Smith*, Hoffm. Ch. (N. Y.) 506.

7. See *Kemble v. Kemble*, 44 N. J. Eq. 454; *Boston Frankline Co. v. Condit*, 19 N. J. Eq. 394; *Lenfers v. Henke*, 73 Ill. 405; *Adam v. Briggs Iron Co.*, 7 Cush. (Mass.) 361; *Conant v. Smith*, 1 Aik. (Vt.) 67; 15 Am. Dec. 669.

partitioned by sale and division of the proceeds;¹ a mill may be partitioned by awarding alternate tool dishes,² though where the property consists of a single indivisible tract or thing, or of several indivisible tracts or things of unequal value, the partition is accomplished by an award of owelty,³ or by sale and division of proceeds.⁴ Partition can be made of different tracts of land upon one petition only when all are owned by the same persons;⁵ and, in such case, each parcel need not be divided, but one or more entire parcels may be assigned to each according to the circumstances and situation of the estate.⁶

a. OF THE DIFFERENT KINDS OF PROPERTY.—A court of equity has authority to partition an incorporeal as well as a corporeal hereditament.⁷ It seems, however, that a common of estovers cannot be divided or apportioned for the reason that it would necessarily lead to surcharging the land from which they are taken, thus prejudicing the interests of strangers to the co-tenancy.⁸

1. *Lenfers v. Henke*, 63 Ill. 405; *Adams v. Briggs Iron Co.*, 7 Cush. (Mass.) 361; *Richards v. Richards*, 36 L. J. Ch. 176. And see *Nisbet v. Nash*, 52 Cal. 540; *Hughes v. Devlin*, 23 Cal. 501; *Rankin's Appeal* (Pa.), 16 Atl. Rep. 82; *Seaward v. Malotte*, 15 Cal. 305; *Wilde v. Milne*, 26 Beav. 504. And see also MINES AND MINING CLAIMS, vol. 15, p. 607.

2. *Daniel's Ch. Pr.* 1157. The power to partition such property has been denied. See *Miller v. Miller*, 13 Pick. (Mass.) 237; *Crowell v. Woodbury*, 52 N. H. 613; *Brown v. Turner*, 1 Aik. (Vt.) 350; 15 Am. Dec. 696. But the authority of the court to effect a partition either by a regulation of its use and enjoyment, or by a division of the source of power or other equitable mode of division, is generally recognized and conceded. See *Smith v. Smith*, 10 Paige (N. Y.) 470; *Hanson v. Willard*, 12 Me. 142; 28 Am. Dec. 162; *Cooper v. Cedar Rapids Water-power Co.*, 42 Iowa 398; *Mandeville v. Comstock*, 9 Mich. 536; *Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 82; 8 Am. Dec. 511; *Hills v. Dey*, 14 Wend. (N. Y.) 204. And see also MILLS, vol. 15, p. 468.

3. See *infra*, this title, *Owelty of Partitions*.

4. See *infra*, this title, *Sale Instead of Division*.

5. *Kitchen v. Sneets*, 1 Ind. 138; *Hunnewell v. Taylor*, 3 Gray (Mass.) 111; *Brownell v. Bradley*, 16 Vt. 105; 42 Am. Dec. 498; *Harman v. Kelley*, 14 Ohio 502, 45 Am. Dec. 552; *Pren-*

tiss' Case, 7 Ohio (pt. 2) 129; 30 Am. Dec. 203.

6. *Hagar v. Wiswall*, 10 Pick. (Mass.) 152; *Hunnewell v. Taylor*, 3 Gray (Mass.) 112; *Halton v. Thanet*, 2 W. Bla. 1334.

7. *Bailey v. Sisson*, 1 R. I. 233. And see *Matthew v. Bath*, 2 Dick. 652; *Buller v. Exeter*, 1 Ves. 340; *Baxter v. Knowles*, 1 Ves. Sr. 494.

Upon a bill in chancery to partition an advowson, the court decided that the parties were entitled to a partition, and made a decree requiring the plaintiff and defendant to mutually execute conveyances to each other enabling plaintiff to hold one moiety of the advowson to him and his heirs, and the defendant the other moiety to her and her heirs as tenants in severalty respectively, containing a provision that the plaintiff and his heirs and the defendant and her heirs should present by alternate turns. *Bodicoate v. Steers*, Dick. 69.

The owner of an undivided interest in a ferry, including both franchise and landings, may bring a bill for partition of the entire property. *Rohn v. Harris*, 130 Ill. 525.

8. *Livingston v. Ketcham*, 1 Barb. (N. Y.) 597; Co. Litt. 165 a.

This rule applies also to carodies uncertain, piscaries uncertain and commons *sans nombre*, Co. Litt. 165 a.

"The reason why a piscary uncertain or a common *sans nombre* cannot be divided is that such division would multiply the interest originally granted and inflict on the grantor a hardship

Growing timber is a subject of partition,¹ and where mining interests are carved out of the fee of the land and become themselves freehold estates they are partible,² though it is necessarily accomplished by sale and division of the proceeds;³ but where the interest amounts to a mere privilege to mine in the lands of another, the opposite rule applies.⁴ Where two or more co-tenants are co-partners and their joint property is held and used for partnership purposes, an action for its division cannot be maintained;⁵ but after the dissolution of the firm or the winding up of its business, if it appears that no part of its real estate will be required to satisfy co-partnership liabilities, it may then be partitioned.⁶ Equity will partition personal property between co-tenants, and when necessary determine the title.⁷

never contemplated by him in making the grant. *Freem. Part.*, § 434, *citing Allnatt on Part.* 8.

1. *Steedman v. Weeks*, 2 Strobb. Eq. (S. Car.) 146; 49 Am. Dec. 660.

2. *Hughes v. Devlin*, 23 Cal. 505; *Rockwell on Mines*, 548. And see *infra*, this title, MINES AND MINING CLAIMS, vol. 15, p. 607.

In *California*, a miner's interest in mines situated upon the lands of the *United States* is a freehold estate. *Merritt v. Judd*, 14 Cal. 64; *Watts v. White*, 13 Cal. 324; *McKeon v. Bisbee*, 9 Cal. 142; *Merced Min. Co. v. Fremont*, 7 Cal. 319; 68 Am. Dec. 262; *Rockwell on Mines*, 548.

In a suit for partition, between tenants in common, of an interest in real estate which has been carved out of the fee, the owner of the fee under whom the tenants in common claim title is not a necessary party. *Canfield v. Ford*, 28 Barb. (N. Y.) 336; 16 How. Pr. (N. Y.) 473.

3. *Lenfers v. Henke*, 73 Ill. 405.

4. *Smith v. Cooley*, 65 Cal. 46; *Hughes v. Devlin*, 23 Cal. 504; *Co. Litt.* a. And see *Canfield v. Ford*, 28 Barb. (N. Y.) 336; 16 How. Pr. (N. Y.) 473.

In *Hughes v. Devlin*, 23 Cal. 504, the court, by CROCKER, J., said: "The mere right to work such mines is held to be an incorporeal hereditament in the land of other persons. But, in such cases, it is held that it is indivisible, because a division of the right would create new rights, and would prejudice the owner of the soil; and it has been, therefore, held that the co-parceners must work the mines jointly with one stock, or each enjoy the right at successive periods of time."

"The working of a mine under a

bare mining right has been uniformly regarded by courts of equity as a species of trade." *Smith v. Cooley*, 65 Cal. 46.

Where a tenant in common of land has granted a right to dig ores therein, the grantee is not entitled to a partition as against the other owners. *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394.

5. *Baird v. Baird*, 1 Dev. & B. Eq. (N. Car.) 524; 31 Am. Dec. 399; *Pennybacker v. Leary*, 65 Iowa 220; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 204; *Flanner v. Moore*, 2 Jones (N. Car.) 123. And see also PARTNERSHIP.

In *North Carolina*, it has been held that a partner is entitled to a partition of land holden by the partnership at any time, though the purposes of the partnership have not been accomplished. *Collins v. Dickinson*, 1 Hayw. (N. Car.) 240.

6. *Patterson v. Blake*, 12 Ind. 436; *Roberts v. McCarty*, 9 Ind. 18; 68 Am. Dec. 604; *Jackson v. Deese*, 35 Ga. 88; *Danvers v. Dorrity*, 14 Abb. Pr. (N. Y.) 206.

The mere fact that real estate is owned as partnership property by several persons, is no objection to a partition of the same, when it does not appear that a suit in equity is necessary to settle the partnership business. *Hughes v. Devlin*, 23 Cal. 501.

Upon the death of a partner having title to partnership real estate, the surviving partner is entitled to a decree declaring the partnership character of the property, directing a sale of such part as was necessary to satisfy partnership debts, and a partition of the balance. *Gray v. Palmer*, 9 Cal. 636.

7. See *infra*, this title, *Progress and History of Partition by Action*.

b. OF THE DIFFERENT ESTATES IN PROPERTY.—At common law and under the English statutes and many of those of the *United States*, estates in remainder or reversion could not be compulsorily partitioned;¹ neither could the tenants in possession do anything tending to effect the severance of such estates;² and tenants in remainder or reversion could not interfere with the tenants in possession, nor with the manner of their enjoyment of their estate.³ Under the statutes of many of the States, however, interests in reversion and remainder may now be partitioned,⁴ and a remainder-man or reversioner may maintain an action for partition in some of the States as well as the tenant in pos-

1. *Culver v. Culver*, 2 Root (Conn.) 278; *Wilkinson v. Stuart*, 74 Ala. 198; *Packard v. Packard*, 16 Pick. (Mass.) 194; *Johnson v. Johnson*, 7 Allen (Mass.) 196; 83 Am. Dec. 676; *Brown v. Brown*, 8 N. H. 93; *Wood v. Sugg*, 91 N. Car. 93; 49 Am. Rep. 639; *Osborne v. Mull*, 91 N. Car. 203; *Ziegler v. Grimm*, 6 Watts (Pa.) 106; *Moore v. Shannon*, 6 Mackey (D. C.) 157; *Stevens v. Enders*, 13 N. J. L. 273; *Norment v. Wilson*, 5 Humph. (Tenn.) 310; *Robertson v. Robertson*, 2 Swan (Tenn.) 201; *Baldwin v. Aldrich*, 34 Vt. 526; 80 Am. Dec. 695; *Evans v. Bagshaw*, L. R., 8 Eq. 469; *Evans v. Bagshaw*, L. R., 5 Ch. App. 340, 39 L. J., Ch. D. 145.

Where A becomes owner of one half of the reversion and one-third of the leasehold, the remainder of the reversion being owned by another, who also owns one-sixth of the leasehold, the remainder of the leasehold being owned by third parties, there can be no partition at the suit of A. The acquisition by A of the reversion while he owned one-third of the leasehold did not create a merger of the entire leasehold estate in the fee, there being an intervening estate in other lessees. *Simmons v. McAdaras*, 6 Mo. App. 297.

2. *Bool v. Mix*, 17 Wend. (N. Y.) 119; 31 Am. Dec. 285; *Stevens v. Enders*, 13 N. J. L. 273. And see *Watson v. Watson*, 3 Jones Eq. (N. Car.) 400; *Williams v. Hassell*, 73 N. Car. 174; *Grisson v. Parrish*, Phil. Eq. (N. Car.) 130.

Partition will not be ordered of land in which the defendant alleges that the plaintiffs have an estate for the life of another, and an equal share with the defendant in a contingent remainder therein. *Simpson v. Wallace*, 83 N. Car. 477.

3. *Freem. Part.*, § 440. And see *Stevens v. Enders*, 13 N. J. L. 273.

4. *Preston v. Brant*, 96 Mo. 552; *Smalley v. Isaacson*, 40 Minn. 450; *Cook v. Webb*, 19 Minn. 167; *Hilliard v. Scoville*, 52 Ill. 449; *Scoville v. Hilliard*, 48 Ill. 453; *Smith v. Gaines*, 38 N. J. Eq. 65; *Howell v. Mills*, 56 N. Y. 227; *Blakeley v. Calder*, 15 N. Y. 617; 13 How. Pr. (N. Y.) 476; *Jenkins v. Fahey*, 73 N. Y. 355; *Bice v. Nixon* (W. Va. 1890), 11 S. E. Rep. 1004; *Bierce v. James*, 87 Tenn. 538.

In *Kentucky*, the possession of a tenant, occupying that relation to the remainder-men, presents no real obstacle to the jurisdiction of the chancellor to make partition and to effectuate it by acting on the possession. *Phillips v. Johnson*, 14 B. Mon. (Ky.) 140.

The statutes of *Tennessee* relating to the partition of lands contemplate a complete and entire partition among all the heirs; hence a partition which allots to some of the heirs their portion, and leaves the portion of other heirs undivided is partial and unwarranted. *Robertson v. Robertson*, 2 Swan (Tenn.) 197.

In *Mississippi*, partition may be had between the holder of a life estate and an owner in fee, provided they are cotenants in possession. *Black v. Washington*, 65 Miss. 60.

Under 2 *New York* Rev. St. 318, §§ 5, 6; 322, § 35; 327, § 60,—a judgment in partition is conclusive on all persons having any interest in the premises, contingent or otherwise; and conveyances upon a sale thereunder are a bar in law and equity against all such parties or their representatives including a non-resident owner of an estate in remainder served with summons by publication. *Jenkins v. Fahey*, 73 N. Y. 355.

The owner of a life estate in land,

session.¹ But in *New York*, and perhaps other States, while partition can be maintained by a tenant in possession against remainder-men and reversioners,² it can be maintained by them only as between themselves, or subject to the interest of the person holding the particular estate;³ and where actual partition cannot be made without great prejudice to the parties in interest, without the consent of the tenant in possession, no sale can be had, and the action must be dismissed.⁴

A homestead right is not subject to dissolution or division by proceedings for partition;⁵ and this protection for the benefit of the widow and minor children is usually continued during her widowhood and their minority,⁶ but this does not preclude a partition as between the heirs at law or their assignees.⁷

also of a fee-simple interest in an undivided one-half thereof, is entitled to have partition thereof under *Texas*, Rev. St., art. 3645, giving that right to "any joint owner or claimant of real estate, or of any interest therein." *Tieman v. Baker*, 63 Tex. 641.

A contingent remainder to become vested on the death of certain persons during the life of the life tenant, is, under *Missouri* statutes, subject to be partitioned during the life of the life tenant. *Preston v. Brant*, 96 Mo. 552.

1. *Scoville v. Hilliard*, 48 Ill. 483; *Hilliard v. Scoville*, 52 Ill. 449; *Cook v. Webb*, 19 Minn. 170.

The right of partition may be enforced against remainder-men, not *in esse*, where half the land was given a brother in fee, and the other half a sister during life, and, at her death, to such of her children as should be living. *Freeman v. Freeman*, 9 Heisk. (Tenn.) 301.

The *New Jersey* partition act requires the consent of the owner of the particular estate to a partition sought by the remainder-men; and then the whole estate must be sold—that in possession as well as that in expectancy. *Smith v. Gaines*, 39 N. J. Eq. 545.

2. *Jenkins v. Fahey*, 73 N. Y. 355; *Sullivan v. Sullivan*, 66 N. Y. 37; *Striker v. Mott*, 2 Paige (N. Y.) 387; 22 Am. Dec. 646. And see *Canfield v. Ford*, 28 Barb. (N. Y.) 336.

Tenants in common of a life estate can maintain a suit for partition. *Hawkins v. McDougal* (Ind. 1890), 25 N. E. Rep. 807.

3. *Sullivan v. Sullivan*, 66 N. Y. 37; *Blakeley v. Calder*, 15 N. Y. 617; 13 How. Pr. (N. Y.) 476. And see *Howell v. Mills*, 7 Lans. (N. Y.) 193; affirmed 56 N. Y. 226; *Clusin v. Keith*, 1 Hun

(N. Y.) 589; *McGlone v. Goodwin*, 3 Daly (N. Y.) 185; *Duffy v. Duffy*, 50 Hun (N. Y.) 266.

4. *Schen v. Fehming*, 31 Hun (N. Y.) 183; 66 How. Pr. (N. Y.) 231; *Sullivan v. Sullivan*, 66 N. Y. 37; *Hughes v. Hughes*, 30 Hun (N. Y.) 349; 63 How. Pr. (N. Y.) 408; *Prior v. Hall*, 13 Civ. Proc. Rep. (N. Y.) 83. See *Prior v. Prior*, 41 Hun (N. Y.) 613; 5 N. Y. St. Rep. 249; *New York Code Civ. Proc.*, § 1533.

A sale in partition subject to a life estate cannot be made. *Hughes v. Hughes*, 30 Hun (N. Y.) 349; 63 How. Pr. (N. Y.) 408.

The Tennessee Doctrine.—Interests in remainder and in reversion cannot be sold, under the statute of *Tennessee*, for the purpose of making partition of the land. *Norment v. Wilson*, 5 Humph. (Tenn.) 310.

5. *Trotter v. Trotter*, 31 Ark. 145.
6. *Robinson v. Baker*, 47 Mich. 619; *Hardy v. Gregg* (Miss. 1887), 2 So. Rep. 358.

Where a man dies, leaving a widow and minor children, his homestead is not subject to partition so long as his widow remains unmarried and occupies it as her residence until all such children arrive at the age of majority, even though all the children may move away from said homestead. *Hafer v. Hafer*, 36 Kan. 524.

7. *Robinson v. Baker*, 47 Mich. 619.
The constitution of *Texas*, art. 16, § 55, prohibiting the partition of land used as a homestead among the heirs of deceased, so long as the guardian of his minor children may be permitted by order of court to use it, does not prevent the homestead from entering into the partition of the estate, providing the right of the minor children

In the absence of statutory provisions, a widow is by virtue her dower right neither a joint tenant, tenant in common nor co-parcener in such a sense as to make her subject to an action for the partition of the property of her deceased husband;¹ and, after dower has been specifically assigned to her, she is then seised severally of the part so assigned to her, and therefore not th liable to such action on the part of the heirs.² A widow's right of dower, however, will not be allowed to defeat a partition of the premises among the tenants in common, subject to her estate and where the dower right attaches to a moiety only of the estate a partition relieving the estate of such right and attaching it to the part assigned in severalty to the doweress may be compelled. Dower can be assigned, as a general rule, in partition cases.³

Of an estate by entireties there can be no compulsory partition during coverture,⁶ but it may be had in connection with a decree of divorce, or whenever by divorce the legal unity of the co

to use it during such permission is not infringed by such partition. *Hudgins v. Sansom*, 72 Tex. 229.

In making such partition, where there is a homestead and also other lands, if there is a widow with a right of dower, she should have her dower and homestead right saved to her in the homestead land whenever it can be done consistently with justice. *Robinson v. Baker*, 47 Mich. 619.

A transfer by husband and wife, of an undivided interest in the homestead, confers upon the transferee a right to compel partition. *Ferguson v. Reed*, 45 Tex. 574.

1. *Bradshaw v. Callaghan*, 5 Johns. (N. Y.) 80; *Hull v. Hull*, 26 W. Va. 1. And see *Coles v. Coles*, 15 Johns. (N. Y.) 321; 8 Am. Dec. 231; 2 Kent's Com. 62; *Keisel's Appeal*, 7 Pa. St. 462.

A widow entitled to dower in the estate of her deceased husband is neither a joint tenant, co-parcener, nor tenant in common, within the meaning of the statute concerning partition, in the code of *Virginia*, and therefore no power is conferred by that statute upon a court of equity to sell the whole estate without her consent, and compel her to receive a moneyed compensation out of the proceeds in lieu of dower. *White v. White*, 16 Gratt. (Va.) 264.

Where it is evident that partition cannot be had during the life of the testator's widow, proceedings for partition are void *ab initio*. *Lee's Estate*, 13 Phila. (Pa.) 291.

2. *Clark v. Richardson*, 32 Iowa 401.

3. *Ward v. Gardner*, 112 Mass. 42;

Wood v. Clute, 1 Sandf. Ch. (N. Y. 199; *Bradshaw v. Callaghan*, 8 Johns (N. Y.) 552; *Clift v. Clift*, 87 Ten. 17; *Brown v. Brown*, 43 Ind. 474; *Bierce v. James*, 87 Tenn. 538. The same rule applies to estates subject to tenancies by curtesy. *Bierce v. James*, 87 Tenn. 538.

A child by first marriage is entitled to partition of the parent's premises against his widow by a later marriage in the absence of proof of issue by such subsequent marriage, or of a testamentary disposition by the parent. *Meyer v. Schurbruck*, 37 La. Ann. 37; And see *Pressley v. Robinson*, 5 Tex. 453; *Putnan v. Young*, 57 Tex. 461.

Where proceedings in partition to set out dower had been stayed on application of the executor, and the widow presented a second petition, reciting them all, and praying that the stay be revoked, etc., the court had jurisdiction under the *Pennsylvania* law of 1869, relating to the orphan's court, to proceed, notwithstanding there was no assent of the parties interested; her petition being treated as a new one. *Neeld's Appeal*, 70 Pa. St. 113.

4. *Coles v. Coles*, 15 Johns. (N. Y.) 321; 8 Am. Dec. 231.

5. See also *DOWER*, vol. 5, p. 925.

6. *Ketchum v. Walsworth*, 5 Wis. 95, 68 Am. Dec. 49.

A partition suit is not authorized, either by the statutes of *New York* or at common law, between husband and wife, of land conveyed to them and their heirs and assigns, by a deed not indicating that they are to hold as

tenants has been destroyed.¹ So partition of community property may be had only in connection with a divorce between the parties holding it,² though where a divorce has been granted without making any disposition of such property, an action for its partition may afterwards be maintained.³

c. EFFECT OF AGREEMENT NOT TO PARTITION. — The absolute right to a partition is a beneficial incident of joint tenancies and tenancies in common, which the parties in interest may waive by agreement.⁴ By the civil law, however, a different rule was adopted,⁵ and several cases both in *England* and the *United*

joint-tenants or tenants in common, or have a severable interest. *Miller v. Miller*, 6 Abb. Pr., N. S. (N. Y.) 444.

1. *Freem. Part.*, § 444.

2. *Kashaw v. Kashaw*, 3 Cal. 321.

In an action for divorce by a wife against a husband, in which the complaint reveals the existence of community property, the court, in addition to granting the divorce, may order a division of the common property and that a homestead be set apart to the plaintiff, although no relief of this character is prayed for in the complaint. *Gimmy v. Gimmy*, 22 Cal. 633.

In *Texas*, a suit for partition, by a purchaser of the wife's community interest at a sheriff's sale, brought against the husband's heirs, is within the jurisdiction of the district court, when it does not appear that the administration is still open. *Wooten v. Dunlap*, 20 Tex. 183. But the parish court in *Louisiana* is without jurisdiction of a suit for partition between the surviving widow and the heirs of the decedent, when it appears that the widow had accepted and disposed of her interest in the community; and that the heirs, who are of age, had unconditionally accepted the succession and been put in possession of its property. In such a case, the succession no longer exists. *Woolfolk v. Woolfolk*, 30 La. Ann. (pt. 2) 139.

3. *De Godey v. Godey*, 39 Cal. 162.

4. *Coleman v. Coleman*, 19 Pa. St. 100, 57 Am. Dec. 641; *Hoyt v. Kimball*, 49 N. H. 322; *Eberts v. Fisher*, 54 Mich. 294; *Platt on Covenants* 404; *Broom's Leg. Max.* 539; *Avery v. Payne*, 12 Mich. 540.

In *Spaulding v. Woodward*, 53 N. H. 577; 16 Am. Rep. 392, the court, by *Foster, J.*, said: "Undoubtedly the right of partition may be waived by the parties in interest, but by express condition or *proviso* may restrain and

prohibit the exclusive and beneficial use and enjoyment of estates holden in common or joint tenancy or in any such, short of an absolute restriction of alienation."

Several persons purchased lands under a deed containing a provision that the property should be held without partition or division, and made valuable and expensive improvements upon it. Afterwards one of the co-tenants brought an action for its partition, maintaining that the *proviso* in the deed was repugnant to the estate granted, on the ground that it was a restriction upon the absolute right of partition; that it was a restraint on alienation, and against public policy. The court held that the right given by the statute to make partition was conferred for the benefit of the party, and might be waived by him, and that as each co-tenant might convey his share at pleasure, it could not be construed as a restraint upon alienation, and refused to maintain the action. *Hunt v. Wright*, 47 N. H. 399; 93 Am. Dec. 451.

One tenant in common of land, holding his share under a deed from his co-tenant, is not barred from having partition by a condition in the deed that the grantee shall not dispose of the premises, or permit them to be occupied by any person but himself during the life of the grantor. *Whitney v. Kendall*, 63 N. H. 200.

5. "It is always free for every one of those who have anything in common among them to divide it; and although they may agree to put off the partition to a certain time, yet they can make no such agreement as never to come to a partition; for it would be contrary to good manners that the proprietors should be forced to have always an occasion of falling out by reason of the undivided possession of a common thing. *Strahan's Domats Civil Law*,

States have either held or inferred the opposite doctrine.¹ But one co-tenant cannot, by a conveyance of his moiety with covenants against partition or otherwise, create or confer upon his grantors a power to prevent partition.²

3. Who May Enforce Partition.—It is a rule of almost universal application that proceedings for partition can be instituted and maintained only by one having an estate in possession or who is entitled to immediate possession of the premises to be partitioned.³ Occupation under a lease for years, however, is not such a possession in the lessee as will deprive the lessors of power

(pt. 1), bk. 2 tit. 5, § 11; Code Napoléon, § 815; Civil Code Lower Can. § 689.

1. See *Mitchell v. Starbuck*, 10 Mass. 11; *Pick v. Cardwell*, 2 Beav. 137.

A tenant in common may enter into such agreements with his co-tenant, as by lease of the premises, as to estop him from demanding a partition. *Eberts v. Fisher*, 54 Mich. 294.

2. *Kean v. Tilford*, 81 Ky. 600.

A plea in bar to a petition for partition, that A, tenant in common with the respondents conveyed to the petitioner, and that the petitioner at the same time executed to the respondents a certain instrument, by him subscribed, not under seal, reciting, "whereas A has conveyed, etc., in consideration whereof I promise B and C (the respondents) that I will hold and improve the same in common with them during the life of D," with an averment that D is now living, was held bad upon demurrer. *Black v. Tyler*, 1 Pick. (Mass.) 150.

3. *Brownell v. Brownell*, 19 Wend. (N. Y.) 367; *Adam v. Ames Iron Co.*, 24 Conn. 230; *Rickard v. Rickard*, 13 Pick. (Mass.) 251; *Bonner v. Proprietors*, 7 Mass. 475; *Schori v. Stephens*, 62 Ind. 441; *Whitten v. Whitten*, 36 N. H. 326; *Stevens v. Enders*, 13 N. J. L. 271; *Sullivan v. Sullivan*, 66 N. Y. 37; *Striker v. Mott*, 2 Paige (N. Y.) 387; 22 Am. Dec. 646; *Hoyle v. Huson*, 1 Dev. (N. Car.) 34 8. And see *Culver v. Culver*, 2 Root (Conn.) 278; *Packard v. Packard*, 16 Pick. (Mass.) 194; *Wilkinson v. Stuart*, 74 Ala. 198; *Brown v. Brown*, 8 N. H. 93; *Wood v. Sugg*, 91 N. Car. 93; 49 Am. Rep. 639; *Osborne v. Mull*, 91 N. Car. 203; *Zeigler v. Grim*, 6 Watts (Pa.) 106; *Norment v. Wilson*, 5 Humph. (Tenn.) 310; *Robertson v. Robertson*, 2 Swan (Tenn.) 201; *Baldwin v. Aldrich*, 34 Vt. 526; 80 Am. Dec. 695; *Simmons v. McAdaras*, 6 Mo. App. 297;

Atha v. Jewell, 33 N. J. Eq. 417; *Godfrey v. Godfrey*, 17 Ind. 6; *Scarborough v. Smith*, 18 Kan. 399; *O'Dougherty v. Aldrich*, 5 Den. (N. Y.) 385.

A grantee of an undivided interest, whose grantor retains the use of the premises for his life, and is still living, cannot have partition. *Nichols v. Nichols*, 28 Vt. 228; 67 Am. Dec. 699.

The action for partition will not lie against, and the judgment and partition will not affect the estate of, one who is only tenant for life of the whole property of which partition is sought. *Smalley v. Isaacson*, 40 Minn. 450.

Nor can one seized in fee of an undivided part of certain real estate, and for life of the residue, have partition as between himself and those having a contingent remainder in such residue. *Hodgkinson Petitioners*, 12 Pick. (Mass.) 374.

A petition for an inquest of partition will not be granted where the estate has not yet vested in the petitioner, and the executors are directed themselves to convert the real estate into personalty. *Ruffell's Estate*, 11 Phila. (Pa.) 46.

If one be joined in partition as plaintiff, who has parted with his title, it is fatal. *Lockhart v. Power*, 2 Watts (Pa.) 371.

Unoccupied Lands.—When lands are unoccupied, as there can be no adverse possession under the circumstances, those having the legal title are in law seized of the land in such a sense as to be entitled to partition. *Byers v. Danley*, 27 Ark. 96; *Beebe v. Griffing*, 14 N. Y. 238; *London v. Overbey*, 40 Ark. 155; *Florence v. Hopkins*, 46 N. Y. 186; *Chaplin v. Holmes*, 27 Ark. 414; *Eberts v. Fisher*, 44 Mich. 551.

Absolute Estate.—A deed from a father to his son conveyed for a valuable consideration, with words of warranty but not of inheritance, a tract of land, reserving a life-estate, and ad-

to maintain partition,¹ but the consequent division or sale must be made subject to the lease.² Neither the donee of a power in a will or other instrument,³ nor a *cestui qui trust*⁴ can maintain partition, neither having either title or right of possession, but a mere right to the proceeds, income or otherwise, and one having a right to enter for condition broken, as he may or may not take advantage of the forfeiture, cannot, before entry, maintain an action for partition.⁵ One not in actual possession of land cannot, as a general rule, maintain partition against one who has disseised him or holds adversely to him, until he has first established his right by an action to recover possession,⁶ but a common

ding: "If I never alter the above deed, after my death, then to remain in full force and virtue in law. The grantor died intestate without altering it, and the son being in possession, on a bill for partition by the other heirs, it was held, that he had in equity an absolute estate, and the partition was refused. *Johnson v. Gilbert*, 13 Rich. Eq. (S. Car.) 42.

1. *Woodworth v. Campbell*, 5 Paige (N. Y.) 518; *Hunt v. Hazelton*, 5 N. H. 216; 20 Am. Dec. 575; *Cook v. Webb*, 19 Minn. 172; Co. Litt. 167 a; *Allnatt on Part.* 52.

Where the owner of one undivided half of a lot of land held a lease of the whole lot, the owner of the reversion in the other half could not sustain a bill for partition on the ground that the lease had terminated, without at least alleging his belief of the termination of the lease. *Lansing v. Pine*, 4 Paige (N. Y.) 639.

But in *Massachusetts* a tenant in common of a reversion in land expectant on a lease for years, cannot maintain a petition for a partition under Rev. St., ch. 103, § 3. *Hunnewell v. Taylor*, 6 Cush. (Mass.) 472.

2. *Woodworth v. Campbell*, 5 Paige (N. Y.) 518.

On petition for a partition, where the petitioner alleged that he was seised in a fee as tenant in common with the respondents, a plea alleging that one of the respondents had a lease of the interest of the petitioner for a term of years, which had not expired, was no answer to the petition. *Hunt v. Hazelton*, 5 N. H. 216; 20 Am. Dec. 575.

3. *Barton v. Cannon*, 7 Baxt. (Tenn.) 398; *Ruffell's Estate*, 11 Phila. (Pa.) 46.

4. *Harris v. Larkins*, 22 Hun (N. Y.) 488.

5. *Whitten v. Whitten*, 36 N. H. 333; *O'Dougherty v. Aldrich*, 5 Den. (N.

Y.) 385; *Spright v. Waldron*, 51 Miss. 356; *Sullivan v. Sullivan*, 66 N. Y. 37; *Therasson v. White*, 52 How. Pr. (N. Y.) 62; *Brock v. Eastman*, 28 Vt. 658; 67 Am. Dec. 733. And see *Jenkins v. Van Schaack*, 3 Paige (N. Y.) 245; *Clapp v. Bromagham*, 9 Cow. (N. Y.) 530; *Witherspoon v. Dunlap*, Harp. (S. Car.) 390.

In *Ohio*, a right of entry will entitle a party to partition, without the actual seisin required in some other States. *Tabler v. Wiseman*, 2 Ohio St. 207.

6. *Windsor v. Simpkins* (Oregon 1890), 23 Pac. Rep. 669; *Criscoe v. Hambrick*, 47 Ark. 235; *Moore v. Gordon*, 44 Ark. 334; *London v. Overbey*, 40 Ark. 155; *Mattair v. Payne*, 15 Fla. 682; *Moore v. Shannon*, 6 Mackey (D. C.) 157; *Overton v. Woolfolk*, 6 Dana (Ky.) 371; *Rickard v. Rickard*, 13 Pick. (Mass.) 251; *Bonner v. Proprietors*, 7 Mass. 475; *Hoffman v. Beard*, 22 Mich. 66; *Spright v. Waldron*, 51 Miss. 356; *Gravier v. Ivory*, 34 Mo. 523; *Forder v. Davis*, 38 Mo. 107; *Rozier v. Johnson*, 35 Mo. 326; *Matthewson v. Johnson*, Hoffm. Ch. (N. Y.) 560; *Van Schurler v. Mulford*, 59 N. Y. 431; *Burhans v. Burhans*, 2 Barb. Ch. (N. Y.) 405; *Greene v. Greene* (Supreme Ct.) 7 N. Y. Supp. 30; *Thomas v. Garvan*, 4 Dev. (N. Car.) 224; 25 Am. Dec. 708; *Drew v. Clemmons*, 2 Jones Eq. (N. Car.) 314; *Harman v. Kelley*, 14 Ohio, 502; 45 Am. Dec. 552; *Longwell v. Bentley*, 3 Grant's Cas. (Pa.) 177; *Lw v. Patterson*, 1 W. & S. (Pa.) 184; *Carrigan v. Evans*, 31 S. Car., 262; *Albergottie v. Chaplin*, 10 Rich. Eq. (S. Car.) 428; *Gifford v. Williams*, L. R., 5 Ch. 546. And see *infra*, this title, *Jurisdiction*.

A tenant in common, who has not been actually ousted, can maintain a petition for partition, though he may,

possession is implied from a common title,¹ and nothing short of an actual and total ouster will bar the action.² Many of the States have adopted the doctrine, however, that partition can be maintained whenever the applicant shows himself seized of the requisite title, and that the question of the title and rights of the parties may be determined and a petition ordered whether the

for the sake of a remedy, have elected to consider himself disseised, and brought a writ of entry against his co-tenant, counting on a disseisin by him. *Fisher v. Dewerson*, 3 Met. (Mass.) 544.

It is erroneous, for a jury of inquest of partition and valuation to include in its proceedings lands held adversely to the heirs, and such error will set aside the inquisition. *McMasters v. Carothers*, 1 Pa. St. 324.

What Amounts to Adverse Holding.—Land was devised to F and M, the son and daughter of testator, and was occupied after testator's death in 1860 by F and his brother D, with M's consent, she and their mother living with D. They farmed the land together, and used the proceeds in common, D residing thereon in a house built by him until 1871, when he removed, but returned in a year. The whole estate was assessed in F's name, until his death in 1883, and some of the taxes were paid by D, probably from the profits of the farm. In 1877 a surveyor, under direction of F and D, made a division of the land between them, but they never occupied in severalty, and it was not shown that M knew of the attempted partition. In a suit brought in 1888 in the orphans' court for partition, D claimed to hold the part laid off to him by the surveyor, and on which he resided, adversely to M and to the heirs of F, who had died in the mean time. *Held*, that there was not sufficient evidence of adverse possession to require the question to be first determined in ejectment, and that it was therefore not error to decree a partition between M and the heirs of F. *Welch's Appeal*, 126 Pa. St. 297.

One joint proprietor, sued by another for improvements with privilege on the land, may still provoke its partition. Such claim is to be taken into account in making the partition, but cannot prevent it. *Jones v. Crocker*, 4 La. Ann. 8.

1. *Thomas v. Gawan*, 4 Dev. (N. C.) 223; 25 Am. Dec. 708; *Hulse v. Hulse* (Supreme Ct.), 5 N. Y. Supp.

747; *Byers v. Danley*, 27 Ark. 96; *Wommack v. Whitmore*, 58 Mo. 448; *Beebe v. Griffing*, 14 N. Y. 238; *Barker v. Jones*, 62 N. H. 497.

In *Brock v. Eastman*, 28 Vt. 660; 67 Am. Dec. 733, the court, by BENNETT, J., said: "In cases where privity has existed between the parties, as in the case of joint tenants or tenants in common, and one tenant ousts his co-tenants by taking all the profits to himself, denying his co-tenant's rights, such a possession may be treated as a disseisin for the purpose of bringing ejectment, or he may elect to treat such possession by his co-tenant as his possession, and in that event may maintain a petition for partition."

Where the parties claim under a common source of title, a motion to nonsuit because the plaintiff had not shown a perfect title in himself, was properly overruled. *McGowan v. Reed* (S. Car. 1890), 11 S. E. Rep. 685.

2. *Womach v. Whitmore*, 58 Mo. 448; *Adams v. Ames Iron Co.*, 24 Conn. 235; *Florence v. Hopkins*, 46 N. Y. 186.

Where a tenant in common ousts his co-tenant, remaining in the sole possession, and subsequently purchases an outstanding title, the co-tenant cannot maintain an action for partition, or for the benefit of the purchase, until he has regained the possession. *Rozier v. Johnson*, 35 Mo. 326.

Where a bill for partition between heirs avers that defendant possessed himself of the intestate's land on the latter's death without authority, and has since held it, except such as he may have disposed of to his co-defendants, to the entire exclusion of complainants, denying that there was any such property belonging to intestate's title, and refusing to give complainants their shares, living on and using such real estate as defendant's own, making great profits thereon, no part of which has he ever shared with complainants, the bill shows an adverse holding under claim of right amounting to an ouster among tenants in common such as destroys the unity of

and is held or claimed adversely or not;¹ and the courts in many of the States in which the former doctrine is maintained have shown a decided tendency toward the adoption of the latter rule.²

An exception to the rule, requiring the applicant for partition to be in possession or entitled to possession, exists in cases of personal property, a court of equity having jurisdiction to try title as well as to decree partition.³ So where a court of chancery has possession of the cause on some clear ground of equity jurisdiction wholly distinct for partition, it may retain it irrespective

possession, and takes away the right to partition. *Rich v. Bray*, 37 Fed. Rep. 273.

But adverse possession alone by defendant in partition, without show of any title to plaintiff's undivided interest therein, and without any evidence casting a doubt upon plaintiff's title thereto, is not sufficient to defeat the partition suit, and compel a resort to ejectment. *Holloway v. Holloway*, 37 Mo. 628.

1. *Bonham v. Weymouth*, 39 Minn. 92; *McMath v. De Barclelaben*, 75 Ala. 68; *Martin v. Walker*, 58 Cal. 590; *Gage v. Ried*, 104 Ill. 509; *Luntz v. Greve*, 102 Ind. 173; *Cooter v. Baston*, 89 Ind. 185; *Howey v. Goings*, 13 Ill. 104; 54 Am. Dec. 427; *Godfrey v. Godfrey*, 17 Ind. 9; *Foust v. Moorman*, 2 Ind. 17; *Scarborough v. Smith*, 18 Kan. 399; *Cook v. Weeb*, 19 Minn. 170; *Fry v. Payne*, 82 Va. 759.

In *Illinois*, whether a suit for partition be by bill in chancery or by petition, the court may under Rev. St., ch. 106, § 39, determine all questions of conflicting title. *Gage v. Lightburn*, 33 Ill. 248.

2. See *Keil v. West*, 21 Fla. 508; *Tablet v. Wiseman*, 2 Ohio St. 207; *Miller v. Dennett*, 6 N. H. 109; *Overton v. Woolfolk*, 6 Dana (Ky.) 374; *Baylies v. Bussey*, 5 Me. 157; *Call v. Barker*, 12 Me. 325; *Marshall v. Crehore*, 13 Met. (Mass.) 464; *Wood v. Le Baron*, 8 Cush. (Mass.) 473; *Cuyler v. Terrill*, 1 Abb. (U. S.) 181; *Denton v. Woods*, 19 La. Ann. 356.

Under the policy of Code Civ. Proc. of *North Carolina*, that all matters of controversy growing out of the same transaction, or concerning the same subject, between all the parties having an interest therein, be disposed of in one action, a proceeding for partition, commenced before the clerk of the superior court, should not be dismissed, where defendant alleges himself to be

sole owner. *Goodman v. Sapp*, 102 N. Car. 477.

In *Massachusetts*, if a tenant in common has not been disseised by a wrongful dispossession, or exclusion from the pernaney of the profits, or has not lost his right of entry, in consequence of an exclusive occupation by his co-tenants for more than twenty years, he will be sufficiently seised to entitle him to the process of partition, though he has not the actual possession. *Barnard v. Pope*, 14 Mass. 434; 7 Am. Dec. 225.

Statutory Construction.—The adoption of the latter doctrine was statutory or the result of statutory construction in many of the States. See *Martin v. Walker*, 58 Cal. 590; *Gage v. Reid*, 104 Ill. 509; *Godfrey v. Godfrey*, 17 Ind. 6; *Scarborough v. Smith*, 18 Kan. 399; *Marshall v. Crehore*, 13 Met. (Mass.) 462; *Fry v. Payne*, 82 Va. 759; *Goodman v. Sapp*, 102 N. Car. 477.

Under the *New York Code*, § 1537, an heir out of possession can maintain partition against the grantee of his ancestor's devisee under a void will. *Malaney v. Cronin*, 44 Hun (N. Y.) 270; *Henderson v. Henderson*, 44 Hun (N. Y.) 420.

But where he claims as heir of his mother, and not his father, who died in possession of the land in controversy, he is not relieved from the common law rule that, to maintain partition, plaintiff must be in actual or constructive possession of the land. *Greene v. Greene* (Supreme Ct.), 7 N. Y. Supp. 30.

3. *Weeks v. Weeks*, 5 Ired. Eq. (N. Car.) 111; 47 Am. Dec. 358; *Smith v. Dunn*, 27 Ala. 316; *Edwards v. Bennett*, 10 Ired. (N. Car.) 361; *Jones v. Zollicoffer*, 2 Hawks (N. Car.) 623; 11 Am. Dec. 795. To the contrary, see *Gudgell v. Mead*, 8 Mo. 53, in which the power of a court of equity to compel the partition of per-

of the question of ouster or adverse possession;¹ there can then be no reason for the suspension of proceedings short of complete justice between the parties.² One who has not been disseised, but whose right of possession has not yet accrued, cannot maintain a proceeding for partition,³ even though the right becomes a vested one before the proceeding is brought to a hearing.⁴

a. THE APPLICANT.—At common law the right of partition, which attached to an estate in co-parceny, was lost to a co-parcener's grantee, though the other still retained the right as against him;⁵ but under the present rule that joint tenants and tenants in common are also entitled to partition, a grantee of a co-tenant succeeds to the right of partition which his grantor had.⁶ This applies only to an absolute transfer, not to a temporary or

sonal property under any circumstances is denied.

1. *Hankins v. Layne*, 48 Ark. 544; *Scott v. Guernsey*, 60 Barb. (N. Y.) 178; *Hasford v. Merwin*, 5 Barb. (N. Y.) 62.

The doctrine that partition cannot be had while the defendant is holding the premises adversely does not apply when plaintiff's title is only an equitable one. *Dameron v. Jameson*, 71 Mo. 97.

2. *Rozier v. Griffiths*, 31 Mo. 171.

3. *Hunnewell v. Taylor*, 6 Cush. (Mass.) 476; *Evans v. Bagshaw*, L. R., 5 Ch. 340; *Attorney-General v. Avon*, 11 W. R. 1050.

4. *Evans v. Bagshaw*, L. R., 5 Ch. 340; *Hunnewell v. Taylor*, 6 Cush. (Mass.) 476.

A judgment creditor, who has levied his execution on real estate held by his debtor in common with third persons, cannot petition for partition of the estate till after the expiration of the year in which the debtor may redeem. *Phelps v. Palmer*, 15 Gray (Mass.) 499; 77 Am. Dec. 378. But it is no objection to his petition that it bears date prior to the time when his right of possession accrued as against his judgment debtor, if that right became perfect before the process was served. *Hawley v. Soper*, 18 Vt. 320.

5. Co. Litt. 174, b. 175, a; *Allnatt* on Part. 54.

A husband, however, may have partition of an estate of which he stands seised of one part in the right of his wife, who is a co-parcener; and if he were the purchaser, he and his wife might have a joint writ. *Allnatt* on Part. 55; Co. Litt. 175 a.

A conveyance of a moiety divests the grantor of his right to partition under all circumstances. *King v. Howard*, 27 Mo. 21.

6. *Stewart's Appeal*, 56 Pa. St. 241; *De Castro v. Barry*, 18 Cal. 96; *Hill v. Jones*, 65 Ala. 214; *Duncan v. Pope*, 47 Ga. 445; *Ragan's Estate*, 7 Watts (Pa.) 438; *Callamar v. Hutchins*, 27 Vt. 734. And see *King v. Howard*, 27 Mo. 21; *Chastain v. Higdon*, 84 Ga. 111; *Stewart's Appeal*, 56 Pa. St. 241; *De Castro v. Barry*, 18 Cal. 96.

The alienee of the shares of minors in a decedent's estate may sue for partition, as the minors might have done. *Rawle's Appeal*, 119 Pa. St. 100.

Where the owner of a life-estate in the share of one of several tenants in common of land assigned his property for the benefit of his creditors, the assignees were entitled to have partition of the land, but that they were not entitled to have the premises sold, it not being for the benefit of the other owners. *Van Arsdale v. Drake*, 2 Barb. (N. Y.) 599.

Grantee Under Sale by Order of Court.—When the interest of a partner in lands purchased and held by the partnership is sold after his death, under order of court, for the payment of his debts, the purchaser is entitled to partition. *Greene v. Graham*, 5 Ohio 265. And see *Cowden v. Cairns*, 28 Mo. 471.

Deed to Creditor as Security.—Upon showing good cause, partition may be ordered at the instance of a creditor holding an absolute deed from one of the tenants in common as security for a debt; but, without good cause, partition in opposition to the will of the debtor of such creditor should be denied. *Welch v. Agar*, 84 Ga. 583.

defeasible one.¹ Proceedings for partition have been entertained where the consideration for the transfer to the petitioner was illegal.² A valid partition, to which the grantor was a party, bars an action for partition by the grantee.³

The fact that one or more of several co-tenants have mortgaged their interests in the co-tenancy does not prevent them from maintaining proceedings for partition at any time before foreclosure;⁴ but the partition will affect the interest of the mortgagor only, and not that of the mortgagee.⁵ Where a co-tenant is also the mortgagee, however, it has been held that partition cannot be maintained against him by the mortgagor,⁶ but the contrary position has also been asserted, and with much reason.⁷ After foreclosure a mortgagee of an undivided part may maintain partition against the owner of the other parts,⁸ but until foreclosure is complete and the mortgagee's title becomes indefeasible he is not such a co-tenant with the owner of the other moiety as to justify an action of partition by either against the other.⁹ In all other cases the general rule is that a party seeking partition must

1. See *Phelps v. Palmer*, 15 Gray (Mass.) 499; 77 Am. Dec. 378; *Newton Bank v. Hull*, 10 Allen (Mass.) 144; *Hunnewell v. Taylor*, 6 Cush. (Mass.) 476; *Attorney-General v. Avon*, 11 W. R. 1050; *Evans v. Bagshaw*, L. R., 5 Ch. 340.

A creditor who has lived upon an undivided interest in lands cannot maintain partition, the debtor still having a right of redemption. *Newton Bank v. Hull*, 10 Allen (Mass.) 144.

2. *Rhea v. White*, 7 Lea (Tenn.) 628.

3. *Tallman v. McCarty*, 11 Wis. 401. And see *Nash v. Church*, 10 Wis. 303; 78 Am. Dec. 462; *Kane v. Rock River Canal Co.*, 15 Wis. 179; *Wendel v. North*, 24 Wis. 223; *Allie v. Schmity*, 17 Wis. 169.

4. *Green v. Arnold*, 11 R. I. 364; 23 Am. Rep. 466; *Upham v. Bradley*, 17 Me. 427; *Hall v. Morris*, 13 Bush (Ky.) 322; *Bradley v. Fuller*, 23 Pick. (Mass.) 1.

5. *Watten v. Copeland*, 7 Johns. Ch. (N. Y.) 140; *Call v. Barker*, 12 Me. 327; *Colton v. Smith*, 11 Pick. (Mass.) 311; 22 Am. Dec. 375; 1 Hill on Mort. 13; *Bradley v. Fuller*, 23 Pick. (Mass.) 1.

6. *Bradley v. Fuller*, 23 Pick. (Mass.) 1; *Gibbs v. Haydon*, 47 L. T. 184; 30 W. R. 726.

If one tenant in common of land takes an assignment of a mortgage upon it, his co-tenants, who derive their title as heirs at law of the mortgagor, cannot maintain a petition for partition

against him, although the mortgage and assignment are not recorded. *Blodgett v. Hildreth*, 8 Allen (Mass.) 186.

7. *Green v. Arnold*, 11 R. I. 364; 23 Am. Rep. 466; *Waite v. Beugley*, 21 L. R., Ch. D. 674; 51 L. J. Ch. 651; 30 W. R. 698.

8. *Phelps v. Townsley*, 10 Allen (Mass.) 554.

9. *Norcross v. Norcross*, 105 Mass. 265.

Where a debtor made three mortgage deeds at the same time of the same land, to secure payment of different sums to three of his creditors, and the deeds were recorded at the same time, and no preference or priority being intended by the parties, although the mortgagees were tenants in common in proportion to the amount of the balance of their several debts, yet until foreclosure, their estate in the land was not indefeasible and not the subject of partition. *Ewer v. Hobbs*, 5 Met. (Mass.) 1.

It has been held that one of several mortgagees of undivided interests on the same land, who has not yet taken possession may file a petition for partition against the others, and the mortgagor and his assignee have no right to oppose. *Munroe v. Walbridge*, 2 Aik. (Vt.) 410. And if the owner of an undivided portion of land mortgage it, and the land remain in the possession of the mortgagor, or of a co-tenant, the mortgagee is entitled to partition, the possession of the

base his claim upon a legal, and not a mere equitable title;¹ but a trustee having a power of sale may maintain the action.² That the claimant bases his possession and title to his moiety upon a disseisin or a tax title does not prevent partition where the person to whose rights he succeeds was under no disability and his title has become indefeasible.³

The right to partition vesting in co-heirs upon the death of their ancestor is not affected by the circumstance that the administrator is entitled to the rents and profits pending the administration, or to a sale of the property for the payment of debts;⁴ and while the administrator may in some States and under some circumstances maintain ejectment upon the title of the intestate, he cannot become such a co-owner or co-tenant as

mortgagor or co-tenant being equivalent to his own *Rich v. Lord*, 18 Pick. (Mass.) 322. But it would appear that this holding had been effectually overruled by the doctrine and the reasons for the doctrine, upon which the decision of the cases above cited is based.

1. See *Stryker v. Lynch*, 11 N. Y. Leg. Obs. 116; *McCabe v. Hunter*, 7 Mo. 356; *Coale v. Barney*, 1 Gill & J. (Md.) 341.

The statutes of *Tennessee*, authorizing partition of real estate, apply to the owners of legal, and not equitable, estates; and therefore a partition cannot be made of a locative interest where the locator has acquired no title by conveyance or by bill, under the act of 1829, ch. 84. *Hopkins v. Toel*, 4 Humph. (Tenn.) 46.

Under *Massachusetts* Rev. Stat., ch. 103, a petition for partition of real estate cannot be granted where the petitioner is seised of one moiety in his own right, and together with the respondents, as joint trustees with himself, of the other moiety, in trust for a third party. *Winthrop v. Minot*, 9 Cush. (Mass.) 405.

In *Pennsylvania*, owing to the fact that there are no courts of equity, equitable titles must as a matter of necessity be protected in courts of law. See *Willing v. Brown*, 7 S. & R. (Pa.) 467.

A vendee who has paid earnest money and received a written agreement, binding the owner of an undivided share of real estate to convey the same to him, takes an equitable estate, sufficient to enable him to maintain an action of partition against his co-tenant. *Longwell v. Bentley*, 23 Pa. St. 99.

2. *Gallie v. Eagle*, 65 Barb. (N. Y.) 583; 1 *Thomp. & C.* (N. Y.) 124.

3. *Ross v. Cobb*, 48 Ill. 111.

4. *Kelley v. Kelley*, 41 N. H. 502. And see *Page v. Webster*, 8 Mich. 263; 77 Am. Dec. 446; *Rail v. Dotson*, 14 Smed. & M. (Miss.) 176; *Wager v. Wager*, 23 Hun (N. Y.) 439; *Shaffet v. Jackson*, 14 La. Ann. 152; *Campau v. Campau*, 19 Mich. 116.

Where children take as tenants in common under a deed, whether immediately or in remainder, the children and heirs of a deceased tenant may join with the survivors in a bill for partition and an account of the rents and profits. *Tindal v. Drake*, 51 Ala. 574. And an heir's mortgage of his undivided share of succession property cannot affect his co-heir's right to claim a partition. *Gilmore v. Menard*, 9 La. Ann. 212; *Finley v. Babin*, 12 La. Ann. 236.

To Test Validity of Devise.—Under *New York* Laws of 1853, ch. 238, an heir-at-law may maintain an action for partition of a testator's lands, and declare void a devise under which the widow is in occupation thereof. In such action, the issues may, by timely demand, be tried by jury. Accordingly, the law does not contravene the constitutional inhibition of trial of title in an action of partition. *Ward v. Ward*, 23 Hun (N. Y.) 431. And see *Hull v. Hull*, 13 Hun (N. Y.) 306; *McKeon v. Kearney*, 57 How. Pr. (N. Y.) 349.

The contrary is held in *Beecher v. Beecher*, 43 Conn. 556. And see *Hubbard v. Ricart*, 3 Vt. 207; 23 Am. Dec. 198.

Under the *Nebraska* statutes, an heir cannot maintain an action for partition until the debts, allowances

will entitle him to maintain partition.¹ In some of the States the heirs are not permitted to maintain partition until the estate has been administered and the debts of the decedent have been paid;² but this rule is not general.³ A tenant by the curtesy of the whole property cannot maintain partition;⁴ but a tenant by the curtesy of an undivided share of real estate is invested with that unity of possession with the others required to make him a tenant in common, and which consequently entitles him to maintain partition.⁵ A tenant in dower is not a co-tenant and not entitled to have partition,⁶ nor can she resist proceedings for partition instituted by others,⁷ though the fact that she is a doweress

and expenses against the estate have been paid or provided for, unless he give a bond, with approved sureties, to pay the same. *Alexander v. Alexander*, 26 Neb. 68.

1. *Whitlock v. Willard*, 18 Fla. 156; *Nason v. Willard*, 2 Mass. 478.

The fact that a petition for partition of the estate of a decedent is signed by the widow "as administratrix," the petition embracing her claim as widow and heir to a share in the estate, and containing a distinct prayer that partition be had between herself and the children, does not invalidate the proceedings, as being instituted by a person having no interest in the partition. *Robinson v. Fair*, 128 U. S. 53.

In *Alabama*, an administrator may join with the heir in a bill for partition, as under the statute he has the authority to lease the estate when divided. *Harkins v. Pope*, 10 Ala. 493.

2. See *Clark's Appeal* (Pa. 1890), 19 Atl. Rep. 493; *Williams v. Mallory*, (S. Car. 1890), 11 S. E. Rep. 1068; *Hyatt v. Venters*, 41 Tex. 285; *Succession of Clark*, 30 La. Ann. (pt. 2, 801); *Thomas v. Thomas*, 73 Iowa 657; *Alexander v. Alexander*, 26 Neb. 68.

In an action by the heirs for a partition of an intestate's lands, where intestate died deeply in debt, leaving no personal estate and only the land in question, the court will stay proceedings for such length of time as will enable the administrator to obtain a license to sell such lands to make assets for the payment of debts. *Garrison v. Cox*, 99 N. Car. 478.

In *Louisiana*, when the surviving member of a community subsequently dies, leaving individual debts unpaid, the administration of her succession must institute suit for partition of the property held in indivision by it and third persons, as required by Rev. Civ.

Code *Louisiana*, art. 1135, and the heirs of the predeceased spouse dying without debts are third persons in that sense. *Succession of Dumestre*, 42 La. Ann. —; 7 So. Rep. 624.

3. See *Rhorer v. Brockhage*, 15 Mo. App. 16; *Simpson v. Straughen* (N. J.), 19 Atl. Rep. 667; *Richardson v. Loupe*, 80 Cal. 490; *Hulse v. Hulse* (Supreme Ct.), 5 N. Y. Supp. 747; *Hendry v. Hollingdrake* (R. I. 1889), 17 Atl. Rep. 50.

4. *Reed v. Reed*, 107 N. Y. 545; affirming 46 Hun (N. Y.) 212; 13 Civ. Pro. Rep. (N. Y.) 109; *Tilton v. Vail* (Supreme Ct.), 6 N. Y. Supp. 146; 53 Hun (N. Y.) 324; 25 N. Y. St. Rep. 212.

Although the statute forbids a tenant by curtesy to be plaintiff in such a partition suit, if he institutes such a suit, and a guardian *ad litem* is appointed for the infants, and no objection is made, and a sale is had and confirmed, the purchaser cannot refuse to take the title. *Reed v. Reed*, 46 Hun (N. Y.) 212; affirmed, 107 N. Y. 545.

5. *Weise v. Welsh*, 30 N. J. Eq. 431; *Walton v. Willis*, 1 Dall. (U. S.) 350; *Tilton v. Vail* (Supreme Ct.), 6 N. Y. Supp. 146; 53 Hun (N. Y.) 324; 25 N. Y. St. Rep. 212; *Tilton v. Vail*, 42 Hun (N. Y.) 638; *Riker v. Darke*, 4 Edw. (N. Y.) 668; *Van Arsedale v. Drake*, 2 Barb. (N. Y.) 599; *Otley v. McAlpine*, 2 Gratt. (Va.) 340; *Allnatt on Part.* 59; *Co. Litt.* 175. *Contra*, see *Walker v. Dilworth*, 2 Dall. (Pa.) 257, in which the doctrine was questioned, but no decision was rendered with reference to it.

6. *Wood v. Clute*, 1 Sandf. Ch. (N. Y.) 199; 2 N. Y. Leg. Obs. 406; *Kissel v. Eaton*, 64 Ind. 248.

7. *Ward v. Gardner*, 112 Mass. 42; *Wood v. Clute*, 1 Sandf. Ch. (N. Y.) 199; 2 N. Y. Leg. Obs. 406.

will not prevent her from maintaining partition by reason of her ownership of a different estate in co-tenancy in the same premises;¹ and a wife possessed of an inchoate right of dower in her husband's undivided share is at liberty to join with him in an action for its partition.²

Until proceedings are taken by the State an alien may be a tenant in common and may maintain partition.³

While a tenant for life or for years can do nothing to affect the reversion or remainder of his estate, both at common law and under the different statutes he is entitled to maintain partition proceedings against his co-tenants;⁴ and partition may be had on the application of a tenant for years, even though his co-tenant holds the remainder or reversion in fee.⁵

Partition cannot be maintained by either husband or wife

1. *Morgan v. Staley*, 11 Ohio 389.

Where one half of an estate is devised to the widow and the other half to the children of the testator, the widow may join with a portion of the children against the others in a petition for partition to obtain an allowance of her share. *Chouteau v. Smith*, 3 Mo. 260.

In *Pennsylvania*, there may be a partition between the widow and only child of one deceased intestate, if it can be made without prejudice to the estate. *Bishop's Appeal*, 7 W. & S. (Pa.) 251.

2. *Foster v. Foster*, 38 Hun (N. Y.) 365.

The wife of a tenant in common, however, need not join as plaintiff with him in an action to partition his property. She is a necessary party, but more fittingly a defendant than plaintiff. *Rosekrans v. White*, 7 Lans. (N. Y.) 486.

One of the heirs of an entire tract, of which a part has been assigned to the widow as dower, may compel partition of the residue. *West v. West*, 30 Ala. 458.

3. *Nolan v. Command*, 11 N. Y. Civ. Proc. Rep. 295.

4. *Shaw v. Beers*, 84 Ind. 528; *Brevoort v. Brevoort*, 70 N. Y. 139; *Ackley v. Dygest*, 33 Barb. (N. Y.) 189; *Van Arsdale v. Drake*, 2 Barb. (N. Y.) 600; *Jenkins v. Fahey*, 73 N. Y. 355; *Wills v. Slade*, 6 Ves. 498; *Baring v. Nash*, 1 Ves. & B. 551; *Gaskell v. Gasxell*, 6 Sim. 643; *Swain v. Hardin*, 64 Ind. 85; *Russell v. Russell*, 48 Ind. 156.

In *Hobson v. Sherwood*, 4 Beav. (Eng.) 184, the MASTER OF THE ROLLS said: "I cannot help regretting that

this suit should have been instituted; the plaintiff alone, who is tenant for life determinable on his second marriage, desires a partition, but the other parties desire to keep the estate together. If, however, the plaintiff is entitled to the relief he asks, he must have it however inconvenient it may be to the other owners. As co-tenant for life I apprehend there can be no question but that he is entitled to a partition; the question is whether the circumstance of his life estate being determinable on his second marriage makes any difference. As at present advised, I think it does not."

5. *Mussey v. Sanborn*, 15 Mass. 155; *Mitchell v. Starbuck*, 10 Mass. 5; *Savage v. Savage* (Oregon 1890), 23 Pac. Rep. 890.

In *Indiana*, the owner of a life estate in an undivided moiety of lands may maintain an action for their partition, and if necessary compel a sale as against the other tenants, some of whom are co-tenants of the fee. *Shaw v. Beers*, 84 Ind. 528.

A tenant in fee of a tract of land subject to a life estate in an undivided half of the land can have partition against the life tenant. *Allen v. Libbey*, 140 Mass. 82.

But a petition for partition will not be granted to one of two tenants in common who has leased the undivided interest of the other, agreeing to pay the insurance taxes and a stated rent during the term. The lessee does not need the aid of the law to sell his own interest, and has no right to invoke it for a sale of the lessor's. A partition reserving the lessor's rights under the lease would be impracticable. *Shillito v. Pullan*, 2 Disney (Ohio) 588.

against the other with respect to lands of which they are seised as co-tenants;¹ though equity has power to grant relief in such case.² If a married woman is a co-tenant with others, she may maintain the action, but as a general rule her husband should be joined with her as a co-plaintiff.³

Except where special statutory provisions have been made creating exceptions to the general rule, an infant co-tenant may institute action for partition in the same manner and by the use of the same means required for the enforcement of any other similar property right by an infant,⁴ and subject to special provisions designed for his protection, he will be as much bound and as little privileged as one of full age.⁵ But while the right of an adult to partition is absolute, that of an infant is only relative, and its exercise will be permitted by a court of chancery only when satisfied that in view of all the circumstances a partition will be for the best

1. *Howe v. Blanden*, 21 Vt. 315. And see *Marston v. Ward*, 35 Tex. 798.

2. *Moore v. Moore*, 47 N. Y. 468; 7 Am. Rep. 466; *Martin v. Martin*, 1 N. Y. 473; 1 Dan. Ch. Pr. 110; 1 Story Eq. Jur., §§ 61, 646, 1361.

3. See *Spring v. Sanford*, 7 Paige (N. Y.) 550. But see *Howe v. Blanden*, 21 Vt. 321; *Marston v. Ward*, 35 Tex. 798.

4. *Thornton v. Thornton*, 27 Mo. 307; *Shull v. Kennon*, 12 Ind. 34; *Bayhi v. Bayhi*, 35 La. Ann. 527; *Cocks v. Simmons*, 57 Miss. 183; *Wilson v. Duncan*, 44 Miss. 642; *Larned v. Renshaw*, 37 Mo. 458; *Mitchell v. Jones*, 50 Mo. 438; *Postley v. Kain*, 4 Sandf. Ch. (N. Y.) 509; *Clark v. Clark*, 14 Abb. Pr. N. S. (N. Y.) 299; 21 How. Pr. (N. Y.) 479; *In re Marsac*, 15 How. Pr. (N. Y.) 383; *Goudy v. Shanks*, 8 Ohio 415; *Burks v. Burks*, 7 Baxt. (Tenn.) 353; *Freeman v. Freeman*, 9 Heisk. (Tenn.) 301; *Zirkle v. McCue*, 26 Gratt. (Va.) 517; *Waugh v. Blumenthal*, 28 Mo. 462; *Larned v. Renshaw*, 37 Mo. 458. *Contra*, *Johnson v. Noble*, 24 Mo. 252.

In *Thornton v. Thornton*, 27 Mo. 307, the court, RICHARDSON, J., said: "It is the duty of every minister of the law to watch with jealous care the rights of infants; but human wisdom has not yet succeeded in providing a shield that will protect the weak and innocent against the strong and crafty, and it is not perceived how infants are more exposed to robbery and treachery when they are plaintiffs than when they are defendants. If an infant has no other means of support but an undivided in-

terest in real estate, it is often of great importance to him to have the power of forcing a partition and of securing the separate enjoyment of his share, for whilst it is held in common with an obstinate co-tenant it would not be productive in yielding a ground rent, nor in any other manner, and to deny him the right to have a partition would drive him to wait or to an application to the county court for a sale of his interest, and in that way produce the very result dictated by the cupidity of his tenant in common."

A decree for partition is not void because based on petition of an infant by his next friend, or because the infant was *non compos mentis*, or because the bond for the purchase money was made payable to the commissioner instead of the parties in interest. *Tate v. Bush*, 62 Miss. 145.

Under *Kentucky* Code, § 490, providing that land held jointly may be sold on application of plaintiff, though an infant, if division would materially impair the value of the land, or of plaintiff's interest where a widow, who is the statutory guardian of all her infant children but one, unites them as plaintiffs with her in a petition for the sale of land, the mother suing not only as guardian but also as next friend, all the parties are before the court, and it appearing that no division could be made without injury to each child's interest, the sale is properly ordered, and the title passed to the purchaser. *Henning v. Barringer* (Ky.), 10 S. W. Rep. 136.

5. *Brook v. Hertford*, 2 P. Wms. 519; *Cannon v. Hemphill*, 7 Tex. 202.

interests of the infant.¹ A substantial compliance with special statutory provisions for the protection of infants is necessary, but nothing more is required.²

b. JOINDER OF SEVERAL APPLICANTS.—Several co-tenants may elect to consider their moieties as one moiety and unite in an application for a separation of their moieties in common from the rest,³ but parties owning no interest in the premises, or not entitled to demand partition, cannot evade their disability by

But where devisees, who were, by the words of the will, to have possession when they should arrive at the age of 21 years, filed a bill for partition before becoming of age, the rights of the parties were declared, and the bill was retained with leave to the parties to apply for partition by petition when they should become of age. *Cole v. Creyon*, 1 Hill Eq. (S. Car.) 311; 26 Am. Dec. 208.

1. *Hartmann v. Hartmann*, 59 Ill. 104; *Lansing v. Gulick*, 26 How. Pr. (N. Y.) 252; *Clark v. Clark*, 14 Abb. Pr. (N. Y.) 300; 21 How. Pr. (N. Y.) 479; *Winchester v. Winchester*, 1 Head (Tenn.) 460.

In *Hartmann v. Hartmann*, 59 Ill. 104, in an application by the infant co-tenant for permission to bring an action for partition, the court, THORNTON, J., said: "We cannot perceive that it would be for the interest of the minors to grant the division. A decree in their favor would necessarily result in a sale, for the proof shows that there could be no partition. We cannot consent that this property, now safe from the fluctuations of prices, the exigencies of money lending, and the faithlessness of guardians, shall without any necessity be changed into a fund which may take wing and fly away; it may prove a grievous wrong to the children, of which we have no ambition to be guilty."

The purchaser under a decree in partition should be discharged from the purchase, if an infant who was plaintiff did not first obtain from the court authority to institute the proceedings, or if the infant acted by guardian without security. *Clark v. Clark*, 14 Abb. Pr. (N. Y.) 299; 21 How. Pr. (N. Y.) 479. 2. See *Henning v. Barringer* (Ky. 1886), 10 S. W. Rep. 136.

The omission of a guardian *ad litem*, appointed in proceedings for partition to file his bond according to the requisition of the statute, is an amendable irregularity, and does not affect the

jurisdiction nor the validity of the judgment sale. *Croghan v. Livingstone*, 17 N. Y. 218; 25 Barb. (N. Y.) 336.

By the act of *South Carolina* of 1748, in all cases where land shall be given or descend to any person in co-partenary, joint tenancy, or in common, such person or persons, as soon as of age, may apply to the circuit court for a writ of partition; and if any such persons, twelve months after becoming of age, neglect so to do, then the guardian of him or them not of age may apply; and, by the act of 1808, the circuit court has power to appoint guardians, besides its common law power of appointment *ad litem*. *Witherspoon v. Dunlap*, 1 McCord (S. Car.) 546.

But in *Tennessee*, upon a bill filed for the purpose of partitioning lands, in which a minor or minors have an interest, and to vest in the widow a title in fee to a portion of the land, including the mansion house, equal to a child's part of the land in lieu of dower, the minors must be made defendants; it would be error to make them complainants in such a cause. *Simpson v. Alexander*, 6 Coldw. (Tenn.) 619; and under the *New York Code of Procedure*, § 1534, an infant cannot be a plaintiff in a suit for partition, except by written authority of the surrogate of the county in which the land is situated. See *Postley v. Kain*, 4 Sandf. Ch. (N. Y.) 508; *In re Marsac*, 15 How. Pr. (N. Y.) 383. So, in *Illinois*, a petition for partition cannot be sustained by a guardian of an infant owner, if he has no interest in the land sought to be divided; the partition must show that it is the petition of the infant by his guardian. *Bowles v. McAllen*, 16 Ill. 30.

3. *Ladd v. Perley*, 18 N. H. 395; *Upham v. Bradley*, 17 Me. 423; *Choteau v. Paul*, 3 Mo. 263.

"A writ is not necessarily confined to mere joint tenants or mere tenants in common; it may so happen that several

joining with a competent co-tenant.¹ It has been maintained that all the co-tenants, being duly qualified, cannot unite in a demand on the court to effect a partition between them upon the ground that they could as well and effectually accomplish the end by agreement,² while on the other hand, the doctrine that a union of all the co-tenants as petitioners is proper, whenever they so elect, has been forcibly urged.³ The rule that a misjoinder of parties plaintiff is fatal to the maintenance of an action, is applicable to proceedings for partition.⁴ Any person having an undivided interest in real estate need not join others as plaintiffs; any may be made defendants.⁵

4. What Courts Have Jurisdiction.—In nearly, if not all, the States of the Union, jurisdiction of actions for partition has been vested in particular courts by statutory enactment.⁶ The juris-

persons may, as to a certain undivided proportion of the estate, be joint tenants, and as to the residue, be tenants in common; yet a writ may well be brought by one or more of them against their companions." Allnatt on Part. 3, citing *Rider v. Williamson*, And. Eng.) 42.

In *New York*, the wife of the plaintiff is, by virtue of her inchoate right of dower, a necessary co-plaintiff in proceedings in partition. *Ripple v. Milborn*, 8 How. Pr. (N. Y.) 456.

Where one of the parties applying to make a partition, under the *New York* act of March 16th, 1785, is an adult, the proceedings are valid, though the others are infants. *Jackson v. Woolsey*, 1 Johns. (N. Y.) 446.

1. *Power v. Power*, 7 Watts (Pa.) 55.

It is error to join in proceedings in partition one who has not a freehold in the land. *Mark v. Mark*, 9 Watts (Pa.) 410.

Common Law.—One seised of a moiety as tenant in common or joint tenant cannot join in one writ with a co-parcener. A co-parcener cannot have the writ by virtue of the statute, because he had a remedy. At common law the statute does not apply to her, and he joint tenant or tenant in common can only have the writ by virtue of the statute; hence the parceners must apply alone at common law or the joint tenant or tenant in common must apply alone under the statute. Allnatt on Part. 58.

2. *Swett v. Bussey*, 7 Mass. 504; *Bompart v. Roderman*, 24 Mo. 385.

In *Bompart v. Roderman*, 24 Mo. 385, the court, by SCOTT, J., said: "The statute contemplates that, in

suits for partition, there should be a plaintiff and a defendant. In all suits at common law there must be an actor and a *reus*. If parties come in voluntarily and ask a court to make a partition among them, and it is done, they will stand afterwards just as they did before the court interfered, so far as judicial sanction is concerned.

3. *Waugh v. Blumenthal*, 28 Mo. 462; *Larned v. Renshaw*, 37 Mo. 458; *Thornton v. Thornton*, 27 Mo. 302; 72 Am. Dec. 266.

Where a will requires an appraisement of the land, and directs that a partition among the children shall be made according to that appraisement without going into a court of law, the children will be entitled to a partition, notwithstanding the executor has failed to cause a partition to be made, as directed by the will. *Chouteau v. Paul*, 3 Mo. 260.

4. *Lockhart v. Power*, 2 Watts (Pa.) 372; *Power v. Power*, 7 Watts (Pa.) 205.

5. *Sample v. Sample*, 34 Kan. 73.

6. See the statutes of the different States. And see also *Mayer v. Hover*, 81 Ga. 308; *Hopkins v. Medley*, 97 Ill. 402; *Labadie v. Hewitt*, 85 Ill. 341; *Wilbridge v. Case*, 2 Ind. 36; *Havens v. Drake*, 43 Kan. 484; *Cheney v. Richards*, 43 Kan. 492; *Chamberlain v. Ballinger* (Ky. 1890), 13 S. W. Rep. 429; *Henning v. Barringer* (Ky. 1888), 10 S. W. Rep. 136; *Hopkins v. Crouch*, 86 Ky. 281; *Girty v. Logan*, 6 Bush. (Ky.) 8; *Gaithers v. Brown*, 7 B. Mon. (Ky.) 90; *Hardy v. Gregg* (Miss. 1887), 2 So. Rep. 358; *Irwin v. King*, 6 Ired. (N. Car.) 219; *Clawges v. Clawges*, 2 Miles (Pa.) 34; *Calland v. Conway*, 14 R. I. 9; *Seamster v. Black-*

diction thus conferred is not, as a general rule, exclusive, but is usually deemed to be cumulative, leaving the applicant to elect between the remedies so conferred and those which can be afforded him by a court of equity.¹ But in some of the States the statutory remedy is permitted to supplant equity jurisdiction,

stock, 83 Va. 232; *Davis v. Tebbs*, 81 Va. 600; *Rouston v. Rouston*, 21 Ga. 161; *Husband v. Aldrich*, 135 Mass. 317; *Spitts v. Wells*, 18 Mo. 468; *Pad-dock v. Shields*, 57 Miss. 340; *Patton v. Wagner*, 19 Ark. 233; *Dean v. Snel-ling*, 2 Heisk. (Tenn.) 484; *Dillard v. Crocker*, *Spears Eq. (S. Car.)* 20; *Fry v. Payne*, 82 Va. 759; *McKeon v. Kearney*, 57 How. Pr. (N. Y.) 349; *Johnson v. Murray*, 12 Lea (Tenn.) 109; *Brendel v. Klopp*, 69 Md. 1; *Hop-per v. Fisher*, 2 Head (Tenn.) 253; *Todd v. Cannon*, 8 Humph. (Tenn.) 512; *Rabb v. Aiken*, 2 McCord Eq. (S. Car.) 118; *Stewart v. Allegheny Nat. Bank*, 101 Pa. St. 343. And see also, JURISDICTION, vol. 12, p. 244.

The circuit court of the *United States* has jurisdiction, in a case between citi-zens of different States, to sustain a pe-tition for partition, according to the statutes of *Massachusetts* for partition of lands among tenants in common. *Ex parte Biddle*, 2 Mason (U. S.) 472.

A court of equity may rightly enter-tain a bill filed by an adult heir against the widow and infant heirs to obtain a sale and partition of the prop-erty of the deceased ancestor, and an account from the widow, who has been in possession of his portion of the rents and profits. *Lawes v. Lumpkin*, 18 Md. 334.

Where plaintiff in partition alleged that there was a verbal agreement be-tween himself and a deceased co-ten-ant, under whom defendants claimed, that the land should be divided in a particular manner, he alleged his willingness to abide by the agreement, to which defendant acceded, and the division was thus made. *Held*, that the court of common pleas of Knox county was not deprived of jurisdiction because of its lack of equity powers, as there was no equitable issue involved. *Chamberlain v. Ballinger* (Ky. 1890), 13 S. W. Rep. 429.

1. *Wilkinson v. Stuart*, 74 Ala. 203; *Patton v. Wagner*, 19 Ark. 233; *Lab-adie v. Hewitt*, 85 Ill. 341; *Wright v. Marsh*, 2 Greene (Iowa) 94; *Spitts v. Wells*, 18 Mo. 471; *Howey v. Go-ings*, 13 Ill. 95; 54 Am. Dec. 427;

60 Am. Dec. 655; *Thayer v. Lane*, Harr. (Mich.) 247; *Whitten v. Whit-ten*, 36 N. H. 322; *Hartshorne v. Hartshorne*, 2 N. J. Eq. 349; *Kennedy v. Kennedy*, 43 Pa. St. 413; *Donnell v. Mateer*, 7 Ired. Eq. (N. Car.) 94; *Baily v. Sissan*, 1 R. I. 233; *Dinkle v. Timrod*, 1 Desaus. (S. Car.) 109; *Grassmeyer v. Beeson*, 18 Tex. 753; *Hopper v. Fisher*, 2 Head (Tenn.) 253; *Castleman v. Veitch*, 3 Rand. (Va.) 598.

These statutory provisions, in some of the States, expressly provide that they are not intended to divest equity of its jurisdiction.

In *Whitten v. Whitten*, 36 N. H. 333, the court placed its decision upon the ground that there were "no nega-tive words in the statute providing for a partition upon petition, and the par-tition of real estate is an undoubted branch of equity jurisdiction.

In *Illinois*, the difference between the statutory and the chancery pro-ceeding in partition is so nice that the court, in order to uphold the jurisdic-tion in a collateral proceeding—as *sci. fa.* on a master's bond, for not pay-ing over money received on the sale—will refer the case to the law or chan-cery side of the court, as may be nec-essary. *People v. McLain*, 3 Ill. App. 27.

"The requirements of the statute, so far as they are especially, substituted for equity and common law proceed-ings, are paramount; but, beyond such special substitution, law and chancery interpose with unabated and general concurrent authority. Hence, we con-clude that even in cases of partition under our statute, the district court cannot be considered *quoad hoc*, as in-ferior or limited. The doctrine will not be questioned that the general jurisdiction of a court cannot be taken away unless by express words of ex-clusion. The statute in question has only enlarged and united powers, pre-viously existing in the court, and modified the proceedings previously existing under those powers, and there-fore there is no reason why the same liberal rule should not be applicable

unless the circumstances are such that a complete and adequate remedy cannot be afforded by the procedure provided by statute.¹ In any case, however, where the jurisdiction of one court has been rightfully invoked, no other court can by a subsequent assumption either divest the jurisdiction of the former court, or itself exercise any authority, unless peculiar and extraordinary circumstances render it unequitable to allow the parties to proceed at law.² As a general rule, jurisdiction in partition has been conferred upon courts having jurisdiction over other actions concerning real property. Where no statutory provision has been made for the partition of personal property, it can only be done in equity.³

a. OF WHAT LOCALITY.—The action of partition is a proceeding *in rem* and local in its nature,⁴ and can be maintained only in the immediate locality, usually in the county, in which the subject matter is situated.⁵ If situated in two or more

to support the presumption that the court acted correctly and by competent authority." *Wright v. Marsh*, 2 *Greene* (Iowa) 104.

1. *Husband v. Aldrich*, 135 *Mass.* 317; *Whiting v. Whiting*, 15 *Gray* (Mass.) 504; *Parmers v. Respass*, 5 *T. B. Mon.* (Ky.) 564; *Beeler v. Bullitt*, 3 *A. K. Marsh.* (Ky.) 283; 13 *Am. Dec.* 161; *Rutherford v. Jones*, 14 *Ga.* 521; *Royston v. Royston*, 13 *Ga.* 425; *Greer v. Henderson*, 37 *Ga.* 1; *Osborn v. Ordinary*, 17 *Ga.* 123; 63 *Am. Dec.* 230; *Bogg v. Chambers*, 9 *Ga.* 1.

These statutes, in some States, expressly provide that the jurisdiction conferred by them shall be exclusive.

In *Gates v. Salmon*, 35 *Cal.* 597; 95 *Am. Dec.* 139, the court, by RHODES, J., said: "There is no such thing, under our system of pleading and practice, as a suit in equity for partition, distinct from the proceeding provided for in the act."

In *Indiana*, petitions for partition under the statute are understood to be proceedings at law and not in equity. *Wilbridge v. Case*, 2 *Ind.* 36.

In *New York*, the old suit in equity for partition is merged in the civil action under the code, and as such may be prosecuted by summons and complaint. *Myers v. Rasback*, 4 *How. Pr.* (N. Y.) 83. The only remedies now remaining are the action under the code and the old petition. *Row v. Row*, 4 *How. Pr.* (N. Y.) 133. And see *Ripple v. Gilborn*, 8 *How. Pr.* (N. Y.) 456; *Jennings v. Jennings*, 2 *Abb. Pr.* (N. Y.) 6.

Grounds for Equity Jurisdiction.—A bill for a partition of lands, alleging a complicated state of facts, as well as fraud in the sale of the lands, shows sufficient ground for equity to take jurisdiction. *Greer v. Henderson*, 37 *Ga.* 1.

2. *Wilkinson v. Stuart*, 74 *Ala.* 198; *Waring v. Lewis*, 53 *Ala.* 615; *Moore v. Lesueur*, 33 *Ala.* 237; *King v. Smith*, 15 *Ala.* 270. And see *Smith v. McIver*, 9 *Wheat.* (N. Y.) 532; *Hines v. Rawson*, 40 *Ga.* 356; *Hause v. Hause*, 57 *Ala.* 263; *Nelson v. Dunn*, 15 *Ala.* 501.

3. *Crapster v. Griffith*, 2 *Bland.* (Md.) 5; *Marshall v. Crow*, 29 *Ala.* 278; *Hewitt's Case*, 3 *Bland* (Md.) 184; *Tinney v. Stebbins*, 28 *Barb.* (N. Y.) 290. And see *Smith v. Dunn*, 27 *Ala.* 316; *Conover v. Earl*, 26 *Iowa* 167; *Swain v. Knapp*, 32 *Minn.* 429; *Tripp v. Riley*, 15 *Barb.* (N. Y.) 334; *Fobes v. Shattuck*, 22 *Barb.* (N. Y.) 568; *Edwards v. Bennett*, 10 *Ired.* (N. Car.) 363; *Weeks v. Weeks*, 5 *Ired. Eq.* (N. Car.) 118; 47 *Am. Dec.* 358; *Smith v. Smith*, 4 *Rand.* (Va.) 102; *Godfrey v. White*, 60 *Mich.* 443.

4. *Corwithe v. Griffing*, 21 *Barb.* (N. Y.) 9.

5. *Phelps v. Stewart*, 17 *Md.* 231; *Johnson v. Kimbro*, 3 *Head* (Tenn.) 557; 75 *Am. Dec.* 781; *Wimer v. Wimer*, 82 *Va.* 890. And see *Brown v. McMullen*, 1 *Nott & M.* (S. Car.) 252; *Den v. Kelty*, 16 *N. J. L.* 517; *Yount v. Yount*, 15 *Mo.* 383; *Varian v. Stevens*, 2 *Duer* (N. Y.) 635.

Provisions with reference to locality are statutory in nearly, if not quite all,

counties, it may usually be brought in either or any of the counties,¹ but in no case can the courts of one State partition lands lying in another,² even though a part of the tract lies in the former State.³ The right to object to the prosecution of the action in a wrong county or locality, however, may be waived by agreement or lost by neglect,⁴ and the theory has some standing that lands abroad may be partitioned where the defendant is a resident and within the jurisdiction of the court within which the action is brought, by an exercise of its power *in personam* and not merely *in rem*,⁵ but in such case nothing more than a conveyance of the legal title can be effected.⁶

Jurisdiction in partition is governed by location irrespective of the residence of the parties interested,⁷ though statutory steps

the States; but the above rule has been adopted with great uniformity.

The jurisdiction of chancery in proceedings for partition, when any of the defendants are non-residents, depends entirely upon statute, which must be strictly construed. All the preliminary requisitions must be strictly complied with, and the necessary facts to confer jurisdiction must appear affirmatively upon the record. *Platt v. Stewart*, 10 Mich. 260.

1. *Den v. Kilty*, 16 N. J. L. 517. And see the statutes of the different States.

Where, in a suit for partition, defendants claim title to an undivided two-thirds of the land, and plaintiff admits their title to only one-half, as to the difference between two-thirds and one-half, it is an action of trespass to try title, of which the court of another county has no jurisdiction. *Peterson v. Fowler*, 73 Tex. 524.

Under the statute of *Missouri*, regulating partition, the circuit court has no jurisdiction to make partition of land situated in another county, unless it is divided by a county line, or all the parties in interest are adults and parties to the petition. *Yount v. Yount*, 15 Mo. 383. And in *South Carolina*, writs of partition can only issue in those districts where the lands lie; and, where they are lands in several districts, several writs must issue. *Brown v. McMullen*, 1 Nott & M. (S. Car.) 252.

2. *Johnson v. Kimbro*, 3 Head (Tenn.) 557; 75 Am. Dec. 781; *Wimer v. Wimer*, 82 Va. 890; *Cartaret v. Petly*, 2 Swanst. 323, note; *Roberdeau v. Rous*, 1 Atk. 544; *Poindexter v. Burwell*, 82 Va. 507; *Story's Eq. Jur.*, § 1296.

3. *Wimer v. Wimer*, 82 Va. 890.

4. See *Bowen v. Durant*, 6 N. Y. St. Rep. 535; *Kimball v. Mapis*, 19 N. Y. Week. Dig. 481.

5. See *Dickinson v. Hoomes*, 8 Gratt. (Va.) 353; *Barger v. Buckland*, 28 Gratt. (Va.) 850; *Humphrey v. McClenachan*, 1 Munf. (Va.) 493; *Farley v. Shippen*, Wythe (Va.) 135; *Massie v. Hatts*, 6 Cranch (U. S.) 148; *Story Eq. Jur.*, § 1292.

In *Muller v. Downs*, 94 U. S. 444, the court, by STRONG, J., said: "It is, undoubtedly, a recognized doctrine that a court of equity sitting in a State, and having jurisdiction of the person, may decree a conveyance by him of lands in another State, and may enforce the decree of process against the defendant. True, it cannot send its process into that other State, nor can it deliver possession of land without its jurisdiction, but it can command and enforce a transfer of the title."

"It is not competent for the court to decree touching a foreign subject when the act to be done can be accomplished and prevented only by authority operating territorially. Thus, a conveyance may be decreed of lands abroad, if the defendant is within the jurisdiction; but not a partition of lands as between joint-tenants, tenants in common, or co-heirs." 4 *Minor's Inst.* 1201.

6. *Muller v. Downs*, 94 U. S. 444; *Wimer v. Wimer*, 82 Va. 890; *Davis v. Headley*, 22 N. J. Eq. 115; 4 *Minor's Inst.*, p. 1201.

If the relief cannot be administered by a decree *in personam*, without going farther and acting upon the land, the court will refuse to entertain the bill. *Wimer v. Wimer*, 82 Va. 890.

7. *Varian v. Stevens*, 2 Duer (N. Y.)

required to confer jurisdiction over non-resident defendants must be accurately and literally followed,¹ and in any case jurisdiction is conferred to the subject matter set forth in the petition or bill.²

b. EFFECT OF TITLE COMING IN QUESTION.—The object of an action for partition was formerly considered to be to turn an estate in possession in common into an estate in severalty, and not to furnish a mode of settling conflicting titles;³ and as a general rule where the jurisdiction has not been extended by statutory enactment, conflicting claims of title bar a recovery in that form of action.⁴ The legal title must first be established in an

635. And see *Platt v. Stewart*, 10 Mich. 260; *Corwith v. Griffing*, 21 Barb. (N. Y.) 9.

1. *Platt v. Stewart*, 10 Mich. 260. And see *Shivers v. Wilson*, 5 Har. & J. (Md.) 130; 9 Am. Dec. 497; *Foot v. Stevens*, 17 Wend. (N. Y.) 488; *Denning v. Corwin*, 11 Wend. (N. Y.) 647; *Gallatian v. Cunningham*, 8 Cow. (N. Y.) 370; *Eastman v. Jones*, 2 Yerg. (Tenn.) 493; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119.

2. *Corwith v. Griffing*, 21 Barb. (N. Y.) 9.

3. *Brook v. Eastman*, 28 Vt. 660; 67 Am. Dec. 733. And see *London v. Overley*, 40 Ark. 155; *McCall v. Carpenter*, 18 How. (U. S.) 297; *Horton v. Sledge*, 29 Ala. 478; *Walker v. Laffin*, 26 Ill. 472; *Foust v. Moor-*

man, 2 Ind. 17; *Manners v. Manners*, 2 N. J. Eq. 384; *Dewitt v. Ackerman*, 17 N. J. Eq. 215; *Hay v. Estell*, 18 N. J. Eq. 251; *Obert v. Obert*, 10 N. J. Eq. 98; *Wilkin v. Wilkin*, 1 Johns. Ch. (N. Y.) 111.

In *London v. Overley*, 40 Ark. 155; citing *Gault's Dig.*, § 4308, the court, by SMITH, J., said: "Partition was originally only a possessory action. It left the title where it found it. It lies only for those who are in possession as joint-tenants, tenants in common, or co-parceners."

The question of title is not one for an issue out of chancery, but one of law for a jury." *Carrigan v. Evans*, 31 S. Car. 262.

4. *Law v. Patterson*, 1 W. & S. (Pa.) 184; *Moore v. Gordon*, 44 Ark. 334; *London v. Overley*, 40 Ark. 155; *Mattair v. Payne*, 15 Fla. 682; *Overton v. Woolfolk*, 6 Dana (Ky.) 371; *Rickard v. Rickard*, 13 Pick. (Mass.) 251; *Hardy v. Gregg* (Miss. 1887), 2 So. Rep. 358; *Gravier v. Ivory*, 34 Mo. 522; *Matthewson v. Johnson*, 1 Hoffm. Ch. (N. Y.) 560; *Maxwell v. Max-*

well, 8 Ired. Eq. (N. Car.) 25; *Simpson v. Wallace*, 83 N. Car. 477; *Longwell v. Bentley*, 3 Grant. Cas. (Pa.) 177; 2 Phila. (Pa.) 157; *Carrigan v. Evans*, 31 S. Car. 262; *Johnson v. Britt*, 9 Heisk. (Tenn.) 756; *Seymour v. Ricketts*, 21 Neb. 240; *Windsor v. Simpkins* (Oregon 1890), 23 Pac. Rep. 669; *Criscoe v. Hambrick*, 47 Ark. 235. And see *Fennell v. Tucker*, 49 Ala. 453; *Miller v. Chittenden*, 2 Iowa 315; *Tupperry v. Hertung*, 46 Mo. 135; *Obert v. Obert*, 12 N. J. Eq. 423; *Wainman v. Hampton*, 110 N. Y. 429; *McGill v. Buie*, 106 N. Car. 242; *Dillard v. Crocker*, *Spears' Eq.* (S. Car.) 20; *Williams v. Wiggand*, 53 Ill. 233; *Leverton v. Waters*, 7 Coldw. (Tenn.) 20; *Gourley v. Woodbury*, 43 Vt. 89; *Baum v. Stern*, 1 S. Car. 415.

In *Tennessee*.—Under §§ 2949, 3266, 4201, 4204 and 4321, of the Code, defining the jurisdiction of the county courts, they have no jurisdiction of a case of partition where the settlement of the title is a necessary preliminary to the adjudication. *Dean v. Snelling*, 2 Heisk. (Tenn.) 484.

A bill for partition of land will not be sustained which states a legal controversy between the plaintiff and the defendant. *Maxwell v. Maxwell*, 8 Ired. Eq. (N. Car.) 25.

Construction of Will.—An action of partition, where plaintiff's right to a partition depends on the construction of a will, was held to be improperly dismissed as in the nature of an ejectment or trespass to try title, and so involving the title to real estate. *McGee v. Hall*, 23 S. Car. 388.

This rule that a bill in equity for partition should be dismissed where the title is denied, or an adverse possession asserted, and the parties left to establish their rights at law, is questioned in *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169.

appropriate action,¹ and for this purpose a court may retain the bill or petition for a reasonable time for its determination at law.² This, however, is a matter of discretion,³ and where it is apparent to the court from the whole record that the applicant for partition has no interest in the premises such relief will be denied.⁴

Judgment of ejectment is decisive of the legal title, and a single recovery is sufficient to sustain a bill for partition.⁵

The possession of one co-tenant, however, being presumed to be that of all, no adverse possession short of an absolute disseisin and a total exclusion will raise such an issue of title as will bar an action of partition;⁶ and where an equitable title is set up or where the title of the applicant is attached on equitable

1. *Trapwall v. Hill*, 31 Ark. 345; *Criscoe v. Hambrick*, 47 Ark. 235; *Moore v. Gordon*, 44 Ark. 334; *Mattair v. Payne*, 15 Fla. 682; *Seymour v. Ricketts*, 21 Neb. 240; *Hoyt v. Tuers*, 35 N. J. Eq. 360; *Lambert v. Blumenthal*, 26 Mo. 471; *Jenkins v. Van Schaack*, 3 Paige (N. Y.) 242. See *Beeler v. Bullitt*, 3 A. K. Marsh. (Ky.) 280; 13 Am. Dec. 161; *Parmer v. Respass*, 5 T. B. Mon. (Ky.) 562; *Martin v. Smith*, 1 Harp. Eq. (S. Car.) 106.

2. *Criscoe v. Hambrick*, 47 Ark. 235; *London v. Overley*, 40 Ark. 155; *Horton v. Sledge*, 29 Ala. 478; *Hoyt v. Tuers*, 35 N. J. Eq. 360; *Walker v. Lafin*, 26 Ill. 472; *Foust v. Moorman*, 2 Ind. 17; *Mattair v. Payne*, 15 Fla. 682; *Nash v. Simpson*, 78 Me. 142; *Boone v. Boone*, 3 Md. Ch. 497; *Fales v. Fales*, 148 Mass. 42; *Fenton v. Steere*, 76 Mich. 405; *Hoffman v. Beard*, 22 Mich. 59; *Manners v. Manners*, 2 N. J. Eq. 384; *Dewitt v. Ackerman*, 17 N. J. Eq. 215; *Hay v. Estell*, 18 N. J. Eq. 251; *Obert v. Obert*, 10 N. J. Eq. 98; *Wilkin v. Wilkin*, 1 Johns. Ch. (N. Y.) 111; *Garrett v. White*, 3 Ired. Eq. (N. Car.) 31; *Straughan v. Wright*, 4 Rand. (Va.) 493; *Simpson v. Wallace*, 84 N. Car. 477; *Curran v. Sprauell*, 10 Gratt. (Va.) 145; *Hardy v. Mills*, 35 Wis. 144; *Chapin v. Sears*, 18 Fed. Rep. 814; *McCall v. Carpenter*, 18 How. (U. S.) 297; *Slade v. Barlow*, L. R., 7 Eq. 296; *Giffard v. Williams*, L. R., 5 Ch. 546.

Where it appears from the answer that there is an outstanding lease on the property, the validity of which is contested, the bill should be withheld for a reasonable time until the question of the lease is determined. *Brendel v. Klopp*, 69 Md. 1.

How Long.—Where defendant in partition denies complainant's title, it is

proper to stay proceedings in the suit for a year, so that complainant may establish his title by an action in ejectment. *Brown v. Cranberry Iron etc. Co.*, 20 Fed. Rep. 849.

3. *London v. Overley*, 40 Ark. 155. And see *Boone v. Boone*, 3 Md. Ch. 497; *Chapin v. Sears*, 18 Fed. Rep. 814.

Where a complainant seeking a partition goes to final hearing upon the merits of his case, the court will not, of its own motion, retain his bill to give him an opportunity for establishing his title at law; if he desires his bill retained for that purpose, he should apply for leave to establish his title. *Hassam v. Day*, 39 Miss. 392; 77 Am. Dec. 684.

4. *Seymour v. Ricketts*, 21 Neb. 240. 5. *Obert v. Obert*, 12 N. J. Eq. 423; *Blyman v. Brown*, 2 Vern. 232.

6. *Florence v. Hopkins*, 46 N. Y. 182; *Boyd v. Dowie*, 65 Barb. (N. Y.) 237; *Hitchcock v. Skinner*, Hoffm. Ch. (N. Y.) 21; *German v. Machin*, 6 Paige (N. Y.) 288; *Rickard v. Rickard*, 13 Pick. (Mass.) 251; *Hulse v. Hulse* (Supreme Ct.), 5 N. Y. Supp. 747; *Holloway v. Holloway*, 97 Mo. 628; *Welch's Appeal*, 126 Pa. St. 297; *Rich v. Bray*, 37 Fed. Rep. 273. And see also, *JOINT TENANTS*, vol. 11, p. 1057.

Possession of land of an ancestor as administrator, or as one of the tenants in common, is not adverse, and does not prevent partition. *Wainman v. Hampton*, 110 N. Y. 429. Seisin in the ancestor and descent to the heir are sufficient, *prima facie*, to vest both title and possession. Hence, a petition, in a suit for partition, which alleges those facts will, if the facts be uncontroverted by the answer, warrant a decree. *Tupper v. Hertung*, 46 Mo. 135.

rounds, the court will dispose of the whole controversy,¹ as it will also in cases in which it has assumed jurisdiction, upon some clearly defined ground of equity jurisdiction.²

In a large number of the States, because of the inconvenience of this restriction, or otherwise, the original possessory character

A petition for partition, which admits that defendant is in possession, claiming the share of one co-tenant, but does not admit that he claims to be sole seised, does not impliedly admit that defendant resists petitioner's claims, and is not demurrable as not alleging that petitioners are in possession, as defendant's possession is that of his co-tenants. *McGill v. Buie*, 106 N. Car. 242.

If one of the parties has conveyed his interest, by ante-nuptial contract to his wife, and a chancery suit is pending between them, involving the validity of the settlement, this does not make the wife's claim adverse to the other parties, nor interpose any obstacle to a sale. *Fennell v. Tucker*, 19 Ala. 452.

1. *Read v. Huff*, 40 N. J. Eq. 229; *Appeal of Hayes*, 123 Pa. St. 110; *Coxe v. Smith*, 4 Johns. Ch. (N. Y.) 271; *Lucas v. King*, 10 N. J. Eq. 277; 3 Pom. Eq. Jur., § 1385; *Story's Eq. Jur.*, § 653; *Goodman v. Sapp*, 102 N. Car. 477; *German v. Machin*, 6 Paige (N. Y.) 288; *Barrell v. Barrell*, 28 N. J. Eq. 173.

2. *Trapnall v. Hill*, 31 Ark. 345; *Davis v. Whittaker*, 38 Ark. 435; *Hankins v. Layne*, 48 Ark. 544; *Dameron v. Jameson*, 71 Mo. 97; *Rozier v. Griffith*, 31 Mo. 171; *Overton v. Woolfolk*, 6 Dana (Ky.) 371; *Scott v. Guernsey*, 60 Barb. (N. Y.) 178; *Howey v. Goings*, 13 Ill. 108; 54 Am. Dec. 427; *Hosford v. Merwin*, 5 Barb. (N. Y.) 62; *Appeal of Hayes*, 123 Pa. St. 110; *Jarrett v. Johnson*, 11 Gratt. (Va.) 327.

The *Mississippi Code*, § 2576, provides that, "if the title of the complainant seeking partition or sale of land for a division of its proceeds shall be controverted, it shall not be necessary for the court to dismiss the bill, or delay the suit for an action at law to try the title, but the question of title shall be tried and determined in said suit by the chancery court, which shall have power to determine all questions of title, and to remove clouds upon the title of any of the lands whereof partition is sought," etc.

Held, that this section does not authorize a tenant in common to make defendants to his bill for partition persons claiming adversely to all the tenants in common. *Beebe v. Louisville etc. R. Co.*, 39 Fed. Rep. 481.

Where, in a suit for partition, defendants claim title to an undivided two-thirds of the land, and plaintiff admits their title to only one-half, the suit is, as to the difference between two-thirds and one-half, an action of trespass to try title, of which the court of another county has no jurisdiction. *Peterson v. Fowler*, 73 Tex. 524.

In an action to set aside a conveyance of a married woman of her separate estate to her husband and a son, on the ground that the husband had not joined in the deed, when it appears that the husband is dead, and his interest in the land of his wife is thereby terminated, a partition among her heirs is proper. *Trawick v. Davis*, 85 Ala. 342.

Agreement to Submit.—Even if the court will not generally act upon equitable titles in a petition for partition, yet it will investigate and determine them, if the parties have substantially agreed that the equitable questions presented in the case shall be determined. *Miller v. Chittenden*, 2 Iowa 315.

In *New York*, an action may be maintained by an heir who is entitled as joint tenant, or tenant in common, to real estate by reason of the death of his ancestor, whether in or out of possession, to set aside and declare void a devise of such real estate, and for a partition of it. See *Greene v. Greene*, 23 N. Y. St. Rep. 869; *Voesing v. Voessing*, 12 Hun (N. Y.) 678; *Hewlett v. Wood*, 62 N. Y. 75; *Ward v. Ward*, 23 Hun (N. Y.) 431; *Wager v. Wager*, 23 Hun (N. Y.) 439; *Hall v. Hall*, 13 Hun (N. Y.) 306; *Malaney v. Cronin*, 44 Hun (N. Y.) 270. But it must appear that the invalidity extends to the whole will or to the entire devise of real property. *McKeon v. Kearney*, 57 How. Pr. (N. Y.) 349.

of the action has been ignored, and now the whole matter of title and of the rights of the parties in the premises may be determined and a partition ordered whenever the plaintiff shows himself seised of the requisite title, whether the land is held or claimed adversely to him or not.¹

c. JURISDICTION OF PROBATE COURTS.—Power has been conferred upon probate courts by statute in some of the States to make partition of the estates of decedents as an incident to their general probate jurisdiction in the settlement of such estates.²

1. *Bonham v. Weymouth*, 39 Minn. 92; *Keil v. West*, 21 Fla. 508; *Cooter v. Baston*, 89 Ind. 185; *Fleenor v. Driskill*, 97 Ind. 27; *Ferris v. Reed*, 87 Ind. 123; *Miller v. Noble*, 86 Ind. 527; *McMahan v. Newcomer*, 82 Ind. 565; *Milligan v. Poole*, 35 Ind. 64; *Godfrey v. Godfrey*, 17 Ind. 6; *Oldham v. Jones*, 5 B. Mon. (Ky.) 458; *Henderson v. Lawrence* (N. J. 1889), 18 Atl. Rep. 774. And see *Bayha v. Kessler*, 79 Mo. 555; *Haggin v. Haggin*, 2 B. Mon. (Ky.) 317; *Morenhout v. Higuera*, 32 Cal. 289; *Bollo v. Navarro*, 33 Cal. 459; *Ormond v. Martin*, 37 Ala. 598; Ala. Sel. Cas. 526; *Griffin v. Griffin*, 33 Ga. 107; *Godfrey v. Godfrey*, 17 Ind. 6.

Where a portion of a tract of land, owned by tenants in common, had been adversely held until the right of all, except one, who was a minor during such adverse possession, were barred,—the assignment, by judicial partition, of the part so adversely held, to the minor, does not vest him with his entire interest therein, but only his aliquot share thereof. *Wade v. Johnson*, 5 Humph. (Tenn.) 117; 42 Am. Dec. 422.

The adoption of this rule has been effected either by statute or by statutory construction in some States. See *Marshall v. Crehor*, 13 Met. (Mass.) 462; *Faust v. Bailey*, 5 Rich. (S. Car.) 107; *Johnson v. Murray*, 12 Lea (Tenn.) 109; *O'Leary v. Durant*, 77 Tex. 409; *Fry v. Payne*, 82 Va. 759; *Martin v. Walker*, 58 Cal. 590.

Heirs seeking to recover property from persons claiming title, and to subject it to a trust in their favor, may do so appropriately by a proceeding in equity for partition. *Breit v. Yeaton*, 101 Ill. 242.

The *Illinois* statute is comprehensive, and confers power to determine rights under the same chain of title or under conflicting titles. And the plaintiff may have a cloud on his title

set aside, or, if not entitled to this relief, may have partition, if he is entitled to that. *Gage v. Bissell*, 119 Ill. 298. And all known claims and titles to the premises of which partition is sought may be investigated without regard to their source. It is not true that no title can be examined but that in the line in which the tenants in common claim. In order, however, to bring a title before the court the bill must state its nature, if known, and must pray for a decree in reference to it. *Gage v. Reid*, 104 Ill. 509; *Luntz v. Greve*, 102 Ind. 173. So in *Indiana*.

Issue to Try Title.—In partition of land among heirs-at-law, where the question of title was raised by some of the defendants, who claimed title by purchase, without notice, from a third person, and were in nowise connected with the estate, the case could be treated as an issue to try title. *Brock v. Nelson*, 29 S. Car. 49.

Right of Entry.—Equity will take jurisdiction to decree partition of lands the title to which is strictly legal, though they are held adversely to complainant, he having neither actual nor constructive possession, if he has an immediate right of entry. *McMath v. De Bardelaben*, 75 Ala. 68.

2. See *Sigourney v. Sibley*, 21 Pick. (Mass.) 101; 32 Am. Dec. 248; *Bal-lard v. Johns*, 83 Ala. 70; *Stimpson v. Malone*, 60 Ala. 338; *Staples Appeal*, 52 Conn. 421; *Ott v. Sprague*, 27 Kan. 620; *Succession of Bailly*, 30 La. Ann. (pt. 2), 1032; *Ex parte Stockman*, 1 La. Ann. 228; *Pond v. Pond*, 13 Mass. 413; *Bemis v. Stearns*, 16 Mass. 200; *Hurley v. Hamilton*, 37 Minn. 160; *Pickering v. Pickering*, 21 N. H. 537; *Billups v. Riddick*, 8 Jones (N. Car.) 163; *Small's Appeal* (Pa. 1888), 15 Atl. Rep. 767; *Wistar's Appeal*, 115 Pa. St. 241; *Flaherty's Estate*, 5 Phila. (Pa.) 477; *Crompton v. Ulmer*, 2 Nott & M. (S. Car.) 429;

Such jurisdiction is dependent upon the probate jurisdiction of the court in the same matter, and if that proves to be defective, the former must fail also¹ and must be exercised while the court still has jurisdiction for probate purposes.² This jurisdiction does not extend to cases of partition between devisees or heirs and third persons, where one transferred his share or otherwise,³ nor to the partition in one proceeding of two estates held in

Gates v. Irick, 2 Rich. (S. Car.) 593, note; Ellis v. Rhone, 17 Tex. 131; Branch v. Hanrick, 70 Tex. 731; Cochran v. Schoenberger, 33 Fed. Rep. 397; Robinson v. Fair, 128 U. S. 53; Earl v. Rowe, 35 Me. 414; 58 Am. Dec. 714; Cox v. Ingleston, 30 Vt. 258; Cheney v. Richards, 43 Kan. 492; Havens v. Drake, 43 Kan. 484.

A petition for partition against an executor for a filial portion, etc., will not lie for money or other property delivered by him to a legatee for life. Billups v. Riddick, 8 Jones (N. Car.) 163.

Only In Intestacy.—The act of *South Carolina* of 1791 gives the court of common pleas the power to grant writs of partition only in cases of intestacy. Crompton v. Ulmer, 2 Nott & M. (S. Car.) 429.

"By the proceedings to settle the estate of the decedent, all parties in interest are brought before the court, and their respective shares definitely and conclusively ascertained and established, and thereby are attained some of the ends usually sought by a suit for partition. The convenience of proceeding from this point without turning the parties over to some other tribunal is so obvious that, in many of the States, the court having jurisdiction over the estate of decedents is authorized to make complete partition thereof among the heirs, devisees and other beneficiaries. The jurisdiction thus established is scarcely second to any in importance, and we therefore exceedingly regret that the statutes regulating its exercise are so general in their terms, and the decisions interpreting them are so infrequent that the practitioner must proceed almost without a guide, unless we regard him as at liberty to pursue the general rules applicable to proceedings for partition conducted in other courts." Freem. on Part., §§ 550.

1. Sigourney v. Sibley, 21 Pick. (Mass.) 101; 32 Am. Dec. 248.

2. Cox v. Ingleston, 30 Vt. 258; Hurley v. Hamilton, 37 Minn. 160; El-

lis v. Rhone, 17 Tex. 131; Collamer v. Hutchins, 27 Vt. 733.

Partitions of succession property, in which a minor is interested, can only be made by the court in which the succession was opened. *Ex parte* Stockman, 1 La. Ann. 228.

In *Maine* and *Pennsylvania*, however, the partition of real estate among heirs and devisees may be made by the probate court, as occasion calls, long after the settlement of an estate. Earl v. Rowe, 35 Me. 414; 58 Am. Dec. 714; Merklein v. Trapnell, 34 Pa. St. 42; 75 Am. Dec. 634.

3. Pond v. Pond, 13 Mass. 413; Romig's Appeal, 8 Watts (Pa.) 415.

The orphans' court in *Pennsylvania*, however, upon the petition of the widow, has jurisdiction to award an inquest to make partition of the real estate of an intestate between the widow and the sole heir of the intestate, or between the widow and the alienee of the heir, and may proceed to decree a sale, and under it to secure the widow's interest upon the property by making it a charge thereon in the hands of the purchaser. Steel's Appeal, 86 Pa. St. 222.

And the statutes in some of the States authorize the court to separate the shares of the heirs or devisees from those of strangers; and in some they are authorized to make a complete partition. See Stewart v. Allegheny Nat. Bank, 101 Pa. St. 312.

In *Massachusetts*, a judge of probate is not authorized to cause partition of the share of one heir or devisee, leaving the others tenants in common; but he may cause the whole land to be divided among all the heirs and devisees. Arms v. Lyman, 5 Pick. (Mass.) 210. In *Alabama*, the jurisdiction of the probate court in a proceeding under the Code, for partition, is not affected by the fact that the interests of the owners are unequal, and partition by lot impracticable. Stimpson v. Malone, 60 Ala. 338. And in *Louisiana*, a suit for the partition of property which belongs in part to minors

common by the same parties as the heirs of two different persons.¹

As a general rule, probate jurisdiction of partition can be exercised only when there is no dispute as to the share or title of each,² but the mere fact that they do not agree as to their rights is not enough to oust the court of jurisdiction; it must appear that there is a real doubt and uncertainty as to the legal rights of the parties,³ and where the dispute or uncertainty arises after the court has assumed jurisdiction and proceeded with the partition, it will be retained to completion.⁴

The jurisdiction of this court may be invoked, as a general rule, by any person entitled to a share of the estate to be partitioned, or, in some States, by a grantee of such party without reference to possession;⁵ but if the decedent did not die seised, the jurisdiction cannot attach.⁶ This jurisdiction, though an incident of the settlement of estates, is not exclusive, and the applicant for partition may elect to proceed in a court of general

and in part to majors does not fall within probate jurisdiction. *Benedict v. Florat*, 30 La. Ann. (pt. 2), 1337.

1. *Snyder's Appeal*, 36 Pa. St. 166; and see *Romig's Appeal*, 8 Watts (Pa.) 415.

The probate court has no jurisdiction of a suit brought by the heirs of one succession against the executor of another succession, for a partition of property which belongs, in certain undivided proportions, to both successions. *Boutté v. Boutté*, 30 La. Ann. (pt. 1), 177. And a partition suit by an executor against the undivided half owner of plantation property, the other half of which is owned by the succession, does not involve probate matters, and is not within the jurisdiction of a probate court, wherein the succession was opened in another parish than that in which the property is situated. *Succession of Baily*, 30 La. Ann. (pt. 2), 1032.

2. *Kelley v. Kelley*, 41 N. H. 503; *Gage v. Gage*, 29 N. H. 533; *Ballard v. Johns*, 84 Ala. 70; *Small's Appeal* (Pa.), 15 Atl. Rep. 767; *Flaherty's Estate*, 5 Phila. (Pa.) 477. And see *Staple's Appeal*, 52 Conn. 421.

The orphan's court of *Pennsylvania* has no jurisdiction to decree partition among heirs where one of the heirs claims to hold a part of the land in severalty, and it makes no difference that such heir consents to the proceedings, if he objects before confirmation. *Eell's Estate*, 6 Pa. St. 457.

Upon a petition for partition to the probate court, a verbal statement by

one of the parties, in the probate court, that the title was in dispute, and afterwards filed in writing in that court before the appointment of a committee to make partition, is sufficient to oust the probate court of jurisdiction in the matter. *Pickering v. Pickering*, 21 N. H. 537.

3. *Wistar's Appeal*, 115 Pa. St. 241; *Dearborn v. Preston*, 7 Allen (Mass.) 192. A final decree of a probate court making distribution of an estate is, until reversed, an investiture of the absolute right and title to the same in the distributees. *In re Garrard* 36 Cal. 277; and see *Freeman v. Rahm*, 58 Cal. 111.

4. *Potter v. Hazard*, 11 Allen (Mass.) 187.

5. *Eckert v. Lyon*, 2 Rawle (Pa.) 136; *De Castro v. Barry*, 18 Cal. 99; *Stewart's Appeal*, 56 Pa. St. 241; *Rankin's Appeal*, 95 Pa. St. 358.

In *Pennsylvania*, under the act of 1883, the widow of a son has an interest in the real estate of the decedent, and is entitled to apply to the probate court for partition. *Cotes' Appeal*, 79 Pa. St. 235.

6. *Law v. Patterson*, 1 W. & S. (Pa.) 184; *McMasters v. Carothers*, 1 Pa. St. 324; *Galbraith v. Green*, 13 S. & R. (Pa.) 93.

The orphan's court has no jurisdiction in a case of partition, where the intestate was tenant in common with another at the time of his death, though the other tenant assent. *Romig's Appeal*, 8 Watts (Pa.) 415.

jurisdiction, though the case be one cognizable in that court.¹

When the lands of the intestate descend subject to dower or homestead or other life estate, probate jurisdiction cannot, as a general rule, attach until the termination of the particular estate.²

5. Commencement of the Action—*a.* WITHIN WHAT TIME.—The possession of one co-tenant being that of the others, the statute of limitations is not applicable to actions for a separation of their interests.³ In many of the States, however, an action for partition may be maintained where one co-tenant has disseised and totally excluded another and holds adversely to him;⁴ and as the statute of limitations operates in favor of the adverse possession of one tenant against another and begins to run from the time of the ouster,⁵ it would appear from analogy that in cases of adverse holding the action would be barred by the expiration of the time limited in the statute, after the ouster and total exclusion.⁶

b. HOW COMMENCED.—Where partition is sought by action, the court must in some regular way have acquired jurisdiction of the parties as well as of the subject matter of the action.⁷ This is universally accomplished where the parties do not voluntarily

1. *Ott v. Sprague*, 27 Kan. 620; *Ellis v. Rhone*, 17 Tex. 131; *Robinson v. Fair*, 128 U. S. 53.

Upon a petition for partition if it appears that the parties claim by descent from the same ancestor, even where advancements have been made to some of the parties not yet settled in the probate office, the supreme court is not thereby ousted of its jurisdiction in the case. *Bemis v. Stearns*, 16 Mass. 200.

But in a recent case in *Texas*, it has been held that, until the administration of an estate is closed, the county court has exclusive jurisdiction to decree partition of the lands among the heirs, when the title is clear as among them, and there are no adverse claims by third persons. *Branch v. Hanrick*, 70 Tex. 731.

2. *Green v. Hardy*, 24 Me. 453; *Sumner v. Parker*, 7 Mass. 79; *Zeigler v. Grim*, 6 Watts (Pa.) 106; *Brown v. Brown*, 8 N. H. 93; *Coon v. Bean*, 69 Ind. 474.

But the power of probate courts to partition the estate of a decedent was held to include the reversionary interests of the heirs after the termination of the particular estate in *Webster v. Merriam*, 9 Conn. 225.

3. *Jenkins v. Dalton*, 27 Ind. 78.

4. See *infra*, this title, *Effect of Title Coming in Question*.

5. See also *JOINT TENANTS*, vol. II, p. 1057.

6. See *Best v. Sanders*, 31 S. Car. 602. The decision in this case is placed upon the ground of an estoppel; but it will be seen that this estoppel is grounded upon a silence for over twenty years, while the tenant resisting the partition was in possession exercising rights and performing acts of which the applicant must have known, not consistent with her joint ownership.

In order to bar a writ of partition by one tenant in common, there must have been twenty years' adverse possession by the other, or an actual dispossession, and a subsequent possession by the disseisor for five years, and his dying so possessed and a descent cast. *Lloyd v. Gordon*, 2 Har. & M. (Md.) 254.

In *Louisiana*, an action brought by parties claiming to own undivided interests in an immovable, against parties possessing and claiming to own in division the whole immovable, and asking judgment decreeing their ownership and for partition, combines the double character of petitory action and an action for partition; and defendants are entitled to plead the prescription of ten years to the petitory action, although an action for partition is only barred by thirty years. *Le Blanc v. Robertson*, 41 La. Ann. 1023.

7. *Rogers v. McLean*, 31 Barb. (N. Y.) 304. And see *Fowler v. Griffin*, 3 Sandf. (N. Y.) 385.

appear by the service of notice or process as in other civil actions,¹ though such appearance by one *sui juris* dispenses with service of process;² and the court will not be authorized to proceed against defendant until jurisdiction has thus been obtained against all.³ In the absence of statutory provision the notice of suit will be upheld when it is sufficiently specific to advise the defendants of the interest to be affected.⁴

Proceedings for partition in probate court must be commenced by written application or petition to the court,⁵ and notice must be given to all parties in interest in order to enable

1. See *Kyle v. Kyle*, 55 Ind. 387; *Nichols v. Mitchell*, 70 Ill. 258; *Smith v. Davis*, 27 Mo. 298; *Palmer v. Palmer*, 2 Dana (Ky.) 390; *Williams v. Wescott*, 77 Iowa 332; *Van Wyck v. Hardy*, 39 How. Pr. (N. Y.) 392; *Larkin v. Mann*, 2 Paige (N. Y.) 27; *Campbell v. Campbell*, 63 Ill. 462.

In *Wisconsin*, particular provisions have been made by statute of the commencement of actions for partition differing slightly from those applicable to ordinary civil actions. See *Tucker v. Whittlesey*, 71 Wis. 74; *Foster v. Hammond*, 37 Wis. 185; *Mecklem v. Blake*, 19 Wis. 397.

Under Comp. Laws *Kansas*, 1862, ch. 162, § 3, requiring notice of a petition for partition to be given to all persons interested therein at least forty days before the term of court next after the filing of the petition, where the notice was served in due time, but only thirty-eight days were given defendant in which to answer, the judgment on the petition rendered more than forty days after service of notice is voidable only. *Havens v. Drake*, 43 Kan. 484; *Cheney v. Richards*, 43 Kan. 492.

2. See *Sullivan v. Sullivan*, 42 Ill. 315; *Dunning v. Dunning*, 37 Ill. 306; *Palmer v. Palmer*, 2 Dana (Ky.) 390.

3. See *Palmer v. Palmer*, 2 Dana (Ky.) 390; *Dean v. Hooper*, 31 Me. 107; *Vick v. Mayor etc. of Vicksburg*, 1 How. (Miss.) 379; 31 Am. Dec. 167.

Where, upon a petition for partition, in which the petitioner alleged that he was seised as tenant in common with persons unknown, the court ordered notice to be published in a newspaper three weeks successively, and, in proof of compliance with the order, produced two successive papers containing the notice, it was held the petitioner was not entitled to the partition against a co-tenant who appeared and objected that notice had not been given to other

co-tenants. *Ashley v. Brightman*, 21 Pick. (Mass.) 285.

In proceedings under the *Kentucky* statute of 1811, in relation to partitions, the record should exhibit the prescribed proof of proper notice to all concerned. *Craig v. Barker*, 4 Dana (Ky.) 600.

Where a partition of an extensive territory is prayed for, the court should prescribe such public notice as will inform all the inhabitants of such territory of the pendency of the application. *Vaughan v. Noble*, 6 Mass. 252.

4. *McCormick v. Paddock*, 20 Neb. 486.

The subpoena should state that the bill is filed for partition, but need not contain a description of the premises. *Keil v. West*, 21 Fla. 508. And in a summons addressed to "the above named defendants," it appearing from the complaint that the persons named in the title to the case in such summons are the only persons other than the plaintiffs having or claiming to have an interest in the property, is in compliance with the statute. *Martin v. Parker*, 14 Minn. 13; 100 Am. Dec. 188.

See, further, as to process and notice of suit and the service thereof, SERVICE OF PROCESS; SUMMONS.

5. *Brown v. Sceggell*, 22 N. H. 548. And see *Richards v. Rote*, 68 Pa. St. 48; *Ragan's Estate*, 7 Watts (Pa.) 438.

The petition should name all persons whose interest is to be divested. *Richards v. Rote*, 68 Pa. St. 48. And "it seems to be obvious that it ought to at least set forth the facts upon which the court is called to act sufficiently to inform the court of the names of the parties so far as known, the respective moieties and interests of each, and the property sought to be divided among them." *Freem. Part.*, §

the court to bind them by its acts.¹ So guardians must be appointed for infant parties,² and the fact of such service of notice and appointment of guardians should appear in the record of the proceeding.³

(1) *Guardians for Infant Defendants*.—An infant must sue by guardian and cannot proceed in person, and appear by an attorney,⁴ and if there are infant defendants in an action for partition, a guardian or guardians *ad litem* must be appointed to protect their interests.⁵

(2) *Notice of Pendency of Action*.—See LIS PENDENS, vol. 13, p. 868.⁶

6. Parties Defendant—*a. WHO ARE NECESSARY*.—The interests of all the co-tenants in the subject matter of the suit are so bound up together that their legal presence as parties defendant, if they have joined in the petition, is an absolute necessity, without which the court cannot proceed.⁷ In a suit for the partition of an es-

552, citing Ragan's Estate, 7 Watts (Pa.) 438; Richards v. Rote, 68 Pa. St. 248.

1. Vick v. Mayor etc. of Vicksburg, 2 How. (Miss.) 379; Brown v. Sceggel, 22 N. H. 548; Richards v. Rote, 68 Pa. St. 48. But see Bauer's Estate, 14 Phila. (Pa.) 264.

Proceedings in partition will be stayed until notice is given to parties in interest. Hanbest's Estate, 11 Phila. (Pa.) 10.

Grantee By Metes and Bounds.—Where three legatees hold a piece of land devised to them in common, if one sells a part of it by metes and bounds, his grantee is not entitled to notice from the probate court when a division is ordered among the legatees in pursuance of the statute. Broughton v. Howe, 6 Vt. 266.

2. Brown v. Sceggel, 22 N. H. 548. And see Richards v. Rote, 68 Pa. St. 48.

3. See Brown v. Sceggel, 22 N. H. 548; Richards v. Rote, 68 Pa. St. 248.

Proof of Service.—In proceedings in partition in the orphan's court, the averment of the record is *prima facie* evidence of the service of notice, but not conclusive; and proceedings will be set aside where it appears in fact that no notice has been given to one of the parties; and notwithstanding it was alleged in the petition that he had been advanced his share of the estate in money. Sankey's Appeal, 55 Pa. St. 491.

4. Fulbright v. Cannefox, 30 Mo. 425. See Clark v. Clark, 14 Abb. Pr. (N. Y.) 299; 21 How. Pr. (N. Y.) 479.

5. See Althause v. Radde, 3 Bosw. (N. Y.) 410; *In re Stratton*, 1 Johns. (N. Y.) 509; Sharp v. Pell, 10 Johns. (N. Y.) 486; Stark v. Brown, 101 Ill. 395; Campbell v. Campbell, 63 Ill. 462; Fowler v. Griffin, 3 Sandf. (N. Y.) 385; Rogers v. McLean, 11 Abb. Pr. (N. Y.) 440; Shaffet v. Jackson, 14 La. Ann. 151; Robinson v. Farr, 128 U. S. 53.

See further, as to the manner of the appointment of guardians *ad litem* and their duties and powers, GUARDIAN AND WARD, vol. 9, p. 153.

6. See also LIQUIDATED DAMAGES, vol. 13, p. 864.

7. Barney v. Baltimore, 6 Wall. (U. S.) 284; Shields v. Barrow, 17 How. (U. S.) 130; Candy v. Stradley, 1 Del. Ch. 113; Hill v. Den, 54 Cal. 6; Holman v. Gill, 107 Ill. 467; Milligan v. Poole, 35 Ind. 64; Harlan v. Stout, 22 Ind. 488; Borah v. Archers, 7 Dana (Ky.) 176; Brashear v. Macey, 3 J. J. Marsh. (Ky.) 93; Batterton v. Chiles, 12 B. Mon. (Ky.) 354; 54 Am. Dec. 539; Mellon v. Reed, 114 Pa. St. 647; Kester v. Stark, 19 Ill. 329; Taylor v. King, 32 Mich. 42; Succession of Porel, 27 La. Ann. 463; Dameron v. Jameson, 71 Mo. 97; Burhans v. Burhans, 2 Barb. Ch. (N. Y.) 407; Pearson v. Carlton, 18 S. Car. 47; Lancaster v. Seay, 6 Rich. Eq. (S. Car.) 111; De la Vega v. Leagu, 64 Tex. 205; Calvert on Parties 259; McKinney v. Moore, 73 Tex. 470; Stark v. Carroll, 69 Tex. 393; Burhans v. Burhans, 2 Barb. Ch. (N. Y.) 398; Kester v. Stark, 19 Ill. 328; Bogardus v. Parker, 7 How. Pr. (N. Y.) 305.

tate or interest carved out of a fee, however, in the absence of statutory provisions, the owner of the fee who is the common source of title is not a necessary party,¹ nor is the owner of an estate in possession a necessary party to an action for the partition of the remainder or reversion,² the partition extending only to the interests of the parties before the court.³ But the holders of the legal title to land must be made parties to an action for a partition among those holding an equitable title,⁴ though the holder of an equitable title need not usually be made a party to an action to partition the legal estate.⁵

The absolute sale of the interest of a co-tenant renders him an

In *Barney v. Baltimore*, 6 Wall. (U. S.) 284, the court, by MILLER, J., said: "If a decree is made which is intended to bind them [the co-tenants], it is manifestly unjust to do this when they are not parties to the suit, and have no opportunity to be heard. But as the decree cannot bind them the court cannot, for that very reason, afford the relief asked to the other parties. If, for instance, the decree should partition the land and state an account, the particular pieces of land allotted to the parties before the court would still be undivided as to these parties, whose interests in each piece would remain as before the partition. And they could at any time apply to the proper court, and ask a repartition of the whole tract unaffected by the decree in this case, because they can be bound by no decree to which they are not parties."

Under the *Wisconsin* statute, as at common law, all having a right, title or interest must, if known, be made parties to a partition suit. *Morse v. Stockman*, 65 Wis. 36.

The purchaser of a mortgagor's interest in land at an execution sale is a necessary party to a partition suit. *De la Vega v. Leagu*, 64 Tex. 205.

In *Kentucky*, only those claiming under the same title are necessary parties in a partition suit. *McIntire v. McIntire*, 82 Ky. 502.

Effect of Non-joinder.—Parties not before the court are not bound by a decree in proceeding for partition. *Dorn v. Beasley*, 7 Rich. Eq. (S. Car.) 84. And the error of entering a judgment *quod partitio fiat*, without all the co-tenants having been named of record, is not cured by the mere addition, after judgment, of the name of a co-tenant omitted as one of the defendants. *Young v. Young*, 88 Pa. St. 422.

1. *Canfield v. Ford*, 28 Barb. (N. Y.) 342; *Story's Eq. Jur.*, § 656. To the contrary, where life estates and remainders are regarded as severable. *Smith v. Brown*, 66 Tex. 543.

In *New York*, under the Code of Civil Procedure, remainder-men are necessary parties to a partition suit. *Moore v. Appleby*, 36 Hun (N. Y.) 368. And see *Miller v. Wright*, 109 N. Y. 194.

Where an undivided interest in land is devised in trust to apply the proceeds to the use of one during his life, with the remainder to his children, or in default of children to his heirs at law, no title is conveyed as against such presumptive heirs as remainder-men, by sale under partition proceedings to which they are not parties. *Moore v. Appleby* 108 N. Y. 237.

2. See *infra*, this title, *What May be Partitioned*.

3. *Story's Eq. Jur.*, § 656; *Story's Eq. Pl.*, §§ 144, 148; *Gaskell v. Gaskell*, 6 Sim. 643; *Agar v. Fairfax*, 17 Ves. 543.

4. *Hunter v. Brown*, 7 B. Mon. (Ky.) 283; *Portis v. Hill*, 14 Tex. 69; 65 Am. Dec. 99.

5. In a partition proceeding, where one of the parties is a partner holding the legal title, the fact that he holds it in trust for the firm does not make his co-partners necessary parties. *Railsback v. Lovejoy*, 116 Ill. 442.

A trustee who, by the deed of trust, has a power of sale and re-investment, is a proper, though not a necessary, party in a proceeding to partition the premises among the beneficiaries. *Welch v. Agar*, 84 Ga. 583.

In *North Carolina*, in a proceeding for partition of land, those having a reversionary interest are necessary parties, as well as the life-tenant. *Bell v. Adams*, 81 N. Car. 118.

improper party defendant in an action for partition,¹ but the purchaser thereupon becomes a co-tenant in his stead and consequently a necessary party.² Purchasers *pendente lite*, however, where the proceedings are prosecuted with reasonable diligence,³ are as firmly bound by the results of the litigation, as would have been the original co-tenant of whom he purchased.⁴ On the same principle where a co-tenant dies his heirs or devisees become co-tenants in his stead and therefore necessary parties defendant in an action for the partition of the joint property;⁵ and where such death occurs during the pendency of the action, it is necessary to substitute his heirs or devisees as parties defendant before proceeding with the partition.⁶

The rule prevails to some extent in States in which a conveyance by one co-tenant of a part of the joint premises by metes and

1. Peterson v. Fowler, 73 Tex. 524; Parker v. Harrison, 63 Miss. 225. And see Hill v. Den, 54 Cal. 6.

2. See Peterson v. Fowler, 73 Tex. 524; Hill v. Den, 54 Cal. 6; Vanderwerker v. Vanderwerker, 7 Barb. (N. Y.) 221; Small's Appeal (Pa. 1888), 15 Atl. Rep. 167; Richardson v. Loupe, 80 Cal. 490.

One who has a joint interest in several parcels of land may have one partition suit, although some of the interests are held by alienees of the original co-tenants of the plaintiff, these alienees being made parties. Parker v. Harrison, 63 Miss. 225.

Where children of the grantee of a life estate in land take the land after the death of the father as tenants in common, a petition which joins all those living, and the heir of one deceased, as parties defendant in a suit for partition, is not multifarious, though some of the tenants have purchased the interests of the others; such purchase not conferring an exclusive right to any portion of the land. Waddell v. Waddell, 99 Mo. 338.

3. Hawes v. Orr, 10 Bush (Ky.) 431; Bybee v. Summers, 4 Oregon 354. And see Raymond v. Paulil, 21 Wis. 531; Hart v. Steedman, 98 Mo. 452.

4. Coble v. Clapp, 1 Jones Eq. (N. Car.) 173; Partridge v. Luce, 36 Me. 16; Edwards v. Dykeman, 95 Ind. 509; Welty v. Ruffner, 9 Pa. St. 224; Hart v. Steedman, 98 Mo. 452.

A purchaser of the interest of one tenant in common, during the pendency of a petition for partition, becomes a privy in estate with such tenant, and will be bound by the subsequent judgment of the court confirming the parti-

tion of the commissioners. Coble v. Clapp, 1 Jones Eq. (N. Car.) 173.

Lis Pendens.—Where a plaintiff in an action of partition conveyed his interest to a stranger, the other parties were not obliged to give to the purchaser notice of the subsequent proceedings in the action. *Lis pendens* was notice in this, as in other cases. Baird v. Corwin, 17 Pa. St. 462.

5. Whitton v. Whitton, 38 N. H. 127; Johns v. Northcutt, 49 Tex. 444; Vanderwerker v. Vanderwerker, 7 Barb. (N. Y.) 221.

In *Louisiana*, in an action of partition, which is a real action, the heirs as well as the executor must be made parties. Chalon v. Walker, 7 La. Ann. 477.

Amendment.—In case of defect of parties to a bill under the Code in New York, if the objection is taken in the answer, the complainant should amend before trial, if the objection be true; if he lies by till the hearing, the court can allow him to amend, in its discretion, on payment of costs. Vanderwerker v. Vanderwerker, 7 Barb. (N. Y.) 221.

6. Requa v. Holmes, 16 N. Y. 198; Requa v. Holmes, 26 N. Y. 347; Pearson v. Carlton, 18 S. Car. 47.

If, after a decree of divorce which directs a division of the common property, the husband dies, a supplemental decree made after his death, without a revivor as to his heirs, directing a sale of the property and a division of the proceeds, is void as against them. It is not enough that his executors are made parties in his stead. Ewald v. Corbett, 32 Cal. 499. And see Tyrrell v. Baldwin, 67 Cal. 5; Phelan v. Tyler, 64 Cal. 82.

bounds is deemed void, that partition may properly be maintained without joining the purchaser,¹ though some such States require him to be made a party defendant.² But in States in which such a conveyance is regarded as a valid transfer of the interest of the grantor in the tract described, his joinder is as necessary as that of a co-tenant of the whole tract.³ Persons who have purchased lands from tenants in common and hold in severalty, however, are neither necessary nor proper parties to an action for the partition of the balance of the estate;⁴ and in States where partition is considered as a possessory action only, an adverse claimant must not be joined,⁵ though the opposite rule would prevail if his adverse possession had ripened into a title thereby making him a co-tenant.⁶

(1) *Holders of Particular Estates and Interests.*—If actual partition is made, the inchoate right of dower of the wife of a co-tenant attaches to the share allotted to her husband. She is not, therefore, in the absence of statutory provision, a necessary party defendant in an action for partition;⁷ and the widow of a deceased tenant in severalty is neither a necessary nor a proper party defendant in an action for partition between the

Many of the authorities, in reference to judgments against deceased parties, hold that the service of process gives courts jurisdiction which they may exercise to final judgment; and on the death of a party, courts ought to pause until his successor in interest can be brought in; but that, if they do not so pause, their action, though erroneous, is not void." *Freem. Part.*, § 464; *citing* *Freem. Judg.*, §§ 140, 153; *Tyrrell v. Baldwin*, 67 Cal. 5.

1. See *Blossom v. Brightman*, 21 Pick. (Mass.) 284; *Jackson v. Myers*, 14 Johns. (N. Y.) 354; *Marmaduke v. Tennant*, 4 B. Mon. (Ky.) 210; *Broughton v. Howe*, 6 Vt. 267; *Barnes v. Lynch*, 151 Mass. 510.

Where defendants conveyed their undivided interest in the common property, reserving a right to use water and a co-tenant also granted them the right to take water from a portion of the tract occupied by him, neither the reservation nor the grant gave them such an interest in the land as entitled them to be made parties to an action for partition. *Pfeiffer v. Regents of University*, 74 Cal. 156.

In *Ohio*, several grantees of different special locations are not proper parties defendant in an action for partition brought by one holding an undivided interest in the whole tract. *Harman v. Kelley*, 14 Ohio 506; 45 Am. Dec. 552; *Prentiss' Case*, 7 Ohio (pt. 2), 132; 30 Am. Dec. 203.

2. *Whitton v. Whitton*, 38 N. H. 133; *Harlan v. Langham*, 69 Pa. St. 237.

This rule is based upon the ground that "he is more deeply interested in a partition than any of the tenants in common of the entire tract—it matters little to them where the respective property may be located; but with the grantee of the special location it is all important that such a division may be made as will allow his deed to become operative. He is entitled to the consideration of the court, and will, whenever his claims are known to the court, be protected as far as possible without doing injustice to the co-tenants of the whole tract." *Freeman on Part.*, § 465; *citing* *Cooper v. Fisher*, 10 L. J. R., N. S., Ch. 221.

3. *Gates v. Salmon*, 35 Cal. 588; 95 Am. Dec. 139; *Sutter v. San Francisco*, 36 Cal. 112.

4. *Richardson v. Loupe*, 80 Cal. 490.

5. *Nugent v. Powell*, 63 Miss. 99; *Beebe v. Louisville etc. R. Co.*, 39 Fed. Rep. 481; *Tilton v. Palmer*, 31 Me. 486.

6. *Tilton v. Palmer*, 31 Me. 486. And see *Baylies v. Bussey*, 5 Me. 153.

But unless their possession has been long enough to give a title, they are not proper parties to a petition for partition, and their equitable rights are not affected by the proceedings. *Tilton v. Palmer*, 31 Me. 486.

7. *Matthews v. Matthews*, 1 Edw. Ch. (N. Y.) 567; *Wilkinson v. Parish*, 3 Paige (N. Y.) 658; *Hoxsie v. Ellis*, 4

heirs,¹ but where the deceased husband was a tenant in common instead of a tenant in severalty, she should be or at least may be made a party to the action.² Where the sale of the premises will be a necessary consequence of a partition, the prevailing rule would seem to be that a right of dower in the premises would be divested by such a sale, whether the doweress is made a party defendant or not;³ but on the other hand, it has been asserted that permitting such a divestiture of title without making the doweress a party would be equivalent to depriving a person of property rights without due process of law.⁴ If the husband had divested himself of his title before partition, the wife must be

R. I. 124. And see *Motley v. Blake*, 12 Mass. 280; *Tanner v. Miles*, 1 Barb. (N. Y.) 560; *Gordon v. Sterling*, 13 How. Pr. (N. Y.) 405.

1. *Bradshaw v. Callaghan*, 5 Johns. (N. Y.) 80; *Motley v. Blake*, 12 Mass. 280; *McClintic v. Manns*, 4 Munf. (Va.) 328.

A widow's right of dower, unassigned, is no bar to partition among tenants in common. But such a widow is not a proper party to a petition for partition among them; and, if wrongly joined as a respondent, she must be discharged with costs. *Leonard v. Motley*, 75 Me. 418.

In *Virginia*, however, it is held to be error to decree a partition of the land of the intestate, subject to the widow's right of dower. She and her husband, if she has married again, should be made parties, her dower first assigned, and a division made of the residue. *Custis v. Snead*, 12 Gratt. (Va.) 260.

2. See *Hull v. Hull*, 26 W. Va. 1; *Barclay v. Kerr*, 110 Pa. St. 130; *Lee's Estate*, 13 Phila. (Pa.) 291; *White v. White*, 16 Gratt. (Va.) 264. See also *infra*, this title, *Of the Different Estates in Property*.

3. *Warren v. Twilley*, 10 Md. 39; *Lee v. Lindell*, 22 Mo. 202; 64 Am. Dec. 262; *Hinds v. Stevens*, 45 Mo. 209; *Jackson v. Edwards*, 7 Paige (N. Y.) 386; *Fink's Appeal*, 130 Pa. St. 256.

It has been held that a tenant in dower need not be made a party, for the reason that neither the husband nor the courts, nor any other human power, can compel the wife to relinquish her right of dower, inchoate though it may be, when she is not asking the aid of the court. *Royston v. Royston*, 21 Ga. 172; *Matthews v. Matthews*, 1 Edw. Ch. (N. Y.) 567; *Van Gelder v. Post*, 2 Edw. Ch. (N. Y.) 577.

In *Weaver v. Gregg*, 6 Ohio St. 547; 67 Am. Dec. 355, the court, by *BRINKERHOFF, J.*, said: "We are of the opinion that it was the intention of the legislature, by a sale in partition, to divest the wife of her inchoate right of dower. In so holding, we do not subject this right at all to the will or caprice of the husband; the sale was the act of the law designed to do justice to joint-owners, and render estates available and put forth when only from the fact that the estate is incapable of actual partition, the necessities of the case require it. The legislature has deemed it more important to the public interest to render estates available to their owners without sacrifice of their value by sale in case of necessity than to preserve in all cases whatsoever the wife's remote and contingent interest at the expense of parties on whom she can have no proper claim."

In *Jacksonville v. Edwards*, 7 Paige Ch. (N. Y.) 411, it was held, that the statutes of the State of *New York* clearly contemplated that the wife's right of dower should be discharged by the partition sale, and that a purchaser under the judgment or decree will be protected against any future claim on her part, both in equity and at law; and that it was the duty of the court to make such disposition of the sale as may be necessary to secure to the wife a fair equivalent for the value of her contingent right of dower in case she survives her husband. A short time afterwards, the provisions of this decision were substantially enacted in statutory form.

4. *Grenier v. Klein*, 28 Mich. 17; *Green v. Putnam*, 1 Barb. (N. Y.) 506; *Wilkinson v. Parish*, 3 Paige (N. Y.) 658.

In a bill for an accounting and partition, by an heir of a husband claiming

made a party in order to divest her of her right of dower;¹ and where a widow is entitled to dower by virtue of the sole seisin of her husband, her right can be divested only by her own act;² but statutes have been enacted in many of the States authorizing her joinder in the action and empowering the court to decree a sale and award to her a part of the proceeds in satisfaction of dower.³ The wife of a party claiming premises as a homestead is a necessary party defendant in an action for their partition,⁴ and the husband of a deceased co-tenant of an estate in fee must be joined in an action for a partition.⁵ So, at common law, the husband of a co-tenant has, during her lifetime, such an estate in her lands as to make him a proper party in an action for a partition, and his interest will not be affected unless so joined.⁶

Lessees, either of a moiety or of the whole of premises held in co-tenancy, are proper but not necessary parties to an action for

under an ante-nuptial contract, against purchasers at a sale by the administrator of the deceased wife, the devisees of the wife are necessary parties. *Wilson v. Holt*, 85 Ala. 95.

1. *Verry v. Robinson*, 25 Ind. 19; 87 Am. Dec. 346.

Where the interest of plaintiff's husband was sold under a judgment against him and the purchaser went into possession and sued the owner of the other moiety for a partition of said premises, without making plaintiff a party to such action, and plaintiff was served with notice of a motion to put defendant in possession in pursuance of judgment, which motion the court sustained over plaintiff's objections, the proceeding of the court in putting defendant in possession was a mere nullity for want of jurisdiction. *O'Connor v. McMahon* (Supreme Ct.), 7 N. Y. Supp. 225.

2. *Francisco v. Gates*, 28 Ill. 67.

3. See *Tanner v. Niles*, 1 Barb. (N. Y.) 562; *Matter of Sipperly*, 44 Barb. (N. Y.) 372; *Gordon v. Sterling*, 13 How. Pr. (N. Y.) 408. See statutes with relation to partition in the different States.

4. *DeUprey v. DeUprey*, 27 Cal. 332; 87 Am. Dec. 81. See *Sutter v. San Francisco*, 36 Cal. 116.

Modification of Judgment.—Where the interest of B was occupied so as to create a homestead claim for himself and wife, and there was no service on B's wife, and she did not appear, but an unauthorized attorney filed pleadings in her name without her knowledge or consent, in an action brought by her to modify the judgment and read-

just said lien, it was *held*, that all the original parties in the partition suit were necessary parties. *Wheat v. Burgess*, 21 Kan. 407.

5. *Bogert v. Bogert* (Supreme Ct.), 5 N. Y. Supp. 893.

Acceptance of Service.—A tenant by curtesy of an undivided share was not named in the petition for partition as a party, and had no notice of the inquest. A commissioner appointed, at the petitioner's instance to find the facts, whose report was duly approved, found that appellant should be made a party; but the report did not make him a party. Afterwards there was the usual rule on the heirs, including appellant. It was *held*, that appellant, by accepting service of the rule, did not become a party to the proceedings so as to be bound by the valuation of the land by the inquest. *Black's Appeal*, 130 Pa. St. 516.

6. *Pillsbury v. Dugan*, 9 Ohio 117; 34 Am. Dec. 427; *Foster v. Dugan*, 8 Ohio 106.

It is not error to direct a partition without making the husband of one of the heirs a party, when the evidence shows that he has been absent, and his absence unaccounted for, for more than seven years. *Appeal of Welch*, 126 Pa. St. 297.

As the husband, under the *Alabama* statutes, has no interest in or control of the statutory separate estate of the wife, and as by *Alabama Code* § 2347, she must sue and be sued alone in all cases involving such estate, a demurrer based on the misjoinder of the husbands of the female heirs should be sustained. *Marshall v. Marshall*, 86 Ala. 383.

rtition,¹ but unless made parties their interests will remain unaffected.²

An administrator is not a proper party defendant in a bill for partition of the lands of the decedent,³ but he is a necessary party defendant where the bill also seeks an account of rents and profits which accrued prior to his death.⁴ In the absence of provision by statute, the holder of an encumbrance upon the undivided share of one co-tenant is neither a necessary nor a proper party in an action for the partition of the joint estate,⁵ but the encumbrance continues and attaches to the whole of the share set off to the tenant upon whose moiety it was a lien,⁶ and where there is any doubt

In an equitable partition suit between beneficiaries under a will, which provided that their shares of the testator's estate should be diminished by the amounts of notes executed by them or by their husbands, the husbands are proper parties. *Hill v. Alexander*, 77 O. 296.

Statutory Rule.—A husband is not necessary party, under the *New York* statutes, to a suit to partition land, a share of which belongs to his wife. *Japes v. Brown*, 14 Abb. N. Cas. (N. Y.) 94. Similar statutes have been enacted in a larger number of the States. 1. *Pleak v. Chambers*, 7 B. Mon. (Ky.) 570; *Fitzpatrick v. Wilson*, 12 Grant's Ch. (Up. Can.) 440; *Thruston v. Minke*, 32 Md. 575; *Calvert on Parties*, 346. And see *Jordan v. McNulty*, 3 Colo. 280.

In an action between reversioners under Code *Maryland*, art. 16, § 99, as amended by Acts of 1886, ch. 232, for the sale of real estate on which there is an outstanding lease, the owner of the lease is not a necessary party. *Brendel v. Klopp*, 69 Md. 1.

2. *Thruston v. Minke*, 32 Md. 575; *Fitzpatrick v. Wilson*, 12 Grant's Ch. (Up. Can.) 440; *Cornish v. Gest*, 2 O. J. Can. 27; *Calvert on Parties*, 346.

3. *Garrison v. Cox*, 99 N. Car. 478; *Tindal v. Drake*, 51 Ala. 574; *Stevenson v. Anderson*, 87 Ala. 228; *Stern v. Cox*, 16 Md. 533; *Foster v. Newton*, 1 Miss. 663; *Speer v. Speer*, 14 N. J. 240. And see *Richards v. Richards*, 6 Mass. 126; *Boutte v. Boutte*, 30 La. nn. 177.

As the authority of the personal representative extends only to renting decedent's lands, and to obtaining an order of sale for payment of debts, he is not a necessary party to a partition between the heirs and an incidental judgment of advancements, where there are no debts. *Marshall v. Mar-*

shall, 86 Ala. 583. And if the bill seeks a partition of lands, and an account of the rents and profits which accrued after the death of a deceased tenant in common only, his personal representative is not a necessary or proper party. *Tindal v. Drake*, 51 Ala. 574.

4. *Tindal v. Drake*, 51 Ala. 574; *Scott v. Guernsey*, 60 Barb. (N. Y.) 181.

5. *Harwood v. Kirby*, 1 Paige (N. Y.) 469; *Sebring v. Mersereau*, 9 Cow. (N. Y.) 344; *Low v. Holmes*, 17 N. J. Eq. 148; *Hotten v. Copeland*, 7 Johns. Ch. (N. Y.) 141; *Long's Appeal*, 77 Pa. St. 151; *Stewart v. Allegheny Nat. Bank*, 101 Pa. St. 342; *Wright v. Vickers*, 81 Pa. St. 122; *Bavington v. Clark*, 2 P. & W. (Pa.) 115; 21 Am. Dec. 432; *Speer v. Speer*, 14 N. J. Eq. 251; *Pendergrass v. Pendergrass*, 26 S. Car. 19. And see *Bradley v. Fuller*, 23 Pick. (Mass.) 1; *Green v. Arnold*, 11 R. I. 364; 23 Am. Rep. 466; *Thruston v. Minke*, 32 Md. 571. But see *Colton v. Smith*, 11 Pick. (Mass.) 314; 22 Am. Dec. 375; *Bradley v. Fuller*, 23 Pick. (Mass.) 4; *Monroe v. Luke*, 19 Pick. (Mass.) 40; holding that a partition can have no effect whatever against an encumbrancer.

The Lien.—A mortgagee of an undivided interest in a parcel of land extends to the moiety which takes the place of his debtor's interest, when the debtor's share of the land is set off to another of the co-tenants, subject to moiety of partition. *Stewart v. Allegheny Nat. Bank*, 101 Pa. St. 342.

In *Indiana*, however, a judgment creditor is not affected by a sale under a decree of partition, and the purchaser is not entitled to enjoin a sale under execution in satisfaction of the judgment. *Wood v. Winings*, 58 Ind. 322.

6. *Bavington v. Clark*, 2 P. & W. (Pa.) 115; 21 Am. Dec. 432; *Loomis v. Riley*, 24 Ill. 307; *Torrey v. Cook*, 116 Mass. 163; *Thruston v.*

as to the extent of the liens, the court should, before decree or sale, ascertain the amount so that no prejudice may be done to the encumbrancer.¹ The encumbrancer is bound by such a partition unless he can affirmatively establish that unfairness had been exercised or that the allotments had been unequally made.² Where the encumbrance is a lien upon some specific part of a moiety only, however, the partition cannot operate to extend it so as to cover property not before embraced by it.³

Even when a sale is sought, under the common law doctrine, encumbrancers cannot be affected and therefore are not necessary parties.⁴ The rule has been quite extensively adopted, however, that a judicial sale transfers the property free from encumbrances and that liens attach to the share of the proceeds which represents the encumbered moiety retaining their legal priorities,⁵ though no greater rights are conferred upon them than

Minke, 32 Md. 574; Webb v. Rowe, 35 Mich. 58; Harwood v. Kirby, 1 Paige (N. Y.) 469; Jackson v. Pierce, 10 Johns. (N. Y.) 417; Sebring v. Mersereau, 9 Cow. (N. Y.) 344; Board of School Land Comm'rs. v. Wiley, 10 Oregon 86.

1. Thruston v. Minke, 32 Md. 571.

When owelty is required to equalize partition between two tenants in common, the estate of one being mortgaged, it should, if to be paid by the unencumbered owner, be paid to the mortgagee of the other, and credited on the mortgage note. Green v. Arnold, 11 R. I. 364; 23 Am. Rep. 466.

2. Wright v. Strother, 76 Va. 857; Milligan v. Poole, 35 Ind. 67.

A defendant in partition duly served cannot, after decree for the first time, object that he was improperly joined, and therefore not bound by the decree; and his assignee stands in the same position. Loomis v. Riley, 24 Ill. 307. And so, where an encumbrancer asserts his lien and the court decides against him, he is estopped from afterwards insisting that his claim was not a proper subject of adjudication. Bernard v. Onderdonk, 98 N. Y. 164. A claimant for dower may be estopped in the same way. Jordan v. Van Epps, 85 N. Y. 427.

A judgment creditor of a party to a partition suit cannot procure payment of his judgment from a receiver appointed *pendente lite* to collect the rents and divide the net proceeds between plaintiff and defendant. The creditor's remedy is to come into the action, press it to a judgment, and obtain payment from the sale of the judgment debtor's share. Verplanck v.

Verplanck, 22 Hun (N. Y.) 104. See also Waring v. Waring, 3 Abb. Pr. (N. Y.) 246.

3. Green v. Arnold, 11 R. I. 364; 23 Am. Rep. 466.

4. Sebring v. Mersereau, 9 Cow. (N. Y.) 344; Thruston v. Minke, 32 Md. 571; Owsley v. Smith, 14 Mo. 155; *In re Harding*, 3 Ired. (N. Car.) 322.

A purchaser at a sale made under an order in proceedings for partition, cannot avoid payment of the purchase money, on the ground of failure of title. Such sales are at the risk of the purchaser. Owsley v. Smith, 14 Mo. 153; Rogers v. Horn, 6 Rich. (S. Car.) 361.

In Wotten v. Copeland, 7 Johns. Ch. (N. Y.) 140, CHANCELLOR KENT held that mortgagors and judgment creditors could not be compelled to join in a suit for partition.

A sale of lands made by the sheriff, under the order of the district court, in an action of partition, is in pursuance of a judgment of a court of record, and can be confirmed or set aside by the judgment of that court alone. Nothing is sold in such case but the title which was vested in the parties; and, if the purchaser was deceived by unfair representations, he may be heard before the court having jurisdiction of the petition, but not elsewhere. Allen v. Gault, 27 Pa. St. 473; 67 Am. Dec. 485.

5. See Garvin v. Garvin, 1 S. Car. 55; Loomis v. Riley, 24 Ill. 310; Westervelt v. Haff, 2 Sandf. Ch. (N. Y.) 101; Cradlebaugh v. Prichett, 8 Ohio St. 649; Simmons v. Simmons, Harp. Eq. (S. Car.) 256; Gerard L. Ins.

those formerly possessed by their debtors.¹ An encumbrancer of the whole estate is not a necessary party, but if made a defendant, the validity and amount of his lien may be determined.² In nearly, if not quite all, of the States statutes have been enacted declaring lien holders to be either necessary or proper parties defendant in an action for partition, and providing for the divestiture of the lien of the encumbrance from the undivided estate, and its attachment to the shares of the respective co-tenants in case of division, or to their respective shares of the proceeds in case of sale.³

(2) *Persons Under Disability*.—That a person otherwise a necessary or proper party to an action for partition is a married woman is entirely immaterial and a judgment or decree will bind

Co. v. Farmers' etc. Bank, 57 Pa. St. 394; 7 Am. Law Reg. 467; Allen v. Gault, 27 Pa. St. 473; 67 Am. Dec. 485; Jacobs' Appeal, 23 Pa. St. 477; Sackett v. Twining, 18 Pa. St. 202; 57 Am. Dec. 599; Steen v. Clayton, 32 N. J. Eq. 121.

Encumbrances Pendente Lite.—Where, after an action of partition is begun, a judgment lien has been acquired against the land, this does not affect the rights of a purchaser at the partition sale. Arnold v. Butterbaugh, 92 Ind. 403.

Where, after the commencement of proceedings in partition, one of the co-tenants, who was a defendant, mortgaged his undivided interest, but judgment *quod partitio fiat* was entered, under which the premises were sold, the lien of the mortgage was discharged, notwithstanding the *Pennsylvania* act of 1867, p. 44, which provides that the lien of a first mortgage shall not be destroyed "by any judicial or other sale whatsoever." Wright v. Vickers, 81 Pa. St. 122.

Validity of Lien.—Where, in a partition suit, actual partition cannot be made and a sale is decreed, and an order of reference is granted directing the referee to ascertain and report the amount due to any party to the action who has any general or specific lien upon the premises, the referee is authorized to take proof and pass upon the question of the validity of a mortgage upon an undivided share, claimed by one of the parties, although the question is not raised by any formal issue in the pleadings. Halsted v. Halsted, 55 N. Y. 442.

1. Where the statute permits a sale ordered to be made on credit, he cannot insist that for his benefit it shall

be made for cash. Stern v. Epstein, 14 Rich. Eq. (S. Car.) 5.

2. Townshend v. Townshend, 1 Abb., N. Cas. (N. Y.) 81.

In Wotten v. Copeland, 7 Johns. Ch. (N. Y.) 140, it was held, on a bill for partition of land subject to a mortgage, that the equity of redemption only can be divided; and the mortgagee cannot be made a party to such a bill, and his rights cannot be affected by it.

3. See the statutes of the different States. See also Loomis v. Riley, 24 Ill. 307; Lewis v. Atkinson, 15 Iowa 361; 83 Am. Dec. 417; Harbison v. Sanford, 90 Mo. 477.

In *Michigan*, the holder of an inchoate lien need not, under Comp. Laws § 6274, be made a party defendant to a bill for the partition of the property. It is proper, however, to make him so; and, in case of non-redemption, the lien may be made chargeable on the defendants as the final form of relief may make suitable. Eberts v. Fisher, 44 Mich. 551.¹ And in such case he should be made a party. Roberts v. Fisher, 44 Mich. 551.

In *New York*, on a bill for partition stating that the shares of the defendants were subject to encumbrances, and praying a sale, the court ordered the cause to stand over until the Revised Statutes should go into operation, under which a sale could be more advantageously made. Harwood v. Kirby, 1 Paige (N. Y.) 469.

Holders of Trust Deeds.—In a suit for partition and sale of real estate, four-fifths of which had been conveyed by the tenant for life to a trustee to secure the payment of certain notes to a third party, it was held, that the trustee and *cestui que trust* were prop-

her as firmly as though she were under no disability;¹ but she can be bound only by a strict conformity to the procedure usually prescribed for her protection,² and where she has acted by mistake, and in ignorance of her rights, if no rights of third parties have intervened, a court of equity will grant her relief.³ The same principles are applicable to infants; they must be made parties defendant notwithstanding their infancy, and are as firmly bound as are adults,⁴ whether the property can be divided or has to be

erly made parties to the proceeding, for the purpose of binding their interest, although no relief was asked either for or against them. *Reinhardt v. Wendeck*, 40 Mo. 577.

And where the beneficiary under such deed had died, his administrator is a necessary party. *Harbison v. Sanford*, 90 Mo. 477.

Effect of Omission.—A partition of land made without notice to a party who has attached on *mesne* process the interest of one of the tenants in common, is not binding upon such party, and he may therefore rightfully levy his execution as upon an estate in common. *Munroe v. Luke*, 19 Pick. (Mass.) 39.

1. *Short v. Prettyman*, 1 Houst. (Del.) 334; *Disbrow v. Folger*, 5 Abb. Pr. (N. Y.) 54; *Pittsburgh v. Dugan*, 9 Ohio 120; 34 Am. Dec. 427.

In *New York*, proceedings in partition under the "act for the partition of lands," passed in 1785, are not obligatory upon a party in interest, who at the time was a *feme covert*, unless she was made a party to the proceedings. *Zimmermann v. Rapp*, 20 Wend. (N. Y.) 100.

Joinder of Husband.—Under the *Alabama* statutes the husband has no interest in or control of the statutory separate estate of the wife, and as by § 2347 of the code she must sue and be sued alone in all cases involving such estate, a demurrer based on the misjoinder of the husbands of the female heirs should be sustained. *Marshall v. Marshall*, 85 Ala. 383.

2. *Horsfall v. Ford*, 5 Bush (Ky.) 642.

3. See *Crenshaw v. Creek*, 52 Mo. 100; *Thompson v. Renoe*, 12 Mo. 157.

Where, at the time of a partition of an estate between co-devisees, one of them had an inchoate right of dower in premises set off by the partition to another, and subsequently to the partition, the inchoate right of dower became perfect by the death of her hus-

band, she will not in equity be held estopped to claim her dower against her co-partitioners. What she had at the time of the partition was a mere possibility, which might or might not subsequently ripen into something of value, but after the death of her husband she had not only an estate, but a right capable of immediate assertion in an action. *Walker v. Hall*, 15 Ohio St. 355; 86 Am. Dec. 482.

4. *Hite v. Thompson*, 18 Mo. 461; *Althause v. Radde*, 3 Bosw. (N. Y.) 410. And see *Richards v. Richards*, 17 Ind. 636; *Hooke v. Hooke*, 6 Ga. 474.

At common law, the infancy of a part of the cotenants was never a sufficient reason for refusing a partition, and a decree in an action brought for that purpose was as binding upon an infant as upon an adult. *Co. Litt.* 171 a; *Allnatt on Part.* 27, 64, 80.

"In equity, as the partition was not consummated until conveyances were executed by the parties in pursuance of the decree of the court, an infant could not be compelled to make partition, because he was incapable of executing a conveyance. But this apparent difficulty was so nearly avoided as to be of little consequence. The infant was subject to the jurisdiction of the court. He could be made a party defendant. In partition cases, infant co-tenants were brought before the court; the allotments were made as in other cases; a decree was entered quieting the enjoyment of the respective purporties to the persons to whom they had been allotted; and the making of the conveyance was respited until the infant attained his majority, or until the further order of the court. In analogy to the practice in either cases, the infant was allowed a day after coming of age to show cause against the decree. But by statute 13 and 14 Vict., ch. 60, § 30, an infant no longer has his day in court after coming of age to show cause against the

sold.¹ But unless an infant appears in the action in a manner authorized by law, or is served with process in a manner authorized by the statutes which have been generally enacted for his protection, the partition as to him will be inoperative,² though not so where the errors or irregularities are in the subsequent proceedings.³ Where, however, by the fraud or collusion of the guardian of an infant co-tenant with the adult tenant, or otherwise, an unequal partition has been made, equity will either order a new partition or restore him to the condition enjoyed before the fraud and collusion.⁴ The fact that a co-tenant is a lunatic will not prevent a partition of the premises, and such lunatic must be made a party to the action in order to bind his interest.⁵

(3) *Unknown Owners*.—The statutes of most of the States provide means of procedure against persons whose names and

decree, but is declared to be a trustee of such portions as are awarded to the other co-tenants." *Freem. Part.*, § 467, citing *Allnatt Part.* 104; *Story's Eq. Jur.*, § 625; *Bowra v. Wright*, 4 De G. & S. 265; 20 L. J., N. S., Ch. 216.

1. See *Albright v. Flowers*, 52 Miss. 246; *Coker v. Pitts*, 37 Ala. 693.

2. *Shaw v. Gregorie*, 41 Mo. 407; *Campbell v. Campbell*, 63 Ill. 462; *Hickenbotham v. Blackledge*, 54 Ill. 316; *Savage v. Williams*, 15 La. Ann. 250; *Fiske v. Kellogg*, 3 Oregon 503.

The appointment of a guardian and service upon him without any service upon the infant gives the court no jurisdiction. *Chambers v. Jones*, 72 Ill. 275.

A partition of real estate, where some of the owners are infants, will not be confirmed, though made under a writ of partition, until the infants have been brought before the court by bill. *House v. Falconer*, 4 Desaus. (S. Car.) 86.

A partition will be set aside where a minor heir is represented by his tutor, who is himself a party to the partition. The objection need not have been made by way of opposition before the notary, before whom no contestation could have been made concerning it. *Succession of Aquillard*, 13 La. Ann. 97.

3. See *Castleman v. Relfe*, 50 Mo. 583; *Shaw v. Gregorie*, 35 Mo. 342; *Fulbright v. Cannefox*, 30 Wis. 425.

It is not an objection to the title that the petition by the infant for a guardian was not verified before a proper officer, or that the proofs did not show that the guardian had no interest ad-

verse to the infant, if, in fact, he had none. *Disbrow v. Folger*, 5 Abb. Pr. (N. Y.) 53.

4. See *Long v. Mulford*, 17 Ohio St. 484; 93 Am. Dec. 638; *Merritt v. Shaw*, 15 Grant's Ch. (Up. Can.) 323.

Where infant defendants to a partition suit seek to set aside a sale of their land, made under a decree rendered in such suit, and for an account of rents and profits against the purchaser at such sale, they will be required, as a condition to granting them the relief sought, to refund to such purchaser whatever of the purchase-money paid by him may have come into their hands, and all taxes paid by him in the belief that he was the *bona fide* owner. *Chambers v. Jones*, 72 Ill. 275.

5. *Bryant v. Stearns*, 16 Ala. 303.

The estate of a lunatic may be transferred to another by means of proceedings in partition. *Snowden v. Dunlavey*, 11 Pa. St. 522.

A decree in a suit for partition, brought by the committee of a drunkard, and to which the drunkard is not a party, will not transfer the legal title to his undivided share of the premises which may be set off to the defendants in severalty; therefore, the drunkard should be made a party to such suit. *Gorham v. Gorham*, 3 Parb. Ch. (N. Y.) 24.

In *Hollingsworth v. Sidsbottom*, 8 Sim. 620; 7 L. J., N. S., Ch. 2, the court ordered a commission, and that the land should be held in severalty; but one of the defendants, being a person of weak intellect, who answered by her guardian, and who could make no conveyance owing to her incapacity,

whereabouts cannot be ascertained as unknown owners or some other general designation.¹ A decree of partition in an action in which there has been a strict compliance with these provisions will be as binding upon such owners as upon those known and made parties defendant by name,² even though such unknown owner was at the time in actual and open possession of the premises partitioned,³ and as a general rule a failure to appear and defend after such procedure will be given the same effect as though such defendant had been sued by name, served with process and made default.⁴

(4) *Persons Not In Esse*.—Where persons not yet *in esse* are or are to become owners of property in co-tenancy, the prevailing rule probably is that they will be bound by a partition made in an action in which a competent tenant for life or of the inheritance has been made a party defendant and treated as a representative of persons who may, by subsequently coming into being,

the decree was made without ordering a conveyance, subject to further directions.

1. See the statutes of the different States. And see cases cited in the following notes, on unknown owners.

2. *Cole v. Hall*, 2 Hill (N. Y.) 625; *Pierce v. Oliver*, 13 Mass. 211; *Cook v. Allen*, 2 Mass. 462; *Foster v. Abbott*, 8 Met. (Mass.) 598; *Marvin v. Titsworth*, 10 Wis. 320; *Nash v. Church*, 10 Wis. 303; 78 Am. Dec. 462; *Baylies v. Bussey*, 5 Me. 157; *Coombs v. Persons Unknown*, 82 Me. 326.

Publication of Notice.—Under the Ohio act of March 3rd, 1831, "to provide for the partition of real estate," a notice given in a newspaper circulated through the county, as provided in § 3 of said act, is a sufficient notice to all the world, and all persons in interest so notified are bound. *Rogers v. Tucker*, 7 Ohio St. 417.

Formal Errors.—All persons who do not appear and become parties to the proceedings upon a petition for partition are concluded, as to their rights in the matter, by a judgment rendered upon a verdict in favor of the petitioners, even if the finding of the jury does not conform to the issue, and, through some inadvertence, be not written out in form before it is affirmed. *Foxcroft v. Barnes*, 29 Me. 128.

Pleading Unknown Ownership.—A complaint for partition which stated that the plaintiff owned an undivided three-eighths of the land; that A, one of the defendants, owned an undivided one-eighth; that B, another defendant,

owned one-sixteenth; and C, another defendant, owned one-fourth; and that F did own the remaining three-sixteenths, but had died, leaving divers persons, to the plaintiffs unknown, his heirs; and that if said A, B and C did not own the interests so mentioned as belonging to them, such interests belonged to unknown owners, whose names, as also the names of said heirs, the plaintiffs were unable to ascertain, was comprehensive enough to include any and all unknown owners, provided the title to any portion proved to be in different parties from those supposed. *Kane v. Rock River Canal Co.*, 15 Wis. 179.

3. *Cook v. Allen*, 2 Mass. 467; *Pierce v. Oliver*, 13 Mass. 211.

It must be given the same effect, even though the unknown owner thus proceeded against was entirely ignorant of the whole proceeding. *Nash v. Church*, 10 Wis. 311; 78 Am. Dec. 462.

4. *Nash v. Church*, 10 Wis. 311; 78 Am. Dec. 462. And see *Herr v. Herr*, 5 Pa. St. 428; 47 Am. Dec. 416; *Cook v. Allen*, 2 Mass. 462; *Pierce v. Oliver*, 13 Mass. 211; *Cole v. Hall*, 2 Hill (N. Y.) 625; *Hynes v. Oldham*, 3 T. B. Mon. (Ky.) 266; *Foxcroft v. Barnes*, 29 Me. 128.

Conclusiveness as to Third Parties.—In *New York*, a judgment in partition, under the statute, where part of the premises belongs to "owners unknown," is not valid unless it appears, upon the face of the record, that the affidavit required by the statute, "that the petitioner or plaintiff in partition

acquire an interest in the property.¹ But in such an action

is ignorant of the names, rights or titles of such owners," was duly presented to the court, and that the requisite notice was published. *Denning v. Corwin*, 11 Wend. (N. Y.) 648. But in *Cole v. Hall*, 2 Hill (N. Y.) 625, the court held that a final judgment in partition, obtained in proceedings against unknown owners, comes in question collaterally, such owners are as fully concluded by it from questioning the fact of the plaintiff's seisin as if they had been made parties by name. The proceedings previous to such judgment will be presumed erroneous until the contrary appears.

In *Indiana*, it is held that, unless the acts of a superior tribunal are void on their face, they are valid without proof or averment of their validity. In cases of domestic judgments of courts of general jurisdiction, where they come collaterally in question, jurisdiction of the person and of subject matter, where the record discloses nothing on the point, will be presumed, in the absence of proof to the contrary. *Waltz v. Borroway*, 25 Ind. 381.

Knowledge of the Applicant.—An unknown owner cannot be permitted to impugn a judgment establishing a partition by showing that the applicant knew, when he filed his petition, that his (the unknown owner's) grantors were parties interested in the land, and that the proceedings on said partition were therefore erroneous, but that the judgment establishing the partition, whether erroneous or not was conclusive while it remained unreversed. *Foster v. Abbot*, 8 Met. (Mass.) 596.

1. *Brevoort v. Brevoort*, 70 N. Y. 136; *Renders v. Koppelman*, 68 Mo. 482; 30 Am. Rep. 802; *Clemens v. Clemens*, 37 N. Y. 59; *Cheesman v. Thorne*, 1 Edw. Ch. (N. Y.) 629; *Noble v. Cromwell*, 26 Barb. (N. Y.) 475; s. c., 6 Abb. Pr. (N. Y.) 59; *Freeman v. Freeman*, 9 Heisk. (Tenn.) 301; *Faulkner v. Davis*, 18 Gratt. (Va.) 684; *Baylor v. Dejarnette*, 13 Gratt. (Va.) 152; 98 Am. Dec. 698; *Gaskell v. Gaskell*, 6 Sim. 643; *Leonard v. Sussex*, 2 Vern. 527; *Wills v. Seacle*, 6 Ves. 498; *Finch v. Finch*, 2 Ves. Sr. 492; *Calvert on Part.* 58; *Freem. Judg.*, § 306.

A partition, or sale under judgment for partition, will, under the statutes of *New York*, bar any future contingent interest of persons not *in esse*,

although there be no notice issued to unknown parties, and though such subsequent owners take, not as claimants under any party to the action, but as purchasers under a will. *Mead v. Mitchell*, 17 N. Y. 210; 72 Am. Dec. 455.

Constitutionality.—The provisions of the *Missouri* partition act, §§ 4, 34—as to contingent interests and the conclusiveness of the sheriff's deed—do not, as against persons not *in esse* at the time a partition is made, dispense with the constitutional right of every person, that his property shall be taken only by due process of law, and are valid. *Renders v. Koppelman*, 68 Mo. 482; 30 Am. Rep. 802.

Adverse Interest in Representative.—It has been held that this doctrine cannot be applied where the person fixed upon as the representative holds an estate liable to be defeated by the limitation to the party not *in esse*. *Goodess v. Williams*, 2 Y. & C. 595.

The English Doctrine.—"It is sufficient to bring before the court the first tenant-in-tail in being, and if there be no tenant-in-tail in being, the first person entitled to the inheritance, and if no such person, then the person for life. It has been repeatedly determined, that if there be no tenant for life, remainder to his son-in-tail, remainder over, and he is brought before the court before he has issue, the contingent remaindermen are barred." *LORD REDESDALE* in *Gifford v. Hart*, 1 Sch. & Lef. 386.

But in *Alabama*, a petition for partition, showing that one heir is alive, and its mother pregnant by the ancestor from whom the inheritance is derived, gives the court no jurisdiction to order a sale for division among the heirs; and the sale will be void, although the child may be afterwards born alive. *Gillespie v. Nabors*, 59 Ala. 441; 31 Am. Rep. 20. And in *Maryland* no person can be treated as the representative of a person not yet *in esse* unless he himself has an estate of inheritance, and on that account also entitled to represent his own interests. *Downin v. Sprecker*, 35 Md. 478.

Failure to Bring in Representative.—Where, upon representations of the solvency of an intestate's estate

ordinary procedure is insufficient; in order to bind the interests of such persons the pleadings must ask for and the judgment must make provision for their protection by substituting the fund derived from a sale of the property and preserving it to the extent necessary to satisfy such interests as they arise.¹

b. PARTIES IN PROBATE COURT.—In proceedings for partition in probate court all persons having an interest in the property in question coming to them either by descent, devise or bequest, whether adults or infants, are necessary parties, and, if not joined, their interests will not be affected;² so a known vendee must be made a party in order to be bound;³ but a sale made during the pendency of the proceedings will have no effect upon the partition.⁴

7. Pleadings in Partition.—The systems of pleading in use in the *United States* are generally of statutory origin, and differ so greatly in the different States that few rules of anything like general applicability can be given;⁵ but it may be stated generally that it is irregular to adjudicate the conflicting interests of the parties without formal pleadings and, in order to enable the court

being made, a partition of the realty was had at the instance of certain of the heirs, and a minor child of the intestate and an unborn child were not made parties, and the representatives of an adult child who died pending the proceedings were not brought in, the partition was not binding, either as to the children or as to their representative. *Pearson v. Carlton*, 18 S. Car. 47.

Contingent Limitations.—"If there are ever so many contingent limitations of a trust, it is an established rule, that it is sufficient to bring the trustees before the court, together with him in whom the first remainder and inheritance is vested; and all that may come after will be bound by the decree, though not *in esse*, unless there be fraud and collusion between the trustees and the first person in whom the remainder of inheritance is vested." *Hopkins v. Hopkins*, 1 Atk. 593.

"If several remainders are limited by the same deed, this creates a privity between the person in remainder and all those who may come after him; and a verdict and judgment for or against the former may be given in evidence for or against any of the latter. But there seems to be a conflict of opinion as to whether the same privity exists between a tenant for life and a reversioner, unless the latter had identified himself with the litigation out of which the judgment resulted,

as by being made a party to the proceedings by said prayer." *Freem. Part.*, § 482, citing *Pike v. Crough*, 1 Ld. Raym. 730; *Adams v. Butts*, 9 Conn. 79; *Ph. Ev.* 14, 15.

1. *Monarque v. Monarque*, 80 N. Y. 320; 8 Abb., N. Cas. (N. Y.) 102.

2. *Whitman v. Reese*, 59 Ala. 532; *Dreaher v. Allentown Water Co.*, 52 Pa. St. 225; 91 Am. Dec. 150.

3. *Butler v. Roys*, 25 Mich. 53; 12 Am. Rep. 218. See *Castro v. Barry*, 18 Cal. 96. That a conveyance of a share is to be recognized and protected and the part conveyed set off to the grantee, is a provision of most of the statutes authorizing partition in this court.

An heir's interest in land was sold at sheriff's sale. Another heir was present and claimed that the interest of the heir which was to be sold belonged to him. The latter afterwards commenced proceedings for partition, and the purchaser at the sheriff's sale was neither named in the partition nor made a party, nor notified by any citation or rule taken in it. The land was adjudged to the petitioner. In an action of ejectment by the purchaser it was held that the decree of the orphans' court was not conclusive. *Thompson v. Stitt*, 56 Pa. St. 156.

4. *Cook v. Davenport*, 17 Mass. 345.

5. See the statutes of the different States.

to grant the relief to which the parties are entitled, their rights by means of their pleadings must be made to appear,¹ stated in a manner conforming to the provisions of laws by which they are conferred.²

a. **THE BILL, PETITION OR COMPLAINT.**—A bill or complaint for partition is entitled to a liberal construction.³ A demurrer to a partition will not be sustained merely because it contains irrelevant or redundant matter,⁴ and it will be upheld where it shows the complainant entitled to a partition of only part of the property of which it is asked.⁵ So, even where no right to partition was shown, the complaint has been retained to grant other relief for which the pleading properly asked.⁶ There is no legal objection to the averment of any fact pertinent to the issue, or tending to determine the relative interests of the parties.⁷

(1) *Particular Allegations.*—A complaint which fails to allege the seisin of the complainant cannot be sustained.⁸ The usual

1. O'Leary *v.* Durant, 70 Tex. 409; Thayer *v.* Lane, Walk. (Mich.) 200. And see Barret *v.* Coburn, 3 Metc. (Ky.) 510; Eberts *v.* Fisher, 44 Mich. 551.

2. Phelps *v.* Stewart, 17 Md. 231.

The proper proceeding for partition in equity, is by petition. Rabb *v.* Aiken, 2 McCord Eq. (S. Car.) 118.

In *Maryland*, a bill for partition or sale of an intestate's estate must conform to the act regulating descents, in order that the rights of election and preference secured to certain of the heirs by the act may be enjoyed. Roser *v.* Slade, 3 Md. Ch. 91.

3. Moore *v.* Harper, 27 W. Va. 362.

In *Turrentine v. Watson*, 3 Tenn. Ch. 307, a demurrer to a bill for partition was overruled, in order that facts might be fully brought out to enable the court to determine whether a reconveyance of land to a person who held it originally by descent from the father amounted to a new purchase, or a re-investiture as of the former estate.

Verification.—A petition for partition need not be verified in *Tennessee*. Martin *v.* Porter, 4 Heisk. (Tenn.) 407. And under the code of *Kentucky* providing that a petition for the division of land need not be verified, it is error to dismiss for want of verification the petition of infants, by their *prochein ami*, for partition. Hall *v.* Snipes (Ky. 1889), 9 S. W. Rep. 388.

4. Sample *v.* Sample, 34 Kan. 73.

A petition for partition which alleges that petitioners and defendant are tenants in common, and in possession of the land, and the necessity of a

sale for partition is not demurrable because it also alleges that petitioners' and defendant's assignor are next of kin and heirs at law of a certain person and his children, who all died seised of the land intestate and without issue, such allegations being redundant. McGill *v.* Buie, 106 N. Car. 242.

Material Facts Must Appear.—A complaint alleging a statutory award by commissioners, did not show that said award and agreement for submission had ever been filed in the court named in such submission, nor that the submission and award had been proved, nor that proof had been made of the due service of a copy of the award, nor that the court had caused the submission and award to be entered of record, and granted a rule to show cause why judgment should not be entered thereon, nor that the same had ever been confirmed by the judgment of the proper court. *Held*, that such paragraph of the complaint for partition was insufficient. Anderson *v.* Anderson, 65 Ind. 196.

5. Carter *v.* Kerr, 8 Blackf. (Ind.) 373.

6. Jenkins *v.* Thomason, 32 S. Car. 254; Harvey *v.* Harvey, 25 S. Car. 283.

7. Eberts *v.* Fisher, 44 Mich. 551.

8. Wintermute *v.* Reese, 84 Ind. 308; Warfield *v.* Gambrill, 1 Gill & J. (Md.) 503; McGill *v.* Buie, 106 N. Car. 242; Maxwell *v.* Maxwell, 8 Ired. Eq. (N. Car.) 29; Tibbs *v.* Allen, 27 Ill. 119.

Do Hold.—The allegation that the demandant and defendants, together and undivided, do hold, is the

practice in complaints under the codes is to allege that the plaintiff is in possession, or that he is seised;¹ but the allegation that the parties are seised as co-tenants is a sufficient statement of the plaintiff's possession,² possession being always presumed from the allegation that the parties are seised in common;³ but it is usually not enough for an heir to allege seisin and possession in his ancestor.⁴ At common law a declaration by a tenant in common need not make any reference to the source of title, but one by a partner or a joint tenant should show how the co-tenants became partners or joint tenants,⁵ and, under the existing systems, it is not generally held to be necessary in applying for partition whether at law or in equity to show any deraignment of the plaintiff's title.⁶ The statutory requirement that the rights and titles of the parties be set forth, however, must be observed,⁷ though it has been held that such a requirement is answered by a general allegation of the seisin of each co-tenant,⁸ the ultimate facts only, and not the history and

proper averment of a tenancy in common. *Biddle v. Starr*, 9 Pa. St. 461.

In a bill for partition, averments that complainants and defendants are tenants in common of the land sought to be partitioned, being in support of complainants' case, defendants are bound to discover their title in answer thereto. *McClaskey v. Barr*, 40 Fed. Rep. 559.

1. *Freem. Part.* § 485, citing 2 *Estes Pl.* 318, *Van Santvoord's Pl.* 234.

2. *Keil v. West*, 21 Fla. 508; *McGill v. Buie*, 106 N. Car. 242. A petition for partition, which admits that defendant is in possession, claiming the share of one co-tenant, but does not admit that he claims to be sole seised, does not impliedly admit that defendant resists petitioner's claims, and is not demurrable, as not alleging that petitioners are in possession, as defendant's possession is that of his co-tenants. *McGill v. Buie*, 106 N. Car. 242.

Under 3 *New York Rev. St.* (6th ed.) p. 584, § 8, providing that the petitioner shall set forth the title of all persons interested in the land, and § 9, providing that such persons may be made parties, an allegation that the ancestor and each of the parties owned in fee is a sufficient allegation of possession; the law drawing to the title such constructive possession as is necessary to maintain the action. *Wainman v. Hampton*, 110 N. Y. 429.

3. *Jenkins v. Van Schaack*, 3 *Paige* (N. Y.) 245. And see *Lucet v. Beekman*, 2 Cal. (N. Y.) 385.

4. *Stewart v. Munroe*, 56 How. Pr. (N. Y.) 193.

5. *Allnatt on Part.* 68; *Sellon's Pr.* 217; *Tate v. Whindnam*, Cro. Eliz. 64.

6. *Freem. Part.* § 486, citing *Rutherford v. Jones*, 14 Ga. 521, 60 Am. Dec. 655.

7. *Prichard v. Littlejohn*, 128 Ill. 123; *Bradshaw v. Callaghan*, 8 Johns. (N. Y.) 558; *Miller v. Sharp*, 48 Cal. 394; *Johnson v. Ray*, 67 Ala. 603; *McCarthy v. McCarthy*, 66 Ind. 128; *Murguiondo v. Hoover*, 72 Md. 9.

In *Indiana* the complaint in a partition suit is sufficient if it does not set forth the title of each of the co-tenants, the partitioner's title being fully set forth. *Pipes v. Hobbs*, 83 Ind. 43. But in *Texas* a bill for partition should set out the title of defendants as well as plaintiffs, and it must appear that all persons interested in the property are parties; otherwise the bill is bad on general demurrer. *Buffalo Bayou Ship Channel Co. v. Burly*, 45 Tex. 6.

In *South Carolina*, in proceedings to obtain partition at law between heirs, it must appear on the proceedings that the ancestor died intestate. *Barns v. Branch*, 3 McCord (S. Car.) 19.

Exception to Levy.—In a petition for partition, where the title of the petitioner is by the levy of an execution, the petitioner may except to the levy that it was made in satisfaction of the interest upon the judgment. *French v. Eaton*, 15 N. H. 337.

8. *Bradshaw v. Callaghan*, 8 Johns. (N.

evidence of the titles of the parties, being required.¹ But where the complainant has pleaded title generally, and also set forth the proceedings by which it was acquired, if there is a difference in effect the specific statement will control.² The complainant is required, under the systems in use in many of the States, to state not only his title to the share in the land sought to be divided, but also that of the defendants,³ and where a different effect from that which would naturally and legally follow is desired to be given to a conveyance, it must be set forth with the facts depended upon to effect the change.⁴

A designation or description of the property to be affected is a necessity,⁵ and it must be sufficiently particular to accurately identify the property upon which the decree is intended to operate.⁶

Y.) 558; *Clapp v. Bromagham*, 9 Cow. (N. Y.) 530; *Bell v. Dangerfield*, 26 Minn. 307; *Pipes v. Hobbs*, 83 Ind. 43; *Blakely v. Boruff*, 71 Ind. 93; *McCarthy v. McCarthy*, 66 Ind. 128.

When some of the defendants in partition are described only as "heirs," but all are served and appear, it is not a good ground of objection, and on general demurrer will be considered waived. *Wooten v. Dunlap*, 20 Tex. 183.

1. *Spensley v. Janesville Cotton Mfg. Co.*, 62 Wis. 549; *Bradshaw v. Callaghan*, 8 Johns. (N. Y.) 558.

In *Pipes v. Hobbs*, 83 Ind. 43, the court held, that a complaint alleging "that plaintiff and defendants are owners in fee simple and tenants in common of the following real estate (describing it), that the plaintiff as the owner in fee simple of the undivided one-fourth interest in value of said real estate, and the defendants to the remaining three-fourths' interest in value of said lands," was sufficient under a statute requiring the complaint to set forth a description of the premises and the rights and titles of the parties interested.

2. *Bell v. Dangerfield*, 26 Minn. 307.

Where one in setting forth title in partition proceedings neglects to show the terms of a probated will, which is a chain in the title, the statement is defective. *Miller v. Smith*, 98 Ind. 226.

But where the plaintiff alleged that his wife inherited from her deceased father a certain undivided part of said lands, and that afterward, at her death, as her surviving husband, he became entitled by descent to her entire share thereof. Although he should have also alleged either that his wife,

at her death, left no mother living, or that the whole amount of property, real and personal, of which she was seised and possessed at her death, did not exceed \$1,000, still the facts stated were sufficient, under the statute of descents, to show that he was entitled to at least three-quarters of her share, and would support the complaint. *Dye v. Davis*, 65 Ind. 474.

Probate Court.—A filed his petition in the probate court for a partition of a lot of land, alleging that he had intermarried with one of several persons to whom the land had been jointly conveyed. It was held that the petition did not present a *prima facie* case of title in the petitioner, and the answer denying all title in him, and he failing to establish his title by competent proof, that his petition must be dismissed. *Ingram v. War*, 5 Smed. & M. (Miss.) 746.

3. *Ramsey v. Bell*, 3 Ired. Eq. (N. Car.) 209; 42 Am. Dec. 163, *Harman v. Kelley*, 14 Ohio 502; 45 Am. Dec. 557; *Buffalo Bayou Ship Channel Co. v. Burly*, 45 Tex. 6, *Harman v. Kelley*, 14 Ohio 502; 45 Am. Dec. 557; *Millington v. Millington*, 7 Mo. 446.

4. *Miller v. Shrap*, 48 Cal. 394. And see *Murguiondo v. Hoover*, 72 Md. 9.

5. *Harmer v. Silver*, 2 Oregon 336. And see *Prichard v. Littlejohn*, 128 Ill. 123.

6. *Thruston v. Minke*, 32 Md. 574; *Miller v. Miller*, 16 Pick (Mass.) 215.

If the description of lands, of which partition is prayed, be loose and uncertain, the court will in a case in which that which was uncertain may be made certain, order a plan and survey to be made of the lands, under the direction of the commissioners. *Mitchell v.*

It has been thought that if the description is intelligible to the parties interested it is sufficient,¹ and that resort may be had to the proofs to establish the identity,² but the more reasonable rule would seem to be to require such definiteness and accuracy as would enable a competent surveyor to locate the property.³

The names and description of all the parties, as whether residents of the State or whether adults, must be stated,⁴ but a failure to include a party as a defendant who is shown to be a cotenant can be taken advantage of only by demurrer,⁵ and it must appear on oath that the names and residence of unknown parties cannot, upon diligent inquiry, be ascertained.⁶

The plaintiff must not only set out the share to which he is entitled,⁷ but also the rights and interests of all the parties as well between themselves as against him positively, if so known to him, otherwise to the best of his knowledge.⁸

Starbuck, 10 Mass. 5; Swanton v. Crocker, 52 Me. 415.

Or if it be so framed as to leave it doubtful whether a particular parcel of land is included, the judge may refer it to the jury with instructions to disregard it, if not so included, although described in the answer and replication. Ham v. Ham, 37 Ala. 261.

In a petition for partition among joint owners, "a certain law library, consisting of about fifteen hundred volumes of text books and reports," without more, is not a sufficient description of the property sought to be divided. Strange v. Gunn, 56 Ala. 611.

Lands in Different Counties.—A petition for partition ought not to include lands lying in different counties, but it must be filed and proceeded upon in the county where the lands lie. Bonner, petitioner, 4 Mass. 122. And see Hughes Case, 1 Bland (Md.) 46.

A petition for partition need not show in what county the lands lie, in order to give the court jurisdiction. Godfrey v. Godfrey, 17 Ind. 6; Upham v. Bradley 17 Me. 423.

1. See Sewall v. Ridlon, 5 Me. 460; Wright v. McCormick, 67 N. Car. 27.

2. Thruston v. Minke, 32 Md. 574.

3. See Swanton v. Crocker, 52 Me. 415; Miller v. Miller, 16 Pick. (Mass.) 216.

4. Hughes Case, 1 Bland (Md.) 46. And see Voorhees v. Hushaw, 30 Ind. 488; Morgan v. Farned, 83 Ala. 367; Ballard v. Johns, 80 Ala. 32; Rice v. Rice, 10 B. Mon. (Ky.) 420.

A petition of the widow for the partition of land against a brother of the deceased former owner and the unknown heirs, etc., is defective, if it

does not allege that the petitioner knows of no brother or sister of the deceased except the one named. But the defect, not going to the jurisdiction, cannot be taken advantage of in a collateral proceeding. Thornton v. Houtze, 91 Ill. 199.

5. Voorhees v. Hushaw, 30 Md. 488. And see Rogers v. Miller, 48 Mo. 379.

6. Ferriss v. Lewis, 2 Tenn. Ch. 291. A petition for partition of land, in which the petitioner avers himself to be tenant in common with "persons unknown," will not support a judgment. Smith v. Pratt, 13 Ohio 548.

The Rule in Probate Court.—The petition, in the statutory proceeding in probate court for the sale of common property and distribution of the proceeds, must set forth the names and residences of all the parties in interest including the petitioner, the heir or devisee of a tenant and the surviving husband of a deceased tenant. Ballard v. Johns, 80 Ala. 32. But this may be waived by appearance; even by the appearance of the guardian *ad litem* of an infant owner. Morgan v. Farned, 83 Ala. 367.

And if there be a variance between an original petition on file in a probate court, and the entry on the order book of that court, as to the persons made parties to the proceedings on such petition, the latter must govern. Hain v. Smith, 1 Ind. 451.

7. Champion v. Spencer, 1 Root (Conn.) 147; Jewett v. Persons unknown, 61 Me. 408; Tibbs v. Allen, 27 Ill. 128; Savery v. Taylor, 102 Mass. 510.

8. Van Cortlandt v. Beekman, 6 Paige (N. Y.) 492; Johnson v. Ray,

In probate court a petition for partition should state that the heirs are either incapable or unable to agree upon a division,¹ but in partition by action in other courts no demand is necessary, and consequently none need be pleaded.²

An accounting for rents and profits and in some States for use and occupation may be had in an action for partition;³ but the facts upon which such right is based must be stated, and it must be specifically asked for.⁴

The rule prevails to some extent that in order to authorize a sale in partition the bill must be framed with that view, containing the proper averments,⁵ but the facts showing why such parti-

67 Ala. 603; *Morenhout v. Higuera*, 32 Cal. 294; *Senter v. De Bernal*, 38 Cal. 642; *Prichard v. Littlejohn*, 128 Ill. 123; *Millington v. Millington*, 7 Mo. 446; *Ramsey v. Bell*, 3 Ired. Eq. (N. Car.) 209; 42 Am. Dec. 163; *Harmer v. Silver*, 2 Oregon 336.

If any of the rights are contingent, the petitioner must state the nature of the contingency. *Van Cortlandt v. Beekman*, 6 Paige (N. Y. 492.

An inquest, issued upon a writ of partition, will not be reversed because the party praying for the partition did not describe particularly the names of the persons entitled to shares, and the purparty of each. *Walton v. Willis*, 1 Dall. (U. S.) 350. Where a bill does not distinctly state the interests of the respective parties, and it does not appear who has been served with process, a reference will be directed to ascertain those facts, though a sale is prayed by the bill. *Wooten v. Pope*, 2 Dev. & B. Eq. (N. Car.) 306.

What Is a Sufficient Statement.—A complaint, in partition, showing that plaintiff claims a third as surviving husband, that his wife left a will the provisions of which he rejected, and that defendants are the devisees under the will, a copy of which is made part of the complaint, sets forth sufficiently the interests of the parties in the land. *Gowdy v. Gordon*, 122 Ind. 533.

Where a bill for partition by executor and devisees sets forth that the undivided interest was devised to the latter in common, with the power, nevertheless, in the executor to sell and dispose of the same. It is a sufficient statement of the respective interests of complainants, who asked no partition as between themselves. *Page v. Webster*, 8 Mich. 263; 77 Am. Dec. 446.

Interest Unknown.—A complaint in partition which alleges that the plain-

tiff owns an undivided interest in the land to be partitioned; that he is tenant in common with the defendants, who claim some interest in the land, of the nature and extent of which the plaintiff is not advised—is sufficient, after a finding in favor of the plaintiff. *Bowen v. Swander*, 121 Ind. 164.

Probate Court.—In an application to the probate court for the sale of land for distribution, the allegations that petitioner and her two children "are the joint owners and tenants, are each entitled to one-third interest therein, and acquired their joint ownership therein by reason of being the widow and minor children of" the deceased owner, are sufficient, on collateral attack, to show the interest of the respective parties. *Morgan v. Farned*, 83 Ala. 367.

1. *Chaney v. Tipton*, 11 Gill & J. (N. Y.) 252.

2. See *Freem. Part.*, § 490.

3. *Bogardus v. Parker*, 7 How. Pr. (N. Y.) 305.

A bill for partition filed by the guardian of a lunatic is not repugnant in seeking an account of the rents and profits, and also a sale of his ward's interest. *West v. West*, 90 Ala. 458.

But a complaint for the partition of lands alleging that one of the defendants had cut and converted to his own use a large amount of timber growing on the land, is bad, and the allegation was properly stricken out on motion, for the reason that it was directed against one only of the defendants. *Crane v. Waggoner*, 27 Ind. 52; 89 Am. Dec. 493.

4. *Bullwinker v. Ryker*, 12 Abb. Pr. (N. Y.) 311. And see *Lansdale v. Brown*, 49 Ga. 278.

5. *Ross v. Ramsey*, 3 Head (Tenn.) 15; *Mewshaw v. Mewshaw*, 2 Md. Ch. 12.

tion cannot be made need not be shown;¹ the statement that the property cannot be equitably divided without sale is sufficient,² and under the statutes of many of the States a mere prayer for a partition, or in case it cannot be made without great prejudice, for a sale and division of the proceeds is sufficient. A prayer for relief in partition is a necessity,³ and in general no other or different relief will be granted than that asked for.⁴

(2) *Multifariousness*.—A bill or complaint which seeks relief in respect to two or more distinct and entirely different subjects which have no connection with each other, so that substantially two or more decrees would be necessary to effect relief, is multifarious and bad on demurrer.⁵ Thus a cause of action for the partition of one tract cannot be joined with that for the partition of another where there are parties having an interest in one tract who have none in the other,⁶ nor can an action for partition of the lands of a decedent be joined with a special proceeding by the administrator for permission to sell the same lands for the pay-

On suit in equity for sale of land for partition, it is sufficient to allege that division is not possible without great loss, and it is not necessary to allege that unavailing efforts have been made to secure a division or sale without resort to the court. *Wilson v. Green*, 63 Md. 547.

A bill for partition, which declares that A B has a right of dower in all the lands, does not authorize the court to decree a sale of the lands, and that the dower shall be extinguished by the payment of a gross sum. *Francisco v. Hendricks*, 28 Ill. 64.

1. *De Uprey v. De Uprey*, 27 Cal. 329; 87 Am. Dec. 81; *McEvoy v. Leonard* (Ala. 1890), 8 So. Rep. 40.

2. *McEvoy v. Leonard* (Ala. 1890), 8 So. Rep. 40. And see *De Uprey v. De Uprey*, 27 Cal. 329.

In proceedings for partition, where it is apparent from the language of the complaint that a division of the estate is impracticable, the complaint is not defective in praying only for a sale and division of proceeds. *Lorenz v. Jacobs*, 59 Cal. 262. *Contra in Rhode Island*.

Dyer v. Vinton, 10 R. I. 517.

3. *Hawley v. Castle, Kirby* (Conn.) 218.

4. Where a bill is filed to have land sold for partition, but no actual partition is asked in the alternative, and no general relief prayed for, the court will not order such actual partition, though the parties might seem to be entitled to it, if the bill had been framed with such an aspect. *McKay v. McNeill*, 6 Jones Eq. (N. Car.) 258.

In *Rhode Island*, a bill for partition praying only for a sale and not for a partition generally, is bad on demurrer. *Dyer v. Vinton*, 10 R. I. 517.

5. *Murguiondo v. Hoover*, 72 Md. 9; *West v. West*, 90 Ala. 458; *Garrison v. Cox*, 99 N. Car. 478.

The cumulation of a demand for the partition of succession property, with a demand for the partition of property held in common, where there is no privity of estate between all the parties, plaintiffs and defendants, is not authorized by the rules of pleading. *Mavor v. Armant*, 14 La. Ann. 177.

6. *Reckefus v. Lyon*, 69 Md. 589; *Hunnell v. Taylor*, 3 Gray (Mass.) 111; *Harman v. Kelley*, 14 Ohio 502; 45 Am. Dec. 552; *Brownell v. Bradley*, 16 Vt. 105; 42 Am. Dec. 498; *Kitchen v. Sheets*, 1 Cart. (Ind.) 138.

In *Reckefus v. Lyon*, 69 Md. 589, the court, by MILLER, J., said: "C has no interest whatever in the lands held jointly by A and B, and he therefore cannot properly be made a party to their controversies and made to bear the burden of any part of their costs. In such a case also there must be two separate decrees against different parties and relating to the subject matters which is manifestly improper."

A bill filed by the guardian of a lunatic, heir to an entire tract, part of which has been assigned to the widow as dower, praying a partition of the residue and a sale of his ward's undivided interest in the reversion, is multifarious. *West v. West*, 90 Ala. 458.

ment of the indebtedness of the estate.¹ But where all the rights of the parties are being litigated the fact that distinct and independent rights are set forth and relied upon does not render the pleading multifarious,² nor is it improper to join an action to establish a resulting trust in lands and one for the partition of the same property in a case in which a court of equity may retain jurisdiction and decree partition incidentally to afford complete relief and avoid multiplicity of suits.³ So a count, for use and occupation, or rents and profits may be joined with one for partition,⁴ and a complaint for partition containing a count for a collateral matter, the relief as to which is merely auxiliary to the partition and necessary to uphold it, is not multifarious.⁵

b. ANSWERS AND DEFENSES.—In general, defenses in partition cases and the mode of their presentation are governed by the rules applicable to other actions.⁶ At common law the death of a party to a suit was presented by a plea in abatement, and when so presented his heirs could not be admitted to defense,⁷ but this rule was changed at an early day in *England*,⁸ and in the *United States*, while a plea in abatement is generally good,⁹ the heirs or

1. *Garrison v. Cox*, 99 N. Car. 478.
2. *Waddell v. Waddell*, 99 Mo. 338;
Rinehart v. Long, 95 Mo. 399; *Bobb v. Bobb*, 76 Mo. 419; *Donovan v. Dunning*, 69 Mo. 436.

3. *Appeal of Hayes*, 123 Pa. St. 110.

4. *Bogardus v. Parker*, 7 How. Pr. (N. Y.) 305. And see *infra*, this title, *Particular Allegations*.

5. *Murguiondo v. Hoover*, 72 Md. 9.

6. *Reed v. Child*, 4 How. Pr. (N. Y.) 125; *Jennings v. Jennings*, 2 Abb. Pr. (N. Y.) 6.

If the complaint fails to sufficiently state the origin, nature, or extent of the interests of the plaintiffs, the objection should have been taken by demurrer. If not taken in that mode, it is waived. *Broad v. Broad*, 40 Cal. 493. And a frivolous, illusive, and flimsy answer to a petition for a division of lands, will be disregarded. *Atkinson v. McIntyre*, 90 N. Car. 147. But the mere uncertainty in the description of the premises cannot be regarded in the same light as an omission of the fact necessary to be stated, nor to constitute a cause of action, and such uncertainty should be obviated by a motion to require the pleading to be made definite and certain by amendment. *Godfrey v. Godfrey*, 17 Ind. 8.

"Any party appearing may plead either separately or jointly with one or more of his co-defendants, that the plaintiffs or any of them were in pos-

session of the premises in question or any part thereof, or that the defendants or any of them did not hold the premises together; that the plaintiffs at the time of the commencement of the suit, as alleged in the petition, and other and further pleadings may also be had between the parties, respectively, according to the rights of the court, as in personal actions until an issue or issues in law or in fact be joined between the parties or some of them." 2 Van Sanvoords, Eq. Pr. 22.

7. *Mitchell v. Starbuck*, 10 Mass. 5; *Thomas v. Smith*, 2 Mass. 479; *Brown v. Wells*, 12 Met. (Mass.) 501.

A petition for partition is neither a personal action nor an action in which the possession of land is demanded, within the meaning of those statutes which provide that those classes of actions shall not abate by the death of either party. *Dwinal v. Holmes*, 37 Me. 97. But tenants in common, who are not named as parties, but have had notice that they might appear and answer, and have failed so to do, are not within the rule. *Mitchell v. Starbuck*, 10 Mass. 5.

8. "No plea in abatement shall be admitted or received in any suit for partition, nor shall the same be abated by reason of the death of any tenant." Stat. 8 and 9 Wm. III.

9. See *Requa v. Holmes*, 16 N. Y. 193; *Mitchell v. Starbuck*, 10 Mass. 5; *Thomas v. Smith*, 2 Mass. 479.

other successors in interest of the deceased party may be brought in and bound by the partition.¹ The plea of the general issue puts in issue all the material allegations of the complaint, and has been held to authorize the introduction of any evidence tending to prevent the plaintiff's recovery,² and pleas of another action pending on the same subject matter and that the plaintiff has no legal capacity to sue are permissible.³ Where no issue is taken on any of the material allegations of the complaint it may set up new matter constituting a defense to the action;⁴ and any

1. *Osgood v. Taggard*, 18 N. H. 318; *Frohock v. Gustine*, 8 Watts (Pa.) 121; *Requa v. Holmes*, 16 N. Y. 195; *Thwing v. Thwing*, 9 Abb. Pr. (N. Y.) 323; 18 How. Pr. (N. Y.) 458.

Non-joinder of a defendant in an action of partition is, at common law, matter of abatement merely; and is not made pleadable in bar by the statute of *Rhode Island* authorizing parties omitted in such action to be summoned in (a right of the plaintiff only to save his action from abatement), nor by the discretionary power of the court to order a sale of the premises in actions of partition. *Hoxsie v. Ellis*, 4 R. I. 123.

2. See *Kent v. Parks*, 67 Ind. 53; *Bethel v. Lloyd*, 1 Dall. (U. S.) 2; *Bates v. McCroy*, 3 Yeates (Pa.) 192; *McKee v. Straub*, 2 Binn. (Pa.) 1; *Reed v. Child*, 4 How. Pr. (N. Y.) 125.

Under the Civil Code of *Kentucky*, § 490, allowing actions to sell property of joint owners to be brought by either of them, where plaintiffs assert a right to the land, and aver that defendant, though he is in possession, has no right thereto, a plea of the general issue is sufficient. *Simmes v. Simmes* (Ky. 1889), 11 S. W. Rep. 665.

But when a bill in equity for partition and an account, etc., alleges that the plaintiff and defendant are the owners of certain land, and are in possession as tenants in common, an answer denying that said parties are as tenants in common or otherwise, owners of, and in the possession of, as tenants in common or otherwise, of land, does not sufficiently deny the common occupancy of the land by said parties. *Crosier v. McLaughlin*, 1 Nev. 348.

Denial that Partition Cannot be Made.

—Where, in partition, plaintiff alleges that no actual partition can be equitably made, which defendants deny, a material issue is raised, so that defendants are entitled to have the cause

heard on pleadings and proofs, and it will not be referred to a master as a case in which there is no material dispute between the parties. *Fisk v. Grosvenor* (N. J. 1890), 20 Atl. Rep. 261.

3. *Hornfager v. Hornfager*, 6 How. Pr. (N. Y.) 279; *Martindale v. Alexander*, 26 Ind. 105; 89 Am. Dec. 458.

Where a judge of probate appointed commissioners to make partition, during the pendency of a petition for partition instituted by some of the heirs, and an action by the widow for dower, and the widow and the petitioners appealed from the decree of appointment, the decree was reversed. *Stearns v. Stearns*, 16 Mass. 167.

4. *Parker v. Stewart*, 1 Morr. (Iowa) 419. And see *Hinton v. Whittaker*, 101 Ind. 344.

What Constitutes a Defense.—In *New Jersey* the fact that several tenants in common of land have made a verbal agreement to convey the same to the remaining co-tenant, is not a bar to a suit by one of the former for a partition. *Polhemus v. Hodson*, 19 N. J. Eq. 63. But in *New York* the defense of an executory agreement by defendant to buy plaintiff's interest in the land forms an issue properly triable. *Wainman v. Hampton*, 110 N. Y. 429.

So a written agreement executed by a son binding himself, for a valuable consideration, to pay a mortgage on lands of his parent, does not create a lien upon the son's interest in such lands after the parent's death, and it is improper to plead it as a defense or counter-claim in an action for partition of the land. *Rider v. Clark*, 54 Iowa 292.

It is no objection to a petition for partition of lands, that the petitioner's hold under a will under which they are also entitled to a remainder in other land, nor that their share is subject to an overdue mortgage. *Taylor v. Blake*, 109 Mass. 513.

Partnership Lands.—Where land

such matter not embraced within the general issue must be pleaded or it cannot be proved.¹ So special statutory defenses, when relied upon, must be pleaded.² If the defendant holds the property adversely to the plaintiff,³ or if the plaintiff's possession is denied,⁴ it must be pleaded.

The defendants, however, as well as the plaintiffs are required to set forth fully and particularly the origin, nature and extent of their respective interests in the property.⁵ This having been done the interests of one may be controverted and put in issue by another, so that their respective rights may be settled and adjudicated together with those of the plaintiff.⁶ But where proper relief could have been obtained by specifically answering a proper

was held as partnership property and the affairs of the firm were unadjusted, or a balance was due the defendant, this matter should be set up in answer; no such defense being interposed, partition might be made. *Holmes v. McGee*, 27 Mo. 597.

When the answer to a complaint for partition of mining lands did not deny any of the allegations of the complaint, but merely set up a partnership between the owners without showing that a suit in equity was necessary to settle the accounts and adjust the business, a demurrer to the answer was held to have been properly sustained. *Hughes v. Devlin*, 23 Cal. 501.

1. See *Ogle v. Adams*, 12 W. Va. 213.

2. *Barnard v. Onderdonk*, 11 Abb. N. Cas. (N. Y.) 349.

3. *Jenkins v. Van Schaack*, 3 Paige (N. Y.) 242; *German v. Machin*, 6 Paige (N. Y.) 288.

4. *Brownell v. Brownell*, 19 Wend. (N. Y.) 367. And see *Howell v. Mills*, 7 Lans. (N. Y.) 193.

5. *Morenhout v. Higuera*, 32 Cal. 295. And see *Nolan v. Skelly*, 62 How. Pr. (N. Y.) 102; *Flagg v. Thurstont*, 11 Pick. (Mass.) 431.

Allowance to defendant for improvements, not having been demanded in the answer, it may be assumed that the rents and profits were a substantial compensation. *Wainman v. Hampton*, 110 N. Y. 429.

Where defendants in partition desire to rely on a lease made by them, they must include such averments in their answers as will enable them to maintain their interests, so that, whether the land is partitioned or sold, equities may be adjusted in it or in its proceeds. *Eberts v. Fisher*, 44 Mich. 551.

Where a defendant in a partition proceeding pleads by special answer a title derived through an executor's sale, and alleges a will which forms a muniment of his title, the terms of the will and of the order of the court, directing the sale of lands by the executor, should be so stated in the answer as to enable the court to determine their legal effect, or copies of them should be filed with the answer. *Young v. Pickens*, 49 Ind. 23.

6. *Morenhout v. Higuera*, 32 Cal. 295; *Green v. Walker*, 99 Mo. 68; *O'Leary v. Durant*, 70 Tex. 409. And see *Bollo v. Navarro*, 33 Cal. 465.

An answer of one defendant may controvert the title or interest of another, although the former's answer is served first. *Barnard v. Onderdonk*, 11 Abb. N. Cas. (N. Y.) 349.

In a suit against co-tenants for land, in the absence of any cross-petition for partition by one defendant against his co-defendant, the court has no authority to decree such partition. *Barter v. Coburn*, 3 Metc. (Ky.) 510.

What Can be Set Up.—Where an action for partition of real estate is brought under *Ohio* Code by heirs, and the administrator, by answer and cross-petition, sets forth the necessity of selling the real estate to pay debts, he may have an order of sale; and statutes of limitation have no application in favor of the heirs so petitioning. *Lafferty v. Shinn*, 38 Ohio St. 46.

Where, in an answer and cross complaint, facts were alleged showing defendants to be entitled to a specific performance of a prior contract, the plaintiff to convey to them the real estate in question, an affirmative relief being demanded by defendants, such answer and cross complaint are

complaint, such answer or cross bill is improper.¹ A cross complaint is merely in effect a counter claim,² and is designed for use when the matter pleaded is not calculated to defeat the partition, but entitles the party pleading it to some affirmative relief from a co-defendant.³

The broad proposition has been laid down by a large number of cases that where the complainant's title is disputed or suspicious, equity will not proceed with the action until the question of title has been settled at law.⁴ But it does not appear that a bare de-

sufficient to defeat the plaintiff's right to partition. *McFerran v. McFerran*, 69 Ind. 29.

1. *Prichard v. Littlejohn*, 128 Ill. 123. And see *Blackburn v. Blackburn* (Ky. 1889), 11 S. W. Rep. 712.

In an action for partition of the father's estate, brought by one son against the father's widow and the widow and heirs of a deceased son, a cross bill filed by the father's widow, asking for an assignment of dower, and damages for detention thereof since her husband's death, is demurrable, on the ground that it was not called for by anything in the original bill, and a decree allowing her damages will be reversed, as her claim for arrearages from the deceased son should first be established as a claim against his estate, and ought not to be mixed with a claim against his heirs. *Bearinger v. Pelton*, 78 Mich. 109.

2. See *Egolf v. Bryant*, 63 Ind. 365. And see *Harness v. Harness*, 63 Ind. 1; *Tabor v. Mackee*, 58 Ind. 290.

Improvements.—Where the answer sets up no claim for improvements made on the land, and it appears that what improvements defendant made were made while in possession during the lifetime of the ancestor an exception to the referee's report, based on his disallowance of such claim, should be overruled. *Hulse v. Hulse* (Supreme Ct.), 5 N. Y. Supp. 747.

On a bill for partition of lands whereof one of the defendants has been in exclusive possession, an account of the rents and profits and tax payments should be taken, and a proportional contribution by the several parties in interest be decreed. But, in order to be allowed compensation for improvements made, he must file a cross bill. *Mahoney v. Mahoney*, 56 Ill. 406.

Taxes upon the property, the payment of which was assumed by the

heir after the ancestor's death, and in consideration of a lease of the property, constitute a lien upon his interest as between himself (or his grantee with notice) and the other heirs, and to be proper ground for counter claim in such action. *Rider v. Clark*, 54 Iowa 292.

3. *German v. Machin*, 6 Paige (N. Y.) 288; *Stafford v. Nutt*, 35 Ind. 93.

Where several tenants in common are sued, by a co-tenant for partition, any one who has made improvements on the estate may set up his equity by cross complaint for an allowance; but he cannot by his answer set up the improvements in bar of the action. *Martindale v. Alexander*, 26 Ind. 104; 89 Am. Dec. 458.

4. See *Daniel v. Green*, 42 Ill. 473; *Luntz v. Greve*, 102 Ind. 173; *Hassam v. Day*, 39 Miss. 395; 77 Am. Dec. 684; *Shearer v. Winston*, 33 Miss. 149; *Van Riper v. Berdan*, 14 N. J. L. 132; *Maxwell v. Maxwell*, 8 Ired. Eq. (N. Car.) 28; *Wilkin v. Wilkin*, 1 John Ch. (N. Y.) 117; *Hoffman v. Beard*, 22 Mich. 59; *Butler v. King*, 2 Yerg. (Tenn.) 122; *Whillock v. Hale*, 10 Humph. (Tenn.) 64; *Groves v. Groves*, 3 Sneed (Tenn.) 188; *Bruton v. Rutland*, 3 Humph. (Tenn.) 435; *Albergothie v. Chaplin*, 10 Rich. Eq. (S. Car.) 428; *Trayner v. Brooks*, 4 Hayw. (Tenn.) 295; *Stuart v. Coalter*, 4 Rand. (Va.) 74; *Curran v. Spraul*, 10 Gratt. (Va.) 197; *Straughan v. Wright*, 4 Rand. (Va.) 493. And see *ante*, this title, *Jurisdiction in Partition*.

An exception to this rule was declared in a case in which one claiming to be tenant in common of land, and being in possession of it, sued for partition; the other tenants denied that she was tenant, and insisted that she should try her title by action. It was therefore held, that, as she could bring no action, being herself in possession, the court before whom the petition was brought was authorized to determine

nial of the plaintiff's title will obstruct the progress of the cause;¹ this is effected only by allegations showing defects in plaintiff's title, or title in the defendant, or otherwise casting suspicion in the title of the plaintiff,² and where any real doubt is made to appear, it is well settled that the court will either dismiss the bill without prejudice or hold it to afford opportunity to remove the doubt;³ but where the real issue is one of the identity of the person entitled to the property rather than one of the title itself, a different

the question, especially if it depended merely on construction. *Allen v. Allen*, 2 Jones Eq. (N. Car.) 235.

1. *Lucas v. King*, 10 N. J. Eq. 280; *Overton v. Woolfolk*, 6 Dana (Ky.) 374.

In *Overton v. Woolfolk*, 6 Dana (Ky.) 374, the court said: "If a bare denial of the title when there was no reasonable doubt or suspicion attending it, would authorize a dismissal of the complainant's bill, it would place this equitable jurisdiction, which has been established by a long train of decisions, and is deemed of much public convenience, at the mercy of every profligate and unconscientious defendant, and render the court a mere ministerial agent to carry into effect the wishes of parties in cases where there were no matters of controversy between them."

An answer which, without denying the title set up by plaintiff, alleged in him a different title, void for champerty, and claiming title in defendant in virtue of adverse possession, is bad on demurrer. *Sanford v. Tucker*, 54 Ind. 219.

2. *Lucas v. King*, 10 N. J. Eq. 280; *Overton v. Woolfolk*, 6 Dana (Ky.) 374.

It cannot be shown in defense that the guardian of the grantor of the petitioner formerly presented a petition for leave to sell the grantor's interest in the land, describing it as less than the interest now claimed under him by the petitioner, for the purpose of showing "that parties in adverse interest to the petitioner were in possession at that time, without any adverse claim on the part of those then holding the estate now claimed." *Dodge v. Nichols*, 5 Allen (Mass.) 548.

A power of attorney to one to "sue for and recover any right or interest" he might have to property in Maine, or "to compromise the same with parties having adverse interests;" and a deed of the premises, of which partition is asked, to the present claimant of the property is not sufficient to bar the rights of the petitioners, unless it is

shown that the grantee represented "adverse interests," and that the deed was given for the purpose of compromising the claims of the petitioners. *Matthews v. Matthews*, 49 Me. 586.

3. *Obert v. Obert*, 10 N. J. Eq. 100; *Deery v. McClintock*, 31 Wis. 201; *Hay v. Estell*, 18 N. J. Eq. 252; *Garrett v. White*, 3 Ired. Eq. (N. Car.) 135; *Nicely v. Boyles*, 4 Humph. (Tenn.) 177; 40 Am. Dec. 638; *Bruton v. Rutland*, 3 Humph. (Tenn.) 435; *Straughan v. Wright*, 4 Rand. (Va.) 493; *Hardy v. Mills*, 35 Wis. 141; *Chapin v. Sears*, 18 Fed. Rep. 814.

Where one claims land under statute and asks for partition the other party may attack the constitutionality of the statute. *Harvey v. Harvey*, 25 S. Car. 283.

It is a good defense to a suit for partition that the defendant purchased the entire land from an ancestor of the plaintiff, from whom also the latter claims to derive title by descent, and obtained a decree for the specific performance of the contract of sale and a conveyance; and it makes no difference that the purchase money, after it was paid into court, was received as assets by the administrator of the vendor, who had meanwhile died. *Daggy v. Ash*, 23 Ind. 338.

Where an answer to a bill in equity for partition of lands set up a bargain and sale of the premises by the ancestor of the complainant to the defendant, the ancestor being a tenant in common with the defendant, and the contract of sale being under the hand and seal of the deceased ancestor, in this respect, the answer presented a complete defense to the relief sought. *Nichols v. Padfield*, 77 Ill. 253. And where it alleges a parol contract between the ancestor and defendant for the conveyance of part of the land sought to be partitioned, defendant need not demand a conveyance before filing his answer, as plaintiff, by bringing suit and alleging that the land is part

rule prevails,¹ and a joint answer of several defendants is insufficient as such when it alleges the adverse title to be in only one of them.² Where the rights of the plaintiff are admitted but the defendants set up conflicting titles as between themselves, the plaintiff's share may be assigned to him and the suit retained for further application for partition by the defendants after the settlement of their claims at law.³

Many of the States, however, have empowered their courts of equity to determine the issues raised by an answer disputing the title of the complainant,⁴ and under statutes vesting both legal and equitable functions in the same court and abolishing the distinctions between legal and equitable jurisdiction, such issues may be determined by the same tribunal and in the same action.⁵ It has been held, however, that the abolition of the distinction between actions at law and in equity extended only to forms of action, and did not affect the inherent qualities and differences, and that now, as before, a question of disputed title would have to be settled in an action for ejectment before the partition could be proceeded with,⁶ but if there is also a

of the estate left by decedent, repudiates the contract made by the ancestor. *Cutsinger v. Ballard*, 115 Ind. 93.

1. *McClaskey v. Barr*, 42 Fed. Rep. 609.

2. *Black v. Richards*, 95 Ind. 184.

3. *Phelps v. Green*, 3 Johns. Ch. (N. Y.) 302.

Where there is a dispute among the defendants, the issues may, if the court deems it necessary, send them to a jury. *Hoffman v. Beard*, 22 Mich. 72. And it is necessary that the estate of each known owner, or of the defendants or some of them, should be stated in the judgment, when their rights as between each other are disputed. See *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 302.

4. See *Ormond v. Martin*, 37 Ala. 598; 1 Ala. Sel. Cas. 226; *Griffin v. Griffin*, 33 Ga. 109; *Gage v. Reid*, 104 Ill. 509; *Godfrey v. Godfrey*, 17 Ind. 9; *Wolcott v. Wighton*, 7 Ind. 46; *Forder v. Davis*, 38 Mo. 107; *Purvis v. Wilson*, 5 Jones (N. Car.) 22; 69 Am. Dec. 773; *Parker v. Shane*, 22 How. (U. S.) 13. And see, *infra*, this title, *Jurisdiction in Partition*.

5. *Morenhout v. Higuera*, 32 Cal. 293; *Bollo v. Navarro*, 33 Cal. 465; *Perry v. Richardson*, 27 Ohio St. 110.

Where, under the old practice, proceedings in equity for partition by sale were transferred to the supreme court, the whole case was taken up, and all subsequent and necessary orders in the

cause will be made by that court. *Ammon v. Ammon*, 82 N. Car. 398.

Defendant in partition pleaded sole seizure under a deed from a third person, who, being made a party, alleged that the deed was procured from him by defendant by fraud; whereupon the court below dismissed the suit. This was error; the court should have decided the point of law raised by the plea, and have had an issue framed, and tried by a jury, on the allegation of fraud in the deed. *McBryde v. Patterson*, 73 N. Car. 478.

Paramount Title Must be in Party Pleading It.—The defense of a paramount outstanding title, though valid in an action of trespass to try title, is not admissible in an equity proceeding for partition, unless the defendant has acquired it, or claims under or with it, or makes the holder a party to the suit. *Burleson v. Burleson*, 28 Tex. 383.

6. *Deery v. McClintock*, 31 Wis. 202.

The controlling consideration in the decision of *Deery v. McClintock*, 31 Wis. 202, was, that judgments in partition are conclusive as to the title or interest of all persons, parties to the action and their legal representatives and all persons claiming under them, or either of them, except tenants, or persons having claims as tenants in dower, by the curtesy, or for life to the whole of the premises which shall be subject to partition, while a judgment in an action of ejectment is not conclu-

question as to actual possession in the case, this should be first settled before dismissing the case for the determination of the title at law.¹

c. THE REPLICATION.—In addition to his complaint or bill for partition the applicant is in many of the States entitled to file a replication denying such allegations in the answer as he may choose to controvert.²

8. **Matters of Procedure**—*a*. CHANGE OF PARTIES.—When a person interested in the subject matter of a partition is not named as a party to the proceeding, he may, upon motion to the court, be permitted to become a party and to defend the suit.³ Such a motion may be made at any time before final judgment;⁴ the original parties to the suit are entitled to notice of the application and opportunity to be heard,⁵ and the granting or withholding of such relief is a question for the exercise of the sound legal discretion of the court;⁶ but in the exercise of such discretion such persons only should be admitted as have some estate or legal interest in the property to be affected, and who might properly have been originally made parties to the suit.⁷ Adverse claims of title and other questions at issue in the action cannot be

sive upon the defendants, at least, as to the first judgment, which may always be vacated and a new trial had at the option of the defeated party; thus prejudicing the right of the defendant if he is compelled to submit to a trial of the legal title in this form of action instead of trial in ejectment as provided by law.

1. *Tobin v. Tobin*, 45 Wis. 298.

2. *Freem. Part.* § 492. And see *Murray v. Fitzsimmons*, 2 Johns. (N. Y.) 482.

Burden of Proof.—Where the averments of the answer to a bill praying partition of estate are put in issue by a replication, the burden of proof is on the respondent. *Naglee's Estate*, 52 Pa. St. 154.

Partial Reply.—A reply alleging that deceased in his will devised to plaintiffs the property theretofore advanced to them, but omitting any reference to the advancement to plaintiff's mother, or to the distribution of decedent's estate, as averred in the answer, is only a partial reply, and therefore demurrable. *Duncan v. Henry*, 125 Ind. 10.

3. *Field v. Persons Unknown*, 34 Me. 35; *Huntress v. Tiney*, 46 Me. 83. And see *Hamby Mt. Gold Mines v. Calhoun Land etc. Co.* (Ga. 1889), 9 S. E. Rep. 831; *Smith v. King*, 81 Ind. 217; *Latimer v. Hanson*, 1 *Blond* (Md.) 51; *Fales v. Fales*, 148 Mass. 42; *Van*

Wyck v. Hardy, 39 How. Pr. (N. Y.) 392; *Wickersham v. Young*, 1 Miles (Pa.) 395; *Ex parte Crawford*, 27 S. Car. 159; *Lancaster v. Seay*, 6 Rich. Eq. (S. Car.) 111.

In a suit for partition, one having an interest in the land who was not originally made a party may join as co-petitioner in an amended petition in the suit. *Grand Tower Min. etc. Co. v. Gill*, 111 Ill. 541.

4. *Woolfolk v. Woolfolk*, 30 La. Ann. 139; *Hinds v. Stevens*, 45 Mo. 209.

The court will refuse to grant the motion after the interlocutory judgment for partition is entered, as the statute furnishes another remedy. *Field v. Persons Unknown*, 34 Me. 35. But where, in a partition suit, the names of certain defendants were inadvertently omitted from the copy summons filed, it is not conclusive that they had not been made parties, and if it appears that they had been actually parties, the summons might be amended after judgment and sale. *Van Wyck v. Hardy*, 11 Abb. Pr. (N. Y.) 473; 20 How. Pr. (N. Y.) 222.

5. *Smith v. King*, 81 Ind. 217.

6. *Lancaster v. Seay*, 6 Rich. Eq. (S. Car.) 111; *Huntress v. Tiney*, 46 Me. 83; *Field v. Persons Unknown*, 34 Me. 35.

7. *Fales v. Fales*, 148 Mass. 42; *Wickersham v. Young*, 1 Miles (Pa.)

litigated upon affidavits upon such an application, but must be remitted for trial in some appropriate action,¹ and where an intervenor against whom no affirmative relief is asked fails to appear, the intervention should be dismissed without prejudice.² So in partition, as in other cases, new parties may be brought in and made parties defendant upon application of the plaintiff.³

b. AMENDMENTS.—A discretionary power to amend the pleadings and proceedings in actions for partition is exercised to meet the merits of the case whenever it can be considered as open or subject to be opened, the same rules apply as in ordinary actions.⁴

345; *Woolfolk v. Woolfolk*, 30 La. Ann., 139; *Harman v. Kelley*, 14 Ohio 502; 45 Am. Dec. 552.

Where, after filing their petition in a suit for partition, plaintiffs disposed of all their interest in the property, and thereafter procured an order for service of process on non-resident defendants, such order and service were valid, and the original plaintiffs' purchaser was properly made a party plaintiff, and the cause allowed to proceed. *Hamby Mt. Gold Mines v. Calhoun Land etc. Co.* (Ga. 1889), 9 S. E. Rep. 831.

Creditors of Intestate.—On a bill for partition of land among heirs, creditors of the intestate may come in, on the ground of a deficiency of personal assets to satisfy their claims, to have the deficiency supplied out of the real estate. *Latimer v. Hanson*, 1 Bland (Md.) 51.

Where in a suit for the partition and settlement of a testator's estate, it was sought to have the share of one of the beneficiaries under the will settled upon his wife and children, under a clause in the will designed to protect such share against creditors of the beneficiary, but it was not clear that judgment creditors of the beneficiary were not entitled to resort to the fund for payment of their debts, such judgment creditors should be allowed to intervene in the suit. *Ex parte Crawford*, 27 S. Car. 59.

Doweress.—The wife of a co-parcener, becoming a widow after judgment and before the sale, cannot be made a party and have her interest ascertained by the court. She must look to the sheriff for her portion of the proceeds of the sale. *Hinds v. Stevens*, 45 Mo. 209.

1. *Morse v. Stockman*, 65 Wis. 36. And see *Deery v. McClintock*, 31 Wis. 195.

2. *Noble v. Meyers*, 76 Tex. 280.

3. See *Cowan's Appeal* (Pa. 1888), 16 Atl. Rep. 28; *Van Wyck v. Hardy*, 39 How. Pr. (N. Y.) 392. And see also **PARTIES TO ACTIONS.**

4. See *Warfield v. Warfield*, 5 Har. & J. (Md.) 459. And see *Miller v. Miller*, 61 Ind. 471; *Blackburn v. Blackburn* (Ky. 1889), 11 S. W. Rep. 712; *Muir v. Thomson*, 78 S. Car. 499; *Van Wyck v. Hardy*, 39 How. Pr. (N. Y.) 392. And see, further, **AMENDMENT**, vol. 1, p. 546.

Where, after sale in partition, it appears that there has been a mistake in one of the lines of the tract, as set out in the petition and judgment, an "amended petition," so called, to set aside the sale, and have the mistake corrected, is, in effect an exception to the report of sale, and does not attack the judgment; and hence the civil Code of *Kentucky*, § 772, limiting the chancellor's control over his judgments to 60 days from their rendition, does not apply. *Johnson v. Johnson* (Ky. 1889), 11 S. W. Rep. 5.

Where, in a partition suit, the assignee of a judgment produced before the master the record of his judgment and an assignment to himself, but, in consequence of a mistake in drawing the assignment, a cancelled judgment was described instead of the true one, the master reported against the lien, and the mistake was not discovered until after the time of proving liens had expired, the court allowed the creditor to prove the true judgment, on terms. *Horton v. Buskirk*, 1 Barb. (N. Y.) 421.

It is not error to permit, after the evidence is in, an amendment merely modifying the terms of the prayer. *Rettig v. Newman*, 99 Ind. 424. Or by adding to it "and such other relief as they may be entitled to in the premises." *Cowan's Appeal* (Pa. 1888) 16 Atl. Rep. 28. The trial court may amend an interlocutory decree in parti-

c. PROCEDURE ON DEFAULT.—If default is made in appearing or pleading, or if the rights and interests of the several parties are not controverted, there must be a reference to take proof of the title and rights of the parties preliminary to an interlocutory judgment.¹ On such reference the title should be traced back to the common source of all the co-tenants,² and the proof exhibited should be at least such as would establish a *prima facie* right of recovery in an action of ejectment.³ Where a complainant makes default in pleading he is deemed to have abandoned his cause.⁴

d. DISPOSITION OF THE ISSUES.—Issues of fact arising in an

tion at any time before final decree. *Warren v. Williams*, 25 Mo. App. 22.

Amendments on New Trial.—Though the defendant did not allege in its answer or prove on the trial facts which would entitle it to an equitable lien arising out of transactions which resulted in a void mortgage, it may, on the new trial, amend its answer, and give proof of such facts. *Foster v. Roche* (Supreme Ct.), 4 N. Y. Supp. 605. But after trial of a petition for partition of three parcels of land, the court refused to allow an amendment by striking out one of the parcels, the effect of which would be to defeat the respondent's claim to costs for failing to establish a right to partition of that parcel. *Loud v. Penniman*, 19 Pick. (Mass.) 539. And where a lot was sold under a decree in partition which contained no provision for costs, and the decree was subsequently amended *nunc pro tunc*, and execution issued, and the lot sold a second time, a purchaser at the second sale acquires no rights against an innocent purchaser at the first sale, without knowledge of any facts authorizing the amendment. *McClannahan v. Smith*, 76 Mo. 428.

1. *Porter v. Lee*, 6 How. Pr. (N. Y.) 491; *Neilson v. Cox*, 1 Cai. (N. Y.) 121. See *Reinhart v. Lugo*, 75 Cal. 639; *Mount Hope Iron Co. v. Dearden*, 140 Mass. 430; *Griggs v. Peckham*, 3 Wend. (N. Y.) 436; *Richardson v. Loupe*, 80 Cal. 490; *Hughes v. Devlin*, 23 Cal. 508; *Anchison v. Anchison*, 23 Mo. 376.

On overruling a demurrer to the answer alleging the existence of the lease, the cause may be referred, with leave to plaintiff to attack the validity of the lease. *Cannon v. Lomax*, 29 S. Car. 369.

Where the court points out the basis

on which an equitable settlement and a partition of property may be made, and counsel cannot thereupon agree as to the amount due each, a reference will be ordered. *Enyard v. Nevius* (N. J. 1889), 18 Atl. Rep. 192.

But where the plaintiff, in a bill for partition, died pending the suit, and the suit was revived against his heirs, a reference as to the title of such heirs, who had made default, was unnecessary, that sufficiently appearing from the bill filed by the ancestor. *Wilde v. Jenkins*, 4 Paige (N. Y.) 481.

Irregularity in Taking Default.—Under Comp. Laws *Kansas*, 1862, ch. 162, § 3, requiring notice of a petition for partition to be given to all persons interested therein at least forty days before the term of court next after the filing of the petition, where the notice was served in due time, but only thirty-eight days were given defendant in which to answer, the judgment on the petition rendered more than forty days after service of notice is voidable only. *Havens v. Drake*, 43 Kan. 484; *Cheney v. Richards*, 84 Cal. 492.

2. *Hamilton v. Morris*, 7 Paige (N. Y.) 39.

3. *Griggs v. Peckham*, 3 Wend. (N. Y.) 436; *Larkin v. Mann*, 2 Paige (N. Y.) 27; *Jennings v. Jennings*, 2 Abb. Pr. (N. Y.) 6; *Hamilton v. Morris*, 7 Paige (N. Y.) 39; *Wilde v. Jenkins*, 4 Paige (N. Y.) 491; *Ripple v. Gilborn*, 8 How. Pr. (N. Y.) 456. And see *Mills v. Miller*, 2 Neb. 314; *Porter v. Lee*, 6 How. Pr. (N. Y.) 491.

4. *Lafferty v. Beale*, 1 Miles (Pa.) 51. Different questions are referred to the referee or master, upon default, in different States under statutory provisions, and the procedure upon such references and the powers and duties of the referees are governed by the rules applicable to references and re-

action for partition are usually made triable by jury,¹ though the power to dispose of all the matters in controversy, including issues of fact as well as of law, may be, and in a number of States has been, conferred upon courts sitting without a jury.² The issues triable by jury, however, are issues of fact arising from a denial of plaintiff's right to maintain the action only; issues involving the examination of a long account between the parties being triable by the court or by reference.³

ceivers in general. See further REFERENCES.

1. *Brown v. Brown*, 52 Hun (N. Y.) 532; *Covington v. Covington*, 73 N. Car. 168; *Harding v. Devitt*, 10 Phila. (Pa.) 95; *Cassedy v. Wallace*, 61 How. Pr. (N. Y.) 240.

Where, upon a petition for an inquest for partition, the respondent denies the identity of the petitioner, and the testimony before the examiner upon the point is conflicting, there should be an issue to a jury. *Armstrong's Estate*, 14 Phila. (Pa.) 320.

In an action to have a homestead declared and partitioned, where the court charged the jury that: "In case you find for plaintiff for her homestead, find that plaintiff is only entitled to an undivided 200 acres out of the original 1,920 acres, and for an undivided half interest in and to the improvements erected on said 200 acres, and state the amount you may find such improvements were worth at date of deed to defendant," it was held, that this did not direct the jury to make partition, but only directed them on the issues of facts necessary to establish the rights of the parties, and enable the court to render judgment, and is therefore proper. *Lewis v. Sellick*, 69 Tex. 379.

On a petition for partition the court has no power to frame an issue of fact for the determination of a jury, after the interlocutory judgment is entered, and while it remains in force, by which the rights of parties can be affected. *Ham v. Ham*, 39 Me. 216.

2. *Foreman v. Hough*, 98 N. Car. 386.

Under *South Carolina* Gen. Stat., § 2115, the circuit judge can hear a partition case and render judgment at chambers in the county where the land lay, without the consent of all the parties to the cause. *Woodward v. Elliott*, 27 S. Car. 368.

In *Georgia* the court has full power

to determine the titles of the parties, the same as upon a bill in equity, and may direct an issue to try any controverted question of fact. *Griffin v. Griffin*, 33 Ga. 107.

The common and undivided lands in the Island of Nantucket are liable to partition upon petition; and if an issue in fact be joined on such petition, upon the seisin of the petitioners, it may be tried in the supreme court when sitting in the county of Suffolk. *Mitchell v. Starbuck*, 10 Mass. 5.

Feigned Issue.—The direction by the orphan's court of an amicable ejectment to try the title to land claimed by the defendant by virtue of a parol gift, is only a feigned issue to inform the conscience of the court and of no conclusive effect. *Wible v. Wible*, 1 Grant Cas. (Pa.) 406.

3. *Brown v. Brown*, 52 Hun (N. Y.) 532. And see *Genet v. Delaware etc. Canal Co.*, 2 Civ. Pro. Rep. (N. Y.) 448.

Consent.—A reference to take proof and report with findings may be ordered by consent. *Thurber v. Chambers*, 4 Hun (N. Y.) 721.

Where all the parties who are to be affected by a decree in petition are adults, and have been personally served with process, the court will not examine the proceedings particularly to ascertain whether all the proper parties are before the court, or whether their interests are correctly stated, if no objection is made to the master's report. *Braker v. Devereaux*, 8 Paige (N. Y.) 513.

In a suit for partition, if the rights of the parties have materially changed subsequently to the master's report, so that a partition cannot be made, there should be a special application to the court for a new reference. *Reynolds v. Reynolds*, 5 Paige (N. Y.) 161.

Trials in actions for partition are governed by the rules applicable to trials in general. See also TRIAL.

(1) *Evidence*.—In actions for partition the burden of proof rests with the complainant to establish the co-tenancy and his interest in the premises and the title by which he holds it.¹ To establish title, neither the examination of records nor oral statements is sufficient.² The muniments of title themselves should be produced and may be examined to ascertain the character of the estates of the respective parties,³ though adverse possession for a sufficient time to satisfy the statute of limitations is both competent and sufficient evidence of title.⁴ Deeds of property other than that in question are not admissible for the purpose of controlling or defeating a title by descent or operation of law.⁵ So

1. *Gilman v. Stetson*, 16 Me. 124; *Shaw v. Parker*, 6 Blackf. (Ind.) 345; *Van Riper v. Berdan*, 14 N. J. L. 132; *Brock v. Nelson*, 29 S. Car. 49.

Where all parties claim through a common grantor, plaintiff is not required to prove the source of such grantor's title. *O'Melia v. Mullarky*, 124 Ill. 506.

In a suit by heirs against the executors and devisees for partition, in which the executors seek to be reimbursed out of the estate for payments made on behalf thereof, one of the items being for payment of taxes on lands, a part of which had been adjudged to be the separate property of the widow, the burden is on plaintiffs to show how much, if any, of such item is for taxes on the widow's separate property. *Haley v. Gatewood*, 74 Tex. 281.

2. *Hicks v. Chapin*, 67 Ill. 236.

A decree against the unknown heirs of T which was based upon the testimony of a witness that he once had in his possession a patent for 1,920 acres of land issued to the heirs of T, that he and one W obtained it as attorneys for such heirs, that he placed it in the hands of B and D for location, who agreed to locate it for the usual fee of one-third, and the patent which was given in evidence, and also a deed from B and D to plaintiff for 694 acres, cannot be upheld. These facts, without more, were entirely insufficient to support the decree divesting the heirs of title. *Byrnes v. Sampson*, 74 Tex. 79.

3. *Bradley v. Zehmer*, 82 Va. 685; *Hicks v. Chapin*, 67 Ill. 236.

It is error to nonsuit plaintiffs in partition, who claim under a sheriff's deed reciting a sale of two-thirds of the land to them, under execution for taxes, and also under a writing, exe-

cuted by defendant's grantor, acknowledging that he held two-thirds of the land as their tenant. *Chastain v. Higdon*, 84 Ga. 111.

In *Alabama*.—In a statutory proceeding for the partition of crops between two joint owners it is permissible, if not necessary, for plaintiff to prove that, before the institution of the proceeding, he was dispossessed by defendant of the crops, and of the land on which they were raised; and the record, or papers, of the action of unlawful detainer, are the highest and best evidence of the eviction; and, as preliminary to their introduction, the justice may testify to the fact that there was such a suit between the parties in his court. *Gassenheimer v. Huguley*, 64 Ala. 83.

4. *Saco Water Power Co. v. Goldthwaite*, 35 Me. 456; *Clapp v. Bromagham*, 9 Cow. (N. Y.) 530.

Competency of Witnesses.—In an action for the partition of real estate, in which the legitimacy of the children is put in issue by the heirs-at-law of the husband, the widow, even though she be a party to the suit, is a competent witness on behalf of the children. *Van Tuyl v. Van Tuyl*, 8 Abb. Pr., N. S. (N. Y.) 5.

5. *Burghardt v. Van Deusen*, 4 Allen (Mass.) 374. See *Henderson v. Lindley*, 75 Tex. 85. *In re Coomb*, 8 N. J. Eq. 78.

The valuation books of the town in which the land is situated are not admissible, for the purpose of showing that after the date of the deed conveying other lands the former owner was not taxed for any land; or to show that after the date of the deed, work was done upon the premises by the grantee, if no title by adverse possession is claimed. *Burghardt v. Van Deusen*, 4 Allen (Mass.) 374.

instruments improperly executed are excluded,¹ and a judgment by an heir against the administrator of the decedent is not evidence to establish a right to an allowance for the debt upon a partition of the lands descending from such decedent.² Proof of legal title, in the absence of evidence of ouster or adverse possession, raises a presumption of complainant's possession, which is *prima facie* sufficient.³

(2) *Variance Between Pleadings and Proof*.—Where the proof shows that the interests of the parties have been incorrectly described in the pleadings the court may amend the record and give judgment according to the proofs,⁴ and if the variance amounts to a failure to establish a cause of action against one or more of the alleged co-tenants, the partition is not thereby defeated. Judgment of dismissal may be rendered as to them, but directing a partition as to those against whom the cause of action was established.⁵

9. The Interlocutory Judgment.—After the disposition of the issues or upon the coming in of the report of a referee in a proper case, an interlocutory judgment for partition should be given.⁶ It is the province of this judgment to determine and declare all the rights, titles and interest of the parties, and of each

Must Support the Issue.—A bill for partition, founded on the allegation that there never was any acquisition of title by a railway company by its proceedings to condemn land, cannot be sustained by showing that the company lost the title to the property condemned by abandonment or non-user. *Chicago etc. R. Co. v. Chamberlain*, 84 Ill. 333.

1. *Parker v. Chancellor*, 73 Tex. 475.

2. *Stephenson v. Cotter* (Supreme Ct.), 5 N. Y. Supp. 749.

But a decree on a bill in equity filed by an executor against residuary legatees to determine their distributive shares, fixing the amount of the advancement to a legatee and the amount of his distributive share, is conclusive evidence of such amounts in a suit for partition of real estate devised to them by the same will. *Torrey v. Pond*, 102 Mass. 355.

3. *Brownell v. Brownell*, 19 Wend. (N. Y.) 367. And see *Jenkins v. Van Schaack*, 3 Paige (N. Y.) 242; *Clapp v. Bromaghan*, 9 Cow. (N. Y.) 530.

4. *Thompson v. Wheeler*, 15 Wend. (N. Y.) 342; *Loud v. Penniman*, 19 Pick. (Mass.) 539; *Ferris v. Smith*, 17 Johns. (N. Y.) 221.

Where a petitioner for partition alleged a seisin in fee, and, upon the facts as agreed by the parties and sub-

mitted to the court, it appeared that the petitioner's interest was only for life, the petition may be amended so as to conform to the opinion of the court, and judgment for partition awarded accordingly. *Fay v. Fay*, 1 Cush. (Mass.) 93.

A bill for partition alleged that the sheriff levied on certain lands, while the levy was in fact upon only the undivided two-eighths of the lands described in the bill. It was held that the variance was not fatal. *Holman v. Gill*, 107 Ill. 467.

It was no error in the proceedings of a writ of partition, in *Pennsylvania*, that the original writ called only for a partition of lands in "Hellam township," but the judicial writ was for lands in "Hellam and Windsor townships." *Ewing v. Houston*, 4 Dall. (U. S.) 67.

Allnatt lays down the contrary rule, that the judgment must be conformable to the demand. Allnatt Part. 75.

5. *Ferris v. Smith*, 17 Johns. (N. Y.) 221; *Loud v. Penniman*, 19 Pick. (Mass.) 539. And see *Paine v. Ward*, 4 Pick. (Mass.) 246.

6. *Curry v. Colgan*, 3 How. Pr. N. S. (N. Y.) 26. And see *Reed v. Howard*, 71 Tex. 204; *Henrichsen v. Hodgen*, 67 Ill. 179; *Wain v. Meirs*, 27 N. J. Eq. 351.

of them, in the property, leaving nothing open or in reserve except mere matters of detail in carrying it out.¹

a. QUESTIONS DETERMINED.—The question which is, perhaps, preliminary to all others is that of the co-tenancy of the parties or their rights and interests in the subject matter.² This having been favorably determined, the judgment must then determine what undivided shares the several parties are entitled to, and what interests or estates they respectively hold in such shares,³ but only the extent of the rights of the parties should be defined. An allotment of a particular section of a tract to each party is erroneous.⁴ Where there are shares belonging to unknown owners they may properly be designated collectively.⁵ In some States and under some circumstances the interlocutory judgment may decide whether there shall be an actual partition or a sale and division of the proceeds, in which case there should be an appointment of commissioners to effect the one purpose,⁶ or of a referee or otherwise to effect the other.⁷

b. DIRECTIONS AS TO MANNER OF MAKING THE PARTITION.

1. *Brown v. Bulkley*, 11 Cush. (Mass.) 168; *Taggart v. Hurlburt*, 66 Barb. (N. Y.) 553; *Tibbs v. Allen*, 27 Ill. 119; *Kilgour v. Crawford*, 51 Ill. 249.

An order of court which, instead of adjudicating the rights of parties to proceedings for partition, directs the commissioners to do this, and to make partition accordingly, is irregular. *Street v. Benner*, 20 Fla. 700.

On petitions for partition, all questions concerning the title of the parties, and the nature and proportions of their interests, are for the jury; and the interlocutory judgment, which is conclusive, should conform to the verdict. *Allen v. Hall*, 50 Me. 253.

2. See *Lorenz v. Jacobs*, 53 Cal. 24; *Emeric v. Alvarado*, 64 Cal. 529; *Tibbs v. Allen*, 27 Ill. 119.

This includes questions of adverse claims of titles where such questions are permitted to be litigated in actions for partition. See *infra*, this title, *Jurisdiction*, as well as all questions as to what may be partitioned and who may apply for partition, involved in the case in hand. See *infra*, this title, *What May be Partitioned*, and *Who May Enforce Partition*.

A decree in partition, decreeing one-third of the land to plaintiff and the remainder to two defendants, and directing that the land be divided equally between the three, sufficiently shows that each was decreed a one-third interest. *Askey v. Williams*, 74 Tex. 294.

3. *Tibbs v. Allen*, 27 Ill. 119; *Kilgour v. Crawford*, 51 Ill. 249; *Emeric v. Alvarado*, 64 Cal. 529; *Lorenz v. Jacobs*, 53 Cal. 24; *Reed v. Howard*, 71 Tex. 204; *Phelps v. Green*, 3 Johns. Ch. (N. Y.) 304; *Ledbetter v. Gash*, 8 Ired. (N. Car.) 463; *Askey v. Williams*, 74 Tex. 294; *Agar v. Fairfax*, 17 Ves. 542.

In a petition for partition, it is error for the court not to determine the shares of the parties strictly in accordance with the statutes. *Aldridge v. Montgomery*, 9 Ind. 302.

A decree in a partition suit is erroneous in ignoring a valid agreement set up by the answer changing the relative proportions of the respective holdings of the parties. *Johnson v. Murray*, 12 Lea (Tenn.) 109.

Change of Ownership Pending Action.—In partition in which the allotment of shares was required to be in the names of the original co-tenants, it was no part of the duty of the justice to determine who owned the different shares at the time of application for partition. *Burk v. Hand*, 45 N. J. Eq. 166.

4. *Reed v. Howard*, 71 Tex. 204; *Dondero v. Van Sickle*, 11 Nev. 389.

5. *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 285.

6. See *infra*, this title, *Actual Partition*.

7. See *infra*, this title, *Sale Instead of Division*.

—It is competent for the court in interlocutory judgment to direct the manner in which the partition shall be made,¹ and direct the execution of conveyances or the performance of such other steps as shall be necessary to carry the partition into effect.² Every judgment of partition must be understood to contain all statutory directions by implication if they are not expressed.³

It may also provide for an account between the parties in respect to the rents and profits received.⁴

c. NOT A FINAL JUDGMENT.—The interlocutory judgment in an action for partition directing a division or sale of the premises in question is not a final decree, but merely an interlocutory order.⁵ Its rendition is not notice of its terms and conditions, without reference to the doctrine of *lis pendens* to parties or to their privies,⁶ and it may be changed, altered or amended to meet the exigencies of new facts if such should appear;⁷ or it may be set aside upon application of the parties in interest where it appears to have been procured by suppression of such material facts as would have defeated the action,⁸ and the court may, in the exercise of a sound legal discretion, permit a discontinuance after interlocutory judgment.⁹ So, as a general rule, it is not appealable, and can be reviewed only in connection with the final decree.¹⁰ But as all the labor between the rendition of the interlocutory and

1. Harrell v. Harrell, 12 La. Ann. 549; Grassmeyer v. Beeson, 18 Tex. 753.

2. Grassmeyer v. Beeson, 18 Tex. 753; Dan'l Ch. Pr. (5th ed.) 2254; Seaton's Forms 184; Story's Eq. Jur., § 656.

3. Houston v. Blythe, 71 Tex. 719.

It is not a modification of a judgment, directing the commissioners to proceed generally according to law, to give, in a subsequent order appointing new commissioners, specific instructions following the statute, as every judgment of partition contains the statutory directions by implication if not expressed. Houston v. Blythe, 71 Tex. 719.

An order directing partition of the land of an intestate between his widow and heirs, saving the rights of homestead, is inconsistent with a subsequent order directing the assignment of the homestead, saving the rights of the distributees, under the partition, and both orders are rendered practically inoperative. Williams v. Malory (S. Car.), 11 S. E. Rep. 1068.

4. Brownson v. Gifford, 8 How. Pr. (N. Y.) 389.

5. Bybee v. Summers, 4 Oregon 354. And see Daleschal v. Geiser, 36 Kan. 374; Beebe v. Griffing, 6 N. Y. 464;

Pipkin v. Allen, 29 Mo. 229; Medford v. Harrell, 3 Hawks (N. Car.) 41.

A final decree at the time of appointing a commissioner for the division of land, in a suit for partition, is erroneous. Seay v. White, 5 Dana (Ky.) 555.

A petitioner in an action for partition can discontinue his suit at any time before the cause is submitted on the question of confirming the report of the commissioners. Ivory v. Delore, 26 Mo. 505. And an order directing all of decedent's land to be divided between his widow and son, may be revoked at any time before partition is actually made and any portion of the land ordered to be sold for the payment of debts. Lee v. Henderson, 75 Tex. 190.

6. Bybee v. Summers, 4 Oregon 354; Kester v. Stark, 19 Ill. 328.

7. Kester v. Stark, 19 Ill. 328; Bybee v. Summers, 4 Oregon 354.

8. Daleschal v. Geiser, 36 Kan. 374; Lee v. Henderson, 75 Tex. 190.

9. Furman v. Furman, 12 Hun (N. Y.) 441.

10. Beebe v. Griffing, 6 N. Y. 465; Clester v. Gibson, 15 Ind. 10; Wood v. Wilkinson, 13 Ind. 352; Berry v. Berry, 13 Ind. 446; Hunter v. Miller, 11 Ind. 356; Cook v. Knickerbocker,

the final judgment is lost in case of a successful appeal, some courts have considered it a final judgment, at least, to the extent of being appealable.¹ In some instances the right to appeal from such an interlocutory judgment has been conferred by statute, and under such statutes such a judgment must be reviewed, if at all, by a direct appeal or motion for a new trial without waiting for the final decree.²

10. Equitable Relief Incidental to Partition.—"He who seeks equity must do equity." Hence where co-tenants apply to a court of equity to effect a partition of their estates, it will adjust all the equities growing out of the common tenancy according to the full exigencies of the case.³ Equities which do not grow out of the relation of the parties to the common property, however, cannot be taken into consideration in an action for partition,⁴ though

11 Ind. 230; *Griffin v. Griffin*, 10 Ind. 170; *Durham v. Durham*, 34 Mo. 447; *Pipkin v. Allen*, 29 Mo. 229; *Ivory v. Delore*, 26 Mo. 505; *Medford v. Harrell*, 3 Hawks (N. Car.) 41.

But where an order has been made for the sale of land in a proceeding for partition, the commissioner reported a sale, and thereupon the purchaser appeared and filed exceptions to the report, upon which the commissioner made up an issue, and, without any notice, to other parties, a judgment setting aside the sale was rendered. The order setting aside the sale was a final judgment from which an appeal would lie. *Hollett v. Evans*, 28 Ind. 61.

1. *McFarland v. Hall*, 17 Tex. 676. And see *Tompkins v. Hyatt*, 19 N. Y. 534.

The decision in *McFarland v. Hall*, 17 Tex. 676, seems to have been decided partially if not wholly upon the ground that such a judgment leaves nothing to be done but to execute the directions contained in it, and is, therefore, final.

In *New York* an appeal from an interlocutory judgment may be taken to the general term of the supreme court, but cannot be carried to the court of appeals. *Tompkins v. Hyatt*, 19 N. Y. 534.

2. *Ryan v. McMahon*, 43 Cal. 627; *McCourtney v. Fortunes*, 42 Cal. 387; *Shepherd v. Rice*, 38 Mich. 556; *Randles v. Randles*, 67 Ind. 434.

3. *Packard v. King*, 3 Colo. 211; *Evarts v. Woods* (Supreme Ct.), 6 N. Y. Supp. 200; *Dall v. Confidence Min. Co.*, 3 Nev. 535; *Piper v. Farr*, 47 Vt. 721; *Miller v. Peters*, 25 Ohio St. 270; *Lynch v. Lynch*, 18 Neb. 586; *King v. Cooper* (Ill. 1890), 24 N. E. Rep. 768.

In *Dall v. Confidence Min. Co.*, 3

Nev. 535, the court by BEATTY, C. J., said: "Though partition had its origin in the common law courts, it is a subject over which the courts of equity assume almost exclusive jurisdiction, and in disposing of the cases for partition, the equities of the respective parties growing out of their ownership of the property as tenants in common, or otherwise, are taken into consideration and disposed of upon the broad principles which govern its courts in the administration of justice."

In a proceeding for partition, the court has ample power to settle the rights of parties interested in the land. If the land needs to be sold, their rights are the same in the proceeds that they were in the land; and the court has power to adjust and secure their right, whether legal or equitable, in the proceeds of such sale. *Milligan v. Poole*, 35 Ind. 64.

A law providing for a partition of real estate among joint owners by a proceeding in equity contemplates an equitable partition according to real ownership, rather than a partition according to precise legal interest; but where the legal interests are certain, and the facts are such as to render the equitable proportions entirely uncertain, the only safe rule is to follow the legal title. *Kelley v. Madden*, 40 Conn. 274.

4. *Stuart v. Coalter*, 4 Rand. (Va.) 74; 15 Am. Dec. 731. And see *Wolcott v. Robbins*, 26 Conn. 236; *Doggett v. Hart*, 5 Fla. 215; 58 Am. Dec. 464; *Norris' Appeal*, 64 Pa. St. 275; *Hale v. Darter*, 5 Humph. (Tenn.) 79; *Story's Eq. Jur.*, § 615; *Bailey v. Knapp*, 79 Me. 205.

the setting forth independent grievances, of which a court of equity has no jurisdiction, is no ground for a refusal to retain the bill for partition when the right to such relief is properly pleaded.¹

a. MATTERS PRELIMINARY TO PARTITION.—As an incident of and preliminary to partition, deeds of conveyance may be corrected, and specific performance of contracts for conveyance may be decreed, to the end that upon partition each party may have his equitable title in common converted into a legal title in severalty.² So a deed or devise may be construed when necessary in order to decide the cause,³ and a mortgage may be reformed and foreclosed and the manner of its payment from the proceeds of the sale of the common property prescribed.⁴

b. PARTIAL PARTITION.—Where a partition is to be enforced by legal process it is essential that the whole tract embraced by the co-tenancy should be included, and no partition can be had at the instance of one whose interest extends to only a portion of the common property.⁵ But when the whole tract is so included, two or more co-plaintiffs may have their interests set off to them to be enjoyed in common,⁶ and two or more, or all of the defendants may elect to have their shares assigned to them in common.⁷

1. *Hoffman v. Ross*, 25 Mich. 176.

2. *Rann v. Rann*, 95 Ill. 433.

3. *Simmons v. Hendricks*, 8 Ired. Eq. (N. Car.) 85; 55 Am. Dec. 439. And see *Leavitt v. Palmer*, 3 N. Y. 19; 51 Am. Dec. 333; *Willis v. Henderson*, 5 Ill. 13; 38 Am. Dec. 120; *Newcomer v. Kline*, 11 Gill & J. 457; 37 Am. Dec. 74; *Beardsley v. Knight*, 10 Vt. 185; 33 Am. Dec. 193; *Welsh v. Usher*, 2 Hill Ch. (S. Car.) 167; 29 Am. Dec. 64. And *infra*, this title, *Jurisdiction in Partition*.

A court of equity will not take jurisdiction simply to put a construction on a deed or devise because that is a pure legal question; there is a plain remedy at law, and such assumption on the part of a court of equity would break down all distinction between the two jurisdictions; but where a case is properly in a court of equity under some of its known and accustomed days of jurisdiction, and the question of construction incidentally arises, the court will determine it, it being necessary to do so in order to decide the cause. *Simmons v. Hendricks*, 8 Ired. Eq. (N. Car.) 85; 55 Am. Dec. 439.

4. *Conyers v. Mericle*, 75 Ind. 443.

5. *Bigelow v. Littlefield*, 52 Me. 24; *Sutter v. San Francisco*, 36 Cal. 112; *Duncan v. Sylvester*, 16 Me. 391; 41 Am. Dec. 400; *Hanson v. Willard*, 12 Me. 145; 28 Am. Dec. 162; *Miller v. Miller*, 13 Pick. (Mass.) 237; *Sweet*

ney v. Meany, 1 Miles (Pa.) 167. And see *infra*, this title, *Who May Enforce Partition*.

It has been held that ordinarily a tenant in common cannot enforce partition of merely a part of the common estate. But a part purchased by one, with the acquiescence of the others, may be divided without forcing partition of the entire property. *Battle v. John*, 49 Tex. 202.

6. *Northrop v. Anderson*, 8 How. Pr. (N. Y.) 351; *Shull v. Kennon*, 12 Ind. 34; *Upham v. Bradley*, 17 Me. 427; *Allen v. Hoyt*, 5 Met. (Mass.) 326; *Page v. Webster*, 8 Mich. 265; 77 Am. Dec. 446.

There may be an actual partition between all the plaintiffs on the one side, and all the defendants on the other. *Walker v. Walker*, 3 Abb. N. Cas. (N. Y.) 12.

Time of Application.—The order of reference for such a purpose should be granted before final decree. *Northrop v. Anderson*, 8 How. Pr. (N. Y.) 351.

Contra.—It has been held that a partial partition is unauthorized and improper under all circumstances. See *Handy v. Leavitt*, 3 Edw. (N. Y.) 229; *Robertson v. Robertson*, 2 Swan (Tenn.) 199.

7. *Glasscock v. Hughes*, 55 Tex. 461; *M'Whorter v. Gibson*, 2 Wend. (N. Y.) 443; *Murray v. Wooden*, 17 Wend. (N.

So, where there is no dispute as to the interests of a part of the co-tenants, their shares may be set off to them, the balance being left in common until the disputes of the remaining co-tenants are judicially determined.¹

c. ADJUSTMENT OF CLAIMS AND EQUITIES BETWEEN CO-TENANTS.—If one co-tenant has made advances in excess of his share of the purchase price, or has paid more than his just share of an encumbrance, re-payment may be directed, and if not made, the share upon which such balance is an equitable lien may be sold to satisfy it.² So, where unequal advancements have been made by an ancestor to his heirs, the court will require them to be brought into hotchpot and adjusted in an action to partition his

Y.) 531; *Shull v. Kennon*, 12 Ind. 34; *Battle v. John*, 49 Tex. 202.

Where, under a petition for partition, a committee is appointed "to set off the share of the several persons interested according to their respective titles," it is sufficient to set off the share of the person or persons petitioning, in common or severally as they elect, and to leave the remainder undivided. *Abbott v. Berry*, 46 N. H. 369.

Costs on Assignment in Common.—The general provisions of the act of *New York* for the partition of lands contemplate an assignment to each owner of his respective portion, when capable of being ascertained; and the consent of parties to retain their portion undivided will be construed into an assent to a joint judgment against all for the costs. *M'Whorter v. Gibson*, 2 Wend. (N. Y.) 443.

Sale of Part.—One tenant may have his share set off to him while those of the others are sold, if the court is of the opinion that such course is for the best. *Haywood v. Judson*, 4 Barb. (N. Y.) 228.

1. *Phelps v. Green*, 3 Johns. Ch. (N. Y.) 302.

Part of the lands may be reserved to some of the parties on account of prior equities, and part may be sold. *Harfield v. Cane*, 4 Abb. App. Dec. (N. Y.) 525.

2. *Packard v. King*, 3 Colo. 214; *Warfield v. Banks*, 11 Gill & J. (Md.) 98; *Titsworth v. Stout*, 49 Ill. 78; *McMekin v. Brummet*, 2 Hill Eq. (S. Car.) 638.

Where A, having a title to an estate, took jointly with two others an assignment of a survey of an inferior claim to the same and other land, and a patent was issued to the three, the co-tenants were not entitled to a partition of so

much land within the patent as was covered by A's claim; but where, after the privity of joint tenancy had commenced, A purchased adverse claims, his co-tenants were entitled to the benefit of those claims on paying a ratable proportion of their cost; and that, on making partition, the portion of the land which A had improved should be allotted to him, excluding in the computation the additional value given to it by the improvement. *Sneed v. Atherton*, 6 Dana (Ky.) 276; 32 Am. Dec. 70.

Where one tenant in common, under a parol agreement to purchase the interest of his co-tenant, makes a part payment, and the latter afterwards takes advantage of the statute, and refuses to complete the bargain, a court of equity, in decreeing a partition, may properly decree the purchase-money so paid to be a lien on the premises. *Campbell v. Campbell*, 11 N. J. Eq. 268.

Claim Against Common Ancestor.—Where the decision and interlocutory judgment in partition between heirs follows a stipulation as to an allowance of a claim of one of the heirs for services to decedent, it is proper, on a subsequent reference to ascertain the amount of the claim, to refuse to allow for services before the time for which allowance is made by the interlocutory judgment. *Stephenson v. Cotter* (Supreme Ct.), 5 N. Y. Supp. 749.

And an heir is not entitled to a lien, in the absence of any contract therefor, and in view of the fact that he had not availed himself of his remedy at law to recover the money from his father, or from his estate, within the time allowed by statute. *Baird v. Chapman*, 120 Ill. 537.

real estate among them,¹ and where one co-tenant has wasted a part of the common property, he will be compelled in equity to take that part in a partition between him and his co-tenants.²

When partition of premises upon which there are encumbrances is sought, the court should ascertain their validity and extent and apportion them according to the rights of the parties,³ and where the debts for which an encumbrance is created are equitably the

In an action on a recognizance given for the valuation of land, taken under proceedings in partition instituted by an administrator, by virtue of a special act of Assembly, the defendant cannot claim to set off his share as an heir in the valuation. His remedy is to compel a settlement of the administration account, and a distribution in the orphans' court. *Custer v. Commonwealth*, 25 Pa. St. 375.

1. *Pigg v. Carroll*, 89 Ill. 205; *Marshall v. Marshall*, 86 Ala. 383; *White v. White*, 41 Kan. 556. And see *Duncan v. Henry*, 125 Ind. 10; *State v. Rickey*, 8 N. J. L. 50; *Kepler v. Kepler*, 2 Ind. 363.

But upon ordering a partition of lands, pending administration, and where it does not yet appear that exact justice cannot be done to all the heirs and distributees on final settlement of the administration, it would be premature and erroneous for the court, in anticipation of mere possible inequalities, to consider all the advances previously made to the heirs with a view to hotchpot. *Saxon v. Ames*, 47 Miss. 565.

A decree in partition is conclusive of the right to the land allotted, but to nothing more. It is not too late after partition to settle the matter of advancements to some of the parties, and consequently the distribution of the valuation money among those by law entitled. *Dutch's Appeal*, 57 Pa. St. 461.

Innocent Purchaser from Heir.—Where the testator devised one undivided third of his real property to his widow, and the rest in equal shares to his children, and the interest of one son was sold upon a judgment recovered against him before the testator's death, and the purchaser brought an action for partition, it was no defense that the testator held the notes of the son whose interest the purchaser had acquired, to an amount exceeding the value of the interest devised, and had bequeathed them, it

not appearing that the moneys for which such notes were given were paid by the way of advancement. *Wisner v. Teed*, 9 How. Pr. (N. Y.) 143.

2. *Polhemus v. Emson*, 30 N. J. Eq. 405; *Backler v. Farrow*, 2 Hill Eq. (S. Car.) 111.

A charge that one of tenants in common has broken covenant to keep the property in repair may be tried in an action for partition. *Metcalf v. Hoopingard*, 45 Iowa 510.

This doctrine is the converse of that of allowance for improvements. See *Polhemus v. Emson*, 30 N. J. Eq. 405.

3. *Kingsbury v. Buckner*, 70 Ill. 514; *Titsworth v. Stout*, 49 Ill. 78; *Townshend v. Townshend*, 1 Abb. N. Cas. (N. Y.) 81. And see *Thruston v. Minke*, 32 Md. 571; *Halsted v. Halsted*, 55 N. Y. 442; *Dunham v. Minard*, 4 Paige (N. Y.) 441.

In the partition of land, if one of the tenants in common has rightfully paid money for taxes, or to relieve the premises of a legal incumbrance resting on the entire interest of all, the others should be required to contribute their just proportion of the same. *Illinois L. & L. Co. v. Bonner*, 75 Ill. 315.

Persons holding a lien on any undivided interest, by mortgage, judgment or otherwise, if made parties to the suit, will be bound by the partition, and limited in their claims to the share set off to the party under whom they claim. *Milligan v. Poole*, 35 Ind. 64. And see *infra*, this title, *Parties Defendant*.

Limitations of Actions.—The statute presumption of payment of mortgages, etc., arising from the mere lapse of time, though it does not avail to support a demand for affirmative relief against the mortgage, may avail to preclude the holder of the mortgage from claiming thereunder as a lienor, when made defendant in partition. *Townshend v. Townshend*, 1 Abb. N. Cas. (N. Y.) 81.

debts of only a part of the co-tenants, their shares will be subjected to the payment of such encumbrance.¹

d. OWELTY OF PARTITION.—The law cannot contemplate the injustice of taking property from one person and giving it to another without an equivalent or a sufficient security for it,² and, therefore, where the property is of such a character that it cannot be equally divided without impairing the value of all the portions, it will be divided into shares of unequal value, and the inequality corrected by means of a charge or lien upon the more valuable parts in favor of the less valuable ones.³ The payment

1. *Evarts v. Woods* (Supreme Ct.), 6 N. Y. Supp. 200. And see *Central Bank v. Early*, 115 Pa. St. 359.

2. *Wynne v. Tunstall*, 1 Dev. Eq. (N. Car.) 28; *Darlington's Appropriations*, 13 Pa. St. 432; *Davis v. Norris*, 8 Pa. St. 125.

Owelty Is Equality.—A sum paid by one of two joint owners, upon a partition of lands which cannot be quite equally divided, to equalize the shares, to make the value received by the recipient of the smallest parcel as great as that received by him who takes the largest, is called owelty of partition. Abb. Law Dict., tit. Owelty.

Where an equal division of the property cannot be made and where the aggregate amount of the benefits to the parties from a sale, instead of an actual partition of the premises, will be small in reference to the value of the property of which a partition is sought, it may be effected by an alternate use and occupation of the property, or by the assignment of a portion of the premises held in common, to one of the parties charged with a servitude or assignment for the benefit of another party to whom a distinct portion of the premises is assigned in severalty. *Smith v. Smith*, 10 Paige (N. Y.) 470.

A decree of the probate court, establishing a partition of land, before a sum of money, awarded by the commissioners to make the partition just and equal, is paid or secured, is erroneous, and is no bar to a subsequent partition on the petition of the party to whom the money was awarded, unless he has since accepted the money. *Jenks v. Howland*, 3 Gray (Mass.) 536.

3. *Cox v. McMullin*, 14 Gratt. (Va.) 82; *Field v. Leiter*, 117 Ill. 341; *Smith v. Smith*, 10 Paige (N. Y.) 477; *Chatham v. Crews*, 88 N. Car. 38; *Sampson's Appeal*, 4 W. & S. (Pa.) 86;

Graydon v. Graydon, 1 McMull. Eq. (S. Car.) 63; *Williamson v. Swindle*, McMull. Eq. (S. Car.) 67; *Allnatt on Part.*; 89 Bisp. Eq., § 49. And see *Roberts v. Beckwith*, 79 Ill. 246.

The right to such compensation arises out of an implied warranty attaching to each share from all the others. *Chatham v. Crews*, 88 N. Car. 38.

A provision that the premises, partition of which is sought, shall be allowed to such one or more of the parties in interest as shall, at the return of the rule of the court, offer in writing the highest price therefor above the valuation returned, warrants only a single offer in writing, and the court may compel all parties to hand their offers in together, or permit them to seal them up, until the court shall order them all to be opened. *Klohs v. Reifsnnyder*, 61 Pa. St. 240. And where it is provided that the entire subject may be allotted to any party who will accept it, and pay to the other party or parties such sums as their interests may entitle them to, or the court may order the sale of the entire subject, and distribute the proceeds. Where there are two parties, and each desires to have allotted to him the whole subject, it is error for the court to arbitrarily decide that the one owning the larger share shall take it to the exclusion of the other, but in such case a sale should be ordered. *Corrothers v. Jolliffe*, 32 W. Va. 562.

How Held.—Under a statute providing that, if an estate could not be divided among the heirs without injury, it should be appraised and conveyed to either of them who should elect, on his payment to each of the other heirs of their share of the appraised value, a part equal to his share is taken by descent, and the remainder by purchase. *Freeman v. Allen*, 17 Ohio St. 527.

of the amount charged upon the more valuable portion to equalize the partition is not a condition precedent to the vesting of such portion in the party to whom it is assigned,¹ but it creates an encumbrance in the nature of a vendor's lien which becomes a valid charge upon the purpart against which it was decreed,² which follows the land into the hands of third parties,³ and which is a prior lien to a mortgage or other encumbrance placed upon his undivided share by the tenant to whom this portion was assigned.⁴ This lien, however, is a charge upon the land alone, and not upon the person of the owner, and is to be enforced by proceedings *in rem* against the more valuable shares,⁵ and the

The *Massachusetts* statute providing that, if any message, tract of land, or other real estate, which is more than either party's purpart, cannot be sub-divided, it shall be taken by one who shall pay the other parties such a sum of money as will equalize the shares, is not applicable to one parcel of land held jointly. *Codman v. Tinkham*, 15 Pick. (Mass.) 364.

1. *Archer v. Munday*, 17 S. Car. 84.

Payment of owelty may be made a condition precedent to the vesting of title in the more valuable tract, where it appears by the terms of the order providing for such relief that such was the intention of the court. *Burris v. Gooch*, 5 Rich. (S. Car.) 1.

2. *Baltimore etc. R. Co. v. Trimble*, 51 Md. 99; *McCandless' Appeal*, 98 Pa. St. 489; *Allegheny Bank's Appeal*, 99 Pa. St. 148; *Thomas v. Farmers' Bank*, 32 Md. 57; *Wynne v. Tunstall*, 1 Dev. Eq. (N. Car.) 23; *Myers v. Rice* (N. Car. 1890), 12 S. E. Rep. 66; *Applegate v. Edwards*, 45 Ind. 329.

The amount due from a widow for equality of partition is a lien upon the land assigned to her, but such lien does not extend to an indebtedness incurred by her in the purchase of one of the shares which had been directed to be sold. *Burnside v. Watkins*, 30 S. Car. 459.

A recognizance given by a married woman for owelty of partition is a lien upon the land, both as to the share which she acquired under the proceedings in partition and as to her share by descent. *Snively's Appeal*, 129 Pa. St. 250.

A distributee who acquires, under proceedings for partition, a statutory lien on land, extinguishes his debt or claim as well as his lien on the land by afterwards purchasing the land, otherwise than under proceedings to

foreclose his lien. *Allen v. Richardson*, 9 Rich. Eq. (S. Car.) 53.

3. *Dobbin v. Rex*, 106 N. Car. 444; *Sutton v. Edwards*, 5 Ired. Eq. (N. Car.) 425.

Where land was conveyed to A by his sisters under a partition, and charged with the payment of certain sums for owelty of partition, and for further security he gave his bonds to trustees for his sisters, securing their payment by a deed of trust of the lands, and afterwards made an assignment of the land for creditors, the amounts of the bonds with accrued interest constituted a preferred claim on the fund realized from the sale under the assignment. *Stanhope v. Dodge*, 52 Md. 483.

4. *McCandless' Appeal*, 90 Pa. St. 489; *Alleghany Bank's Appeal*, 99 Pa. St. 148.

But under proceedings in equity for partition of the estate of an intestate, where a certain tract of land was decreed to be assigned to A, one of the heirs, on his giving bond, with sureties, to the commissioner, to pay the assessed value of the land, and the bond was given, and, afterwards, judgment was recovered thereon, and the land sold by the sheriff under the execution, A's widow was entitled to dower against the purchaser. *Horde v. Landrum*, 5 S. Car. 213.

5. *Young v. Davidson College*, Phill. Eq. (N. Car.) 261; *Baltimore etc. R. Co. v. Trimble*, 51 Md. 99; *Waring v. Wadsworth*, 80 N. Car. 345; *Halso v. Cole*, 82 N. Car. 161.

In an action to recover the sum awarded by commissioners appointed by the parties to divide real estate, to be paid by the defendant, he cannot set up in defense that his wife, whom he had induced to become a party to the division, was at the time an infant,

proper process for such enforcement may issue at once upon confirmation of the partition.¹ Some cases have directly held that, as there is no adverse possession, the statute of limitations does not run against a recovery for owelty,² but a claim for damages sustained by reason of an eviction from a purpart, is a good counterclaim or offset to a claim for owelty,³ and where owelty is awarded in favor of a co-tenant whose share is encumbered, it should be applied in satisfaction of the encumbrance.⁴ The lien of a charge for owelty upon the more valuable share is not discharged by giving a personal obligation or security for the same claim, the latter being regarded as a mere collateral security.⁵ It would seem that a trustee is under no obligation to advance money to pay owelty awarded against a *cestui que trust*,⁶ and under the statutes of some of the States more than his just share cannot be set off to one co-tenant with a requirement that he shall pay money to equalize, without his consent.⁷ So, under the statutes of some of the States, bids for a choice of parcels may be received, and in others the whole may be awarded to any party who will accept it, and pay to the other parties the amounts to which they are entitled; or to the party who will bid the highest price above the assessed valuation.⁸

as it would be allowing him to take advantage of his own fraud. *Ridgeley v. Crandall*, 4 Md. 435.

1. *Halso v. Cole*, 82 N. Car. 161; *Turpin v. Kelly*, 85 N. Car. 399. And see *Baltimore etc. R. Co. v. Trimble*, 51 Md. 99.

2. *Dobbin v. Rex*, 106 N. Car. 444; *Sutton v. Edwards*, 5 Ired. Eq. (N. Car.) 425.

In *Maryland*, holders of an equitable lien for the amount of money allowed as owelty in partition cannot be properly charged with laches, when they have instituted their proceedings to enforce their lien within twenty years, and so soon as they became informed of their rights. *Baltimore etc. R. Co. v. Trimble*, 51 Md. 99.

3. *Huntley v. Cline*, 93 N. Car. 458.

An incumbrance upon an inheritance, created by the ancestor, is good defense against the payment of the valuation money by the heir to whom the estate was allotted in the proceeding in partition. *Seaton v. Barry*, 4 W. & S. (Pa.) 183.

What Constitutes Payment.—Under a proceeding in partition the land was assigned to A, who was ordered to make payment of one-half its assessed value to the distributees of B. It was held, that the payment of that amount to the administrators of B was not a

satisfaction of the decree and that an heir of B could hold A liable for her share. *Hamer v. Bethea*, 11 S. Car. 416.

4. *Green v. Arnold*, 11 R. I. 364; 23 Am. Rep. 466.

5. *Dobbin v. Rex*, 106 N. Car. 444; *Jones v. Sherrard*, 2 Dev. & B. Eq. (N. Car.) 179. *Wynne v. Tunstall*, 1 Dev. Eq. (N. Car.) 23.

Where a recognizance and bonds are given by one of the heirs, to whom land is awarded in partition, to secure payment of the shares of the others, a judgment on one of the bonds, for a small part of the entire sum for which the recognizance was given, does not divest the lien of the recognizance, either in whole or in part. *Leibert's Appeal*, 119 Pa. St. 517.

6. See *Milligan's Appeal*, 82 Pa. St. 389.

7. *Whitney v. Parker*, 63 N. H. 416; *Wilson v. European etc. R. Co.*, 62 Me. 112.

8. See *Timon v. Moran*, 54 N. H. 441; *Wilson v. European etc. R. Co.*, 62 Me. 112; *Corrothers v. Jolliffe*, 32 W. Va. 562; *Codman v. Tinkham*, 15 Pick. (Mass.) 364; *Freeman v. Allen*, 17 Ohio St. 527; *Commonwealth v. Kreager*, 78 Pa. St. 477.

In all cases of partition in any court, a party having made one bid is not

c. DISPOSITION OF AND ALLOWANCE FOR IMPROVEMENTS.—While one co-tenant cannot be compelled to pay for improvements made by another on the common property, unless they are essential to the preservation of the property,¹ on partition it is proper for the court to take them into consideration in making a division if the proper proportions can be otherwise obtained;² and it is the duty of a court of equity to assign such improvements to the parties whose labor and money have thus become inseparably fixed upon the land, so far as it can be done consistently with an equitable partition.³ So if the property is so circumstanced that it is not susceptible of such a division, the court will, before granting partition, direct an account to be taken and

entitled to another. *Bartholomew's Appeal*, 71 Pa. St. 291; *Klohs v. Reifsnnyder*, 61 Pa. St. 240.

1. See *JOINT TENANTS*, vol. II, p. 1104.

2. *Hart v. Hawkins*, 3 Bibb (Ky.) 510; 6 Am. Dec. 666; *Carver v. Coffman*, 109 Ind. 547.

3. *Withers v. Thompson*, 4 T. B. Mon. (Ky.) 335; *Wilkinson v. Stuart*, 74 Ala. 198; *Drennen v. Walker*, 21 Ark. 557; *Beam v. Scroggin*, 12 Ill. App. 321; *Carver v. Coffman*, 109 Ind. 547; *Elrod v. Keller*, 89 Ind. 382; *Mahony v. Mahony*, 65 Ill. 408; *Louvalle v. Menard*, 1 Gilm. (Ill.) 39; 41 Am. Dec. 161; *Crafts v. Crafts*, 13 Gray (Mass.) 360; *Nelson v. Clay*, 7 J. J. Marsh. (Ky.) 138; 23 Am. Dec. 387; *Hart v. Hawkins*, 3 Bibb (Ky.) 510; 6 Am. Dec. 666; *Smith v. Frost*, 1 Bibb (Ky.) 377; *Booraem v. Wells*, 19 N. J. Eq. 87; *Brookfield v. Williams*, 2 N. J. Eq. 341; *Town v. Needham*, 3 Paige (N. Y.) 545; 24 Am. Dec. 246; *St. Felix v. Rankin*, 3 Edw. Ch. (N. Y.) 323; *Conklin v. Conklin*, 3 Sandf. Ch. (N. Y.) 64; *Pope v. Whitehead*, 68 N. Car. 191; *Annelly v. De Saussure*, 17 S. Car. 389; *Scafe v. Thomson*, 15 S. Car. 386; *Reeves v. Reeves*, 11 Heisk. (Tenn.) 669; *Osborn v. Osborn*, 62 Tex. 495; *Robinson v. McDonald*, 11 Tex. 385; 62 Am. Dec. 480, note; *Hovey v. Ferguson*, 18 Grant's Ch. (Up. Can.) 498; *Biehn v. Biehn*, 18 Grant's Ch. (Up. Can.) 497; *Wood v. Wood*, 16 Grant's Ch. (Up. Can.) 471; *Yancy v. Batte*, 48 Tex. 46; *Acklin v. Paschal*, 48 Tex. 147. And see *Story v. Johnson*, 1 Y. & C. Ex. 546; *Clift v. Clift*, 72 Tex. 144; *Sarbach v. Newell*, 28 Kan. 642.

In partition by one tenant in common of lands granted his co-tenants,

who have severally made valuable improvements on distinct portions thereof, it is proper to order "that there be set off to the several parties such portions of the premises as will include their respective improvements, provided always that the rights or interests of neither of the other parties be prejudiced thereby." *Seale v. Soto*, 35 Cal. 102.

Where land is divided among co-tenants, and some of them have made improvements, they should have their full shares of the land, as it would be estimated without the improvements, and their shares, if practicable, should include their improvements; but if that cannot be done, they should have an allowance for them. *Borah v. Archer*, 7 Dana (Ky.) 176; *Dean v. O'Meara*, 47 Ill. 120.

By Mistake.—Where a tenant in common has made valuable improvements on the land held in common, thinking that he is making them on adjoining land, which he owns in severalty, the court will allot him that part of the land on which his improvements are situate, and their value will not be considered in determining the shares. *Dugan v. Mayor etc. of Baltimore*, 70 Md. 1.

Doctrine of Accountability.—Neither the statutory doctrine of "betterments," nor the *South Carolina* act of 1885, relating to actions to recover land, authorizing defendant to set up claim for betterments or improvements by answer, applies to an action for partition between tenants in common. This is governed by the equitable doctrine of the accountability of one tenant in common to his co-tenants when he has increased the value of the property by improvements, and is at the same time liable for rents and

provide for a suitable compensation for the improvements.¹ They must have been made in good faith, however, and not for the purpose of embarrassing the other co-tenants.² If a co-tenant purposely covers the whole of the estate with valuable improvements in such a manner as to render it impossible to assign the shares of the others without including part of such improvements, he will be considered as a volunteer as to them, and when made without the consent of his co-tenants, he is not entitled to com-

profits. *McGee v. Hall*, 28 S. Car. 562.

Sale Before Partition.—In an action for partition by a son, who, in the lifetime of his mother, from whom the lands descended, had made a parol contract to sell his interest to his brother, such interest is chargeable with the purchase money paid by the latter, and with improvements made by him to the extent of the interest of the vendor. *Tucker v. Markland*, 101 N. Car. 422.

1. *Sarbach v. Newell*, 30 Kan. 102; *Green v. Putnam*, 1 Barb. (N. Y.) 500; *Sanders v. Robertson*, 57 Ala. 465; *Ormond v. Martin*, 1 Ala. Sel. Cas. 526; *Carver v. Coffman*, 109 Ind. 547; *Killmer v. Wuncher*, 79 Iowa 722; *Baird v. Jackson*, 98 Ill. 78; *Kurtz v. Hibner*, 55 Ill. 521; *Dean v. O'Meara*, 47 Ill. 120; *Martindale v. Alexander*, 26 Ind. 105; 89 Am. Dec. 458; *Arterburn v. Gwathmey*, 3 Bibb (Ky.) 306; *Respass v. Breckenridge*, 2 A. K. Marsh. (Ky.) 584; *Worthington v. Hiss*, 70 Md. 172; *Spitts v. Wells*, 18 Mo. 468; *Doughday v. Crowell*, 11 N. J. Eq. 204; *Hitchcock v. Skinner*, Hoffm. Ch. (N. Y.) 21; *St. Felix v. Rankin*, 3 Edw. (N. Y.) 323; *Tucker v. Markland*, 101 N. Car. 422; *Youngs v. Heffner*, 36 Ohio St. 232; *Johnson v. Pilot*, 24 S. Car. 255; 58 Am. Rep. 253; *Sutton v. Sutton*, 26 S. Car. 33; *Broyles v. Waddell*, 11 Heisk. (Tenn.) 32; *Lewis v. Sellick*, 69 Tex. 379; *Bond v. Hill*, 37 Tex. 626; *Robinson v. McDonald*, 11 Tex. 390; 62 Am. Dec. 480; *Carter v. Carter*, 5 Munf. (Va.) 108. And see *Annelly v. De Saussure*, 17 S. Car. 389; *Swan v. Swan*, 8 Price 518; *Scaife v. Thomson*, 15 S. Car. 368; *Woodward v. Clarke*, 4 Strobb. Eq. (S. Car.) 167; *Rowland v. Best*, 2 McCord Eq. (S. Car.) 317.

A *bona fide* possessor may recover the value of his improvements on the part of the land from which he is evicted in a judicial partition; and

plaintiff has not the option of paying their value, or the enhanced value of the soil. *Davis v. Wilcoxon*, 10 La. Ann. 640.

Where land and also buildings are owned in common, but the buildings stand on land not owned in common, and the respondent, in a petition for partition of both land and buildings, files a claim for improvements, he should be allowed for improvements only upon the land, and not for any additions to the buildings; and he is liable merely for the rents and profits of the petitioner's interest in the land, and not in the buildings. *Rice v. Freeland*, 12 Cush. (Mass.) 170.

Contribution may be decreed in a proper case for moneys expended in making repairs. *McDearman v. McClure*, 31 Ark. 559.

The children of a second marriage, however, are not, after their father's death, entitled to any reimbursement for permanent improvements made by him on land, the separate estate of his first wife, while he was holding it as tenant by the curtesy. *Clift v. Clift*, 72 Tex. 144.

Cannot Direct Improvements to be Made.—A court of equity, in a suit for partition, has not power to cause improvements to be made at the expense of the part owners and against the will of one of them. *Field v. Leiter*, 117 Ill. 341.

2. *Hall v. Piddock*, 21 N. J. Eq. 314. *Sarbach v. Newell*, 30 Kan. 102; *Annelly v. De Saussure*, 17 S. Car. 389.

The provisions of § 1074 of the Revised Statutes of *Indiana* 1881, in regard to occupying claimants, are purely equitable, and should be applied to the analogous case of one who, in good faith, makes valuable improvements on real estate while holding under color of title, and is afterwards found not to be the rightful owner of one-third thereof, so that, on partition of the same between him and the true owner, he is entitled to have the value

pensation.¹ But if made while in good faith supposing himself to be the sole owner, and it is afterwards found that he has title to an undivided part only, a proper allowance will be made.² Some of the cases have placed the right to compensation for improvements solely on the ground of the consent to their erection on the part of the co-tenants, and deny it where such consent does not appear.³ The improvements for which an allowance will be made are such as are substantial and useful and not such as are

of such improvements taken into consideration. *Carver v. Coffman*, 109 Ind. 547.

1. *Nelson v. Clay*, 7 J. J. Marsh. (Ky.) 142; 23 Am. Dec. 387; *Hancock v. Day*, 1 McMull. Eq. (S. Car.) 69; 36 Am. Dec. 293; *Rowan v. Reed*, 19 Ill. 21; *Thurston v. Dickinson*, 2 Rich. Eq. (S. Car.) 317; 46 Am. Dec. 56; *Dellet v. Whitner*, 1 Cheves Eq. (S. Car.) 223; *Thompson v. Bostwick*, McMull. Eq. (S. Car.) 75; *Corbett v. Laurens*, 5 Rich. Eq. (S. Car.) 314.

2. *Carver v. Coffman*, 109 Ind. 547; *Annelly v. De Saussure*, 17 S. Car. 389; *Carter v. Carter*, 5 Munf. (Va.) 108. And see *Ormond v. Martin*, 1 Ala. Sel. Cas. 526; *Worthington v. Hiss*, 70 Md. 172.

Where plaintiff took possession of land under a deed from one who owned a third in fee and a life estate in the residue, and a deed from another purporting to convey the interest of the remainder-men, which was afterwards found to be void, and held possession for over twenty years, making valuable improvements, without which the land would have been of little value, the remainder-men living in another State, and plaintiff having no knowledge of their rights, it was held that on partition of the land between himself and the remainder-men, plaintiff was entitled to allowance for his improvements. *Killmer v. Wuchner*, 79 Iowa 722.

3. See *Rowan v. Reed*, 19 Ill. 21; *Baird v. Jackson*, 98 Ill. 78; *Lewis v. Sellick* (Tex.), 7 S. W. Rep. 673; *Jones v. Johnson*, 28 Ark. 211; *Husband v. Aldrich*, 135 Mass. 317.

In *Maine*, a tenant in common is entitled to the benefit of the value of improvements made by him on a part whereof he has the exclusive possession, if so possessing with the consent of his co-tenants, from the share assigned to him, or including it; if in possession without their consent, he is still entitled to such value, although

his share be assigned elsewhere. *Reed v. Reed*, 68 Me. 568; *Allen v. Hall*, 50 Me. 253.

Where improvements are erected at the joint expense of co-tenants, and one of them occupies the improvements by consent of the other, and claims homestead therein, if the land is afterwards partitioned, the occupant is entitled to his homestead, and the other co-tenant to half of the value of the improvements. *Lewis v. Sellick*, 69 Tex. 379.

In *Alabama*, no compensation for improvements can be allowed beyond the amount of rents charged against the tenant making them and then only as a counter-demand to the claim for rents. *Horton v. Sledge*, 29 Ala. 478; *Ormond v. Martin*, 37 Ala. 598.

In *Indiana* no allowance will be made for improvements out of the proceeds of the sale of the common lands unless such improvements were necessary to the enjoyment of the estate. *Elrod v. Keller*, 89 Ind. 382.

In *Scott v. Guernsey*, 48 N. Y. 123, in which a claim for compensation for improvements was made, the court used the following language: "There was no consent, mistake, or other equitable ground in this case for relieving a party who made his investment with full knowledge of the facts voluntarily, and without any inducement offered by the other co-tenants." At the applicant's offer to share their rents, upon being paid a due proportion of the value of the improvements, after the termination of the life estate, it might have offered a better ground to claim compensation. The applicants are not within the reason of any of the adjudged cases where relief has been granted in partition for money expended in improvements by one of several co-tenants in common. If the land had been really enhanced in value by the improvements, the applicants are in a better plight than strangers as they will receive their

merely ornamental,¹ and in estimating the amount to be allowed, it is not their cost, but the value that they impart to the premises which is to be considered,² the party making them being entitled to the increased value of the property besides his *pro rata* interest in the premises,³ and payment of the ratable proportion should be made before division, or added to the share allotted to the tenant to whom such compensation was due.⁴ Where one of the co-tenants has made improvements which add to the value of the common property, and is at the same time chargeable with rents and profits or use and occupation, the claim for rents and profits or use and occupation may be offset against that for improvements.⁵ But where the improvements were made and the use and occupation enjoyed under a supposition of sole ownership, there is no liability for such use and occupation or for rents and profits anterior to a demand by action,⁶ and rents and profits which are due solely to the enhanced value of the land caused

pro rata share of the increased proceeds of the sale. The owner cannot be called upon to offer any indemnity or compensation for money expended by a stranger for improvements if he had full knowledge of the risk he was encountering, when they were made.

1. *Hitchcock v. Skinner, Hoffm. Ch. (N. Y.)* 21.

2. *Williman v. Holmes*, 4 Rich. Eq. (S. Car.) 476; *Scaife v. Thomson*, 15 S. Car. 368; *Annely v. De Saussure*, 17 S. Car. 391; *Johnson v. Harrelson*, 18 S. Car. 604; *Buck v. Martin*, 21 S. Car. 592; 53 Am. Rep. 702; *Moore v. Williamson*, 10 Rich. Eq. (S. Car.) 323. And see *Arterburn v. Gwathmey*, 3 Bibb (Ky.) 306; *Kurtz v. Hibner*, 55 Ill. 514; 8 Am. Rep. 665; *Stoney v. Schultz*, 1 Hill Eq. (S. Car.) 465.

3. *Dean v. O'Meara*, 47 Ill. 120; *Kurtz v. Hibner*, 55 Ill. 514; 8 Am. Rep. 665. And see cases above cited.

In *Lewis v. Sellick*, 69 Tex. 379, it was held that where the verdict, in an action to recover a homestead, under the charge of the court, fixed the value of the improvements erected on plaintiff's homestead at the time the defendant purchased from plaintiff's co-tenant at a certain sum, it was error to render judgment for "one-half of all the improvements" situated on the homestead, defendant since his purchase having erected additional improvements thereon.

Interest Not Allowed.—On decreeing partition of land between tenants in common, it is erroneous to allow current interest on the amount paid by

one of them for improvements and taxes. *Talbot v. Todd*, 7 J. J. Marsh. (Ky.) 456.

4. *Hitchcock v. Skinner, Hoffm. Ch. (N. Y.)* 21.

5. *Sutton v. Sutton*, 26 S. Car. 33; *Pickering v. Pickering*, 63 N. H. 468; *Luck v. Luck*, 113 Pa. St. 256; *Respass v. Breckenridge*, 2 A. K. Marsh. (Ky.) 581; *Rowan v. Reed*, 19 Ill. 28; *Teasdale v. Sanderson*, 33 Beav. 534; *Carter v. Carter*, 5 Munf. (Va.) 108.

The provision of the statutes of *Alabama* that "persons holding possession under color of title, in good faith, are not responsible for damages or rent for more than one year, before the commencement of the suit," is applicable in a chancery suit for the partition of lands; and a defendant in such suit will be allowed for the value of improvements made by him, not exceeding the rent charged against him. *Ormond v. Martin*, 1 Ala. Sel. Cas. 526. And is liable for rent for no more than one year before the suit. *Sanders v. Robertson*, 57 Ala. 465.

In *West Virginia* the right of a co-tenant to compensation for improvements is not enforced against an attachment for judgment creditor of the co-tenant against whose interest such right exists, though it is recognized generally. *Houston v. McCluney*, 8 W. Va. 135.

6. *Johnson v. Pelot*, 24 S. Car. 255; 58 Am. Rep. 253; *Scaife v. Thomson*, 15 S. Car. 368; *Woodward v. Clarke*, 4 Strobb. Eq. (S. Car.) 170; *Riddlehoover v. Kinard*, 1 Hill Eq. (S. Car.) 381.

by such improvements are not to be charged against an allowance made as compensation for such improvements.¹ A partition without objection to a failure or refusal to make allowance for improvements is a bar to an action for the recovery of compensation therefor.²

f. RENTS AND PROFITS; USE AND OCCUPATION.—The court may not only proceed to divide the land, but will also in a proper case compel the parties to account for their use and occupation, or for the rents and profits received from the common property.³ Thus a complainant may have partition and account in the same bill,⁴ and in cases in which there has been an exclusion of a part of the co-tenants, an accounting in connection with partition may be had by cross bill or otherwise upon demand of the defendant as well as upon the bill of the complainant,⁵ but in any event the

1. *Worthington v. Hiss*, 70 Md. 172; *Johnson v. Pelot*, 24 S. Car. 255; 58 Am. Rep. 253; *Lewis v. Price*, 3 Rich. Eq. (S. Car.) 172.

In *Johnson v. Pelot*, 24 S. Car. 254; 58 Am. Dec. 253, the court by SIMPSON, C. J., said: "In estimating rents and profits against a co-tenant for improvements, a distinction has been drawn between said improvements and the ground upon which they stood—the improving tenant being exempt for the one and held for the other. It is manifest here that the unimproved ground was worthless except for the improvements, and also that that portion on which the improvements were erected was made rentable only on account of the improvements, so that its rental value, if any, was due to the improvements, and might well be classed as an improvement made by the tenant's own labor, and, therefore, exempt."

In *Worthington v. Hiss*, 70 Md. 172, the court directed the auditor, in stating the amount, to ascertain what portion of such rents and profits had been due to the use of the improvements upon the parcels of said property which had been improved, as distinguished from the portion thereof which had been due to the use of the land in its present condition, and to exclude the first mentioned portion of such rents and profits from the allowance to be made.

2. *Spitts v. Wells*, 18 Mo. 468.

3. *Dall v. Confidence Min. Co.*, 3 Mo. 531; *Holloway v. Holloway*, 97 Mo. 628; *Story's Eq. Jur.*, §-655. And see cases hereinafter cited. To the contrary see *Mattair v. Payne*, 15 Fla. 602.

An order referring the case to the

master to state the account of defendant for receipt of rents and profits, together with all improvements, does not fix on defendant a liability for rent of houses on the premises, but is an order of inquiry only. *Johnson v. Pelot*, 24 S. Car. 255; 58 Am. Rep. 253.

In *Hardy v. Gregg* (Miss. 1887), 2 So. Rep. 358, it was held that an account for rents and profits cannot be taken in a suit for partition when there is no allegation showing a right to an account and no prayer for an account. But in *Rust v. Rust*, 17 W. Va. 901, it was held that under prayer for general relief in a bill for partition there may be a decree for an account of rents and profits, and errors in the details of such decree are not a proper subject for appeal. And see also *Humphrey v. Foster*, 13 Gratt. (Va.) 653.

4. *Obert v. Obert*, 10 N. J. Eq. 98; *Worthington v. Hiss*, 70 Md. 172; *Holloway v. Holloway*, 97 Mo. 628; *Tuckerfield v. Buller*, 1 Dick. 241; *Wills v. Slade*, 6 Ves. 498; *Agair v. Fairfax*, 17 Ves. 533; *Turner v. Morgan*, 8 Ves. 143.

5. *Davidson v. Thompson*, 22 N. J. Eq. 84; *Goodenow v. Ewer*, 16 Cal. 472; *Hawkins v. Taber*, 47 Ill. 460; *Howey v. Goings*, 13 Ill. 107; 54 Am. Dec. 427; *Carver v. Coffman*, 109 Ind. 547; *Sarbach v. Newell*, 28 Kan. 642; *Scantlin v. Allison*, 32 Kan. 379; *Illinois T. & T. Co. v. Bonner*, 75 Ill. 315; *Roberts v. Beckwith*, 79 Ill. 246; *Bridgford v. Barbour*, 80 Ky. 529; *Worthington v. Hiss*, 70 Md. 172; *Pope v. Salsman*, 35 Mo. 362; *Story v. Johnson*, 1 Y. & C. Ex. 546; *Walther v. Regnault*, 56 Hun (N. Y.) 560; *Allen v. Barkley*, Spears Eq. (S. Car.) 264; *Sutton v. Sutton*, 26 S. Car.

claim for rent must be well established.¹

g. CONVEYANCE OF PART BY METES AND BOUNDS.—When one co-tenant has conveyed a portion of the common property by metes and bounds, in an action for a partition the court will, so far as it can be done without detriment to the interests of the other co-tenants, set apart to the grantee the portion thus conveyed to him,² and where the tract consists of several parcels, it will require the whole to be partitioned in one suit, so that the rights of the grantees may be best protected.³

h. COMPELLING CONVEYANCE.—On decreeing a partition between co-tenants, a part of whom hold their interests by equitable titles only, the court will compel those in whom the legal title rests to convey according to the partition awarded.⁴ Partition cannot be maintained, however, simply on proof that the claimant is entitled to a conveyance; he must bring an action for specific performance of the agreement to convey either in con-

3; *Johnson v. Pelot*, 24 S. Car. 255; 8 Am. Rep. 253; *Humphrey v. Foster*, 13 Gratt. (Va.) 653; *Rust v. Rust*, 7 W. Va. 901. See also *JOINT TENANTS*, vol. 11, p. 1098.

In an action for partition of quarry lands, a co-tenant made a defendant may require the plaintiff to account for moneys received for stone quarried herefrom and sold by the plaintiff. *McCabe v. McCabe*, 18 Hun (N. Y.) 53.

In a partition suit, the defendant was held properly charged with rents and profits received by his son-in-law, who held title to the premises by virtue of a tax title, it appearing in evidence that the defendant was an active agent in procuring such title, bidding the premises off at private tax sale, and that the rents paid to the son-in-law were paid by defendant's direction; and also with the rental value of a portion of the premises, he occupying them in person, and refusing to rent them to others. *Miller v. Mills*, 1 Neb. 362.

The court has no authority to declare the amount to which plaintiff is entitled on account of the receipt of the rents to be a special lien on the growing crops on the premises, and to order that a special execution issue thereon. *Holloway v. Holloway*, 97 Mo. 28.

Delay.—Where there is a long delay in bringing a suit for partition of lands in possession of defendant, and all the parties thought that plaintiff had no rights in the property, and she has made no objection to its use and dis-

position by defendants, though cognizant thereof, interests on rents and profits will not be allowed before commencement of the suit. *Clark v. Hershy*, 52 Ark. 473.

No Accounting Between Remaindermen.—Where, by consent of a life tenant, partition is made between the remaindermen, an accounting between them of the rents and profits should not be granted, though one of them may have been in exclusive possession, as, until the disclaimer by the life tenant, he is entitled to the rents and profits. *Bice v. Nixon* (W. Va. 1890), 11 S. E. Rep. 1004.

1. *Hawkins v. Taber*, 47 Ill. 459.

As to offsetting rents and profits against improvements, see *infra*, this title, *Compensation for Improvements*.

2. *Young v. Edwards* (S. Car. 1890). 11 S. E. Rep. 1066; *Barnes v. Lynch*, 151 Mass. 510. And see *Gates v. Salmon*, 35 Cal. 576; 95 Am. Dec. 139; *Sutter v. San Francisco*, 36 Cal. 112; *Harlan v. Langham*, 69 Pa. St. 235; *Whitton v. Whitton*, 38 N. H. 133; *Story's Eq. Jur.*, § 656, c.

3. *Barnes v. Lynch*, 151 Mass. 510; *Sutter v. San Francisco*, 36 Cal. 112; *Bigelow v. Littlefield*, 52 Me. 24.

4. *Overton v. Woolfolk*, 6 Dana (Ky.) 376; *Chickering v. Failes*, 29 Ill. 294; *Hanler v. Brown*, 7 B. Mon. (Ky.) 283; *Christian v. Christian*, 6 Munf. (Va.) 534; *Adams Eq. Jur.* 231; *Attorney General v. Hamilton*, 1 Madd. 122; *Cartwright v. Pultney*, 2 Atk. 380; *Story's Eq. Jur.* 652. And see *Esterbrook v. Savage*, 21 Hun (N. Y.) 145.

nection with or preliminary to his action for partition.¹ If, after decree in partition, no application to compel the execution of deeds is made until, by long delay the circumstances of the parties have so changed as to render such step inequitable, it will be denied.²

11. Management of the Property Pending Suit—*a*. THE APPOINTMENT OF A RECEIVER.—The parties to a partition suit may at the commencement of the suit agree upon the appointment of a receiver, and if such step will tend to the preservation and maintenance of their rights and interests, the court will make the appointment in pursuance of such agreement.³ So when a co-tenant interferes with the collection of the rents of the other parties, or refuses to unite with the others in renting the property,⁴ or when the defendants or part of them dispute the title of the plaintiff and endeavor to prevent or delay the accounting for rents and profits,⁵ a receiver may be appointed at the instance of the injured parties; and, generally whenever it appears during the prosecution of an action for partition that a receiver is necessary to protect the interests of all the parties, the court will, upon proper application, appoint one.⁶

1. *Williams v. Wiggand*, 53 Ill. 233.

2. If the parties are not competent to execute conveyances an effectual partition could not formerly be had in equity. And see *Wadhams v. Gay* 73 Ill. 415.

3. *Bowers v. Durant*, 2 N. Y. St. Rep. 127.

4. *Pignolet v. Bushe*, 28 How. Pr. (N. Y.) 9. And see *Rutherford v. Jones*, 14 Ga. 521.

The court has power to authorize a receiver appointed in a partition suit to let the property *pendente lite*. The order may be made *ex parte*. And, if the property can be more advantageously let for a term of three years, and it is probable that the litigation will not end before the expiration of the term, the court may order it let for that term; and if the litigation terminates sooner, the tenants are entitled to indemnity, on the modification of the order so as to cut off their terms. *Weeks v. Weeks*, 106 N. Y. 626.

Where a receiver in partition proceedings obtains an *ex parte* order authorizing him to make leases for terms of three years, and during such term a sale is ordered, the court may abridge the term of the leases made by the receiver, provision being made to compensate the lessees. *Weeks v. Cornwall*, 19 Abb. N. Cas. (N. Y.) 356.

A court of equity has jurisdiction to appoint a receiver, at the instance of one tenant in common against his co-tenants, who are in possession of undivided valuable property receiving the whole of the rents and profits and excluding their companion from the receipt of any portion thereof, when such tenants are insolvent. *Williams v. Jenkins*, 11 Ga. 598.

5. *Duncan v. Campan*, 15 Mich. 415. And see *Harris v. Reynolds*, 13 Cal. 514, 73 Am. Dec. 600.

6. *Weise v. Welsh*, 30 N. J. Eq. 431; *Goodale v. Fifteenth District Court* 56 Cal. 26; *Low v. Holmes*, 17 N. J. Eq. 148; *High on Receivers* 607. And see *Sandford v. Ballard*, 33 Beav. 402; *Sandford v. Ballard*, 30 Beav. 109; *Jeffery v. Smith*, 1 Jac. & W. 302; *Fereday v. Wrightwick*, 1 Russ. & M. 46; *Holmes v. Bell*, 2 Beav. 298; *Hargrave v. Hargrave*, 9 Beav. 549; *Milbank v. Revett*, 2 Meriv. 405; *Norway v. Rowe*, 19 Ves. 159; *Scurrah v. Scurrah*, 14 Jur. 874; *Spratt v. Ahearne*, 1 Jones Jr. Ex. 50; *Street v. Anderson*, 4 Bro. C. C. 414; *Evelyn v. Evelyn*, 2 Dick. 800; *Calvert v. Adams*, 2 Dick. 478.

The purchaser at a judicial sale of a mining claim may, when the judgment debtor remains in possession working the claim and is insolvent, have a receiver appointed to take charge of the proceeds during the

b. INJUNCTIONS.—(1) *Injunction to Stay Waste.*—A co-tenant in possession may be restrained by injunction from the commission or continuance of any act destructive to the common estate and not within the usual and legitimate enjoyment of the premises;¹ but it must be made to appear that the wrongdoer is insolvent and incapable of responding in pecuniary damages,² and that he is exceeding his legitimate share of the use of the estate.³ Such relief may be obtained in a suit for partition as well as in an independent proceeding.⁴

(2) *Injunction Against Proceeding at Law.*—A partition at law reaches only the legal estates and titles of the parties, and does not touch their equities.⁵ Where some of the co-tenants are proceeding for a partition at law, therefore, and it appears that some of the co-tenants will thereby suffer fraud or wrong, or be deprived of some clear right which the legal tribunal cannot secure, such proceeding will be enjoined.⁶

period allowed by statute for redemption. *Hill v. Taylor*, 22 Cal. 191.

But such appointment of a receiver will not be made solely because one of the co-tenants is occupying all of the common property without paying rent; he has the right to so occupy it unless the occupation is a virtual ousting of the complainant. *Varnum v. Leek*, 65 Iowa 751.

1. *Hawley v. Clows*, 2 Johns. Ch. (N. Y.) 122; *Obert v. Obert*, 5 N. J. Eq. 397; *Kerr on Injunctions*, 258, § 5; *Hilliard on Injunctions* 354. And see *Bliss v. Rice*, 17 Pick. (Mass.) 23; *Kennedy v. Scovil*, 12 Conn. 327; *Bailey v. Hobson*, L. R., 5 Ch. 180.

Where one co-tenant occupies as a tenant of the other, equity will restrain him from committing waste. *Twort v. Twort*, 16 Ves. 128.

The husband of a co-tenant may be enjoined from committing waste in an action for partition between the co-tenants. *Weise v. Welsh*, 30 N. J. Eq., 431.

2. *Smallman v. Onions*, 3 Bro. C. C. 521; *Coffin v. Loper*, 25 N. J. Eq. 443; *Lewis v. Christian*, 40 Ga. 188. And see *Hihn v. Peck*, 18 Cal. 640.

3. *Hihn v. Peck*, 18 Cal. 640. An injunction will not be granted to restrain a co-tenant from an excessive use of the common property where it appears that no damage is occasioned to his co-tenant thereby. *Norris v. Hill*, 1 Mich. 202.

But even a majority of the co-tenants have no right to make such use of the common property as to depreciate and injure it, thus damaging the mi-

nority, and an injunction will issue to restrain such use. *Ballou v. Wood*, 8 Cush. (Mass.) 48.

4. *Baily v. Hobson*, 22 L. T. R. 594; 2 Alb. L. J. 74; *Coffin v. Loper*, 25 N. J. Eq. 443; *Weise v. Welsh*, 30 N. J. Eq. 431. And see cases above cited.

5. *Greenup v. Sewell*, 18 Ill. 53; *Baldwin v. Breed*, 16 Conn. 65; *Thornton v. York Bank*, 45 Me. 164; *Tilton v. Palmer*, 31 Me. 487; *Marshall v. Crehore*, 13 Met. (Mass.) 468; *Liscomb v. Root*, 8 Pick. (Mass.) 377; *Bull v. Nichols*, 15 Vt. 335.

6. *Hall v. Piddock*, 21 N. J. Eq. 312; *Wilkinson v. Stuart*, 74 Ala. 198; *Gash v. Ledbetter*, 6 Ired. Eq. (N. Car.) 185.

Where one who has paid the entire purchase money for a piece of land, took the conveyance jointly to himself and his sister on her agreement to pay him one-half of the purchase price, it was held that she was not entitled to have half of the land set off to her without paying half of the purchase money and for half the improvements, and that a court of equity would enjoin her from proceeding at law for a partition of such property. *Maloy v. Sloan*, 44 Vt. 311.

An executor, being defendant in a suit for partition and accounting brought by one claiming as residuary devisee, and who was unaware of any other claimant, prior to the institution of proceedings in escheat, may be enjoined from prosecuting a suit for partition and division subsequently brought by himself against the eschea-

12. Actual Partition—*a*. APPOINTMENT OF COMMISSIONERS.—

At common law the writ *de partitione facienda* was issued to the sheriff upon the entry of the interlocutory judgment, by which he was commanded with twelve good and lawful men of the neighborhood to go to the manors and tenements, and there by the oaths of the said twelve men and in the presence of the parties, to cause the same to be divided, respect being had to the value of the property.¹ In chancery, commissioners were appointed and authorized to enter upon and examine the estate in question and make a fair allotment thereof and distinguish such allotment by certain metes and bounds.²

Under the statutes of the different States the general rule is where an actual partition is ordered, to require the appointment of a designated number of reputable and disinterested freeholders (usually three or five) as commissioners to make the partition

tor, in which he has admitted the liability of said devisee's interest to escheat; and an amended complaint praying for such injunction was properly allowed to be filed by the devisee. *Muir v. Thompson*, 28 S. Car. 499.

But a purchaser of real estate under a proceeding for partition, takes it subject to the lien of existing judgments, and in the absence of fraud he will not be allowed, after his purchase, to enjoin a sale of the premises under execution upon such judgments. *Wood v. Winings*, 58 Ind. 322.

1. *Freem. Part.*, § 520. And see 2 *Sellon's Pr.* 219; *Chitty's Pl.* 1394.

After the partition was made it was returned to the court under the seals of the sheriff and the twelve jurors. This return certified that on a day named, the sheriff took with him twelve free and lawful men, naming them, and went on the manor, etc., and by the oath of said men he caused to be divided the said manor, etc. The return states the bounds of the several allotments, and to whom each allotment had been delivered and assigned. Upon this return, the final judgment of the court is: "Therefore, it is considered that the aforesaid partition to be holden firm and effectual forever."

Freeman on Partition, § 520; *citing* 2 *Sellon's Pr.* 219; *Chitty's Pl.* 1394.

2. *Freeman on Part.*, § 521.

The commission issued from chancery states the names of the several persons entitled to allotments and designates their respective interests. It authorizes the summoning of witnesses, and their examination upon oath, and

provided that their depositions should be reduced to writing, and required the commissioners to certify and return the same without delay to the court in writing, together with all examinations and interrogatories, and also the writ closed up under their seals. *Freeman on Partition*, § 521; *citing* *Seaton's Forms* 190.

The return of the commissioners must detail their proceedings and appoint the sheriffs of each party according to their allotments to be enjoyed by them in severalty, distinguishing each part if so directed by the commission of metes and bounds. There is no prescribed form of certificate; it is in the nature of a report, and, as a rule, it should follow as nearly as may be the language of the commission, and the particulars, description, and quantities of the several parts of the estate may be described by a schedule. *Daniels' Chanc. Pr.* 1158.

After the return of the commission, and order of confirmation of the certificate must be obtained. *Freeman on Part.* 521.

The court can order a partition to be made; but it cannot itself make the partition, except in the indirect mode of confirming the report of the referees appointed for the purpose of carrying out the order of partition. *Dondero v. Vansickle*, 11 Nev. 389. And where the court points out the basis on which an equitable settlement and a partition of property may be made, and counsel cannot thereupon agree as to the amount due each, a reference will be ordered. *Enyard v. Nevius* (N. J. 1889), 78 Atl. Rep. 192.

directed by the judgment.¹ The appointment of such commissioners is usually made in and by the interlocutory judgment,² and in any event should be made only upon due notice to all parties to the action.³

1. See *Jordan v. McNulty*, 14 Colo. 380; *Stallings v. Stallings*, 22 Md. 41; *Bennett v. Bennett*, 5 Gill (Md.) 463; *Chaney v. Tipton*, 3 Gill (Md.) 327; *Railey v. Railey*, 5 B. Mon. (Ky.) 110; *Buck v. Wolcott*, 15 Gray (Mass.) 502; *Coply v. Crane*, 1 Root (Conn.) 69; *Crowell v. Woodbury*, 52 N. H. 613; *Munro v. Merchant*, 26 Barb. (N. Y.) 383; *Wilcox v. Cannon*, 1 Coldw. (Tenn.) 369; *Zinn v. Prior*, 1 Brev. (S. Car.) 482; *Richardson v. Loupe*, 80 Cal. 490; *Coffin v. Argo* (Ill. 1890), 24 N. E. Rep. 1068. And see also the statutes of the different States and cases cited in this section.

In a petition under the statute for partition, assuming in none of its stages an adversary form, the appointment of commissioners by the court to make partition is virtually and substantially equivalent to the entry of judgment *quod partitio fiat*. *Southgate v. Burnham*, 7 Me. 369.

In *Maryland*, under act of 1818, it is error to issue a commission if all the parties in the cause are not infants. *Lawes v. Lumpkin*, 18 Md. 334.

If the parties agree upon three proper persons the court will designate them; and when the designation of the commissioners is made upon the selection of the parties, their report is regarded with even more respect than the verdict of a jury. *Livingston v. Clarkson*, 4 Edw. Ch. (N. Y.) 596.

But judgment will not be entered on an award or report of persons amicably chosen by the parties to make partition or appraisement. Parties cannot substitute their own contrivance for the writ of inquisition provided by law. *Bellas v. Dewart*, 17 Pa. St. 85.

If, upon a petition, the parties agree that certain commissioners may make the partition, there is no need of a judgment. *Symonds v. Kimball*, 3 Mass. 299.

Qualifications. — A deputy sheriff, summoned by the sheriff, is a legally qualified commissioner for making partition, and, though he act in that capacity, may make the return in the capacity of deputy sheriff. *Smith v. Barber*, 7 Ohio, pt. 2, 118.

Examination of the Property.—In an

action of partition, the judge may, without consulting either party, appoint experts to ascertain the true condition of the property and suggest a mode of partition; and the experts need not notify or consult either party, or proceed contradictorily with the parties. *Cameron v. Lane*, 36 La. Ann. 716.

Under the *Illinois* revised statutes, providing that partition of land may be compelled "by bill in chancery, as heretofore, or by petition," and that the court shall appoint three commissioners to make partition, a decree in partition ordering sale of the property without appointment of commissioners is erroneous, though the proceeding is by bill, and not by petition. *Coffin v. Argo* (Ill. 1890), 24 N. E. Rep. 1068.

2. See *Freeman on Part.*, § 222. And see also the statutes of the different States and the cases cited in this section.

3. See *William v. Brown*, 5 Cow. (N. Y.) 281; *Stallings v. Stallings*, 22 Md. 41; *Railey v. Railey*, 5 B. Mon. (Ky.) 110; *Harris v. Preston*, 10 Ark. 201.

A notice of presenting a petition in partition and of moving to appoint commissioners, need not mention the place where the court before which the motion is to be made will be held, and if it mention a wrong place, it may be rejected as surplusage. *William v. Brown*, 5 Cow. (N. Y.) 281.

When the recitals in the record show the jurisdiction of the court and its compliance with the statute, the order appointing commissioners to make partition is an adjudication affirming the sufficiency of the application and notice, which can be questioned only in a direct review of the proceedings in an appellate court. *Hall v. Law*, 102 U. S. 461.

Where the order of reference to ascertain liens in an action for partition does not provide for notice to persons not parties to the action, who have liens on the land, as required by *New York Code Civil Proc.*, § 1562, the defect is jurisdictional, and cannot be amended *nunc pro tunc*, as against

It is usually indispensable that the commissioners should be sworn,¹ and in case of the death, resignation or removal of a commissioner, the court has power to fill the vacancy by a new appointment, even though such an event is not provided for by the statute.²

b. THEIR POWERS AND DUTIES.—Within the scope of the purposes for which they are appointed the commissioners are to act as judges, the whole power of the court being delegated to them.³ They may make such a division and such regulations for the use and enjoyment of the several parts as the parties might make by a partition deed between themselves, and take such steps as may be necessary to make the partition perfectly equal so far as human judgment is capable of producing equality.⁴ But the commissioners are not permitted to violate any statutory or

such persons. *O'Grady v. O'Grady* upp. (Supreme Ct.), 8 N. Y. S. 278.

1. *Massey v. Massey*, 4 Har. & J. (Md.) 144; *McClanahan v. McClanahan* (Ky. 1890), 14 S. W. Rep. 496; *Smith v. Moore*, 6 Dana (Ky.) 417.

But in *Wilcox v. Cannon*, 1 Coldw. (Tenn.) 369, it was held that the requirement that the commissioners shall be sworn is merely directory, and the silence of the record in regard to the matter, or the failure to establish the existence of the fact in any mode, will not affect the validity or effect of the partition, if the substantial requirements of the statute have been complied with.

Where the commissioners appointed to make partition of lands view the premises before one of them has taken the oath prescribed by the statute, and their report is filed, which for some reason is not confirmed, and afterwards the commissioner takes the oath before the filing of the final report, the filing of the first report does not render the commissioners *functus officio*, nor is the failure to take the oath before viewing the premises a reversible error. *Jordan v. McNulty*, 14 Colo. 280. And in *Winship v. Crothers*, 20 Ind. 455; *McClanahan v. McClanahan* (Ky. 1890), 14 S. W. Rep. 496.

2. *Coggeshall v. State*, 112 Ind. 561.

Notice to the parties of the substitution of a commissioner in the place of one previously appointed, who has declined to act, is not necessary, as any objection to the commissioner may be interposed as an objection to the report at any time before confirmation. *Jordan v. McNulty*, 14 Colo. 280.

One of the commissioners named in

a warrant under seal of the court declined to act, and another was appointed, and the appointment certified on the back of the warrant. *Held*, a good appointment, the seal applying to the substitute as well as to the others. *Parsons v. Copeland*, 38 Me. 537.

Waiver of Objection.—An objection that two of three commissioners appointed to partition land met on the premises, and, in the presence of the parties, filled the vacancy occasioned by the absence of the third, comes too late, if raised in the first instance after they have filed their report. *Simmons v. Foscue*, 81 N. Car. 86.

3. *Danl. Ch. Pr.* 1154.

The commission ought to be produced to the commissioners when they meet, and should remain with them till their proceedings are closed and their return annexed. *Danl. Ch. Pr.* 1155, *citing* *Curzon v. Lyster*, *Seaton* (1st ed.) 197.

Commissioners appointed to divide real estate cannot be also authorized in the same commission to subdivide a part of the same among the heirs of the original tenants in common. *Oram v. Young*, 18 N. J. L. 54.

4. *Smith v. Smith*, 10 Paige (N. Y.) 478; *Morrill v. Morrill*, 5 N. H. 134; *Hill v. Dey*, 14 Wend. (N. Y.) 204. And see *Hitchcock v. Skinner*, *Hoffm. Ch.* (N. Y.) 21; *Carter v. Carter*, 5 Munf. (Va.) 108; *Earl of Clarendon v. Hornby*, 1 P. Wms. 446; *Bishop of Salisbury v. Phillips*, *Carthew* 505; *Co. Litt.* 164 b.

The *Wisconsin* revised statutes, §§ 3149-3153, as amended by *Wisconsin* acts 1881, ch. 203, concerning "partition of water powers," is not invalid be-

other provisions of law in effecting a division,¹ and in cases of uncertainty it is their duty to apply to the court for instructions.²

Notice of the time and place of their meetings should be given to all interested parties,³ and usually they are all required to be present and to deliberate together.⁴ Their first duty consists in ascertaining whether or not an actual partition can be made, and in most of the States they may, instead of attempting a partition, report to the court that they find a division prejudicial and impracticable.⁵ Their next step should be to divide the subject

cause it authorizes the commissioners to temporarily occupy and control the mills, etc., when necessary to enable them to perform their duties. *Janesville Cotton Mfg. Co. v. Ford*, 55 Wis. 197.

A mill may be divided by giving to the parties every alternate toll dish, and in case of an advowson the partition is effected by directing alternate presentation. *Danl. Ch. Pr. citing Earl of Clarendon v. Hornby*, 1 P. Wms. 446; *Seaton* 585-588; *Bodicoate v. Steers*, 1 Dick. 69; *Johnstone v. Baber*, 22 Beav. 562; 6 De G. M. & G. 439; 2 Jur., N. S. 1053.

The rent payable by a public company for the privilege of running water pipes through the lands of joint owners may be partitioned by apportioning it between them, according to their respective portions of land. *Warner v. Baynes*, Amb. 589.

The commissioners are required to make the best use of their judgment, knowledge and skill. *Danl. Ch. Pr.* 1155. And when this is done the court will not distrust their return when supported by evidence, though there was a wide contrariety of opinion between the different witnesses. See *In re Thompson*, 3 N. J. Eq. 637; *Post v. Post*, 65 Barb. (N. Y.) 192.

Where the allegations and proof do not make out a case of fraud in the division of land, the mere opinion of witnesses, as to the inequality of such division, will not authorize the court to set such division aside. *Craddock v. Hancock*, 2 B. Mon. (Ky.) 389.

1. *Burdett v. Norwood*, 15 Lea (Tenn.) 491.

2. *McLaughlin v. Chambers*, 57 Mich. 35. And see *Carland v. Jones*, 1 Busb. Eq. (N. Car.) 235.

3. *Doubleday v. Newton*, 9 How. Pr. (N. Y.) 71; *Simpson v. Simpson*, 59 Mich. 71; *Carliss v. Carliss*, 8 Vt. 373; *Brokaw v. McDougall*, 20 Fla. 212.

Notice is not required by the statute

in *New York*, but should nevertheless be given. *Row v. Row*, 4 How. Pr. (N. Y.) 133; *Doubleday v. Newton*, 9 How. Pr. (N. Y.) 71.

If notice of partition may in any case be given by the commissioners by putting written notices to persons interested into the mail, reasonable notice is given, where such persons live at a distance of two hundred miles from the land to be divided, by placing the notices in the mail only seven days before the time appointed to make partition. *Ware v. Hunnewell*, 20 Me. 291.

Presumption of Correctness.—The return of a sheriff to an inquest of partition, showing that the parties have been notified of the time and place of holding the same, and that as many of them as desired attended, is presumed to be true in the absence of evidence to the contrary. *Welch's Appeal*, 126 Pa. St. 297.

4. *Simpson v. Simpson*, 59 Mich. 71; *Kane v. Parker*, 4 Wis. 123; *Cole v. Hall*, 1 Hill (N. Y.) 625; *Zinn v. Pryor*, 1 Brev. (S. Car.) 482; *Odiorne v. Seavey*, 4 N. H. 53; *Schuyler v. Marsh*, 37 Barb. (N. Y.) 350; *Boyd v. Doty*, 8 Ind. 374.

But in *New York*, a majority of the commissioners may act when they have so met and conferred. *Underhill v. Jackson*, 1 Barb. Ch. (N. Y.) 73. So in *Indiana*, *Boyd v. Doty*, 8 Ind. 374. So in *North Carolina*, *Thompson v. Shemwell*, 93 N. Car. 223.

The proceedings of commissioners appointed to make partition are not invalidated by the fact that two of them once made a view and conferred without the knowledge of the third, if with no improper motive, and if all were present at the conference when the report was aged upon. *Townsend v. Hazard*, 9 R. I. 436.

5. *Lucas v. Peters*, 45 Ind. 313; *Wood v. Little*, 35 Me. 107; *Biggins v. Jones*, 39 Ohio St. 95; *Haines v. Hewitt*,

matter of the partition into such shares or parcels as the interlocutory judgment directs.¹ They have no authority to ascertain the interests and proportions of the respective parties; these are first fixed by the court, and the commissioners make the allotments accordingly.² Such division must be made with reference

129 Ill. 347; Freeman Part., § 522; 3 Rumsey's Pr. 51.

The commissioners must determine the location and boundaries of the property; they are to find out where and what it is. Allen v. Hall, 50 Me. 263; Rice v. Freeland, 12 Cush. (Mass.) 170.

In partition by one plaintiff against several defendants, the inquest should set out each of the parts of plaintiff and defendant; and if the land cannot be divided, it should be valued. Wetherill v. Keim, 1 Watts (Pa.) 320. And if it appear by the return of the jury that land cannot be divided, the court may decree it to the demandant at a valuation, though the defendants reside out of the State. Dewar v. Spence, 2 Whart. (Pa.) 211.

In making partition under chapter 228 of *New Hampshire* Gen. Stat. of real estate among tenants in common, where the property is of such description that it cannot be divided so as to give each his equal share without great prejudice or inconvenience, the committee may, and generally should, receive and consider such offers as may be made by the several owners for a choice of the parcels into which the premises are divided. Timon v. Moran, 54 N. H. 441.

A report of the commissioners that the property sought to be divided is incapable of division, is not to be set aside as false without legitimate proof of its falsity. Patterson v. Blake, 12 Ind. 436.

1. Houston v. Blythe, 71 Tex. 719; Doremus v. Doremus, 8 N. J. Eq. 556. See Quick v. Brenner, 101 Ind. 230.

Freeman Part., § 522; Danl. Ch. Pr., 1156. And see Arnold v. Elmore, 16 Wis. 509; Hobbs v. Parker, 31 Me. 143; Barnes v. Taylor, 30 N. J. Eq. 7.

Unless the assent of the widow to a sale of her interest be first obtained, dower must be first set off before making partition. It is not proper to divide the whole among the heirs, leaving dower to attach to each parcel. Phelps v. Stewart, 17 Md. 231.

In partition, under the *Pennsylvania* act, the inquest may divide the land

into more purparts than there are heirs; and such of the purparts as are not accepted may be sold. Darrah's Appeal, 10 Pa. St. 210.

The provision of the *Pennsylvania* act of 1841, "that in all cases of partition in the court of common pleas the court shall allow the holders of the titles to the land, or parts thereof, to take the same, or parts thereof, consecutively, according to the dates of their respective titles, legal or equitable," etc., extends to all cases, both where the land is divisible into as many purparts as there are parties, and where it is not, unless it be where the titles of the parties electing are of the same date. Dana v. Jackson, 6 Pa. St. 234.

2. Agar v. Fairfax, 17 Ves. 543; Allen v. Hall, 50 Me. 263; Brown v. Bulkley, 11 Cush. (Mass.) 168; Kane v. Parker, 4 Wis. 123; Marvin v. Titsworth, 1 Wis. 320; Ham v. Ham, 39 Me. 216; Shaw v. Parker, 6 Blackf. (Ind.) 345; Wildy v. Bonney, 28 Miss. 710; Mount Hope Iron Co. v. Dear-den, 140 Mass. 430; Richardson v. Toupe, 80 Cal. 490; Succession of Harrell, 12 La. Ann. 337; White v. Mitchell, 60 Tex. 164.

Any recitals in deeds given by commissioners appointed to make partition and to execute conveyances, which go beyond the decree appointing them, are nugatory. McCall v. Carpenter, 18 How. (U. S.) 297. And see Logan v. McChord, 5 Litt. (Ky.) 159.

Where, on a petition for partition, the defendants sign a *cognovit* acknowledging the correctness of the allegations contained in the petition, and consenting that partition should be made of the land therein described, the court has no power, and can confer none on commissioners, to make partition of other land, in addition to that set forth in the petition. Corwith v. Griffing, 21 Barb. (N. Y.) 9. But where land, in a petition for partition, is described as bounded on the sea, or on a bay, it is to be held as including the flats; and it is the duty of the commissioners to partition the flats; and

to the comparative value of the several parcels, and not their quantity,¹ and to accomplish this they are authorized to employ a surveyor when necessary,² and to summon and examine such witnesses as they may see fit,³ but their evidence must be confined to the proof of such facts only as may be necessary to enable the commissioners to make proper and impartial allotments.⁴ They must then allot the several shares to the respective

where they have left the flats undivided, their report will be recommitted, that the flats may be divided, if capable of division. *Patridge v. Luce*, 36 Me. 16.

An interlocutory decree directed the commissioners to divide equally between the plaintiff and the defendant, who were infants, the tract of land of which A B died seised. Instead of so doing, the commissioners assigned to the appellee one-fifth of said tract of land, leaving the residue undivided. *Held*, that the commissioners in this respect violated their duty, and it was error to confirm their report. *Custis v. Snead*, 12 Gratt. (Va.) 260.

In *Louisiana*, partitions between minors, to be valid must be made in conformity to the order of court, and in the manner advised by the family meeting. *Succession of Story*, 5 La. Ann. 208.

1. *Coply v. Crane*, 1 Root (Conn.) 69; *Lewis v. Central Ins. Co.*, 23 Ind. 445; *Hunter v. Brown*, 7 B. Mon. (Ky.) 285; *Buck v. Wolcott*, 15 Gray (Mass.) 502; *Stannard v. Sperry*, 56 Conn. 541; *Grimes v. Little*, 56 Ga. 649; *Haines v. Hewitt*, 129 Ill. 377; *Field v. Hanscomb*, 15 Me. 365. And see *Waln v. Meirs*, 27 N. J. Eq. 77; *Dondero v. Vansickle*, 11 Nev. 389.

In *Connecticut*, the report of a committee appointed in partition, that it has aperted, is, in effect, a report that it finds the value of the several parts, described by metes and bounds, to be equal; and such finding has the force of a jury's verdict, and cannot be revised, except for alleged intentional unfairness. *Stannard v. Sperry*, 56 Conn. 541.

An inventory is unnecessary in proceedings for the partition of one piece of property only, of which a minor owns an undivided share. *Life Assoc. v. Hall*, 33 La. Ann. 49.

In making partition, so much of the ancestor's lands, acquired by him after making his will, as are conveyed to a child by way of advancement, are to be valued according to their worth at the

time of the conveyance, and the residue of the lands at their worth at the time of the ancestor's death. *Toomer v. Toomer*, 1 Murph. (N. Car.) 93.

A tenant in common procured from his co-tenant a conveyance to his wife, and others, of part of the common property under an agreement to convey to his co-tenant other parts of the property of equal value, but omitted to disclose such agreement in a suit for partition brought by him after his co-tenant's death, against the widow and minor heirs, and a judgment therein was rendered, which was held void for fraud. *Held*, that in partitioning the lands between the heirs and the survivor's wife, to whom the interest of the heirs was sold under the judgment, the value of the lands conveyed under the agreement should be determined as of the time of the conveyance, and not as present time. *Tucker v. Whittlesey*, 74 Wis. 74.

2. See *Houston v. Blythe*, 71 Tex. 719; *Barnes v. Taylor*, 30 N. J. Eq. 7; *Freeman Part.*, § 522.

In *Massachusetts* the court may order a survey under the direction of the commissioners. *Mitchell v. Starbuck*, 10 Mass. 5.

The notary must be assisted by experts in making the partition. *Succession of Aquillard*, 13 La. Ann. 97.

A person who has been appointed and acted as commissioner in a writ of partition, cannot also act as surveyor, whom the commissioners were authorized to employ, and charge for his services in both capacities. *Ervin v. Epps*, 15 Rich. (S. Car.) 223.

3. See *Brokaw v. McDougall*, 20 Fla. 212; *In re Thompson*, 3 N. J. Eq. 637; *Daniels Ch. Pr.* 1153; *Braithwaite's Pr.* 234; *Curzon v. Lyster*, *Seaton* (1st ed.) 195.

4. See *Curzon v. Lyster*, *Seaton* (1st ed.) 195; *Freeman Part.*, § 522; *Hall v. Hall* (Mass. 1890), 25 N. E. Rep. 84.

It is no ground for setting aside a report that the commissioners refused to hear witnesses as to the effect of any

co-tenants; and in so doing they should, so far as can be done without injustice to the others, assign to each the part most valuable to him, from whatever source the increased value may have arisen.¹ Thus, where one of the co-tenants has erected improvements upon a part of the joint property, that part should be allotted to him,² and where a portion of the co-tenancy is contiguous to other property owned by one of the co-tenants, that

particular division of the property in question, or adjoining property, where it is not shown that such refusal constituted misconduct in them under the terms of their appointment.¹ *Hall v. Hall* (Mass. 1890), 25 N. E. Rep. 84.

1. See *Story v. Johnson*, 1 Y. & C. Ex. 546; *Arnold v. Cauble*, 49 Tex. 527; *Bromagham v. Clapp*, 5 Cow. (N. Y.) 295; *Shaw v. Parker*, 6 Blackf. (Ind.) 345; *Bird v. Bird*, 15 Fla. 424; 21 Am. Rep. 296.

In *Maryland*, the right of election is in no event confined to the right of choice between parcels, but is a right to take the whole estate, if indivisible among the heirs; and to take all, or any parcel or parcels, if divided into parcels less than the number of heirs. *Catlin v. Catlin*, 60 Md. 573.

In *Illinois*, in a decree for partition, the portion of a wife should be set off to the husband and wife in right of the wife, or to her alone, and not to the husband and wife jointly and in fee. *Cost v. Rose*, 17 Ill. 276.

In *Louisiana*, in a partition of land in kind, the notary cannot dispense with lots, without the parties' express written agreement, notified to him. *Moore v. McKiernan*, 4 La. Ann. 226.

Grantee by Metes and Bounds.—Where an undivided portion of a tract of land is conveyed, and the grantor afterwards conveys to others particular parts by metes and bounds, and the grantee of the undivided portion then petitions for partition, his share of the land should be so set off and assigned as not to embrace any part of the land thus conveyed by metes and bounds, if he can otherwise have a fair and equal partition. *Webber v. Mallett*, 16 Me. 88; *Furrrh v. Winston*, 66 Tex. 521.

Where the interest of one of several heirs in certain city lots, constituting a portion of an inheritance, has been sold on execution, the fact that, upon a voluntary partition among the heirs, to which the execution purchasers were not made parties, said city lots were set off to others of the heirs than

him whose interest has been so sold, cannot prejudice the rights of such purchasers. *Butler v. Roys*, 25 Mich. 53; 12 Am. Rep. 218.

Original Co-tenants.—In partition the allotment of shares is required to be in the names of the original co-tenants. It is no part of the duty of the justice to determine who owned the different shares at the time of application for partition. *Burk v. Hand*, 45 N. J. Eq. 166.

Re-allotment.—Where deeds were made to the different parties for their separate interests, and one of the parties mortgaged the portions assigned to him, and attachments were levied thereon, on appeal, the partition was set aside, and on another hearing, the lots levied on and mortgaged were allotted to other parties, it was held, that the liens of the mortgages and attachments could not be shifted to the lots assigned to the debtor by the last partition. *Martin v. Kennedy*, 83 Ky. 335. But if any one of the co-tenants shall have in the mean time sold the land allotted to him upon the original partition, the same land may be allotted to the purchaser upon the re-partition, if this can be done without detriment to the other parties in interest. *Grigsley v. Peak*, 68 Tex. 235.

Allotment, How Made.—The chancery rule was that the distribution of the different portions among the respective co-tenants should be by lot. *Danl. Ch. Pr.* 1158.

But the commissioners are now usually authorized to exercise their judgment and discretion in the distribution. See *Cecil v. Dorsey*, 1 Md. Ch. 223.

2. See *Williman v. Holmes*, 4 Rich. Eq. (S. Car.) 475; *Hulse v. Hulse* (Supreme Ct.), 5 N. Y. Supp. 747; *Ogle v. Adams*, 12 W. Va. 213; *Collet v. Henderson*, 80 N. Car. 337; *Buck v. Martin*, 21 S. Car. 590; 53 Am. Rep. 702; *Sarbach v. Newell*, 28 Kan. 642; *Johnson v. Pelot*, 24 S. Car. 255; 58 Am. Rep. 253; *Quick v. Brenner*, 101 Ind. 230; *Town v. Needham*, 3 Paige (N. Y.) 553; 24 Am. Dec. 246;

portion should be assigned to him.¹ The use of water power may be regulated by the size of the flumes or gates or by provisions for alternate use,² and the interest or portion of one or more of the parties may be set off to them, and that of the others sold if the court is of the opinion that such a course is best.³

If the joint property consists of several parcels, each parcel need not, and if it would decrease their value, should not be divided between each co-tenant; but, so far as possible, whole

Hall v. Piddock, 21 N. J. Eq. 314; Kelley's Appeal, 113 Pa. St. 119; 57 Am. Rep. 444; Acklin v. Paschal, 48 Tex. 147; Fair v. Fair, 121 Mass. 559.

Where a son, upon an express understanding with his father, actually occupies a parcel of land belonging to the latter, and improves the property to a considerable amount, there is sufficient ground for a decree excepting said parcel from partition under a bill filed by the heirs. Haines v. Haines, 6 Md. 435.

Where, in partition, the judgment determining the rights of the parties, and decreeing that the land be so divided "as to give to each party the land upon which his improvements are situated," appears to have been rendered on a trial on the merits, the court cannot, at a subsequent term, inquire into an agreement of the parties relative to the division, but must have the division made according to the decree. Petrucio v. Seardon, 76 Tex. 639.

But if one co-tenant, after petition for partition by another, places, by consent of the other, a building on the commonland, said building is not to be taken into account in appraising the land. Parsons v. Copeland, 38 Me. 537.

1. See Koehler v. Klein, 128 Ill. 393; Cochran v. Shoenbeger, 33 Fed. Rep. 397; Hall v. Piddock, 21 N. J. Eq. 314; Canning v. Canning, 2 Drew 436.

If one party must have, or ought to have, a particular purpart because of its contiguity and relation to his other property, it should be assigned to him at its fair market value to others, and he should not be coerced, by the other party's bidding, into paying more. Cochran v. Shoenbeger, 33 Fed. Rep. 397.

It is no ground of objection to a partition of realty, made between heirs, that the husband of one of the heirs owns a parcel of land adjoining theirs, and near a spring of water thereon, which spring the husband has walled up and used constantly for several years in

connection with his land, and which is almost indispensable to the proper enjoyment thereof, and that, notwithstanding these facts, the spring is allotted to another of the heirs, when to allot the spring to said first-named heir would make the lots unshapely and without uniformity, making it almost impossible for one of the heirs to fence his portion, and would leave one of the full shares without any water. Mackbee v. Fields (Ky. 1886), 1 S. W. Rep. 485.

2. Smith v. Smith, 10 Paige (N. Y.) 470; Hills v. Dey, 14 Wend. (N. Y.) 204; Morrill v. Morrill, 5 N. H. 134. And see Munroe v. Gates, 42 Me. 178; De Witt v. Harvey, 4 Gray (Mass.) 486; Hoffman v. Savage, 15 Mass. 130; Davenport v. Lamsen, 21 Pick. (Mass.) 72; Chandler v. Goodrich, 23 Me. 78; White v. Story, 2 Hill (N. Y.) 549.

But in *New Hampshire*, it is held that partition cannot be made by assigning to each of the joint owners the exclusive occupation and enjoyment of the whole premises for alternate periods of time, according to their respective rights. Crowell v. Woodbury, 52 N. H. 613.

In *Maine*, commissioners have no authority to assign to one tenant the right of hauling lumber across the land assigned to another, and of driving lumber on the stream through such land, and using the dam there; nor to prescribe the mode of keeping the dam in repair. Dyer v. Lowell, 30 Me. 217. But see to the contrary, Cheswell v. Chapman, 38 N. H. 14; 75 Am. Dec. 158.

In *Pennsylvania*, the court has no power, in the absence of a severance by a testator, to order the coal and surface to be divided and each appraised separately. Christy's Appeal, 110 Pa. St. 538.

3. Haywood v. Judson, 4 Barb. (N. Y.) 228; Lucas v. Peters, 45 Ind. 313.

parcels should be allotted to each,¹ and a right of way or other privilege attached to the whole estate may be made appurtenant to the share set off to one or left in common for the use of all,² or one purpart may be charged with a servitude or easement for the benefit of another.³

Under the English rule the commissioners have no power to award sums to be paid by way of owelty unless authorized by the court,⁴ but the contrary doctrine prevails in the *United States*,⁵ though they can divide the property in such a manner as

If a portion of the lands can be divided without injury, or if the shares of one or more of the parties can be set off to them, and the residue cannot be partitioned, the latter portion only should be ordered to be sold. *Lucas v. Peters*, 45 Ind. 313.

So the distributors of the real estate of an intestate are not obliged to divide and set out the whole estate in severalty, but they may assign certain parts of it to two or more of the heirs, to be held in common. *Gordon v. Pearson*, 1 Mass. 323. And see *Walker v. Walker*, 3 Abb. N. Cas. (N. Y.) 12; *Northrop v. Anderson*, 8 How. Pr. (N. Y.) 351.

But in *Vermont*, under the act of 1797, relating to partition, the court cannot assign the interest of one tenant in common to a co-tenant, nor order that of one tenant in common to be sold; and a petition to that effect was dismissed with costs. *Jewett v. Nash*, 4 Vt. 517.

1. *Smith v. Barber*, 7 Ohio, pt. 2, 118; *Earl of Clarendon v. Hornby*, 1 P. Wms. 446; *Canning v. Canning*, 2 Drew 34; 18 Jur. 640; *Story v. Johnson*, 1 Y. & C. Ex. 538; *Stannard v. Sperry*, 56 Conn. 541.

In making partition of real estate, it is better, where it can be done without injury to the value of the estate, that a part of every distinct kind of property should be assigned to each tenant, especially of property that far exceeds the other in value. A violation of this principle, however, is not necessarily sufficient ground for setting aside a partition. *Hay v. Estell*, 19 N. J. Eq. 133.

The rule that a commissioner's report of partition which leaves the parties subject to probable litigation should not be approved, should be applied, on a petition to have a third of a third of an estate set off to the petitioner; no private ways being assigned, although many of the lots adjoined no public

ways, and her share being set off in different tracts, although it was practicable under the decree to set it off in one tract. *Richardson v. Armington*, 10 R. I. 339.

But where lands in several districts are partitioned, under one proceeding in one of the districts, separate writs of partition are properly issued to each district. *Daniels v. Moses*, 12 S. Car 130.

A loss, which would arise in dividing part of the property in kind, cannot be compensated in apportioning the partition of the rest. *Blanchard v. Blanchard*, 7 La. Ann. 529.

A share may consist of tracts not contiguous, and it is not error to direct the partition to be thus made if the commissioners deem it expedient. *Huston v. Blythe*, 71 Tex. 719.

2. *Henrie v. Johnson*, 28 W. Va. 190; *Mount Hope Iron Co. v. Dearden*, 140 Mass. 430.

3. *Cheswell v. Chapman*, 38 N. H. 14; 75 Am. Dec. 158; *Laster v. Lister*, 3 Y. & C. Ex. 540. And see *Chandler v. Goodridge*, 23 Me. 78.

Where, by the report of the commissioner appointed by the court to make partition of land between heirs, a right of way is reserved across certain parts of the partitioned premises, for the purpose of enabling certain heirs to have access to woodland set off to them, the party whose premises are burdened with this right of way is bound to make its use as convenient as the mode of access which the farmer usually provides for himself to get to and from his woodland. *Blakeman v. Talbot*, 31 N. Y. 366; 88 Am. Dec. 275.

4. *Daniels Ch. Pr.* 1157; *Mole v. Mansfield*, 15 Sim. 41; *Peers v. Needham*, 19 Beav. 316.

5. See *Smith v. Smith*, 10 Paige (N. Y.) 477; *Wood v. Little*, 35 Me. 112; *Brookfield v. Williams*, 2 N. J. Eq. 341; *Graydon v. Graydon*, *McMull*.

to make it necessary to require a co-tenant to pay money to equalize the partition against his will only in a case of necessity,¹ and neither the commissioners nor the court can, unless authorized by statute, divide the land into town lots and dedicate a part of it to the public for streets.²

c. THEIR REPORT.—After the completion of the division and allotment, the commissioners must report to the court by which they were appointed, all the proceedings had before them and what they have done in the premises.³ If they have been unable to agree on a division or allotment, they may make separate returns.⁴ But though all should be present to hear and deliberate, as a general rule, the majority may decide,⁵ though when the report is made by part only, it should show affirmatively that all were present.⁶

The general rule applicable to reports, that every essential must

Eq. (S. Car.) 63; *Williamson v. Swindle*, McMull. Eq. (S. Car.) 67; *Robertson v. Robertson*, 2 Swan (Tenn.) 197; *Larkin v. Mann*, 2 Paige (N. Y.) 27; *Hills v. Dey*, 14 Wend. (N. Y.) 204; *Morrill v. Morrill*, 5 N. H. 134; *Calhoun v. Rail*, 26 Miss. 414. *Phelps v. Green*, 3 Johns. Ch. (N. Y.) 302; *Haywood v. Judson*, 4 Barb. (N. Y.) 228; *Warfield v. Warfield*, 5 Har. & J. (Md.) 459; *Norwood v. Norwood*, 4 Har. & J. (Md.) 112; *Wynne v. Tunstall*, 1 Dev. Eq. (N. Car.) 23; *Cox v. McMullin*, 14 Gratt. (Va.) 82.

In *Illinois*, where commissioners to make partition, who were directed to assign certain proportions of the land to the parties, ordered the payment of a sum of money to the minor co-tenant in lieu of certain land, a decree confirming such report was held to be erroneous, as it was in effect selling the minor's land without an application for that purpose made in the manner provided. *Gooch v. Green*, 102 Ill. 507.

1. *Burdett v. Norwood*, 15 Lea (Tenn.) 491.

Commissioners in partition have no authority to direct the partial destruction of a building on the property in order to effect an equal division. *Vail v. Vail*, 52 Hun (N. Y.) 520; 17 Civ. Pro. Rep. (N. Y.) 38.

2. *New Albany v. Williams* (Ind. 1890), 25 N. E. Rep. 187; *Kitchen v. Sheets*, 1 Ind. 139.

3. *Hathaway v. Persons Unknown*, 32 Me. 136; *Brokaw v. McDougall*, 20 Fla. 212. And see *Munroe v. Stickney*, 48 Me. 458. *Daniels' Ch. Pr.* 1158.

Special Return.—To a writ of parti-

tion under the *South Carolina* act of 1791, the commissioners may make a special return, recommending that the property be vested in one of the parties interested, on his paying a specified sum of money to the others. *Carnes v. White*, 1 Brev. (S. Car.) 458.

Clerical Mistakes.—Where the affidavit and report of commissioners appointed to make partition bear date one day prior to the order of their appointment, and no specific objection is raised to this, it will be regarded as a mistake of the clerk in making up the record. *Tibbs v. Allen*, 27 Ill. 119.

4. *Daniels' Ch. Pr.* 1159; *Curzon v. Lyster*, *Seaton* (1st ed.) 197.

5. *Thompson v. Shemwell*, 93 N. Car. 222; *Simpson v. Simpson*, 59 Mich. 71; *Kane v. Parker*, 4 Wis. 123; *Cole v. Hall*, 2 Hill (N. Y.) 625; *Underhill v. Jackson*, 1 Barb. Ch. (N. Y.) 73; *Scuyler v. Marsh*, 37 Barb. (N. Y.) 354; *Townsend v. Hazard*, 9 R. I. 436.

But in ejectment, an order making the return of partitioners the judgment of the court cannot be excluded on the ground that only one partitioner went upon the land. *King v. Dillon*, 66 Ga. 131.

6. *Townsend v. Hazard*, 9 R. I. 436.

A report of commissioners in partition must be signed by all the commissioners; or, if not so signed, it should state the reason of the omission; it should also state that all the commissioners met together and consulted, etc., where a sufficient reason is given for its not being signed by all. *Underhill v. Jackson*, 1 Barb. Ch. (N. Y.) 73.

be recited, applies to the report of commissioners for partition.¹ Thus a return that it is impracticable to make an equal partition is insufficient, the facts rendering it impracticable must appear.² So, the testimony upon which they acted must be set forth, that the court may see that they have arrived at a correct conclusion,³ and the subject matter of the partition and the part of it set off to each of the parties must be specifically designated and described,⁴

1. *Hardin v. Cogswell*, 5 Heisk. (Tenn.) 549; *Daniels Ch. Pr.* 1159; *Braithwaites' Pr.* 238.

In *Illinois*, the report of the commissioners in partition must show that they went upon the land, or that they had such personal knowledge of it as to render a personal examination unnecessary. And where actual partition cannot be made and a sale is ordered on their report, the order must provide that the premises shall not be sold unless at least two-thirds of their appraised value is bid. When the widow is entitled to dower and also to a homestead right therein, the latter must contribute to the dower as well as the other interests. *Knapp v. Gass*, 63 Ill. 492. And see *Campbell v. Campbell*, 63 Ill. 502.

Construction.—The report of commissioners to make partition of real estate cannot receive a construction more favorable to the party to whom land is assigned than the language of a grantor in a deed. *Munroe v. Stickney*, 48 Me. 458.

Effect.—The fact that the commissioners have recommended that a certain tract of land be set off to the widow does not vest her with title to her share in the estate at the time of the partition sale, where she has expressly waived her right to said tract, and consented that it should be sold with the rest, and the order of sale is made to that effect. *Turbeville v. Flowers*, 27 S. Car. 337.

Where commissioners in partition make a second report by consent of the parties, in consummation of the agreement of partition made by them, such report may be admitted in evidence. *Bruce v. Osgood*, 113 Ind. 360.

2. *Hardin v. Cogswell*, 5 Heisk. (Tenn.) 549; *McGee v. Russell*, 49 Ark. 104.

Under a decree directing commissioners to partition land subject to the widow's homestead, and certain other charges, the commissioners reported

that the lands could not be divided without injury to the proprietors; that the premises were subject to the life-estate of the widow, and were worth a certain sum. *Held*, that the report was authorized by *Illinois Rev. Stat.*, ch. 109, §§ 19, 22, providing that if the lands cannot be divided the commissioners shall so report, and that if dower or homestead have not been allotted the commissioners may allot them. *Schaefer v. Kienzel*, 123 Ill. 430.

3. *Brokaw v. McDougall*, 20 Fla. 212. "The certificate having been signed and sealed by the commissioners, must, together with any plans therein referred to and the depositions of the witnesses be annexed to the commission, which must then be closed up and sealed by the acting commissioners. *Danl. Ch. Pr.* 1159.

4. *Harrington v. Barton*, 11 Vt. 31; *Christy's Appeal*, 110 Pa. St. 538; *Mansfield v. Olsen* (Miss. 1888), 4 So. Rep. 545; *Pulliam v. Wilkerson*, 7 Baxt. (Tenn.) 611; *Counce v. Studley*, 75 Me. 47; *Koehler v. Klein*, 128 Ill. 393. And see *Sanborn v. Clough*, 40 N. H. 316.

A report of commissioners for partition is sufficiently certain if it is capable of being reduced to a certainty by a survey. *Boyd v. Doty*, 8 Ind. 374.

Where a reference to public records and memorials of the locality does not make certain the several shares, a field book and map should accompany the report. *Mansfield v. Olsen* (Miss. 1888), 4 So. Rep. 545.

Where the plat accompanying the report of commissioners in a partition suit gives the distances correctly, an objection that the plat is out of proportion is properly disregarded. *Koehler v. Klein*, 128 Ill. 393.

A mere description of city lots by their numbers is insufficient. *Barnes v. Taylor*, 30 N. J. Eq. 7. But the commissioners may make the allotments

together with their valuation.¹ Such report must be signed, though it need not be under seal, and annexed to the commission and returned to the court,² and after such return the commissioners have no further power to correct mistakes in the report,³ but mere mistakes and clerical errors will be rectified by the court upon motion upon an equitable basis.⁴

d. **VACATING OR SETTING ASIDE THE REPORT.**—If the court finds that the partition as made is unequal and unjust, it cannot equalize it by requiring a money compensation or otherwise, but must vacate the report and send the matter back to the same or another commission for further action.⁵ But the report is regarded in the light of a verdict of a jury rendered upon a trial at law, and it should be disturbed or interfered with by the court only upon grounds similar to those upon which a verdict will be set aside and a new trial granted.⁶ Thus the proceedings of the

by reference to known public boundaries, or public surveys, if these are in fact sufficient, without erecting monuments. *Marvin v. Titsworth*, 10 Wis. 320.

If marks or monuments can be found, these must govern; and if not, parol evidence may be introduced to show their location; and if no marks or monuments were set, their proper location must be shown by prorating the distances as given in the record. *McAlpine v. Reichnecker*, 27 Kan. 257.

1. *Tucker v. Whittlesey*, 74 Wis. 75; *Christy's Appeal*, 110 Pa. St. 538.

An estate described, in the report of commissioners to make partition, as a homestead, is to be presumed to be of the value of \$800, according to *Massachusetts Gen. Stat.*, ch. 104. *Warren v. Greenwood*, 121 Mass. 112.

In *Connecticut*, the report of a committee appointed in partition, that it has aparted, is, in effect, a report that it finds the value of the several parts, described by metes and bounds, to be equal; and such finding has the force of a jury's verdict, and cannot be revised, except for alleged intentional unfairness. *Stannard v. Sperry*, 56 Conn. 544.

At What Time.—When a co-tenant has agreed to convey his share, the value of the lands should be determined as of the time of the conveyance, and not as of the present time. *Tucker v. Whittlesey*, 74 Wis. 75.

2. See *Lane v. Bommelman*, 17 Ill. 95; *Sullivan v. Sullivan*, 42 Ill. 315; *Archibald v. Davis*, 4 Jones (N. Car.) 133.

The *Tennessee* statute of 1787, ch.

17, § 1, which provides that the return of the commissioners in a partition suit shall be made under their seals, is merely directory, and does not vitiate the record of partition where the direction has not been complied with, the return having been received and made part of the record of the court. *Bledsoe v. Wiley*, 7 Humph. (Tenn.) 507.

Presumed Correct.—The county court in *Tennessee*, being possessed of general jurisdiction in cases of partition, its proceedings will be presumed to be correct, in the absence of proof to the contrary, where they are collaterally brought in question, and this presumption has greater force after a long interval of time. *Wilcox v. Cannon*, 1 Coldw. (Tenn.) 369.

3. *Bates v. Thornbury*, 5 Dana (Ky.) 9.

4. *Boyd v. Doty*, 8 Ind. 370; *Pulliam v. Wilkinson*, 7 Baxt. (Tenn.) 611; *Manners v. Charlesworth*, 1 M. & K. 330; 2 *Van Santvoord's, Eq. Pr.* 47. And see *Haines v. Hewitt*, 129 Ill. 347.

When the description of the land in the commissioner's report does not conform to that in the petition, the report cannot be accepted, but an amendment may be made. *Counce v. Studley*, 75 Me. 47.

5. *Lucas v. Peters*, 45 Ind. 313; *George v. Murphy*, 1 Mo. 777; *Riggs v. Dickinson*, 2 Scam. (Ill.) 439; *Murphy v. Murphy*, 1 Mo. 741.

6. *Livingston v. Clarkson*, 4 Edw. (N. Y.) 596; *Doubleday v. Newton*, 9 How. Pr. (N. Y.) 71; *Lucas v. Peters*, 45 Ind. 313; *Lake v. Jarrett*, 12 Ind. 395.

commissioners are conclusive unless based on erroneous principles,¹ or unless shown by a clear and decided preponderance of evidence to have been grossly unequal or unjust.² So the report will be vacated and set aside when a party has had no notice of the proceedings, and consequently does not attend,³ or where the proceedings were unfairly conducted,⁴ or where the commissioners

Equity will not set aside partition proceedings, where the facts relied on should have been known at the time, and where no fraud appears. *Grant-ham v. Kennedy*, 91 N. Car. 148.

1. See *Haulenbeck v. Conkright*, 26 N. J. Eq. 159; *Riggs v. Dickinson*, 3 Ill. 437; 35 Am. Dec. 113; *Doubleday v. Newton*, 9 How. Pr. (N. Y.) 71; *Wilhelm v. Wilhelm*, 4 Md. Ch. 330; *Totten's Appeal*, 46 Pa. St. 301; *Bull v. Pyle*, 41 Md. 419; *Kerr v. Hooks*, *Wright* (Ohio) 609.

The report of commissioners to make partition of land can be impeached only for fraud, partiality, or gross error of judgment. *Jewitt v. Scott*, 19 Tex. 567.

A partition long acquiesced in and acted upon by the parties generally, ought not to be disturbed for mere irregularity; but if unjust or illegal, it may be impeached by one who never acquiesced. *Carter v. Carter*, 5 Munf. (Va.) 108.

Where a suit for partition abates by the death of a party, a report of the commissioners, made during the abatement, is irregular. *Reynolds v. Reynolds*, 5 Paige (N. Y.) 161.

2. *Geer v. Winds*, 4 Desaus. (S. Car.) 85; *In re Thompson*, 3 N. J. Eq. 637; *Kane v. Parker*, 4 Wis. 123; *Jewett v. Scott*, 19 Tex. 567; *Hay v. Estell*, 19 N. J. Eq. 135; *Wilhelm v. Wilhelm*, 4 Md. Ch. 330; *Haulenback v. Conkright*, 26 N. J. Eq. 159; *Morrill v. Morrill*, 5 N. H. 329; *Nicelar v. Barbrick*, 1 Dev. & B. (N. Car.) 257; *Sever v. Sever*, 8 Mass. 132; *Hall v. Hall* (Mass. 1890), 25 N. E. Rep. 84; *Borah v. Archers*, 7 Dana (Ky.) 176; *Williamson v. Amilton*, 13 La. Ann. 387; *Storn v. Johnson*, 1 Y. & C. Ex. 538.

The English Doctrine.—"It is improper for the court to interfere with the valuation of commissioners unless there is a mistake so gross as to induce the court to think that they have acted from unjust, corrupt, or fraudulent motives." *Lester v. Lester*, 3 Y. & C. Ex. 544.

Where commissioners, appointed to make partition, by mistake allotted a

share to the husband instead of the wife, and the court confirmed the report, but no conveyances were made, the husband acquired no title. *Bolling v. Teel*, 76 Va. 487.

The confirmation of a referee's report in favor of a sale of the land in an action for partition brought by certain heirs against co-heirs will not be refused because it does not affirmatively appear that the ancestor left no debts unpaid, though the three years have not elapsed since letters of administration were issued, within which an action may be brought to charge the land for the decedent's debts, when no such question has been raised by the pleadings, or at the trial before the referee. *Hulse v. Hulse* (Supreme Ct.), 5 N. Y. Supp. 747.

Procedure on Motion.—On a motion to re-commit a report of commissioners for partition on the ground of unfairness, the court will receive testimony on that point. *Peck v. Metcalf*, 8 R. I. 386. But a party who takes exceptions to the report of commissioners in a partition case is not entitled to a jury trial of the issues of fact made by such exceptions. *Dillman v. Cox*, 23 Ind. 440.

3. *Doubleday v. Newton*, 9 How. Pr. (N. Y.) 71; *Keaton v. Pennington* (Ky. 1889), 11 S. W. Rep. 198.

In acting upon the report of commissioners partitioning land, the court should ascertain whether persons, known to be concerned, and within the State, have had sufficient notice of the time and place of making partition to enable them to be present for the protection of their rights. The commissioners' return, that they have given sufficient notice is not conclusive upon the court. *Hathaway v. Persons Unknown*, 32 Me. 136.

4. See *McLaughlin v. Chambers*, 57 Mich. 35; *Borah v. Archers*, 7 Dana (Ky.) 176; *Keaton v. Pennington* (Ky. 1889), 11 S. W. Rep. 198.

The report of a committee appointed by the court will be set aside where it appears that the committee, without the knowledge or consent of the par-

acted fraudulently or under the interest of one of the parties in interest.¹ If the report be set aside for the misconduct of the commissioners or any of them, new ones may be appointed in their places; but if for a mere irregularity or unintentional omission to perform some duty, the same commissioners will be retained to make the second partition.²

To question the validity of a partition of lands made and reported by the commissioners, exception must be taken, as a general rule, not merely to the decree, but also to the report of such commissioners,³ and in any event equity will not disturb an equitable partition which has been acted upon for several years,

ties, and in their absence, went on the land with a person skilled in the valuation of timber lands, and took his estimate of its value. *Gage v. Gage*, 64 N. H. 543.

Where the court appointed commissioners to set off the dower, and to make partition of the land among the heirs, and one of the persons named, with a stranger, styling themselves commissioners, made a report of partition illegal in form, the report was void upon its face. *Lovd v. Malone*, 23 Ill. 43; 74 Am. Dec. 179.

But an objection that the commissioners, having been sworn before the correction, made their report in reference thereto, is entitled to no weight in the absence of any pretence of their having prejudiced the rights of any parties. *Winship v. Crothers*, 20 Ind. 455. And it is no ground for setting aside a report that the commissioners refused to rule as to the binding effect of an admission made by petitioner's counsel that convenience to other lands of the parties should be considered in making the partition. *Hall v. Hall* (Mass. 1890), 25 N. E. Rep. 84.

1. *Gooch v. Green*, 102 Ill. 507; *McLaughlin v. Chambers*, 57 Mich. 35; *Jewett v. Scott*, 19 Tex. 567.

In *McLaughlin v. Chambers*, 57 Mich. 35, the court by CHAMPLIN, J., said: "The commissioners are clothed with important duties, and it is essential that their means should be free from bias, and that they should not be influenced or subject to be influenced by the parties interested, by communications made in the absence of other parties. If the commissioners desire information respecting their duties, they should apply to the court for instruction."

A motion to set aside an appraisal is properly overruled, however, where a

former appraisal has been set aside on a motion based on the same affidavits, except that in the second case they also charge improper influencing of the appraisers, which charges are mainly founded on hearsay. *Snyder v. Snyder*, 75 Iowa 255.

In the deliberations of the commissioners and in the preparation of their report, all interested parties should be excluded. *Paul v. Detroit*, 32 Mich. 109; *Peavey v. Wolfborough*, 37 N. H. 286; *Marquette etc. R. Co. v. Probate Judge*, 53 Mich. 217.

2. 2 Van Santvoord's Eq. Pr. 47. And see *Jewett v. Scott*, 19 Tex. 567.

3. *Kern v. Maginniss*, 55 Ind. 459; *Clark v. Stephenson*, 73 Ind. 489; *Hall v. Hall* (Mass. 1890), 25 N. E. Rep. 84; *Hulse v. Hulse* (Supreme Ct.), 5 N. Y. Supp. 747.

In *Illinois*, a party to a partition suit, who fails to except to the commissioner's report, waives all objection thereto. *McCracken v. Droit*, 108 Ill. 428.

The respondent in a petition for partition, who does not object to an interlocutory judgment for partition, cannot, at a hearing on the motion to confirm the commissioner's report, set up want of title in the petitioner as a bar to the partition. *Mount Hope Iron Co. v. Dearden*, 140 Mass. 430.

A party to a partition suit who has expressly agreed that a certain portion of the land shall be assigned to him, cannot afterwards complain of such assignment. *Haines v. Hewitt*, 129 Ill. 347.

In *New Jersey* the correct way to bring before this court objections to the report of commissioners making partition, is not by exceptions, but by motion to suppress the return. *Hay v. Estell*, 19 N. J. Eq. 133.

though originally invalid.¹

e. THE DIVISION IN PROBATE COURT.—In probate courts, after jurisdiction of the parties is obtained and a decree of distribution has been made, a designated number of commissioners (usually three freeholders) are appointed by the court to make the partition.² Due notice of the time and place at which the partition will be made should be given to all interested parties,³ and the partition should be conducted according to the equitable

1. *Piatt v. Hubbell*, 5 Ohio 245; *Totten's Appeal*, 46 Pa. St. 301; *Leverett v. Stevenson*, 81 Ga. 701; *Hathaway v. Thayer*, 8 Allen (Mass.) 421.

After a partition by parol of land held in common, the erection of a division fence, and possession and enjoyment by the parties under the partition for nine years, it will not be set aside, if not grossly unequal. *Cummins v. Nutt*, Wright (Ohio) 713.

Where it is proven that commissioners were appointed to allot certain property described in a will, and reported their doings to the court, and the division so made has been acquiesced in for ten years or more by all the devisees, although there is no record of the division, the allotment will not be disturbed in the absence of evidence showing it to be unjust. *Caudill v. Caudill* (Ky.), 7 S. W. Rep. 545.

A partition, even when it takes on itself the aspect and quality of a compromise, may be attacked for lesion beyond one-fourth, but when the partition is once made, and the parties compromise on disputes growing out of it, the compromise is unassailable for lesion. *Williamson v. Amilton*, 13 La. Ann. 387.

In *Wisconsin* a final decree of partition cannot be opened by mere motion, after the term at which it was entered has passed. *Kane v. Parker*, 4 Wis. 123.

2. See *Pinney v. Bissell*, 7 Conn. 21; *Clement v. Brainard*, 46 Conn. 179; *Milligan's Appeal*, 82 Pa. St. 389; *Odiorne v. Seavey*, 4 N. H. 53; *Ward v. Corbett*, 72 Ala. 438; *Witham v. Cutts*, 4 Me. 31. And see also the statutes of the different States and the other cases cited in this subdivision.

In *Connecticut* the commissioners may be appointed by the testator in his will. *Strong v. Strong*, 8 Conn. 409.

Where a certain number of acres off the north side of a lot of land was

devised to one person, and the residue of a lot was devised to another person, and one of the devisees died before any division was in fact made between them, held, that the probate court had power, on application of one of the devisees, to appoint a committee to set off and divide the land according to the terms of the devise. *Chamberlin v. Chamberlin*, 16 Vt. 532.

Commissioners Must be Sworn.—By the provisions of *New Hampshire Rev. Stat.* 206, the committee appointed to make partition are to be sworn before proceeding to a hearing of the parties in the case of proceedings pending in the probate court as well as in the supreme court. If not so sworn, the report of the committee will be set aside and a new committee appointed. *Ela v. McConihe*, 35 N. H. 279.

3. *Ragan's Estate*, 7 Watts (Pa.) 438; *Merklein v. Trapnell*, 34 Pa. St. 46; 75 Am. Dec. 634; *Proctor v. Newhall*, 17 Mass. 81; *Smith v. Rice*, 11 Mass. 507. And see *Kidd v. Commonwealth*, 16 Pa. St. 426.

Under the laws of *Pennsylvania*, notice to the widow and heirs is not necessary before awarding an inquest in partition in the orphan's court. *Horam's Estate*, 59 Pa. St. 152. And the sheriff's return, that all the parties interested in a partition were present, is *prima facie* evidence of that fact, though not conclusive; so also of his return, that they were all notified. *Ragan's Estate*, 7 Watts (Pa.) 438.

Where one of the heirs has consented to the partition as made, no notice to him is necessary. *Rice v. Smith*, 14 Mass. 431.

In *Alabama*, if the petition for partition shows on its face that there is a person in interest not made a party, the proceedings founded thereon are void, but not where such fact must be shown by outside evidence. *Whitlow v. Echols*, 78 Ala. 206.

In *South Carolina* parol evidence cannot be introduced to show in a col-

rules long recognized in like proceedings in other courts.¹ Thus owelty of partition may be decreed where an equal division cannot be made without great prejudice to the parties,² or the portion upon which improvements have been placed should, where it can be done without prejudice, be set off to the party making them,³ or the purpart of one may be charged with a right of way or other servitude in favor of that set off to another,⁴ or a sale may be ordered of the whole or of a part of the estate when it cannot be otherwise equitably divided,⁵ as in partition proceedings in a court of equity.

lateral proceeding, that an infant defendant had not been served. *Tederall v. Bouknight*, 25 S. Car. 275.

1. *Freeman Part.*, § 559. And see *Cheswell v. Chapman*, 38 N. H. 17; 75 Am. Dec. 158; *Rex v. Rex*, 3 S. & R. (Pa.) 533.

A partition by an orphans' court should be made with reference to the value and amount of the land rather than the present income. *Young v. Bickel*, 1 S. & R. (Pa.) 467.

2. See *Robbins v. Gleason*, 47 Me. 271; *Thayer v. Thayer*, 7 Pick. (Mass.) 209; *Jenks v. Howland*, 3 Gray (Mass.) 536.

The contrary rule obtains in *Alabama*. *Ward v. Corbett*, 72 Ala. 438. Yet if such division be acquiesced in by the parties it will be supported in equity. *Terrell v. Cunningham*, 70 Ala. 100. And see *Montgomery v. Gordon*, 57 Ala. 377.

In *New Hampshire* a judge of probate has no authority, upon a petition for partition of real estate, to assign to any part owner other than a petitioner, a portion greater than his just share, upon his paying to the others the value of such excess in money; and a decree to that effect, being invalid, is not made good by a release of the sum awarded, made by the party entitled. *Pickering v. Pickering*, 20 N. H. 541.

In partition of real estate, in which a minor has an interest, a guardian who has no funds of the minor is not bound to take real estate charged with an owelty equal to the value of the purpart, even though it be to the minor's advantage that he should do so. *Milligan's Appeal*, 82 Pa. St. 389.

But he may, if he deems it best, elect to receive it. *Gelbach's Appeal*, 8 S. & R. (Pa.) 205.

If the party to whom the smaller share is allotted has only an estate for life, he takes only a life estate in the

money awarded to equalize his share. *Terrell v. Cunningham*, 70 Ala. 100.

The commissioners may distribute to an heir as his share of an estate, his own debt to it. *Bailey v. Strong*, 8 Conn. 278.

3. *Freeman on Part.*, § 559.

A claim by one of the devisees of a testatrix to have her interest in certain land, of which partition is prayed, marshaled, justifies an order that partition shall be made, but that such interest shall be retained, subject to the further inquiry and order of the court. *Gatewood v. Toomer*, 14 Rich. Eq. (S. Car.) 139.

In partition in the orphans' court, under the act of April 8th, 1833, between the widow and collateral kindred of a man who died without issue, the widow is entitled to have her half, including the mansion house, set off to her in severalty for life, if it can be done without prejudice to the rest; even though the remainder cannot be actually divided, without prejudice, among the other heirs. *Poundstone v. Everly*, 31 Pa. St. 11.

4. *Chiswell v. Chapman*, 38 N. H. 14; 75 Am. Dec. 158; *Davenport v. Lamson*, 21 Pick. (Mass.) 72.

Lands may be allotted to several of the heirs in common with their consent. *Thayer v. Thayer*, 7 Pick. (Mass.) 209.

5. See *Eshelman v. Witmer*, 2 Watts (Pa.) 263; *Vandever v. Baker*, 13 Pa. St. 126; *McCall's Appeal*, 56 Pa. St. 363; *Conover v. Walling*, 15 N. J. Eq. 167; *Inman v. Prout*, 90 Ala. 362; *Robson v. Watts*, 11 Tex. 764; *Vensel's Appeal*, 77 Pa. St. 71.

The orphans' court can enforce specific performance by the purchaser at a sale under proceedings in partition. *Hore's Estate*, 11 Phila. (Pa.) 63.

When, in partition proceedings, a sale is required, the orphans' court must issue the order of sale to the ex-

As in equity all the commissioners must act, but a majority may decide and report,¹ and receiving and filing a report has been held equivalent to an approval.² A return will be set aside when based upon a plain mistake of law or of fact, or when fraudulent

executor or administrator, if there is one, and not to a stranger, as trustee, there being no apparent reason for passing by the executor. *Taylor's Appeal*, 119 Pa. St. 297.

A proceeding in partition under the intestate laws of *Pennsylvania*, by which the estate is sold by order of the orphans' court, creates a lien upon the land for unpaid purchase-money, independent of a mortgage or any other security which may have been taken. And such lien can only be discharged by payment to the heir. A payment to the administrator, to whom the order was directed to sell the land, and to whom a bond and mortgage were given, will not discharge the lien which the law creates in favor of the heir. And this rule is equally applicable to the purchaser and his alienee. *Hise v. Geiger*, 7 W. & S. (Pa.) 273.

Where, in partition proceedings in the orphans' court, it is practicable to divide the land into as many purparts of equal value as there are heirs, there need be no appraisement. *Wistar's Appeal*, 105 Pa. St. 390.

In case of actual partition of land, the mansion house should be given to the widow. *McCall's Appeal*, 56 Pa. St. 363.

In *Pennsylvania* an heir or the assignee or alienee of an heir may offer in writing a sum in excess of the appraised value fixed by the commissioners, and the one offering the highest price above such valuation is entitled to have the property allotted to him. See *Hersher v. Brennenman*, 6 S. & R. (Pa.) 2; *Mason's Appeal*, 41 Pa. St. 74; *Rankin's Appeal*, 95 Pa. St. 358; *Ragan's Estate*, 7 Watts (Pa.) 438; *Cochran v. Schoenbuger*, 33 Fed. Rep. 397. But the right to accept an allotment is waived by failure to appear and make his election on the day fixed therefor by the court. *Wentz's Appeal*, 7 Pa. St. 151.

If a husband accepts the wife's share she has no owelty to receive. A recognizance given by the husband to her is inoperative. *McMillan's Appeal*, 52 Pa. St. 434.

The orphans' court may refuse, as

coming too late, the offer of one of the parties in partition, made only three hours before the time of sale, to take the property at the appraised value. *Wistar's Appeal*, 115 Pa. St. 241.

In proceedings in the orphans' court for the partition of real estate, the confirmation of a report of sale, stating that two-thirds of the purchase-money was to be paid at the execution of the deed, and the remaining sum at the death of the intestate's widow, is not a conversion of the real estate into personalty until the conditions are sufficiently complied with to entitle the purchaser to the deed. *Biggett's Estate*, 20 Pa. St. 17.

The interest which a widow has in the estate of her deceased husband is realty, and upon a proceeding in partition in the orphans' court, under the intestate law of *Pennsylvania*, and the confirmation of the estate to the heir, the widow's interest still remains realty, and not subject to the control of a subsequent husband, unless by deed duly executed and acknowledged by the wife, as provided by law. *Miller v. Leidig*, 3 W. & S. (Pa.) 456.

A recognizance being for the full appraised value of the land, it covers the share of the widow, the principal of which the heirs were entitled to recover at her death, though her name was not mentioned in the recognizance, and it was given to the heirs alone. *Bailey v. Commonwealth*, 41 Pa. St. 473.

1. *Odiorne v. Seavey*, 4 N. H. 53.

2. *Fishback v. Young*, 19 Tex. 515.

Contents of Return.—The description in the report must be sufficiently definite to identify the land. *Wheeler v. Bolton*, 66 Cal. 83.

In *Alabama*, every fact necessary to sustain the jurisdiction of the court must appear on the face of the proceedings, but where such proceedings have ripened into a rule and the averments are sufficient to support the jurisdiction of the court, irregularities will not invariably be proceedings. *Whitlow v. Echols*, 78 Ala. 206.

Any mistakes made by the distributors in describing the lines whereby

lent acts have been practiced by an interested party, and a grossly inadequate valuation may be evidence of mistake or fraud,¹ but the court will interfere only in case of intentional misconduct or great and manifest inequality and injustice.² So irregularity in the proceedings of the commissioners is a proper ground for setting aside their report.³ New commissioners should be appointed when a report is set aside upon any ground involving the misconduct of the commissioners who made it.⁴

f. THE EFFECT OF ACTUAL PARTITION.—The interest of the holder of a lien upon an undivided interest in the joint premises, like the inchoate right of a wife to dower, is transferred by the partition from the moiety of the whole to the whole of the purport set off to the tenant against whose moiety the lien was a charge,⁵ but if the lien is against the whole premises the lien

more land is given to some and less to others than they are in fact entitled to, can be corrected by appeal only, and not by bill in chancery. *Gates v. Treat*, 17 Conn. 388.

1. *Krieder's Estate*, 18 Pa. St. 374; *Rex v. Rex*, 3 S. & R. (Pa.) 533.

The committee must divide the land according to the terms of the devise, without regard to any agreement of the devisees as to the division line, which has not been acquiesced in for fifteen years. *Chamberlin v. Chamberlin*, 16 Vt. 532.

A division of an estate by order of the probate court, by which a share was assigned to an heir, before deceased, was held invalid. *Wass v. Bucknam*, 38 Me. 356.

Where commissioners, appointed by the judge of probate to divide an estate among heirs, undertook to divide a lot of land between two of them, and, supposing it to contain 100 acres, they assigned to one fifty-five acres on the northerly part of the lot, to extend southward till the quantity should be completed, and to the other they assigned forty-five acres, being the southerly part of the lot, but made no survey or actual location of either parcel, and afterwards, the lot was found to contain one hundred and thirty acres, the surplus belonged to the two assignees, in the proportion of fifty-five to forty-five. *Witham v. Cutts*, 4 Me. 31.

2. *Rex v. Rex*, 3 S. & R. (Pa.) 533; *Webster v. Merriam*, 9 Conn. 225; *Young v. Bickel*, 1 S. & R. (Pa.) 467.

In *Rex v. Rex*, 3 S. & R. (Pa.) 533, the court said: "It is generally to be supposed that they (the commissioners) are better judges of this matter

than the court. Great regard should, therefore, be paid to their opinion." But "if it appeared that the inquest acted on erroneous principles, or if it appeared that there was great inequality in the division or valuation, their powers are sufficiently extensive to afford relief."

3. *Ela v. McConihe*, 35 N. H. 279, in which the commissioners were not sworn as required by law.

4. *Pickering v. Pickering*, 20 N. H. 541.

5. *Harwood v. Kirby*, 1 Paige (N. Y.) 471; *Thruston v. Minke*, 32 Md. 574; *Loomis v. Riley*, 24 Ill. 307; *Torrey v. Cook*, 116 Mass. 163; *Webb v. Rowe*, 35 Mich. 58; *Jackson v. Pierce*, 10 Johns. (N. Y.) 417; *Board of School Land Commissioners v. Wiley*, 10 Oregon 86; *Westervelt v. Haff*, 2 Sandf. Ch. (N. Y.) 98; *Furlong v. Soule*, 39 Me. 122.

The lien of a mortgage on a co-tenant's undivided interest is divested from the land set off to another co-tenant, and attached to the owelty due the mortgagor. *Reed v. Fidelity Ins. etc. Co.*, 113 Pa. St. 574.

A judgment, in an action for partition of lands held by partners as tenants in common, which directs a partition by commissioners, and charges a mortgage held by one of the partners, covering the undivided interest of his co-partner upon the separate share of the latter, is not, where no division has already been made, a bar to an action for the foreclosure of the mortgage. *Reid v. Gardner*, 65 N. Y. 578.

If, instead of an actual partition, the premises are sold and a part of them purchased by the mortgagor,

holder is not affected if not made a party to the suit.¹ So, as a co-tenancy is at any time subject to partition, it does not fall within the equitable principle upon which emblements are allowed to the outgoing tenant; crops growing on the land, therefore, become the property of the tenant to whom the purpart upon which they are growing is awarded.² But when the property has been leased, the tenant to whom it is assigned is entitled only to such rents as fall due after the decree is made.³

At common law, in case of an eviction by title paramount, a co-parcener might either re-enter and defeat the partition, or recover from her co-tenants for the part she had lost;⁴ but joint tenants and tenants in common were confined to the right of a recovery for the eviction.⁵ In the *United States* warranty of title is implied from partition, and where a co-tenant has been evicted from the purpart allotted to him by a title paramount to that

who is to pay a certain amount to the other tenants in common, the mortgage will attach as a lien to the land so purchased. *Westervelt v. Haff*, 2 Sandf. Ch. (N. Y.) 98.

One who takes a mortgage or levies an attachment on land set off in partition proceedings is a purchaser *pendente lite* if an appeal is pending, and the lien will not be shifted because the land is afterwards partitioned differently. *Martin v. Kennedy*, 83 Ky. 335.

But where a mortgage embraces the interest of the mortgagee in some specified part of the common property, it cannot, through the operation of the partition, be extended to property not embraced in such mortgage. *Green v. Arnold*, 11 R. I. 364; 23 Am. Rep. 466.

1. See *Townshend v. Townshend*, 1 Abb. N. Cas. (N. Y.) 81; *Eberts v. Fisher*, 44 Mich. 551; *Barnard v. Onderdonk*, 11 Abb. N. Cas. (N. Y.) 349; *Jordan v. Van Epps*, 85 N. Y. 427.

In case of a conveyance of two-thirds of a parcel of land in common, by one who holds the fee, subject to a claim for dower, partition between the parties to the deed will not save the grantee from the liability of having the widow's dower assigned in his portion of the estate; nor can the grantee, by petition for partition, have his portion set out in severalty before the dower has been assigned. *Blanchard v. Blanchard*, 48 Me. 174.

If partition has been made of land subject to a widow's annuity, she cannot apportion her annuity and levy

several distresses upon the several parcels. She can distrain but once, and for the whole amount. *Shouffer v. Coover*, 1 W. & S. (Pa.) 400.

Where some of the co-tenants have sold their undivided interests in the land held in common, and have reserved liens for the unpaid purchase money, the existence of these liens does not, *per se*, prevent partition. The liens will attach to the parcels set off; and a partition once made will not be disturbed at the instance of lien creditors, unless they show that it is unequal and unfair as respects the security for their debts. *Wright v. Strother*, 76 Va. 857.

2. *Calhoun v. Curtis*, 4 Met. (Mass.) 413; 38 Am. Dec. 380.

In *Gray v. King*, 39 Tex. 616, it was held that until the final decree of partition, the defendant is entitled to half of the increase of the stock.

3. *Mahoney v. Alviso*, 51 Cal. 440.

After one tenant in common has obtained partition by legal process, he may maintain an action of assumpsit against his former co-tenant, to recover his share of the rent received by such co-tenant, on a demise by him of the whole estate before and during the pendency of the process for partition, though such co-tenant appeared and pleaded to the petition that the petitioner was not seised of said estate as tenant in common thereof. *Munroe v. Luke*, 1 Met. (Mass.) 459.

4. Co. Litt. 174 a; *Rawle on Covenants* (4th ed.) 473.

5. *Ross v. Armstrong*, 25 Tex. Supp. 372; *Rawle on Covenants* (4th ed.) 474.

partitioned, he can enforce contribution in equity for his loss.¹ One to whom a part of a tract of land is set off, takes it with the appurtenances and easements belonging to it before the partition.²

13. Sale Instead of Division.—By the common law and under the statutes of earlier times, the courts had no power to direct a sale of the property in actions for partition,³ but the right to exercise such power in a proper case has been either conferred upon them by statute or assumed by them upon equitable principles almost universally both in *England* and in the *United States*.⁴ The exercise of such power violates no constitutional

1. *Dugan v. Hollins*, 4 Md. Ch. 147; *Sawyers v. Cator*, 8 Humph. (Tenn.) 256; *Walker v. Hall*, 15 Ohio St. 362; 86 Am. Dec. 482; *Nixon v. Lindsay*, 2 Jones Eq. (N. Car.) 233; *Western v. Skiles*, 35 Fed. Rep. 674. And see *Devour v. Johnson*, 3 Bibb (Ky.) 409.

The obligation of warranty, on the part of each of the co-heirs towards the other, in matters of partition, extends to the solvency of the debtors, whose debts may have been partitioned. *Lacour v. Lacour*, 13 La. Ann. 463.

A bill in equity by an heir evicted of his share of the real estate after partition, because of want of title of the deceased thereto, to compel contribution from the other heirs in land or money, should include the widow, who has had her dower set off, as a party defendant. *Kimball v. Tate*, 75 Me. 39.

A bought land from an heir, who took it at the appraisement, subject to one-third to the widow, to be paid on the death of the widow. *Held*, that under § 41 of the *Pennsylvania* act of March 29, 1832, the heir might recover his portion of this after the widow's death, in assumpsit against A. *Shelly v. Shelly*, 8 W. & S. (Pa.) 153.

It is held in *Pennsylvania* that where one of several partitioners is evicted of his part by a prior title, he is entitled to a new partition. *Feather v. Strohoecker*, 3 P. & W. (Pa.) 505; 24 Am. Dec. 342.

2. *Powell v. Riley*, 15 Lea (Tenn.) 153.

Where several persons unite in the purchase of a piece of ground, and divide the same into smaller lots, upon each of which a house is built, and then partition is made between them, each must so regulate and grade his

own lot, as that the water which falls or accumulates upon it shall not run upon the lot of his neighbor. *Bentz v. Armstrong*, 8 W. & S. (Pa.) 40; 42 Am. Dec. 260.

Where the surface of land and the coal beneath, by proceedings in partition, were allotted to different heirs, without limitation or servitude imposed on either, the owner of the coal could not remove it without leaving sufficient supports to sustain the surface. *Jones v. Wagner*, 66 Pa. St. 429; 5 Am. Rep. 385.

3. See *Bisph. Eq.*, § 493; *Harkins v. Pope*, 10 Ala. 499; *Deloney v. Walker*, 9 Port. (Ala.) 497.

4. See *Story's Eq. Jur.*, § 654, note a; American notes to *Agar v. Fairfax*, 2 Lead. Cas. Eq. (4th Eng. ed.) 915; *Freeman Part.*, §§ 536, 537. And see the statutes of the different States and the cases cited in this section.

"Previous to the Partition act, 1868 (31 and 32 Vict., ch. 40), where land was held in co-ownership, a majority, however large, of the co-owners could not insist upon a sale. *Citing Turner v. Morgan*, 8 Ves. 143; *Parker v. Gerard*, Amb. 236; *Warner v. Paynes*, Amb. 589. The act alters this rule, and provides, by § 4, that where the parties representing at least a moiety of the estate desire a sale, the court shall direct a sale, unless it sees good reason to the contrary. On the other hand, by § 3, where persons representing less than a moiety desire a sale, the court may order a sale, if, under all the circumstances, it appears more beneficial to the parties interested than a partition. As generally happens when a new rule is introduced by statute, the judges were at first reluctant to forego the old practice; and in *Dicks v. Batten* (not reported), VICE-CHANCELLER

principles,¹ and actual partition, being both at common law and by statute a matter of absolute right, under statutes authorizing a sale instead of actual partition, when the circumstances designated by the statute are found to exist, it is equally a matter of absolute right.²

a. WHEN A SALE WILL BE ORDERED.—A sale will be directed only when the facts and circumstances required by statute to authorize it are affirmatively made to appear,³ though the ques-

LOR STUART held that a sale ought not to be granted at the instance of a party entitled to five-eighths in a case where partition could be made without difficulty—a decision which VICE-CHANCELLOR MALINS followed in *Pemberton v. Barnes*, citing 19 W. R. 709; L. R., 6 Ch. 687, n. The decision was, however, overruled by LORD HATHERLY. See 19 W. R. 988; L. R., 6 Ch. 688. And it may now be considered as settled that if the owners of a moiety or more desire a sale, the owners of the remainder must, even where the estate is large and a partition would be easy, show some special grounds to induce the court to refuse a sale. In *Allen v. Allen*, 42 L. J., Ch. 839, decided by VICE-CHANCELLOR WICKENS recently, an attempt seems to have been made to force a sale on the owners of four-sixths, mainly on the ground that the chief clerk had certified that a sale would be more beneficial to all parties than a partition. The majority desired a partition of the bulk of the property, and evidence was adduced to show (1) that though part of the property consisted of houses, a partition could be made without difficulty, and (2) that the property was increasing in value. The vice-chancellor thought that the balance of the argument might rather be in favor of a sale, but he held in accordance, as it seems to us, with the clear intention of § 3 of the act, that this circumstance was not sufficient to justify him in forcing a sale of the entire property upon the dissentient majority, and therefore made an order referring it to Chambers to make a partition of so much of the property as was capable of apportionment, and a sale of so much as was incapable of apportionment. There must be many cases in which justice will be best done by an order of this kind, which gives due effect to the wishes of the majority, but does

not permit them to be carried to the unreasonable extent tolerated by the old rule." *Solicitor's Journal and Reporter* (July 26, 1872), vol. 17, p. 742.

Personal Property.—Where there is inadequacy or absence of a legal remedy, as for a partition of personal property owned by co-tenants, equity has jurisdiction, and if a partition is impracticable, will order a sale and an accounting between the co-tenants. *Spaulding v. Warner*, 59 Vt. 646.

1. See *Richardson v. Monson*, 23 Conn. 97; *Metcalfe v. Hoofingardner*, 45 Iowa 510.

2. See *Bentley v. Long Dock Co.*, 14 N. J. L. 489; *Johnson v. Olmsted*, 49 Conn. 517; *Pell v. Ball*, 1 Rich. Eq. (S. Car.) 361; *Burgess v. Eastham*, 3 Bush (Ky.) 476.

But an assignment for the benefit of creditors by a tenant in common does not authorize the trustees to institute proceedings against the co-tenants for the sale of the entire estate for the purpose of a partition under the code of *Maryland*. *Richie v. Munder*, 49 Mo. 10.

In *Louisiana*, where some of the part owners are minors, the judge has no power of his own will to order a sale of the property to be divided, upon terms of credit. This can only be done at the instance of the tutor, and upon the advice of a family meeting. *Succession of Morgan*, 12 La. Ann. 153. And in *South Carolina* the court will not, for the purpose of partition between heirs and devisees, order a sale of the whole premises, against the consent of a deviser, especially where he is a minor. *Pell v. Ball*, *Spears Eq.* (S. Car.) 518. Nor can a sale be ordered where a tenant by curtesy, an interested party, objects. *Bragg v. Lyon*, 93 N. Car. 151; *Parks v. Siler*, 76 N. Car. 191.

3. See *Windley v. Barrow*, 2 Jones Eq. (N. Car.) 66; *Johnson v. Olmsted*, 49 Conn. 517; *Gregory v. Gregory*, 69 N. Car. 522; *Davis v. Davis*, 2 Ired.

tion is so far within the discretion of the court that an order of sale will not be reversed except in a clear case of error.¹ The grounds upon which a sale instead of actual partition should be ordered are substantially alike in the different States, the usual requirement being that a sale is best for the interest of the parties or that an actual partition cannot be made without great prejudice to the parties interested,² a sale of a part and division of the

Eq. (N. Car.) 607; *Reeves v. Reeves*, 11 Heisk. (Tenn.) 669; *Succession of Dumestre*, 40 La. Ann. 571. And the burden of proof rests with the party seeking a sale. *Davis v. Davis*, 2 Ired. Eq. (N. Car.) 607.

A sale should not be decreed when the existence of one of the statutory requisites does not appear. *Tindall v. Tindall* (Miss. 1888.), 3 So. Rep. 581.

In order to authorize a sale for partition, the bill must be framed with that view, containing the proper averments, and the regular proceedings must be had under it. *Ross v. Ramsey*, 3 Head (Tenn.) 15.

1. *Scott v. Guernsey*, 48 N. Y. 125; *Brooks v. Davey*, 109 N. Y. 495; *Brooks v. Ackerly* (N. Y.), 17 N. E. Rep. 412.

On a petition for partition of real estate, where it appears that the premises are not susceptible of partition, there is no error in ordering the estate to be sold subject to the widow's dower, which may afterwards be assigned, in accordance with the provisions of the statute. *Fight v. Holt*, 80 Ill. 84.

2. *Windley v. Barrow*, 2 Jones' Eq. (N. Car.) 66; *Gregory v. Gregory*, 69 N. Car. 522; *Trull v. Rice*, 85 N. Car. 327; *Thurston v. Minke*, 32 Md. 571; *Baldwin v. Aldrich*, 34 Vt. 526; 80 Am. Dec. 695; *Ross v. Ramsey*, 3 Head (Tenn.) 15; *Helm v. Franklin*, 5 Humph. (Tenn.) 405; *Davidson v. Bowden*, 5 Sneed (Tenn.) 129; *Fleet v. Dorland*, 11 How. Pr. (N. Y.) 490; *Bentley v. Long Dock Co.*, 14 N. J. Eq. 489; *Wilson v. Duncan*, 44 Miss. 642; *Pankey v. Howard*, 47 Miss. 87; *Willson v. Smith*, 22 Gratt. (Va.) 502; *Johnson v. Olmsted*, 49 Conn. 509; *Holmes v. Holmes*, 2 Jones' Eq. (N. Car.) 334; *Stephenson v. Cotter* (Supreme Ct.), 5 N. Y. Supp. 749; *Post v. Post*, 65 Barb. (N. Y.) 192; *Blakemore v. Blakemore*, 39 La. Ann. 874; *Tindall v. Tindall* (Miss. 1888), 3 So. Rep. 581; *Brooks v. Ackerly* (N. Y. 1888), 17 N. E. Rep. 412. And see *Durruty v. Mu-*

sacchia (La. 1890), 7 So. Rep. 555; *Bruhn v. Fireman's Bldg. Assoc.*, 42 La. Ann., 7 So. Rep. 556; *Henning v. Barringer* (Ky. 1888), 10 S. W. Rep. 136; *Grimes v. Little*, 56 Ga. 649; *Waln v. Meirs*, 27 N. J. Eq. 77; *Dondero v. Vansickle*, 11 Nev. 389.

In *Vermont*, when an actual partition cannot be made without great inconvenience a sale will be ordered. *Baldwin v. Aldrich*, 34 Vt. 529; 80 Am. Dec. 695. So in *Louisiana*. *Meyer v. Pargoud*, 34 La. Ann. 969; *Cazes v. Gassie*, 40 La. Ann. 360.

In *Georgia*, when the entire property will by division be depreciated in value, a sale will be ordered. *Tucker v. Parks*, 70 Ga. 414; *Royston v. Royston*, 13 Ga. 427.

In *Kentucky*, when a division of the land would materially impair its value, a sale should be directed. *Burgess v. Eastham*, 3 Bush (Ky.) 476.

In *Pennsylvania*, in proceedings for the partition of an intestate's real estate, where there are collateral heirs and a widow, if the estate cannot be divided without prejudice to the whole, it may be appraised and finally sold, if no one will take it at the appraised value. *McCall's Appeal*, 56 Pa. St. 363.

When, in proceedings for the partition of land among a widow and heirs, the commissioners determine that the portion set apart for the widow's dower cannot be actually partitioned without injury to the parties entitled in remainder, it is their duty to report their determination to the court; and it is then the duty of the court to order a sale of that portion of the premises subject to the life estate of the widow. *Post v. Post*, 65 Barb. (N. Y.) 192.

Where infants are interested in property sought to be partitioned, it is the duty of the court to protect their rights and prevent a sacrifice of their interests. A sale should not, therefore, be ordered where infants or a trustee, without power to purchase, are parties, unless it appears that actual partition with or without compensation cannot be made. *Walker v. Walker*, 3 Abb.

rest being usually permissible as well as a sale of the whole.¹ Under these provisions it is usually held that if the court is unable to divide the property upon the principle that "equality is equity," a sale will be ordered,² and if by a partition the value of all the shares would be much less by reason of the division than the value of the whole as an entire tract, an actual partition

N. Cas. (N. Y.) 12. And see *Hartmann v. Hartmann*, 59 Ill. 103.

Where commissioners of sale report to the court that it is impracticable to partition a farm so as to subject the interest of one of the heirs to the liens upon it, and there is no evidence produced to the contrary, it is proper to decree the sale of the whole farm. *Beckham v. Duncan* (Va. 1888), 5 S. E. Rep. 690.

1. See *Post v. Post*, 65 Barb. (N. Y.) 192; *Brooks v. Ackerly* (N. Y. 1888), 17 N. E. Rep. 412; *Beckham v. Duncan* (Va. 1888), 5 S. E. Rep. 690; *Haywood v. Judson*, 4 Barb. (N. Y.) 228.

Where there are several parcels the impossibility of dividing one of them is not a reason for ordering a sale of that one. *Walker v. Walker*, 3 Abb. N. Cas. (N. Y.) 12.

Commissioners were ordered to assign to each petitioner for partition, one-fifth of the premises. Their report was that it could not be so divided without great detriment, and they advised a sale. The four defendants objected. *Held*, that a sale was not to be ordered, unless it appeared that the plaintiff's one-fifth could not be set off, and that if that was the meaning of the report, it was defective, and could not sustain a decree for sale, because it did not set out the facts on which the opinion was based. *Lake v. Jarrett*, 12 Ind. 395.

In *North Carolina* a partition cannot be directed as to some of the shares, and a sale and partition as to the others. *Bragg v. Lyon*, 93 N. Car. 151. But under the statute of 1787, lands in one county may be sold for the purpose of making partition among heirs, where they cannot be divided without injury to some of them, although partition has been made among the heirs of land in another county by commissioners appointed by the court. *Strudwick v. Ashe*, 3 Murph. (N. Car.) 207.

But in *Alabama* the various statutes authorizing partition on application to "the judge of probate of the county in which the property is," being origin-

ally applicable only to land, and so regarded as local, a sale of land not in the county is void. *Turnipseed v. Fitzpatrick*, 75 Ala. 297.

2. *Higginbottom v. Short*, 25 Miss. 160; 57 Am. Dec. 198; *Steedman v. Weeks*, 2 Strobb. Eq. (S. Car.) 145; 49 Am. Dec. 660; *Branscomb v. Gillian*, 55 Iowa 235; *Blakemore v. Blakemore*, 39 La. Ann. 804; *Tucker v. Parks*, 70 Ga. 414; *Gregory v. Gregory*, 69 N. Car. 522; *Holmes v. Holmes*, 2 Jones' Eq. (N. Car.) 334; *Windley v. Barrow*, 2 Jones' Eq. (N. Car.) 66; *Ross v. Ramsey*, 3 Head (Tenn.) 15.

The provision in the statute allowing the court to decree a sale of common land, in a suit for partition, where it cannot be divided without great prejudice, refers to the comparative prejudice by a sale or partition; and to authorize a decree of sale, it must appear that the injury to the collective interests of the parties will be much greater in consequence of an actual partition than of a sale. *Smith v. Smith*, 10 Paige (N. Y.) 470.

A sale and division of proceeds was held proper, instead of an actual partition, in the case of two tracts of land containing the big trees of *Calaveras in California*. *Briges v. Sperry*, 95 U. S. 401.

Property cannot be conveniently divided where such division would necessitate the cantling of tenements to an injurious extent. *Meyer v. Pargoud*, 34 La. Ann. 969.

Under *Kentucky* general statutes, ch. 63, art. 5, § 6, providing that, when land held jointly or in common cannot be divided without materially impairing its value, the court may, on petition of one of the parties in interest, order a sale and a division of the proceeds, the court cannot order a partition by which one of the joint owners would be obliged to take less than his share of the land, with compensation from the other in money. If there cannot be a proper partition, the land must be sold, and the proceeds distributed. *Wrenn v. Gibson* (Ky. 1890), 13 S. W. Rep. 766.

would be inequitable and would not be ordered;¹ so where the principal element of the value of the property consists in its adaptation as a whole to business purposes.² But the circumstances which will render a partition injurious must usually relate in some way to the land itself, its location, condition, quantity, and the like, the mere complication of the interests of the owners not being sufficient,³ though the nature and extent of the respective interests of the owners may be considered in connection with the physical condition and qualities of the property in determining whether partition can be made without injury.⁴

In *Indiana*, the court had no power to require plaintiffs to pay defendant for her interest in the land, or for improvements made or taxes paid by her, but, as the property could not be divided, plaintiffs had a right to have it sold and their share of the proceeds distributed to them. *Alleman v. Hawley*, 117 Ind. 532.

A mine must necessarily be partitioned through the instrumentality of a sale. *Leupers v. Henke*, 73 Ill. 405.

1. *Branscomb v. Gillian*, 55 Iowa 235; *Trull v. Rice*, 85 N. Car. 327; *Royston v. Royston*, 13 Ga. 425; *Coleman v. Lane*, 26 Ga. 515; *Clason v. Clason*, 6 Paige (N. Y.) 545.

On a reference to a master in a suit for partition, to ascertain whether a sale is necessary, the question for the master to decide is, whether the value of the whole property would be materially diminished, and not whether it would be for the benefit of the parties to turn the estate into money. *Clason v. Clason*, 6 Paige (N. Y.) 541.

The prejudice spoken of in the statute means a prejudice to all the owners and not to a part only. *Van Arsdale v. Drake*, 2 Barb. (N. Y.) 601. And a decree of sale where the aggregate amount of the benefits to the parties from a sale instead of an actual partition will be small in reference to the value of the property, of which a partition or sale is sought. *Smith v. Smith*, 10 Paige (N. Y.) 475.

2. *David v. David* (Supreme Ct.), 9 N. Y. Supp. 256.

Were two pieces of property are used together for business purposes and their value would be reduced by a separation and vesting in different owners, though situate several miles apart, a sale of the whole will be ordered. *Briges v. Sperry*, 95 U. S. 401.

3. *Smith v. Upton* (Ky. 1890), 13 S. W. Rep. 731; *Vesper v. Farnsworth*,

40 Wis. 357; *Walker v. Walker*, 3 Abb. N. Cas. (N. Y.) 12; *Hassell v. Mizell*, 6 Ired. Eq. (N. Car.) 392. And see *Tyler v. Jewell* (Ky. 1889), 11 S. W. Rep. 25.

That all the parties are insolvent is not a reason for directing a sale. *Stephenson v. Cotter* (Supreme Ct.), 5 N. Y. Supp. 749.

In a special proceeding for partition, the administrator of the estate of the ancestor of the co-tenants cannot interplead and ask that the land may be sold in aid of assets. *Garrison v. Cox*, 99 N. Car. 478.

An order of sale in partition will not be refused because the time has not yet expired within which the estate of the testator, under whose will complainants derive title, may be subjected to the payment of debts, when it does not appear that there are any debts, but it does appear that the administrator has a large amount of personal property in his hands. *Hendry v. Hollingdrake* (R. I. 1889), 17 Atl. Rep. 50.

Arrears of taxes and assessments furnish no ground for ordering a sale instead of partition. *Fleet v. Dorland*, 11 How. Pr. (N. Y.) 489.

In a suit for partition of real estate under the *Maryland* code, art. 16, § 99, as amended by Acts *Maryland* 1886, ch. 232, where the property cannot be divided in kind, a sale will be decreed, though the costs of the proceeding exceed the value of the property. *Brendel v. Klopp*, 69 Md. 1.

The court will not, from the smallness of the quantity, conclude that a sale was necessary, in opposition to a positive statement in the answer. *Davis v. Davis*, 2 Ired. Eq. (N. Car.) 607.

4. *Vesper v. Farnsworth*, 40 Wis. 357. And see *Fleming v. Vennum*, 45 Ill. 374.

Where it appears that the title to land sought to be sold for partition is subject to be divested out of the pe-

A sale for distribution of the proceeds, like an actual partition, can be ordered only when all the parties have a joint interest in all the property included in the suit,¹ and in some of the States where actual partition is impracticable, the commissioners may make an appraisal of the property, and any of the parties may take it at the appraised valuation, a sale being ordered only when none of the owners will take it, or in case of a controversy as to who shall be permitted to take it.²

tioners, by the terms of an executory devise, which extended to it, the court should not order a sale of the premises. *McKay v. McNeill*, 6 Jones' Eq. (N. Car.) 258.

Land devised to a daughter for life, with remainder to such children as she may leave her surviving, cannot be sold for partition during her life, for, until her death, it cannot be known who are the remainder-men. *Ex parte Miller*, 90 N. Car. 625.

A judicial sale to A of a large tract of land turned out not to conclude owners of about an undivided sixth part, and these owners instituted a partition suit. Meanwhile A had conveyed part of the land to persons who erected valuable improvements. *Held*, that a sale of the whole tract should not be ordered, but that the shares of the plaintiffs in partition should be allotted to them from the unimproved part still held by A. *Gittings v. Worthington*, 67 Md. 139.

1. *Pankey v. Howard*, 47 Miss. 83. And see *Howell v. Mills*, 7 Lans. (N. Y.) 193; *Boyd v. Dowie*, 65 Barb. (N. Y.) 237.

To authorize a decree for the sale of land incapable of beneficial division among the parties interested therein, preparatory to a distribution of the proceeds, it must appear that all persons having an interest in the land are parties to the suit, and a title to the land must be shown in the parties litigant; but where such title did not appear to have been put in issue, or controverted by any proceedings in the cause, testimony that the land had belonged to an intestate at the time of his death, to whom the parties proved themselves heirs, was held sufficient to sustain the jurisdiction of the court. *Calwell v. Boyer*, 8 Gill & J. (Md.) 136.

But on partition of the parties' interests in a spring and aqueduct, though the defendant's right may be regarded as appurtenant to and a part of other real estate owned by him, a sale of

such right, in common with the plaintiffs', may properly be ordered. *Allard v. Carleton*, 64 N. H. 24.

2. See *King v. Reed*, 11 Gray (Mass.) 490; *Dyer v. Lowell*, 30 Me. 217; *Corrothers v. Joliffe*, 32 W. Va. 562; *Cochrane v. Schoenbeger*, 33 Fed. Rep. 397. And see the statutes of *Kansas, New Hampshire, Ohio, Pennsylvania, Virginia, West Virginia* and perhaps other States.

Under the *Pennsylvania* act of April 22nd, 1856, providing that in partition, where a valuation shall have been made, the land shall be allotted to such one or more of the parties who shall offer, in writing, the highest price above the valuation, all bids must be received before any are announced; and the rule allowing priority according to the dates of their titles, applicable under act May 5, 1841, where the land is taken at the valuation, does not apply to such bidding. *Eyerman v. Detwiler* (Pa. 1890), 20 Atl. Rep. 511.

Where a testator devised lands to his children equally, to be amicably divided by them, and, if possible, W. J. to take a certain forty acres, and if they could not agree to such partition, and the premises had to be sold, that W. J. should have the first right to purchase the forty acres "at the price at which it may be appraised, or at such price as may be agreed upon." W. J. had the right to purchase the forty acres at the appraised value, whether or not the other heirs would pay more for the same tract. *Snyder v. Snyder*, 75 Iowa 255.

In *Louisiana*, the immovable property of a succession, even though partly owned by minors, may be sold for less than its appraised value, to effect a partition among co-heirs or co-proprietors, and an objection that a sale of immovables of a succession was null, in being for less than the appraised value, can only be properly urged by way of opposition to the ho-

b. THE ORDER.—The order directing a sale in partition must be made by the court.¹ This may in some States be done without the advice or assistance of commissioners.² But the more general practice is to first submit the partition to commissioners, who report their conclusion as to the divisibility of the premises before the court takes action,³ though the report does not conclude the court, any of the parties being at liberty to show that the decision of the commissioners is erroneous.⁴ The order of sale must show that the proper preliminary steps to determine that the parties are entitled to partition and that a division cannot be made without prejudice to the owners, have been taken,⁵ and should fix the terms of sale and give proper directions as to

mologation of the partition. *Ventress v. Brown*, 30 La. Ann. 1012. And see *Shaffet v. Jackson*, 14 La. Ann. 151.

An appraisalment of the value of land is not essential to the validity of a judicial sale ordered at the instance of the owners for the purpose of dividing the proceeds. *Southwick v. Greuzenbach* (Ky.), 14 S. W. Rep. 344.

1. *Irvin v. Divine*, 7 T. B. Mon. (Ky.) 248. And see the cases cited in this subdivision.

In the case of an order of sale of real estate, on petition for partition, under the *Ohio* act of 1810, the proceeding being *in rem* before a court of competent jurisdiction, it must be presumed that the court made the order, on a state of facts being proved, that gave jurisdiction and authorized the exercise of it. *Glover v. Ruffin*, 6 Ohio 255.

2. See *Thompson v. Hardman*, 6 Johns. Ch. (N. Y.) 436; *Gardiner v. Luke*, 12 Wend. (N. Y.) 269; *Hall v. Partridge*, 10 How. Pr. (N. Y.) 188; *Woodward v. Elliott*, 27 S. Car. 368.

The *Maryland* acts of 1870, ch. 450, providing that "no sale or partition of lands under such proceedings shall take place after the passage of this act, except under the decree of a court, as hereinbefore provided," does not affect the rights of parties under a decree which went into effect before the act was passed, or the powers of the court to enforce such decree. *Johnson v. Johnson*, 52 Md. 668.

3. See *Steedman v. Weeks*, 2 Strobb. Eq. (S. Car.) 148; 49 Am. Dec. 660; *Tucker v. Tucker*, 19 Wend. (N. Y.) 226; *Lake v. Jarrett*, 12 Ind. 395; *Reynolds v. Reynolds*, 5 Paige (N. Y.) 161; *Deming v. Clark*, 59 Ill. 218.

A writ of sale will not be ordered by the court, on an agreement to parti-

tion, where *femes covert* are parties, without a writ of partition. *Vidal v. Girard*, 1 Miles (Pa.) 322.

Under the *Illinois* Revised Statutes ch. 106, § 1, which provide that partition of land may be compelled "by bill in chancery, as heretofore, or by partition," and § 16 which directs that the court shall appoint three commissioners to make partition, a decree in partition ordering sale of the property without appointment of commissioners is erroneous, though the proceeding is by bill, and not by petition. *Rohn v. Harris*, 130 Ill. 525.

In *Texas* the court cannot order a sale before a commissioner's report. *Keener v. Moss*, 66 Tex. 181.

4. *McCann v. Brown*, 43 Ga. 386; *Irvine v. Divine*, 7 T. B. Mon. (Ky.) 244.

In *Waln v. Meirs*, 27 N. J. Eq. 351, the master having reported that the lands could not be divided among the heirs without great prejudice to their interests, and the court being unable, upon the evidence, to reach the same conclusion, an order was made appointing commissioners to make partition among the owners, according to their respective interests, unless they should be of opinion that such partition could not be made without great prejudice, in which case they were to report to the court accordingly.

5. *McLain v. Van Winkle*, 46 Ill. 406; *Denning v. Clark*, 59 Ill. 218; *Gallatian v. Cunningham*, 8 Cow. (N. Y.) 361.

There is no necessity for filing exceptions to the report of commissioners of partition, and no propriety in such a course. The proper practice for the complainant, a report that partition would be prejudicial to the interest of the owners being filed, is to

the manner of making it,¹ and name the officer or designate the persons by whom the sale is to be made, if commissioners have not been before appointed.²

c. CONDUCT OF THE SALE.—Sales of property in proceedings for partition are judicial sales,³ and must be made at public auction to the highest bidder,⁴ notice of the time and place

apply for a decree for sale. Notice of this application will be given, and the party feeling aggrieved by the report may present his objections in opposition to the decree for sale. *Bentley v. Long Dock Co.*, 14 N. J. Eq. 480.

An *ex parte* order of court for the executrix to sell for partition will be set aside on petition of heirs liable to be thereby deprived of their legal right to ask for a partition in kind, etc. *State v. St. Landry Parish Judge*, 31 La. Ann. 802.

In *Missouri*, an order of sale in partition does not extend beyond the term at which the sale is required to be made, and if such sale does not, for lack of bidders, take place at that term there must be a renewal of the order before further steps can be taken; and if, without such renewal, a sale is made at a subsequent term, it is void. *Hughes v. Hughes*, 72 Mo. 136.

Must Name Parties.—An order for sale of land on petition by the administrator of a tenant in common which fails to state the names of all the persons interested, is absolutely void, and a sale thereunder does not divest the title of the heirs. *McCorkle v. Rhea*, 75 Ala. 213.

1. See *Patton v. Hanna*, 46 Mo. 314; *Kilgous v. Crawford*, 51 Ill. 249; *Shaffet v. Jackson*, 14 La. Ann. 151; *Alleman v. Hawley*, 117 Ind. 532.

But a failure to do so would not vitiate the title of a purchaser at such sale. *Patton v. Hanna*, 46 Mo. 314. And if a partition sale and the master's report are confirmed by the final decree, the fact that no formal order of sale was entered of record is immaterial. *Hess v. Voss*, 52 Ill. 472.

In suit for partition of real estate, the court ordered a sale thereof, and that the proceeds, after payment of costs and expenses, should be paid into court, subject to its further order, and the rights of the mortgage creditors of the parties in and to the same. *Held*, that the meaning of such order was, that the commissioner should sell the real estate free from the mortgage

and judgment liens, and that the same should be transferred to and satisfied from the proceeds as the court might afterwards direct. *Fouty v. Morrison*, 73 Ind. 333.

In *Missouri*, an order of sale expires with the term at which the sale should have been made. *Carson v. Hughes*, 90 Mo. 173.

2. See *Jennings v. Jennings*, 2 Abb. Pr. (N. Y.) 6; *Denning v. Clark*, 59 Ill. 218.

"Where the court determines upon a sale of the whole or some part of the property it usually appoints a referee or commissioners to make the sale, though under some statutes this duty devolves upon the sheriff of the county." *Freeman Part.*, § 544.

Where the proceedings in partition are upon bill and answer, the sale may be ordered to be made by a trustee instead of by commissioners. *Phelps v. Stewart*, 17 Md. 231.

In *Pennsylvania*, in a suit for partition of lands devised to a person for life, with a general power of appointment, which power is duly exercised, the proper person to execute an order of sale is the administrator *de bonis non cum testamento annexo* of the original devisor, and not the executor of the devisee. *Rawle's Appeal*, 119 Pa. St. 100.

Qualifications of Officer Making Sale, etc.—Neither the commissioners, referee nor sheriff, nor any person for the benefit of either of them, shall be interested in the purchase, nor directly or indirectly purchase any of the premises sold, nor shall any guardian of any infant party in a partition suit purchase or be interested in the purchase of any lands being the subject of such suit except for the benefit or in behalf of such infant, and all sales contrary to such provision shall be void. See *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

3. *Hutton v. Williams*, 35 Ala. 503; *Kopp v. Kopp*, 48 Hun (N. Y.) 532.

4. *Hache v. Ayrand*, 14 La. Ann. 174.

Emerick's Estate, 11 Phila. (Pa.) 74-

having been given in accordance with the statutes and rules of law of the respective States,¹ the rules applicable to judicial sales in general and particularly to foreclosure sales being applicable to the conduct of sales in partition.² It is the duty of the officer or officers conducting the sale to make it in such a manner and at such times as will be fair and equitable to all the parties,³ and he must be present in person at the sale; he cannot delegate his power to a third person.⁴ In making the sale, the property may

While, for the purpose of accuracy it is better to have a memorandum of sale subscribed by the purchaser. (*National Fire Ins. Co. v. Loomis*, 11 Paige (N. Y.) 431) it is not absolutely necessary, as such a case is not regarded as coming within the Statute of Frauds. *Hegeman v. Johnson*, 35 Barb. (N. Y.) 200; *Andrews v. O'Mahoney*, 112 N. Y. 567.

At What Place.—Land held in common, situated in two counties, may be sold in either county, in a suit in the court of equity of such county for partition. *In re Skinner*, 2 Dev. & B. Eq. (N. Car.) 63.

A sale of lands, for division among the heirs, is not void because made at the court house of the county in which administration was granted, instead of at the court-house door of the county in which the lands were situated. *Cal-loway v. Kirkland*, 57 Ala. 476.

Who May Buy.—A failure of a person to defend in foreclosure proceedings does not prevent him from afterwards acquiring title to the same land by purchase at a sale under partition. *Thompson v. Frew*, 107 Ill. 478.

Agreement to Purchase.—An agreement between heirs, that one will buy at the partition sale, for a certain price, some of the joint property, is legitimate and binding; and, if the property is adjudicated for less than the stipulated price to the heir who agreed to buy it, he is liable for the difference. *Ventress v. Brown*, 34 La. Ann. 448.

1. See *Hess v. Voss*, 52 Ill. 472; *Tibbs v. Allen*, 29 Ill. 535; *Woodward v. Elliott*, 27 S. Car. 368.

Where the sale was directed to be advertised for three weeks instead of six, the error may be corrected by amendment. *Alvord v. Beach*, 5 Abb. Pr. (N. Y.) 451.

Some proof independent of the assertion of the commissioner must be made, that public notice was given of a sale of lands in partition, otherwise

it is error to confirm the sale. *Tibbs v. Allen*, 29 Ill. 535.

2. See *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

And see also *Judicial Sales*, vol. 12, p. 208; *Foreclosure of Mortgages*, vol. 8, p. 246.

12 Am. & Eng. Encyc. of Law 208, tit., *Conduct of Sale*, vol. 8 Am. & Eng. Encyc. of Law 246.

A bidder at a partition sale under authority of the orphans' court, will not be allowed to withdraw his bid. *Emerick's Estate*, 11 Phila. (Pa.) 74.

In *Louisiana*, in a partition suit, adult heirs have an absolute right under *Louisiana Civil Code*, art. 1342, to demand that their shares be sold for cash. *Dickson v. Dickson*, 33 La. Ann. 1370. But a sale of minor's property, to effect a partition, must be preceded by an inventory and appraisement, and be made, not for cash, but on terms of credit recommended by a family meeting. *Monition of Dickson*, 6 La. Ann. 754.

In *Kentucky*, the bond required where land which cannot well be divided is sold under the statute, need not be given where the land is owned by persons under a legal disability, nor, in such case, need a privy examination of a *feme covert* owner be had. *Kendall v. Briggs*, 81 Ky. 119.

3. *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259; 38 Am. Dec. 561.

The referee has power to adjourn the sale from time to time if, in his discretion, he thinks there is good reason for doing so. *King v. Platt*, 37 N. Y. 155.

If the officer does not proceed with due diligence in bringing on the sale, any party interested in having the premises sold may apply to the court to direct the sale to be had. *Kelly v. Israel*, 11 Paige (N. Y.) 147.

4. *Heyer v. Deaves*, 2 Johns. Ch. (N. Y.) 154; *Van Tassel v. Van Tassel*, 31 Barb. (N. Y.) 439.

Power Exhausted by One Sale.—The

be subdivided and sold in separate parcels, if so doing would promote the interests of the parties,¹ and in such case an easement in one part may be annexed to and sold with another part, the former part being sold subject to the servitude of such easement,² but the action of the officer making the sale in such case is subject to the approval of the court.³ He cannot, however, vary from the instructions of the court contained in the judgment or elsewhere,⁴ and if a different course appears to him to be more practicable, he should apply to the court for instructions,⁵ being held to a strict accountability for the purchase price of the property sold,⁶ and liable to punishment for contempt of court for a disregard of the directions contained in the judgment.⁷

d. CONFIRMATION OF THE SALE.—The confirmation of the sale by the court is essential;⁸ for this purpose, when the sale is

trustee in partition proceedings was empowered to sell at private sale, before November 5th, 1883, for not less than \$6,000, and on November 5th, 1883, at a public sale in Charleston, South Carolina, he sold accordingly, but the purchaser failed to comply with his bid. Instead of compelling him to take the title, he advertised and sold again to one who sold to I T H and I F H, parties to this proceeding: *Held*, that the first sale exhausted the power, so that the second sale was void. *Simmons v. Baynard*, 30 Fed. Rep. 532.

1. *Wainwright v. Rowland*, 25 Mo. 53. And see *Hoffman v. Burke*, 21 Hun (N. Y.) 580; *Cunningham v. Cassidy*, 17 N. Y. 276; *McLaughlin v. Teasdale*, 9 Daly (N. Y.) 23.

The court may in all cases direct a separate sale of distinct parcels, as buildings, houses or lots. *Reynolds v. Telfair*, 5 N. Y. Law Bull. 21.

2. *Rosenkrans v. Snover*, 19 N. J. Eq. 420.

3. *Underhill v. Underhill*, 4 N. Y. St. Rep. 858.

4. *People v. Bergen*, 53 N. Y. 404; 15 Abb. Pr., N. S. (N. Y.) 97; *Preston v. Compton*, 30 Ohio St. 299; *Bache v. Doscher*, 67 N. Y. 429.

The decree of sale having provided that the proceeds shall be reinvested in other real estate, the title to be taken in all respects like that to the property ordered sold, the fact that the title is in the mother and "her children," and that she may have other children than those made parties to the suit, is immaterial. *Tyler v. Jewell* (Ky. 1889), 11 S. W. Rep. 25.

5. *Easton v. Pickersgill*, 55 N. Y. 310.

6. *Coggeshall v. State*, 112 Ind. 561. And see *Preston v. Compton*, 30 Ohio St. 299.

In *New Jersey*, under Rev. Laws 597, commissioners appointed to make partition, where the lands, not being susceptible of division, are sold, are jointly liable at law to each heir or tenant in common for his share of the purchase money. *Hall v. Higgins*, 15 N. J. L. 58.

Proceedings in partition, resulting in a sale of the land, charge the purchaser with notice that the securities taken by the sheriff from the purchaser, for the deferred payments, and trust funds, and the purchaser is required to see that the purchase money is properly applied. *Preston v. Compton*, 30 Ohio St. 299.

But where a commissioner was appointed by the court to sell a slave for partition, and the security taken by him, although reputed good at the time of the sale, proved insolvent before the note could be collected, an attachment for contempt against the commissioner for not paying the money into court, under a rule for that purpose, is not a proper remedy, if, indeed, there is any. *Pritchard v. Oldham*, 8 Jones (N. Car.) 439.

7. *People v. Bergen*, 53 N. Y. 404; 15 Abb. Pr., N. S. (N. Y.) 97.

8. *Lloyd v. Lloyd*, 61 Iowa 243; *Ex parte Bost*, 3 Jones Eq. (N. Car.) 483; *Watson v. Martin*, 75 Ala. 506.

A decree of partition is not final until confirmation of the sale. The interlocutory judgment may be set aside, and new parties admitted at any time before the final judgment confirming the sale. *Parkinson v. Caplinger*, 65 Mo. 290.

made, it must be reported to the court, where it may be either approved and confirmed or vacated and set aside,¹ the purchaser being only a bidder, and the sale not being complete until the bid has been accepted by a confirmation of the sale.²

e. SETTING ASIDE THE SALE.—The court has power to set aside and vacate a sale made in an action for partition and order a re-sale, although there was no fraud and the sale was in all respects regular, the confirmation or vacation of the sale resting in the discretion of the court having original jurisdiction of the action.³ But in the exercise of such discretion, it will not, as a general rule, direct a re-sale where the former sale is not void,

The title to land under a partition suit is only equitable until confirmation and delivery of the commissioner's deed. *Stout v. McPheeters*, 84 Ind. 585. *Merritt v. Horne*, 5 Ohio St. 308; 67 Am. Dec. 298.

1. *Freeman Part.* § 544.

A judgment confirming a partition sale rendered without notice to parties in interest will be vacated on motion. *Blue v. Blue*, 79 N. Car. 69.

In sales in partition, the sheriff is not compelled, under the laws of *Missouri*, as in sales *in invitum*, to sell and make return at a specified term. *Patton v. Hanna*, 46 Mo. 314.

The report should show that the officer making the sale has complied with the directions of the court contained in the interlocutory judgment or elsewhere, and such officer will not be permitted to show by affidavit that the terms of the sale were different from those shown by his report, and that they were in fact pursuant to the judgment. *Koch v. Pursell*, 45 N. Y. Super. Ct. 162.

In *New York*, after the report of the sale is filed, any party feeling injured thereby may file exceptions to it within eight days after notice of filing. If exceptions are filed, they are heard and passed upon as in other cases; if none are filed, the report becomes absolute at the expiration of the eight days; and the confirmation should not be ordered before the expiration of the eight days, except upon notice to all parties having an interest in the proceeds. *Bicknell v. Byrnes*, 23 How. Pr. (N. Y.) 486.

The report of a master, in a suit for partition, upon a reference to him for a sale and distribution of the proceeds among those entitled, that he has paid over the proceeds to those entitled, is not *res judicata* so as to bind such per-

sons, though the report be confirmed. *Messervey v. Barelli*, *Riley Eq.* (S. Car.) 138.

When, in a suit by the heirs for partition, the court ordered an absolute sale of premises subject to a dower right, and in which dower had been assigned, and the sheriff so sold and conveyed to the purchasers, but stated, in his return, that all the land was sold, "except so much as was heretofore assigned to M as her dower interest," the portion of land assigned as dower was not, thereby, expressly reserved to the widow. *Caldwell v. Layton*, 44 Mo. 220.

Correction of Errors.—In a suit for partition, where some of the parties are infants, if all the facts appear upon the face of the master's report upon the title, an error prejudicial to the rights of the infants may be corrected by the court, though no formal exception to the report has been filed by the guardian *ad litem*. *Safford v. Safford*, 7 Paige (N. Y.) 259; 32 Am. Dec. 633.

2. *Ex parte Bost*, 3 Jones' Eq. (N. Car.) 483; *Hays' Appeal*, 51 Pa. St. 58.

3. *Hale v. Clauson*, 60 N. Y. 339; *Goode v. Crow*, 51 Mo. 212; *Woodward v. Elliott*, 27 S. Car. 368; *Brown v. Frost*, 10 Paige (N. Y.) 243; *McColter v. Jay*, 30 N. Y. 80. And see *Neiman v. Early*, 28 Mo. 475; *Thorne v. Andrews*, 33 N. J. Eq. 457; *Hinkle v. Wilson*, 53 Md. 287.

The discretionary power of the court to vacate a sale should not be exercised when the rights of *bona fide* purchasers who are not made parties to the motion have intervened. *Prior v. Prior*, 41 Hun (N. Y.) 613.

Where lands are ordered to be sold for partition by a court of equity, the authority of the court to set aside an inchoate sale, and to order a re-opening of the biddings, applies as

unless special circumstances exist requiring it.¹ Thus a sale will be set aside and a re-sale ordered where there has been fraud or misconduct on the part of the purchaser,² or fraudulent negligence, mismanagement or misconduct on the part of any other person connected with the sale,³ or where there has been surprise, mistake or misapprehension created by the conduct of the purchaser or the officer who conducted or some person interested in the sale,⁴ or where outside circumstances have concurred to reduce the number of bidders or the amount bidden.⁵ But mere inadequacy of price will not be a sufficient ground to set aside the sale,⁶ unless it is so very inadequate as to raise an inference

well to cases where all the parties are adults, as where some of them, or all, are infants. *Ex parte Bost*, 3 Jones' Eq. (N. Car.) 482.

Where, after sale in partition, it appears that there has been a mistake in one of the lines of the tract, as set out in the petition and judgment, an "amended petition," so called, to set aside the sale, and have the mistake corrected, is, in effect, an exception to the report of sale, and does not attack the judgment; and hence Civil Code of *Kentucky*, § 772, limiting the chancellor's control over his judgments to sixty days from their rendition, does not apply. *Johnson v. Johnson* (Ky. 1889), 11 S. W. Rep. 5.

1. *Lefevre v. Laraway*, 22 Barb. (N. Y.) 173. And see *Comstock v. Purple*, 49 Ill. 158.

2. *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167; *Fisher v. Hersey*, 78 N. Y. 387.

3. *Blue v. Blue*, 79 N. Car. 69; *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

A sale of lands under partition may be set aside where no advertisement was made in the township where the lands lie, as required by the statutes of *New Jersey*, the buyer at such sale being repaid the purchase money paid by him, with interest. *Rudderow v. Dudley*, 41 N. J. Eq. 611. But a judgment directing the sale of lands found by the county court not to be susceptible of partition, though improper under *New York* Code Civil Proc., § 1533, providing that where it appears that a partition cannot be made without great prejudice to the owners, the complaint shall be dismissed, will not be set aside on the motion of infant owners, when the judgment sale, and confirmation were unexcepted to; the remedy, if any, being against the guardian *ad*

litem in the action for negligence. *Prior v. Prior* (Supreme Ct.), 2 N. Y. Supp. 523.

4. *Woodward v. Elliott*, 27 S. Car. 368; *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167; *Blue v. Blue*, 79 N. Car. 69.

A material misdescription in the sheriff's advertisement vitiates his sale; a new advertisement and sale is necessary. *Stoffel v. Reiners*, 3 Mo. App. 33.

5. *Goode v. Crow*, 51 Mo. 214; *Kemp v. Hein*, 48 Wis. 32. And see *Burke v. Daly*, 14 Mo. App. 542; *Patterson v. Patterson*, 51 Md. 190.

A sale of land in partition proceedings will be set aside, where it was made for a grossly inadequate price, and when the yellow fever prevailed at adjoining places, and, owing to a quarantine, the parties interested were not present. *Kirkland v. Texas Express Co.*, 57 Miss. 316.

A sale of lands under partition may be set aside, where no advertisement was set up in the township where the lands lie, as required by statute, the buyer at such sale being repaid the purchase money paid by him, with interest. *Rudderow v. Dudley*, 41 N. J. Eq. 611.

A partition sale may be set aside, after its ratification and the auditor's report of distribution, on the prayer of parties erroneously reported by the trustee to be the purchasers, their bid being made, with the trustee's consent, merely to prevent the property from being sold at a less sum. *Patterson v. Preston*, 51 Md. 190.

6. *Howell v. Mills*, 53 N. Y. 322; *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259; 38 Am. Dec. 561; *Allen v. Martin*, 61 Miss. 78. And see *Frazier v. Frazier*, 26 Gratt. (Va.) 500.

of fraud or unfairness in the sale,¹ though the power to set aside will be more readily exercised in behalf of an infant or an incompetent person than in behalf of an adult.² A sale will not be vacated for mere formal defects or irregularities,³ nor for defects, errors or irregularities in the proceedings in the suit leading up to the sale.⁴ But a purchase by or for the officer conducting the sale or other person charged with a duty inconsistent with the acquisition of profit from the purchase will be set aside,⁵ and a

The sale for partition having been set aside on an advance bid being made, it is error to re-open the bidding after a second sale on an advance bid of fifteen per cent., no fraud nor unfairness being alleged. *Collins v. Wood*, 88 Tenn. 779.

1. *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259; 38 Am. Dec. 561; *Chapman v. Boetcher*, 27 Hun (N. Y.) 606; affmd. 90 N. Y. 692; *Allen's Estate*, 11 Phila. (Pa.) 48; *Simon v. Simon*, 1 Miles (Pa.) 404; *Loyd v. Loyd*, 61 Iowa 243.

Where a sale was for an inadequate sum, the court may require the party applying for a re-sale, to give sufficient security that the property will produce an advanced price, as a condition for granting the re-sale, or in a proper case it may require a deposit of the amount of the advance expected. *Duncan v. Dodd*, 2 Paige (N. Y.) 99. And see *Allen v. Martin*, 61 Miss. 78.

2. *Duncan v. Dodd*, 2 Paige (N. Y.) 99; *Allen's estate*, 11 Phila. (Pa.) 48.

Where the record of proceedings for a partition of land, by sale under order of court, disclosed the fact that there were infants parties to the cause, and there appeared on the face of the proceedings valid ground upon which they might thereafter by bill of review impeach the decree and disturb the possession of the purchaser, and this objection was presented to the court before the contract of the purchaser was completed, as a ground upon which he asked to be relieved from his purchase, the sale should be set aside. *Earle v. Turton*, 26 Md. 23.

A, a minor and owner in fee of a tract of land, conveyed a part of it, his brothers joining in the conveyance, all of them, and the grantee also, believing that A had only a life estate therein and the brothers the remainder. After the death of A, the grantee and a part of A's heirs filed their bill for partition, and the sale was set aside, the purchase money directed to be repaid, and par-

tition of the whole tract among A's heirs decreed. *McClintic v. Manns*, 4 Munf. (Va.) 328.

3. *Howerton v. Sexton*, 90 N. Car. 581; *Yates v. Gridley*, 16 S. Car. 496; *White v. Jones*, 67 Tex. 638; *Cantelon v. Whitley*, 85 Ala. 247; *Foster v. Roche*, 117 N. Y. 462; *Southwick v. Grenzenbach* (Ky. 1890), 13 S. W. Rep. 918; *Donahoe v. Fackler*, 8 W. Va. 249.

The mere absence of the tutor and under tutor at the taking of an inventory of property held in common between the minor and another party, for the purpose of effecting a partition by sale, after they have been duly notified to attend, or their refusal to sign the *proces verbal*, without a formal protest, can afford no ground upon which to annul the sale. *Gernon v. Bestick*, 15 La. Ann. 697.

But the fact that one of the parties in interest was not a party to proceedings in partition, in which the land was ordered to be sold by a commissioner, would be sufficient of itself, on the application of the *bona fide* purchaser at such commissioner's sale, to set the same aside. *Harlan v. Stout*, 22 Ind. 488.

The fact that the parties to a partition suit owned another tract of land in another county, and that it did not appear that partition in kind of the two tracts could not be made, is not ground for setting aside the sale; the parties not wishing to sell this other tract, which was productive. *Frazier v. Frazier*, 26 Gratt. (Va.) 500.

4. *Slingluff v. Stanley*, 66 Md. 220; *Patapsco Guano Co. v. Elder*, 53 Md. 463; *Bolgiano v. Cooke*, 19 Md. 395.

A sale will not be set aside because of the absence from the sale of the guardians of interested infants unless such non-attendance occasioned a diminished price for the property. *Stryker v. Storm*, 1 Abb. Pr., N. S. (N. Y.) 424.

5. *Howery v. Helms*, 20 Gratt. (Va.) 1; *Bokcut v. Atkinson*, 14 Ohio 236;

re-sale may be had when a purchaser fails or refuses to complete his purchase or to comply with its terms.¹

The application may be made by any one, whether a party or not, whose rights are affected by the sale,² and should be by motion upon due notice,³ though if the sale has been confirmed, it should be by an independent suit in equity, in which case it may be set aside either because of fraud in the sale or in the proceedings anterior to it.⁴

f. RIGHTS AND OBLIGATIONS OF THE PURCHASER.—It is a rule of frequent application which appears to be growing into a general rule, that the bid of a purchaser is made upon the implied condition that there are no undisclosed defects in the title to the property sold, and that he is entitled to a title free from reasonable doubt and not obliged to take one which is not marketable.⁵

Armstrong v. Huston, 8 Ohio 552; *Lefevre v. Laraway*, 22 Barb. (N. Y.) 175; *Jackson v. Woolsey*, 11 Johns. (N. Y.) 446; *Gallatain v. Cunningham*, 8 Cow. (N. Y.) 378.

1. *Bicknell v. Byrnes*, 23 How. Pr. (N. Y.) 486; *Pratt v. Bentley*, 4 Rich. (S. Car.) 19.

Where a purchaser of land under decree of court fails to pay the price, the title will not be made, even although there be a confirmation of the sale. And if the land be sold under an execution against him, the purchaser thereof takes subject to the equities against the defendant in the execution. *Burgin v. Burgin*, 82 N. Car. 196.

Where the purchaser at partition sale of realty failed to pay, his surety may petition for a re-sale. *Rout v. King*, 103 Ind. 555.

2. *Goodell v. Harrington*, 76 N. Y. 547; *Gould v. Mortimer*, 26 How. Pr. (N. Y.) 167.

3. *Ex parte White*, 82 N. Car. 377; *McCotter v. Jay*, 30 N. Y. 80; *Brown v. Frost*, 10 Paige (N. Y.) 243. And see *Welch v. Marks*, 39 Minn. 481.

4. See *Stoffel v. Reiners*, 3 Mo. App. 33; *Fisher v. Hersey*, 78 N. Y. 387.

A probate sale to effect a partition cannot be set aside, unless all interested be made parties. *Bank of Louisiana v. Delery*, 2 La. Ann. 648.

The Re-sale.—The sale having been rightly set aside, the court resumed absolute control of the tract, and had the power, by a supplemental order, to direct a re-sale. *Johnson v. Johnson* (Ky. 1889), 11 S. W. Rep. 5.

After a re-sale of land to pay a balance due on notes given for the purchase-money at the partition sale, no right of redemption remains in the

first purchaser. Such re-sale is not a new proceeding within the *Tennessee* statutes of redemption. *Holman v. Green*, 4 Baxt. (Tenn.) 135.

5. *Fleming v. Burnham*, 100 N. Y. 1; *Ferry v. Sampson*, 112 N. Y. 415; *Shriver v. Shriver*, 86 N. Y. 575; *Jordan v. Poillon*, 77 N. Y. 518; *Blakely v. Calder*, 13 How. Pr. (N. Y.) 476; *Althause v. Radde*, 3 Bosw. (N. Y.) 410; *McGown v. Witkins*, 1 Paige (N. Y.) 120; *Rogers v. McLean*, 31 Barb. (N. Y.) 304; *Boliver v. Zeigler*, 9 S. Car. 287; *Miller v. Feezor*, 82 N. Car. 192; *Toole v. Toole*, 112 N. Y. 333; *Scholle v. Scholle*, 55 N. Y. Super. Ct. 474; *Gassen v. Palfrey*, 9 La. Ann. 560; *Southwick v. Grenzsbach* (Ky. 1890), 13 S. W. Rep. 918; *Steen v. Clayton*, 32 N. J. Eq. 121.

Although a twenty years' possession of lands clearly adverse makes a title which a purchaser at a partition sale may not refuse, yet, if it is possible that the possession may not be adverse, he will not be compelled to take the title. *Shriver v. Shriver*, 86 N. Y. 575.

There must be proof of something more than possession, however long, to bar an action to foreclose the statutory lien for purchase money of lands of an intestate sold for partition; and the vendees of a purchaser are not protected by want of express notice of the lien. *Daniels v. Moses*, 12 S. Car. 130.

A purchaser at a judicial sale in partition proceedings will not be compelled to complete his purchase if there is an outstanding tax lease on the premises; and it does not matter that a referee had reported the lease to be invalid, the holder of the lease not having been a party to the proceeding

But the doctrine of *caveat emptor* is still applied to some extent to such sales under which, in the absence of fraud or misrepresentation, no warrantee is imported, and the purchaser can insist only upon the title of the parties to the partition and is obliged to take the property, even though a title paramount to that involved in the partition exists.¹ The court will not, how-

before the referee, and that proceeding, moreover, not having been prosecuted to judgment. *Herring v. Berrian*, 55 N. Y. Super. Ct. 110.

Where a receiver in a partition suit, on an *ex parte* application, obtained leave to give leases for three years. In one year final judgment was obtained. The property could be sold free from the leases, but that a sum sufficient to indemnify the lessees should be set aside until it could be determined whether they were entitled to indemnity. *Weeks v. Cornwall*, 19 Abb. N. Cas. (N. Y.) 356.

If the purchaser gets substantially what he contracts for, this is sufficient, and he may be compelled to complete his purchase. *Riggs v. Pursell*, 66 N. Y. 193.

Where a defect of title does not appear until after the purchase has been completed, the purchaser's rights are not then barred, and the court, in the exercise of its equity powers, can still relieve the purchaser, though it will act with great caution after the deed has been executed and delivered. *Paine v. Upton*, 87 N. Y. 327; 41 Am. Rep. 371; *Crane v. Stiger*, 58 N. Y. 625; *Spray v. Rodman*, 43 Ind. 225.

And if he pays off subsequently discovered liens, he is entitled to be subrogated to the rights of the distributee who should have paid such liens, and to receive out of the distributee's share of the money in the hands of the commissioner, the amount paid by him to satisfy. *Spray v. Rodman*, 43 Ind. 225.

Where there is danger that the property will be held liable for debts by a former deceased owner, a purchaser will not be compelled to complete his purchase. See *Hall v. Partridge*, 10 How. Pr. (N. Y.) 188; *Boragdus v. Parker*, 7 How. Pr. (N. Y.) 305; *Disbrow v. Folger*, 5 Abb. Pr. (N. Y.) 53.

But a purchaser cannot object to the title on the ground of a mere possibility of some person, not a party to the suit, having an interest in the premises. *Dunham v. Minard*, 4 Paige (N. Y.) 441.

Where the title can be cured even

though by parol proof, and such proof is offered, the purchaser cannot refuse to complete his purchase. *Hellreigel v. Manning*, 97 N. Y. 56; *Murray v. Harway*, 56 N. Y. 337.

It has been held in *Ohio* that where the defendants' supposed title to a part of the land in question fails, they cannot be released from the payment of a proportionate part of the purchase money remaining unpaid, and due to the administrator of the party whose heirs are plaintiffs in the bill, upon a mere reference to the matter in their answer, without filing a cross bill. *Glick v. Gregg*, 19 Ohio 57.

1. *Cashion v. Faina*, 47 Mo. 133; *Owsley v. Smith*, 14 Mo. 153; *Schwartz v. Dryden*, 25 Mo. 572; *Rogers v. Horn*, 6 Rich. (S. Car.) 362; *Evans v. Dendy*, 2 Spears (S. Car.) 10; 42 Am. Dec. 356; *Sebring v. Mersereau*, 9 Cow. (N. Y.) 344; *Bassett v. Lockard*, 60 Ill. 164; *Wood v. Winings*, 58 Ind. 322.

When one of several co-tenants purchases the joint property at a sale in partition under a decree of court, the co-tenancy is thereby severed; and if he subsequently pays taxes which were due, and constituted a lien upon the property at the time of the sale, he does it in the character of purchaser, and has no claim for contribution from his late associates. *Stephens v. Ells*, 65 Mo. 456.

But in a suit upon a note given by the purchaser of land at a partition sale to the sheriff, the deed containing no covenant of warranty, the defendant is entitled to deduct the value of a lease given pending the partition proceedings. *Winfrey v. Work*, 75 Mo. 55.

Where the pleadings in an action for the partition of land, and the published advertisement of the land for sale, under the decree of the court, describes the land as containing an uncertain number of acres, the purchaser at the sale cannot, when sued for the purchase money, put in evidence verbal representations made by the sheriff at the day of the sale, as to the quantity of the land, to support his defense of

ever, in any event relieve a purchaser from the consequences of his own negligence, and if he knew of the defect, or by the use of reasonable diligence should have known of it, he will be compelled to complete the purchase.¹

The doctrine is universal that the purchaser is entitled to the whole of the title partitioned, as against the parties to the suit, grantors by conveyance pending the proceedings and holders of liens who have been given due opportunity to establish them and procure their allowance.² Thus, if the court has failed to acquire jurisdiction over one or more of the parties to, or the subject matter of the action, or if there is any other defect or irregularity affecting the title or avoiding the judgment, the purchaser will be released,³ but irregularities not affecting the jurisdiction of the court over the parties or the subject matter are amendable and

failure of consideration on the ground of deficiency in the quantity of land. *Thompson v. Wofford*, 13 S. Car. 216.

1. *Dennerlein v. Dennerlein*, 111 N. Y. 518; *Mott v. Mott*, 68 N. Y. 247; *Coates v. Fairchild*, 14 N. Y. Week. Dig. 189; Appendix, 89 N. Y. 631.

Where there is a person in possession of the premises who is not made a party, the purchaser takes subject to his rights, the possession of such person being constructive notice. *Bell v. Gittre*, 14 N. Y. St. Rep. 61.

2. See *Gates v. Irick*, 2 Rich. (S. Car.) 593; *Allen v. Gault*, 27 Pa. St. 473; 67 Am. Dec. 485; *Baird v. Corwin*, 17 Pa. St. 463; *Michoud v. Girod*, 4 How. (U. S.) 503; *Davone v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Brooks v. Davey*, 109 N. Y. 495; *Weseman v. Wingrove*, 85 N. Y. 353; *Noble v. Cromwell*, 27 How. Pr. (N. Y.) 289; *Dunham v. Minard*, 4 Paige (N. Y.) 441; *Sears v. Hyer*, 1 Paige (N. Y.) 483.

A sale of land, for the purpose of partition, under an order of court, upon a bill for that purpose, is a sale by the parties; and if they cannot make the title stated in the bill, the purchaser is entitled to rescind the purchase. *Smith v. Brittain*, 3 Ired. Eq. (N. Car.) 347; 42 Am. Dec. 175.

In a suit for partition, it is not necessary, under the statute requiring the titles of the parties to be ascertained, that encumbrancers upon the separate shares of the parties should be joined as parties. *Sebring v. Mersereau*, *Hopk. Ch.* (N. Y.) 501.

3. *Goode v. Crow*, 51 Mo. 214; *Sandford v. White*, 56 N. Y. 359; *Cook v. Farnam*, 21 How. Pr. (N. Y.) 286; 477.

34 Barb. (N. Y.) 95; *Rogers v. McLean*, 10 Abb. Pr. (N. Y.) 306; *Clark v. Clark*, 14 Abb. Pr. (N. Y.) 300; *Alvord v. Beach*, 5 Abb. Pr. (N. Y.) 451; *Kohler v. Kohler*, 2 Edw. Ch. (N. Y.) 669; *Cook v. Farren*, 34 Barb. (N. Y.) 91; 21 How. Pr. (N. Y.) 286; *Miller v. Wright*, 109 N. Y. 194; *Scholle v. Scholle*, 55 N. Y. Super. Ct. 474; *In re Cavanagh*, 14 Abb. Pr. (N. Y.) 258; 37 Barb. (N. Y.) 22; *Toole v. Toole*, 112 N. Y. 333; 22 Abb. N. Cas. (N. Y.) 392; *Abraham v. Lob*, 35 La. Ann. 377.

Land was conveyed, and the grantee entered into possession. Afterwards proceedings were had, in partition, in relation to the same premises, to which the grantee was not a party, and the premises were sold by commissioners appointed by the court, and conveyed by them to the purchaser. *Held*, that the first grantee's possession was adverse, and the deed from the commissioners void. *Jackson v. Vrooman*, 13 Johns. (N. Y.) 488.

A sale for distribution not reported to or confirmed by the court, with no report of the payment of the purchase-money, no order to make title, and no conveyance of the land, passes no title. *Watson v. Martin*, 75 Ala. 506.

But the mere fact that the judgment directing the sale of the property might have been set aside is not a ground upon which the purchaser will be relieved. If the court had jurisdiction of the parties and the subject matter, his title will not be affected unless the judgment is actually set aside. *De Forest v. Farley*, 62 N. Y. 628; *Darvin v. Hatfield*, 4 Sandf. (N. Y.) 468. And see *Chalon v. Walker*, 7 La. Ann.

no effect will be given them.¹

So a purchaser will be released where fraud or misrepresentation has entered into the sale,² or where he cannot be put into possession of the property purchased,³ or where the completion

1. See *Alvord v. Beach*, 5 Abb. Pr. (N. Y.) 451; *Croghan v. Livingston*, 17 N. Y. 218; *Rogers v. McLean*, 11 Abb. Pr. (N. Y.) 440; *Bogert v. Bogert*, 45 Barb. (N. Y.) 121; *Van Wyck v. Hardy*, 20 How. Pr. (N. Y.) 222; 11 Abb. Pr. (N. Y.) 473; *Noble v. Cromwell*, 26 Barb. (N. Y.) 475; *Reed v. Reed*, 46 Hun (N. Y.) 212; *Tilton v. Vail*, 25 N. Y. St. Rep. 212; *Mead v. Mitchell*, 17 N. Y. 211; 72 Am. Dec. 455; *Herbert v. Smith*, 6 Lans. (N. Y.) 494; *Donahoe v. Fackler*, 8 W. Va. 249; *Dugan v. Baltimore*, 70 Md. 1; *Woodhull v. Little*, 102 N. Y. 165; *Rockwell v. Decker*, 33 Hun (N. Y.) 343; *Calloway v. Kirkland*, 57 Ala. 476.

Where the purchaser, at a sale made under a decree of court for partition, refused to complete his purchase, on the ground that the plaintiff in the action for partition was not authorized to commence and prosecute it, held, that none but parties to the action could call in question the purchaser's title, and they being bound by the proceedings that the sale must be consummated. *Blakeley v. Calder*, 15 N. Y. 617.

Where the order appointing a guardian of infant defendants in an action for partition is regular in form, and is shown to the purchaser at the partition sale by the guardian at the time of the payment of the shares of the infant owners to the guardian, and the guardian assures the purchaser of his appointment, the purchaser is justified in assuming that the appointment is valid, and making the payment, though there were irregularities attending the appointment unknown to the purchaser. *Howerton v. Sexton*, 104 N. Car. 75.

But if in a partition action the plaintiffs omit to file any of the papers necessary to the judgment which they may be allowed to file *nunc pro tunc*, the purchaser is not compellable to take title until they are so filed. *Waring v. Waring*, 7 Abb. Pr. (N. Y.) 172.

A purchaser at a partition sale, who, during the suit, has taken a conveyance of an interest in the land, expressed to be subject to the proceed-

ings pending, cannot refuse to take the title under his bid, on the ground that he was not made a party. *Noble v. Cromwell*, 3 Abb. App. Dec. (N. Y.) 382.

2. See *Fisher v. Hersey*, 17 Hun (N. Y.) 370; *affd.* 78 N. Y. 387.

In case of an agreement between the purchaser and some of the parties by which competition was prevented, the contract is void as against public policy and will not be enforced. *Wheeler v. Wheeler*, 5 Lans. (N. Y.) 355.

But it is held in *Missouri* that false and fraudulent representations concerning lands, made by a parcener thereof at a partition sale, to influence purchasers, do not constitute a defense to an action by the sheriff to recover the amount bid for said lands, there being nothing in the case to show that the party making the representations was acting as the agent or representative of his co-parceners. *Matlock v. Bigbee*, 34 Mo. 354.

Mistake.—Where it appeared that, at a partition sale, the contract to purchase was made in a reasonable but erroneous belief upon the part of the purchaser that the lot cornered upon an avenue and street, but the front line was two hundred and twenty-five feet from the avenue, as laid down upon the official map, and that the value of said lot was one-third less in consequence of the location with reference to the avenue, the purchaser should be relieved from the performance of his contract. *Fairchild v. Fairchild*, 59 How. Pr. (N. Y.) 351.

3. *Kapp v. Kapp*, 15 N. Y. St. Rep. 967; *McGown v. Wilkins*, 1 Paige (N. Y.) 120; *Rogers v. McLean*, 31 Barb. (N. Y.) 304; *Rice v. Barrett*, 99 N. Y. 403.

The purchaser cannot be compelled to complete the purchase, unless the parties interested in the sale will allow the expenses of obtaining possession, together with mesne profits, from the completion of the purchase to the time of obtaining possession, to be deducted from the purchase money. *McGown v. Wilkins*, 1 Paige (N. Y.) 120.

A sale and conveyance of real estate in the adverse possession of a

of the sale has been delayed and the property has been materially injured in the meantime without fault on his part.¹ But where other parties, against whose rights and interests errors and irregularities have been committed, take no steps to obtain relief, the purchaser cannot for this reason alone refuse to complete his purchase.²

The completion of a purchase is compelled by making a motion upon due notice for an order directing the purchaser to pay the purchase price into court or to the officer making the sale within a specified time and be let into possession.³ Such an order may be enforced by process,⁴ but if he is merely unable to comply with the terms of the sale, without fault on his part, he may be discharged upon payment of costs;⁵ or, on failure of the purchaser to comply with the terms, the property may be re-sold by order

third person, made by commissioners under an order of court in a suit for partition, is not a valid consideration for a note given for the purchase money. *Martin v. Pace*, 6 Blackf. (Ind.) 99.

Where, in partition proceedings, land is sold by a commissioner, the statute providing that whenever it shall appear that the purchase money has been duly paid, the court shall order conveyances to the purchasers, the purchaser acquires no right to possession until the money has been paid. *Deputy v. Mooney*, 97 Ind. 463.

Where, by the terms of the sale, the purchaser is authorized to take immediate possession of the property, he assumes the risk of accident or injury to it, if he does not do so. *McKechnie v. Sterling*, 48 Barb. (N. Y.) 330. And where a purchaser is not authorized to take immediate possession, and the property is injured he will not be relieved from his purchase, if full and adequate compensation is offered. *Aspinwall v. Balch*, 4 Abb. N. Cas. (N. Y.) 193.

1. See *Jackson v. Edwards*, 7 Paige (N. Y.) 412; *Aspinwall v. Balch*, 7 Daly (N. Y.) 200; *Mutual L. Ins. Co. v. Balch*, 4 Abb. N. Cas. (N. Y.) 200.

It has been held in *Pennsylvania* that having decreed a sale in partition, equity has jurisdiction of a supplemental bill filed by the purchasing co-tenant to have deducted from the proceeds remaining in the master's hands payable to the other co-tenant the value of fixtures removed from the premises by the latter, under the doctrine that equity abhors multiplicity of suits. *Williams' Appeal* (Pa. 1889), 16 Atl. Rep. 810.

2. See *Jordan v. Van Epps*, 85 N. Y. 427; *Dunning v. Dunning*, 37 Ill. 315; *Rogers v. McLean*, 31 How. Pr. (N. Y.) 279; 34 N. Y. 526; *Noble v. Cromwell*, 27 How. Pr. (N. Y.) 289; 26 Barb. (N. Y.) 475; *Bogert v. Bogert*, 45 Barb. (N. Y.) 121; *Waring v. Waring*, 7 Abb. Pr. (N. Y.) 472; *Croghan v. Livingston*, 17 N. Y. 218; *Mead v. Mitchell*, 17 N. Y. 211; 72 Am. Dec. 455; *Roy v. Townsend*, 78 Pa. St. 329.

3. 2 Van Santvoord's Eq. Pr. 63.

A purchaser should not be ordered to wait the correction of the title, and then to perform his contract after the time, fixed by the terms of sale has expired. *Toole v. Toole*, 112 N. Y. 333.

4. *Brasher v. Cortlandt*, 2 Johns. Ch. (N. Y.) 505.

A purchaser at a sale under a decree in a suit for partition, will not be attached for contempt in refusing to pay the purchase money until an order to pay the purchase money has been passed. *Cowell v. Lippitt*, 3 R. I. 92.

5. *Deaver v. Reynolds*, 1 Bland (Md.) 50.

Where fraud has entered into the sale, if the purchaser can show that he has been injured and is not guilty of neglect, the court will relieve him from his purchase without imposing terms as a condition of setting aside the sale. *Fisher v. Hersey*, 17 Hun (N. Y.) 370; *affd.* 78 N. Y. 387.

The purchaser of real estate, under a void judicial sale, on a claim for the purchase money and interest, must account for the rents and profits he received when in possession. *Taylor v. Conner*, 7 Ind. 115.

of the court,¹ in which case the officer making the sale may sue for and recover of the first purchaser any loss occurring by reason of the re-sale.² On the other hand, the purchaser may move for leave to pay the money into court and to compel the completion of the sale.³

g. THE CONVEYANCE AND ITS EFFECT.—The purchaser at a partition sale takes a conclusive title as against all the parties to the suit,⁴ and as against their grantors and holders of liens who

1. *Jackson v. Edwards*, 7 Paige (N. Y.) 386; 2 *Van Santvoord's Eq. Pr.* 63.

2. *Hutton v. Williams*, 35 Ala. 503. And see *Michener v. Lloyd*, 16 N. J. Eq. 38; *Carter v. Commonwealth*, 1 Grant Cas. (Pa.) 216; *McMichael v. Skilton*, 13 Pa. St. 215.

After confirmation by the court, a suit will lie by the commissioner against the purchaser for the purchase money, although no previous tender of the deed had been made. *Swain v. Moberly*, 17 Ind. 99.

On sale of land in partition on terms that the purchaser shall pay ten per cent. cash, and that, if he fail to complete the purchase and a re-sale be had at which a less sum is realized, he shall be liable for the deficiency, where one entitled to a share in the land bids it in, but fails to complete the purchase, a subsequent deficiency should be deducted from his share, but he is entitled to have the amount of his cash payment credited on such deficiency, though the terms of sale provide that such payment shall be forfeited on failure to complete the purchase. *Bailey v. Dalrymple* (N. J. 1890), 19 Atl. Rep. 840.

3. *Clason v. Corley*, 5 Sandf. (N. Y.) 447. And see *Monition of Dickson*, 6 La. Ann. 754; *Simmons v. Baynard*, 30 Fed. Rep. 532; *Weseman v. Wingrove*, 85 N. Y. 353; *Chase v. Chase*, 15 Abb. N. Cas. (N. Y.) 91.

In a decree for partition, a formal direction to make title is not necessary, when the order of sale reserves the title as an additional security for the purchase money and the money has been paid. *Latta v. Vickers*, 82 N. Car. 501. And the proceedings under an order for sale, founded on an application for partition of lands, in *New Jersey*, may be discontinued by the petitioners, at any time before the rights of purchasers or bidders become fixed. *Bellerjeau v. Eley*, 8 N. J. L. 273.

A purchaser who is discharged

from his purchase on account of defects in the title, is entitled to receive a return of his deposit with interest from the time the sale was to be completed and the expenses of investigating the title and the costs of his motion to be discharged. *Rogers v. McLean*, 10 Abb. Pr. (N. Y.) 306.

A purchaser at a partition sale, without notice of an order to set it aside, may be made a party at any stage of the proceedings, if necessary to prevent injustice, and may take an appeal independently of an appeal by another party. *Comstock v. Purple*, 49 Ill. 158.

He may recover of the sheriff for misfeasance in selling the whole of a tract when empowered only to sell half. *Lusk v. Briscoe*, 65 Mo. 555.

A purchaser who wishes to be relieved from his purchase because there are liens against the property, must furnish affirmative evidence of such liens and ask to have them removed, or that he should be relieved from his purchase. Until he does this, he presents no case for the interference of the court. *Noble v. Cromwell*, 27 How. Pr. (N. Y.) 289.

4. *Gates v. Irick*, 2 Rich. (S. Car.) 593; *Allen v. Gantt*, 27 Pa. St. 473; 67 Am. Dec. 485; *Noble v. Cromwell*, 27 How. Pr. (N. Y.) 289; 3 Abb. App. Dec. (N. Y.) 382; *Mead v. Mitchell*, 17 N. Y. 210; 72 Am. Dec. 455; *Clemens v. Clemens*, 37 N. Y. 59; *Farmer v. Daniel*, 82 N. Car. 152; *Brooks v. Davey*, 109 N. Y. 495; *Bruhn v. Fireman's Bldg. Assoc.*, 42 La. Ann. —, 7 So. Rep. 556.

Proceedings in partition are binding and conclusive upon all parties to the record, and upon all those holding under them. The sheriff's deed in partition stands upon the same footing as if it were a voluntary conveyance by the petitioner for partition, and will bind such petitioner by way of estoppel. *Pentz v. Kuester*, 41 Mo.

have acquired their interests during the pendency of the action,¹ the purchaser taking the premises discharged of all such encumbrances, and the liens attaching to the proceeds of the sale instead of the land sold.² But owners or holders of liens or interests in the premises, who were such at the inception of the action for partition who were not made parties or otherwise furnished with due opportunity to establish and procure the allowance of their claims, are not thus cut off, and their interests remain an encumbrance upon the property in the hands of the purchaser.³ The title thus obtained, except for fraud participated in by the purchaser, is not subject to collateral attack, and even though based upon erroneous proceedings, if the errors have

1. *Baird v. Corwin*, 17 Pa. St. 463; *Michoud v. Girod*, 4 How. (U. S.) 503; *Davone v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Wright v. Vickers*, 10 Phila. (Pa.) 381; *Loomis v. Riley*, 24 Ill. 307; *Manley v. Pettie*, 38 Ill. 128.

An encumbrance placed on the premises by the heir or his alienee, after the intestate's death, cannot affect the title passing under the orphans' court sale. *Steel's Appeal*, 86 Pa. St. 222.

If, while the proceedings are pending for the partition of lands held in common, the creditor of one of the tenants obtains a judgment against him, the creditor cannot require the sale to be made for cash so as to meet the cash command of his judgment. *Stern v. Epstein*, 14 Rich. Eq. (S. Car.) 5; *Cradlebaugh v. Prichett*, 8 Ohio St. 646; 72 Am. Dec. 610.

2. *Sears v. Hyer*, 1 Paige (N. Y.) 483; *Ellsworth v. Cook*, 8 Paige (N. Y.) 643; *Kilgour v. Crawford*, 51 Ill. 249; *Steen v. Clayton*, 32 N. J. Eq. 121; *Finley v. Babin*, 12 La. Ann. 236; *Wright v. Vickers*, 10 Phila. (Pa.) 381; *Bettran v. Ganthreaux*, 38 La. Ann. 106.

The value of future estates, devested by a sale in partition, will be ascertained, and the interests of the persons entitled thereto protected, in analogy to the provisions of the statute relative to present estates for life in possession. *Jackson v. Edwards*, 7 Paige (N. Y.) 386.

But a sale in partition proceedings does not discharge the State's privilege on the land for the taxes. *Morris v. Lalaurie*, 39 La. Ann. 47.

In *Louisiana*, mortgages on the share of any one may be referred to the proceeds, and a rule be obtained against the mortgage creditors for erasure thereof from the mortgage

book. Such creditors may thereupon contest the validity of the sale. *Bayhi v. Bayhi*, 35 La. Ann. 527.

But where land, of which an infant owns an undivided share and his natural tutor the other, is sold to effect a partition, the legal mortgage of the minor cannot be referred to the proceeds of sale. The mortgage remains attached to the tutor's portion until removed by special mortgage or extinguished by a settlement, with the minor upon his becoming of age, the purchaser meanwhile holding such share subject to the mortgage, and retaining in his hands the price of the tutor's share. *Life Assoc. v. Hall*, 33 La. Ann. 49.

Lands ordered sold under a decree of partition cannot afterwards be ordered sold under a foreclosure of a mortgage existing at the time of the partition. *Thompson v. Frew*, 107 Ill. 478.

3. *Whiting v. Butler*, 29 Mich. 122; *Greiner v. Klein*, 28 Mich. 12; *Wilkinson v. Parish*, 3 Paige (N. Y.) 653; *Jackson v. Edwards*, 22 Wend. (N. Y.) 498; *Sebring v. Mersereau*, 9 Cow. (N. Y.) 344; *Dunham v. Minard*, 4 Paige (N. Y.) 441; *Moore v. Wright*, 14 Rich. Eq. (S. Car.) 132.

Part of a decedent's real estate was set off to be held in dower, and upon petition by the heirs for partition the whole was sold by commissioners by metes and bounds, subject to the dower estate. *Held*, that the authority of the court to make partition extended to estates in reversion; that the sale was good, and that the purchaser took the entire land subject to dower. *Moody v. West*, 12 Ind. 399.

In *Alabama*, an outstanding lien on the lands, under a chancery decree in favor of a person who is not one of the

not been taken advantage of by appeal or other appropriate remedy in the proceedings, they will be deemed to have been waived.¹

Crops growing upon the premises at the time of the sale are regarded as personalty, and do not pass to the purchaser,² though it would appear that an occupying tenant would have no right to prolong his tenancy by planting a crop after the sale and before the confirmation and execution and delivery of the deed.³

h. DISTRIBUTION OF THE PROCEEDS.—The principle upon which partition is based is the same when a sale is necessary as when actual partition is made, and the rights of the parties in the proceeds of sale are the same as in the lands themselves,⁴

joint owners or tenants in common, is not affected by a sale for partition, and consequently is no bar to a decree of sale. *Fennell v. Tucker*, 49 Ala. 453.

1. *Goudy v. Shank*, 8 Ohio 415; *Rogers v. Tucker*, 7 Ohio St. 427; *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167; *Pentz v. Kuester*, 41 Mo. 447; *Kellam v. Richards*, 56 Ala. 238; *Calloway v. Kirkland*, 57 Ala. 476; *Dungan v. Vondersmith*, 49 Md. 299; *Succession of Pinniger*, 25 La. Ann. 53; *Stokes v. Middleton*, 28 N. J. L. 32; *Wiggins v. Howard*, 83 N. Y. 613; *Brackenridge v. Dawson*, 7 Ind. 383; *Dunning v. Dunning*, 37 Ill. 306.

A purchaser of land from one deriving title under a partition sale is not bound to look behind the decree to ascertain whether the commissioners' report was procured by fraud, or whether the land sold for an adequate price; he may rely upon the decree as *res adjudicata* or conclusive until set aside or reversed. *Hunter v. Stoneburner*, 92 Ill. 75.

Under *New York* statutes, an actual partition or sale under a judgment in partition is effectual to bar the future contingent interests of persons not *in esse*, though no notice is published to bring in unknown parties, and though such future owners may take as purchasers under a deed or will, and not as claimants under any of the parties to the action. *Mead v. Mitchell*, 17 N. Y. 210; 5 Abb. Pr. (N. Y.) 92; 72 Am. Dec. 455; *Cheesman v. Thorn*, 1 Edw. Ch. (N. Y.) 629; *Noble v. Cromwell*, 26 Barb. (N. Y.) 475.

In *Louisiana*, where an heir becomes a purchaser at a partition sale of the estate of his ancestor, the whole property in the thing sold, including his own share as heir, passes by force

of the decree. *Breaux v. Carmouche*, 15 La. Ann. 588. But it is not thereby released from the debts of the estate of the decedent if it was paid for by the heritable share of such purchaser. *Wade v. Murray*, 35 La. Ann. 546.

In a proceeding by rule to enforce a judgment in partition, the judgment cannot be altered or amended. *Gerish v. Pope*, 39 La. Ann. 517.

2. *Honts v. Showalter*, 10 Ohio St. 124; *Parker v. Storts*, 15 Ohio St. 351; *Jones v. Thomas*, 8 Blackf. (Ind.) 428.

In *Cassilly v. Rhodes*, 12 Ohio 88, which was an action for the foreclosure of a mortgage, the court said: "The annual crops are saved for the tenant under the common law rule relating to emblements, because the termination of the lease is uncertain." The older jurists give abundant reasons for the doctrine in the protection the law owes to agriculture.

3. See *Leshey v. Gardner*, 3 W. & S. (Pa.) 314; 38 Am. Dec. 764; *Erb v. Erb*, 9 W. & S. (Pa.) 147.

In *Parker v. Storts*, 15 Ohio St. 351, the court said: "His own unauthorized acts after the sale, cannot be allowed to impair the rights of the purchaser, and must be done at his own peril."

A purchaser is not entitled to the rents and profits of the premises until the sale is completed, and the sale is not completed until the court, by causing the execution and delivery of a deed or otherwise, confirms it. *Clason v. Corley*, 5 Sandf. (N. Y.) 447.

4. *Warfield v. Cane*, 4 Abb. App. Dec. (N. Y.) 525; *Green v. Hathaway*, 36 N. J. Eq. 471. And see *Lawes v. Lumpkin*, 18 Md. 334.

In the partition of the land of an intestate, a tract was assigned to the widow. Then all agreed that this tract

the shares being reparded, as a general rule, as land and descending as real estate in case of death.¹ The residue left after payment of the costs constitutes the fund to be apportioned.² This should be first applied to the payment of liens and encumbrances upon the property in the order of their priority;³ after which the shares of the parties are to be paid to them or other-

should be sold with the rest, and the assignment disregarded. The widow's second husband bought this tract at the sale. Another tract was re-sold for less than the amount bid at the first sale of it, the purchaser at the first sale having failed to complete the purchase. *Held*, that the widow's share was one-third of the money actually and finally realized from the sales. *Turbeville v. Flowers*, 27 S. Car. 331.

The decree of sale having provided that the proceeds shall be re-invested in other real estate, the title to be taken in all respects like that to the property ordered sold, the fact that the title is in the mother and "her children," and that she may have other children than those made parties to the suit, is immaterial. *Tyler v. Jewell* (Ky. 1889), 11 S. W. Rep. 25.

The parties, bound by a decree ordering a re-sale are entitled to their proportionate interest in the securities taken at the re-sale. *Baggott v. Sawyer*, 25 S. Car. 405.

Where commissioners in partition assessed the value of three several parcels of land, assigned one parcel to the widow, at the assessed value, as her share, and recommended that the other parcels be sold for distribution among the children, and the return was confirmed, and the two parcels brought at the sale nearly twice the amount they were assessed at by the commissioners, the widow is not entitled to come in and share with the children the amount which the land brought over the assessed value. *Goulding v. Goulding*, 8 Rich. Eq. (S. Car.) 82.

1. *Green v. Hathaway*, 36 N. J. Eq. 471; *Burgin v. Burgin*, 82 N. Car. 196; *Dudley v. Winfield*, 1 Busb. Eq. (N. Car.) 91; *Baltimore v. Latham*, 3 Jones Eq. (N. Car.) 35; *Norton v. Bradham*, 21 S. Car. 375. To the contrary in *New York*, *Robinson v. McGregor*, 16 Barb. (N. Y.) 53.

So the *Indiana* statute, which provides that a woman may not, during her second or subsequent marriage, alienate real estate held by her in virtue of a previous marriage, does not

apply to her share of the proceeds of real estate of which she is entitled to one-third when sold in a proceeding for partition, but the proceeds of her one-third must be paid to her unconditionally. *Small v. Roberts*, 51 Ind. 281.

2. *Freeman Part.*, § 549.

The proceeds of a partition sale of one tract of land cannot be applied in payment of fees or costs accrued in proceedings for partition of another tract. *Liberty Sav. Assoc. v. Commercial Bank*, 87 Mo. 225; *Dale v. Dale*, 88 Mo. 462.

3. *Warfield v. Crane*, 4 Abb. App. Dec. (N. Y.) 525; *Smith v. Smith* (Supreme Ct.), 1 N. Y. Supp. 835; *Tenk v. Lock*, 26 Ill. App. 216; *Evarts v. Woods*, 25 N. Y. St. Rep. 498; *Dees v. Tildon*, 2 La. Ann. 412.

Where, under the judgment in a partition suit, the referee appointed to sell is directed to pay out of the proceeds all taxes and assessments which were liens upon the premises, he is bound, before distributing the fund, to pay off all such liens of which he has knowledge. His duty in this respect is not modified or affected by a provision in the terms of sale to the effect that he will allow all liens, provided the purchaser shall, previous to conveyance, produce proof thereof, with vouchers showing payment. *Weseman v. Wingrove*, 85 N. Y. 353.

Where a testator, by will, devised a farm to three children equally, charged with legacies, the executor filed a bill for partition. The legacies were charged on the whole farm, and that their amount should be ascertained before sale ordered on partition, and that plaintiff, who had acquired by purchase an interest in the farm, could only be compelled by defendants to account for rents and profits by cross bill; and that, as the amount of the personal estate and the deficiency did not appear, a sale should not be ordered until after the executor's account had been settled in the orphans' court. *Adams v. Beideman*, 33 N. J. Eq. 77.

wise disposed of to their use.¹ Where one party has made improvements necessary to the preservation of the property, the other parties should be required to contribute their portion of the expense,² and in the absence of statutory enactment, a life tenant is entitled only to the annual income from his interest, and not to its present value.³ Payment of a share cannot be claimed by one entitled to it until the amount due him shall have

It is proper to require the payment by an heir out of his share any indebtedness owing by him to the estate. *Platt v. Platt*, 13 N. Y. St. Rep. 384.

A petition for partition alleged a mortgage to be a lien on the entire land, afterwards found to be a lien only on the portion allotted to one tenant in common, and a small part of the portion allotted to the other. *Held*, that the latter was entitled to have the partition confirmed on paying his share of the mortgage. *Gordon v. Acuff*, 4 Del. Ch. 63.

1. See *Robinson v. McGregor*, 16 Barb. (N. Y.) 531; *Dees v. Tildon*, 2 La. Ann. 412; *Foster v. Roche* (Supreme Ct.), 4 N. Y. Supp. 605; *Aplington v. Nash*, 80 Iowa 488; *Matter of Partition*, 8 N. J. L. 88.

Rights of Purchasers—Where a decree in a partition suit requires an interchange of deeds, a levy on the interest of one of the parties, made after decree, but before a compliance therewith by interchange of deeds, is good to pass the interest of such party; and the purchaser at a sale under such levy will be entitled to the specific part set off to such party by the decree of partition. *Smith v. Crawford*, 81 Ill. 296.

A, to whom land descended in common with others, charged with debts, sold his undivided share in a certain portion of the land to B, with warranty, and the portion thus sold was afterwards sold under a decree of the surrogate, to pay the debts charged upon the whole estate. *Held*, that B was entitled to stand in the place of the creditors for whose benefit the land was sold, and the residue of the land having been sold in a suit for partition, the amount for which B's interest had sold under the order was directed to be paid to him out of the money in court. *Eddy v. Traver*, 6 Paige (N. Y.) 521; 31 Am. Dec. 261.

Shares of Infants.—Under the *North Carolina Code*, § 1908, requiring the shares of infants on partition sales "to be so invested or settled that the same

may be secured to such party or his real representative," where a judgment in partition is that the proceeds of the sale be paid over to the several parties, tenants in common, the shares of infant owners are payable to their guardian. *Howerton v. Sexton*, 104 N. Car. 75. And see *Carpenter v. Schermerhorn*, 2 Barb. Ch. (N. Y.) 314.

Retention of Fund.—Equity may, in a proper case retain the fund in the trustee's hands, to be rightfully divided on the application of any party in interest. *Chisham v. Way*, 73 Ind. 362. And see *Waring v. Waring*, 7 Abb. Pr. (N. Y.) 472.

2. *Prentiss v. Jansen*, 21 Alb. L. J. 174; *Clift v. Clift*, 72 Tex. 144; *Reeves v. Reeves*, 11 Heisk. (Tenn.) 669.

In partition it was found that plaintiffs owned two-ninths of the land and defendant seven-ninths; that the land itself was worth \$700; that the improvements put thereon by defendant were worth \$3,300, and that the land could not be divided. *Held*, that the order should have been that 31-800 of the proceeds of sale be paid to plaintiffs, less 31-800 of the taxes adjudged to be due defendant, and the remainder paid to defendant. *Alleman v. Hawley*, 117 Ind. 532.

3. *Ex parte Winstead*, 92 N. Car. 703. And see *Velten v. Vogt* (Supreme Ct.), 1 N. Y. Supp. 644.

The value of a dower interest can be ascertained and paid to the doweress if she consents to release her dower and accept a gross sum, and in this way her rights can be extinguished. *Bond v. McNiff*, 38 N. Y. Super. Ct. 83. But she cannot be compelled to relinquish it. *Jackson v. Edwards*, 7 Paige (N. Y.) 386. The policy of the law being always toward the protection of her rights. *Simar v. Canaday*, 53 N. Y. 298; 13 Am. Rep. 523.

Where a right of dower attaches to the interest of one of the parties only, the others are not affected by it. It is paid out of the share of the proceeds to which that party is entitled. *Ford v. Knapp*, 102 N. Y. 135; *Huntington*

been judicially ascertained,¹ orders for investment or distribution being null and void as to parties entitled to, but receiving no notice of the application therefor.² The distribution of the proceeds of sale in partition proceedings is governed by the laws of the State in which the land is situated.³

14. The Final Judgment or Decree.—The final judgment or decree is not only a confirmation of the report of the commissioners, whether actual partition has been had or the property has been sold, but it is also a final determination of the rights of the parties as found by the preceding steps in the action.⁴ When actual partition is made the decree should contain a direction that the parties shall execute mutual conveyances to each other

v. Huntington, 9 Civ. Pro. Rep. (N. Y.) 182.

1. *Spires v. Ordinary*, 11 Rich. (S. Car.) 578; *State v. Cummiskey*, 34 Mo. App. 189. And see *Hurst v. Whitely*, 47 Ga. 366; *Lochner v. Haas* (Supreme Ct.), 6 N. Y. Supp. 185; *Halsted v. Halsted*, 55 N. Y. 442.

In an action on a sheriff's bond to recover money received from a sale in partition proceedings, plaintiff makes a *prima facie* case when he shows a judgment for partition, and an order for a sale and distribution according to the interest of the parties as found, and the approval of the sheriff's report of sale. No further order of distribution is necessary. *State v. Frazier*, 89 Mo. 592.

A final order of distribution of the proceeds of the sale could not be modified at a later time by another judge without a trial. *Fredericks v. Davis*, 6 Mont. 460. And see *Ex parte Lewis*, 7 Ired. Eq. (N. Car.) 4.

A tract of land was partitioned by order and decree of court in 1881. A motion was made by a purchaser of a purpart sold under the decree praying that the plaintiff in the partition suit should show cause why an order directing certain interest to be paid to plaintiff under the decree, as tenant by curtesy, should not be rescinded and set aside. *Held*, that the order was consistent with the judgment, and while that stands the order would stand, and the motion was properly overruled. *Clemans' Appeal* (Pa. 1887), 11 Atl. Rep. 559.

A plaintiff alleging that a partition sale of land is void as against himself, cannot maintain an action to recover a share of the proceeds received by another party. *Ware v. Lisa*, 34 Mo. 505.

2. *Berry v. Irick*, 22 Gratt. (Va.) 614; 12 Am. Rep. 539.

3. *Oberle v. Lerch*, 18 N. J. Eq. 346.

The provisions with relation to the distribution of the proceeds of sale in partition are statutory, differing somewhat in different States. Their general features are as follows:

"1st. The costs of the suit and of the various necessary proceedings therein, including the sale, are to be paid, and the residue, after making such payment, constitutes the fund to be apportioned. 2nd. The various incumbrances are ascertained, and must be paid, in the order of their priority, out of the share or shares of the person or persons against whom such incumbrances are chargeable. 3rd. The court is authorized to inquire and determine the values of estates for life or years, and also of all future estates, whether vested or contingent, and to direct what amount shall be paid to the holders of each of such estates. 4th. The persons authorized to receive the shares of infants, lunatics, and *femes covert*, are designated. 5th. When some of the shares belong to unknown or non-resident owners, or when, from any cause, the persons entitled to such shares are not in court, or cannot at present be ascertained, the moneys representing such shares may be invested under the order of the court, and kept so invested until the time arrives when the court can make a proper distribution." *Freeman Part.* 549.

4. 3 *Rumsey's Pr.* 80; *Post v. Post*, 65 Barb. (N. Y.) 192; *Kilgour v. Crawford*, 51 Ill. 249; *Hart v. Steedman*, 98 Mo. 452; *Scheiner v. Proband*, 73 Tex. 532; *Petrucio v. Seardon*, 76 Tex. 639; *Bowers v. Dickinson*, 30 W. Va. 709; *Lynch v. Rome Gas Light*

of the shares allotted to them respectively,¹ but under most of the statutes with relation to partition in the *United States* the mere entry of the judgment or decree vests the title to the several shares in the person to whom they are allotted, thus rendering subsequent conveyances unnecessary,² in which case the title relates back to the time of the division and starts from the time

Co., 42 Barb. (N. Y.) 591; *Hart v. Steedman*, 98 Mo. 452.

In partition between heirs, to which one holding a judgment lien on the premises is not a party, it is not necessary that the final judgment contain any statement as to the status of such judgment, as such statement would have no force. *Stephenson v. Cotter* (Supreme Ct.), 5 N. Y. Supp. 749.

A money judgment for plaintiff in partition for taxes alleged to have been paid by him for defendant's benefit is unauthorized. *Tucker v. Whitteley*, 74 Wis. 74.

A simple order of court in case of a petition under the statute of partition that "partition be awarded," is void, as in such case the judgment is the record of the case, and should set forth on its face the estate and interest adjudged to each party. *Greenup v. Sewell*, 18 Ill. 53.

A judgment which, as prayed for, recites that experts have been appointed, and reported that the property cannot be conveniently divided in kind, and orders an auction sale in conformity to *Louisiana Civ. Code* 1261, is regular. *Gilmore v. Gilmore*, 9 La. Ann. 197.

How Construed.—Doubtful words of boundary, in a partition in the probate court, are not to receive a construction peculiarly favorable to the person whose lot is described first. *Mann v. Dunham*, 5 Gray (Mass.) 511.

When, in a judgment of partition, a boundary line between two of the parties is described as passing along a visible object, and is also described by courses and distances, the latter must yield to the former. *Mills v. Lux*, 45 Cal. 273.

Presumption.—Until a decree in partition for sale and distribution has been set aside, payment will be presumed to have been made thereunder according to law. Such decree failing to recite that a married woman, a party thereto, was privily examined as required by the *Tennessee* act 1852, § 2, may be attacked for fraud, but can

be reversed only upon full allegation and proof of the facts. *Neil v. Smith*, 1 Lea (Tenn.) 371.

1. *Daniels' Ch. Pr.* 1161. And see *Grassmeyer v. Beeson*, 18 Tex. 753.

Where there is a controversy between the parties, or where there are infants or married women interested, conveyances should always be directed to be settled by the judge. *Daniels' Ch. Pr.* 1161.

One party cannot refuse to execute the conveyance to another on the ground that the remaining party has not executed the conveyance to him. *Oger v. Sparke*, 9 W. R. 180.

A court may declare that any of the parties to the suit wherein the decree is made, are trustees of such lands or any part thereof, or that the interest of unborn persons who might claim under any party to the suit or otherwise, shall, upon coming into existence, be considered as trustees of such lands, and any infant, lunatic or person of unsound mind may likewise be directed to be considered as such trustees, and where the shares of the parties are very minute and complicated, the court, to save expense, instead of directing a conveyance of the several shares, may declare each of the parties to be trustees as to the shares allotted to the others, and then vest the whole estate in a single new trustee with directions to convey to the several parties their allotted shares. *Daniels' Ch. Pr.* 1161.

2. *Young v. Cooper*, 3 Johns. Ch. (N. Y.) 295; *Young v. Frost*, 1 Md. 377; *Van Orman v. Phelps*, 9 Barb. (N. Y.) 500; *Street v. McConnell*, 16 Ill. 125; *Griffith v. Philips*, 3 Grant Cas. (Pa.) 381; *Swett v. Swett*, 49 N. H. 264; *Wright v. Marsh*, 2 Greene (Iowa) 110.

But see to the contrary, *Smith v. Moore*, 6 Dana (Ky.) 417.

A decree for partition, by a court of equity, assigning the portions of the distributees, amounts to no more than an ordinary conveyance. *Anderson v. Hughes*, 5 Strobb. (S. Car.) 74.

of filing the commissioners' report.¹ Where a sale is had, it should direct the officer making the sale to execute conveyances to the purchasers² and contain specific directions as to the disposition of the proceeds of the sale.³ Whether an actual partition or a sale was had, it is essential that the judgment direct that the parties to whom the several shares were allotted in the one instance, or the purchaser in the other, be let into possession,⁴ but until the confirmation of the commissioners' report or the report of sale, the right of possession is contingent only.⁵ The final judgment also determines the amount of the costs and what parties are to pay them.⁶ A decree in partition is a public record and notice to purchasers of the particular lots contained in the respective assignments,⁷ and does not need to be signed by the judge; its validity is derived from its entry upon the record.⁸

a. WHEN VALID AND BINDING.—As a general rule a decree of partition is considered as a unity, and if bad in part it is bad as a whole.⁹ A decree may be impeached for fraud,¹⁰ and a judge

1. *Dixon v. Warters*, 8 Jones (N. Car.) 451; *Van Orman v. Phelps*, 9 Barb. (N. Y.) 500.

The judgment need not be docketed to give it effect. *Lynch v. Rome Gas Light Co.*, 42 Barb. (N. Y.) 591. *Butler v. Lee*, 1 Abb. App. Dec. (N. Y.) 279.

2. See *Jennings v. Jennings*, 2 Abb. Pr. (N. Y.) 6; *Merritt v. Horne*, 5 Ohio St. 308; 67 Am. Dec. 298; *Stout v. McPheeters*, 84 Ind. 585; *Farmer v. Daniel*, 82 N. Car. 152.

3. See *Robinson v. McGregor*, 16 Barb. (N. Y.) 531; *Sears v. Hyer*, 1 Paige (N. Y.) 483; *Post v. Post*, 65 Barb. (N. Y.) 192; *Dunham v. Minard*, 4 Paige (N. Y.) 441.

4. *Meiggs v. Willis*, 8 Civ. Pro. Rep. (N. Y.) 125; *Church's Appeal* (Pa.), 13 Atl. Rep. 756.

Where a party withholds possession from the person entitled to it, the court may, without notice, grant an order in the nature of a writ of assistance, for the purpose of obtaining possession. *Bowery Sav. Bank v. Foster*, 11 N. Y. Wkly. Dig. 493. And see *Chamberlain v. Choles*, 35 N. Y. 477. But if the person in possession is not a party, he cannot be removed summarily. *Boynton v. Jackway*, 10 Paige (N. Y.) 307.

5. *Farmers' L. & T. Co. v. Bankers' etc. Co.*, 11 Civ. Pro. Rep. (N. Y.) 370.

6. See *Williamson v. Williamson*, 1 Metc. (Ky.) 303; *Sprott v. Reid*, 3 Greene (Iowa) 489; 56 Am. Dec. 549. And see also *infra*, this title, *Costs*.

7. *Marshall v. McLean*, 3 Greene (Iowa) 363.

After the court has passed upon a partition made by referees and approved it, the guardians of infant parties are authorized to consent to the judgment as entered; and in such case it is not necessary to notify them of the judgment in order to impose on them the obligation to move for a new trial within ten days after the judgment, if they could under the circumstances prosecute such motion. *San Fernando Farm Homestead Assoc. v. Porter*, 58 Cal. 81.

8. *Dunning v. Dunning*, 37 Ill. 306.

9. *Corwith v. Griffing*, 21 Barb. (N. Y.) 9.

A decree of the judge of probate, assigning the whole of the real estate of the intestate to an eldest son, on condition that he pay to the other children the value of their respective shares within three months in money, but without taking security for the same, may be avoided by the other children as not authorized by the statute. *Newhall v. Sadler*, 16 Mass. 122; *Thayer v. Thayer*, 7 Pick. (Mass.) 209.

But such a decree has been held good as to another party who assented to the assignment, and received the sum awarded to her by the commissioners. *Ricè v. Smith*, 14 Mass. 431.

10. *Stunz v. Stunz*, 131 Ill. 309. And see *Lloyd v. Kirkwood*, 112 Ill. 329; *Gooch v. Green*, 102 Ill. 507; *Hess v.*

ment of partition rendered in a suit in which all the persons in interest were not made parties, is an absolute nullity.¹ So, such a mistake of fact or such an accident as would authorize a court of equity to enjoin or set aside an ordinary judgment, will justify setting aside or correcting a judgment or decree in partition,² and while an error of judgment on the part of the commissioners cannot be urged to impeach the decree, if they have willfully and fraudulently deceived the court, relief will be granted.³ But a decree is not tainted by mere irregularities or amendable defects in the proceedings leading up to it,⁴ and where the defect or

Voss, 52 Ill. 472; Kuchenbeiser v. Beckert, 41 Ill. 172; Johnson v. Johnson, 30 Ill. 215; Lloyd v. Malone, 23 Ill. 43; 74 Am. Dec. 179; Young v. Tucker, 39 Iowa 596; DeLouis v. Meek, 2 Greene (Iowa) 55; 50 Am. Dec. 491; Lillibridge v. Ross, 59 Mo. 217.

In an action for relief for fraud practiced in partition by defendant, parties to that proceeding, to whom portions of the land claimed by the tenant in common were allotted, are not necessary parties, where it does not appear that they were parties to the fraud, or that they did not own the lots assigned to them, or that any right of contribution would exist against them. *Western v. Skiles*, 35 Fed. Rep. 674.

1. Succession of Poree, 27 La. Ann. 463; *Holloway v. McIlhenny Co.*, 77 Tex. 657; *Hull v. Cavanaugh*, 6 Mo. App. 143.

Where one of several tenants in common had alienated his share, before the petition for partition was presented, and the plaintiff proceeded as if no alienation had been made, giving notice to the original co-tenant, and not to his grantee, the judgment of partition was held to be void. *Jackson v. Brown*, 3 Johns. (N. Y.) 459.

After a decree of partition was rendered, a mortgage upon a portion of the premises partitioned, which was unknown to all the parties to the partition at the time of the decree, was foreclosed, and a sale was made thereunder. There was no error in setting aside the decree, and ordering a new partition of the remaining lands upon the same general basis as before. *Bridges v. Howard*, 18 Iowa 116.

2. *Marvin v. Marvin*, 52 How. Pr. (N. Y.) 97; 1 Abb. N. Cas. (N. Y.) 372; *Douglass v. Viele*, 3 Sandf. Ch. (N. Y.) 439; *George's Appeal*, 12 Pa. St. 260; *Boyd v. Doty*, 8 Ind. 373; *Par-*

den v. West, 1 Lea (Tenn.) 728; *Manning v. Horr*, 18 Iowa 117.

Where a partition agreement fixed upon a certain line as dividing off the interest of one of the parties, but in carrying out the agreement a mistake was made in running this line so as to cut a portion of the land it was agreed he should have, and the mistake was carried into the partition deed, and not discovered until afterwards, the proceedings did not, under the circumstances, become a "finality," but that the party was entitled to relief in equity. *Guedici v. Boots*, 42 Cal. 452. And see *Smith v. Butler*, 3 W. C. Rep. 566; *Dewitt v. Hawkins*, 107 Ill. 109.

But where it is not shown that there has been fraud or ill practice on the part of him who sought such partition, but that the mistake complained of arose from the carelessness of the party suing to annul, such error in description will not be a sufficient cause of nullity. *Winn v. Dickson*, 15 La. Ann. 273.

How Corrected.—After an acquiescence for seven years in the confirmation of the report of commissioners of partition, the remedy to correct a mistake in running a dividing line is not by motion, but by a new action begun by summons. *Thompson v. Shammell*, 89 N. Car. 283; *Paul v. Lamothe*, 36 La. Ann. 318.

3. *Adair v. Cummin*, 48 Mich. 380.

But in *Maine* it has been held that the court, under their general power to grant reviews in petitions for partition, will do so, after final judgment on such petition, if it is discovered that the commissioners have made a mistake in their partition. *Wilbur v. Dyer*, 39 Me. 169.

4. See *Richardson v. Loupe*, 80 Cal. 490; Succession of *Corrigan* (La. 1890), 7 So. Rep. 74; *Persenger v. Judd*, 52 Mich. 304.

invalidity is such that certain parties only could take advantage of it, they may by their acts so ratify the decree as to estop themselves from asserting its invalidity.¹

The fact that declaring certain partition proceedings void will invalidate many titles, furnishes no ground for sustaining them.²

b. COSTS.—In the absence of statutory enactment, it is in the discretion of the court to allow or not to allow costs in actions for partition,³ and when allowed, should, as a general rule, be borne by the parties in proportion to the value of their respective interests.⁴ But where one of the parties has made unnecessary

Where a plat duly recorded in the plat book, is referred to in a partition decree as a means of identifying the land, the fact that it is not set out in the record of the partition proceedings does not render the decree void for uncertainty. *Miller v. Indianapolis* (Ind. 1890), 24 N. E. Rep. 228.

A judgment in partition is not defective because the affidavits, on which service of summons by publication was ordered, did not allege non-residence of the parties who were thus served, and stated, on information and belief, inability to find them in the State. *Van Wick v. Hardy*, 4 Abb. App. Dec. (N. Y.) 496.

An erroneous computation or inaccuracy of commissioners may be corrected by the final judgment in proceedings for partition. *Wright v. Marsh*, 2 Greene (Iowa) 94.

1. See *White v. Clapp*, 8 Met. (Mass.) 370; *Leverett v. Stevenson*, 81 Ga. 701; *McQueen v. Fletcher*, 4 Rich. Eq. (S. Car.) 152; *McGregor v. Reynolds*, 19 Iowa 228; *Barclay v. Kerr*, 110 Pa. St. 130; *Jackson v. Richtmyer*, 13 Johns. (N. Y.) 367; *Millican v. Millican*, 24 Tex. 439; *Pratt v. Hubbell*, 5 Ohio 243; *Welchel v. Thompson*, 39 Ga. 561; *Craig v. Craig*, Bailey Eq. (S. Car.) 103; *Leibert's Appeal*, 119 Pa. St. 517; *Succession of Devereux*, 13 La. Ann. 33; *Wisly v. Bonte*, 19 Ohio St. 238; *Bohart v. Atkinson*, 14 Ohio 238.

If a petition be presented by adults for a partition of lands, in which minors are interested, praying for a division in a certain manner, and the petition is made in conformity to their wishes, they cannot be heard to object to it, although, as to the minors, it may be void, and would be set aside upon their application. *Latimer v. Rogers*, 3 Head (Tenn.) 692.

A party to a partition suit who has

expressly agreed that a certain portion of the land shall be assigned to him cannot afterwards complain of such assignment. *Haines v. Hewitt*, 129 Ill. 247.

But where the judge of probate assigned the reversion of the widow's dower to one of the heirs, to the exclusion of the rest, such a decree was held to be void, though of forty years' standing, and the land was yet subject to partition among the heirs. *Sumner v. Parker*, 7 Mass. 79. And see *Cogswell v. Reed*, 12 Me. 198; *McQueen v. Fletcher*, 4 Rich. Eq. (S. Car.) 152.

2. *Prince v. Clark*, 81 Mich. 167.

3. *Williamson v. Williamson*, 1 Metc. (Ky.) 303; *Pratt v. Ramsdell*, 16 How. Pr. (N. Y.) 59; *Young v. Edwards* (S. Car. 1890), 11 S. E. Rep. 1066; *Conkright v. Haulenbeck*, 35 N. J. Eq. 279. And see *Swett v. Bussey*, 7 Mass. 503; *Symonds v. Kimball*, 3 Mass. 299.

A petition for a partition is not an action within the meaning of the statute which provides that in all actions the prevailing party shall recover costs. *Counce v. Persons Unknown*, 76 Me. 548. And see *Brock v. Eastman*, 27 Vt. 559; 67 Am. Dec. 733.

Where the purchaser, is ordered to pay certain costs, he cannot complain if the result to him would have been the same had the court ordered him to pay his bid to the referee, costs to be paid therefrom. *Henderson v. Scott*, 43 Hun (N. Y.) 22.

Where, after final judgment in the county court, no order concerning costs was there made, the petitioner cannot apply to the supreme court therefor. *Houghton v. Sowles*, 57 Vt. 635.

4. *Tibbits v. Tibbits*, 7 Paige (N. Y.) 204; *Boyer's Estate*, 8 Pa. Co. Ct. Rep. 177; *Phelps v. Stewart*, 17 Md. 231;

costs, as by asserting an unfounded claim, or by interposing an improper and unnecessary defense, he must pay such costs as were occasioned by his fault;¹ and where actual partition is made, if for any cause some of the parties are found not entitled to any portion of the property, they should not be charged with any of the costs.² Where a doweress or other holder of a life estate is

Gibson v. Brown, 1 McCord (S. Car.) 162; *Fowler v. Evans*, 26 Tex. 636; *Simmons v. Baynard*, 30 Fed. Rep. 532; *Duncan v. Duncan*, 63 Iowa 150; *Johns v. Northcutt*, 49 Tex. 444; *Le Moyne v. Harding* (Ill. 1890), 23 N. E. Rep. 414; *Coles v. Coles*, 13 N. J. Eq. 366; *Agar v. Fairfax*, 17 Ves. 558; *Biles' Appeal*, 119 Pa. St. 105. And see *Askey v. Williams*, 74 Tex. 294.

Where, in a case of partition, some of the land is divided and allotted to those entitled thereto, but some of the land cannot be divided, and is sold, the costs of all the proceedings, including those of the sale, must be borne equally by all the parties. *Cooper v. Garesche*, 21 Mo. 151.

An apportionment made after setting apart from the proceeds of sale the enhanced value of certain improvements belonging to one of the parties is erroneous—this amount was chargeable with its share of costs, etc. *Sarbach v. Newell*, 35 Kan. 180.

The judgment for costs in partition need not show that the petitioners first paid the costs. *Sprott v. Reid*, 3 Greene (Iowa) 489; 56 Am. Dec. 549.

1. *Hamersly v. Hamersly*, 7 N. Y. Leg. Obs. 127; *LeMoyne v. Harding*, (Ill. 1890), 23 N. E. Rep. 414; *Johns v. Northcutt*, 49 Tex. 444; *Crandall v. Hoysradt*, 1 Sandf. Ch. (N. Y.) 40; *Stephenson v. Cotter* (Supreme Ct.), 5 N. Y. Supp. 749; *White v. White*, 41 Kan. 556; *Masterson v. Finnigan*, 2 R. I. 316.

Where, upon a petition for partition of a parcel of land, it appears that the petitioner and respondent are tenants in common of part only of the land, and not interested in the residue, and partition is accordingly made of such part only, the respondent is entitled to costs. *Paine v. Ward*, 4 Pick. (Mass.) 246; *Loud v. Penniman*, 19 Pick. (Mass.) 539.

Where parties joined as co-tenants in proceedings for partition, appear and contest the petitioner's right to partition, up to the time of the interlocutory judgment in his favor, and

then withdraw their opposition, they will be liable to him for costs up to that time, and not afterwards. *Fisk v. Keene*, 46 Me. 225.

Where an heir filed a bill for partition of land against a third person who claimed it, and the other heirs, he was entitled to costs, though he failed in his suit, as the third person could have established her rights in the land only by an action, the costs of which the heirs could have avoided by proper pleading, but that one who had filed an answer resisting her claim was not entitled to costs. *Van Tine v. Van Tine* (N. J. 1888), 15 Atl. Rep. 249.

In a suit for partition between two parties owning a stock of cattle, sheep, and horses, and in which the defendant, by contract, has been chargeable with the care thereof, and where, by writ of sequestration, plaintiff has obtained the possession thereof, it is error to tax the entire costs against defendant, and to tax as costs against him the expenses of keeping the stock. *Gray v. King*, 39 Tex. 616.

2. *Tanner v. Niles*, 1 Barb. (N. Y.) 560. But see to the contrary, *White v. White*, 41 Kan. 556.

If a defendant in an action of partition makes a disclaimer, and does not appear to be in possession, or doing any act inconsistent with such disclaimer, he is entitled to be dismissed with his costs. *Urban v. Hopkins*, 17 Iowa 105.

A decree of partition may be rendered against non-resident defendants upon service by publication, but judgment for costs cannot be rendered against them in such action where they have not appeared nor been personally served with process. *Talliaferro v. Butler*, 77 Tex. 578.

In a petition for partition, where commissioners, who were appointed after a default, made a return, which was accepted, although resisted by a written motion, this proceeding does not make those who file the motion parties to the petition, or subject them to costs. *Moore v. Mann*, 29 Me. 559.

a necessary party, she is chargeable with her portion of the costs.¹ Statutory regulations governing costs in partition have been very generally adopted, differing widely in different States.²

Necessary disbursements, including the fees of the commissioners and counsel fees when allowed, should be allowed and paid as a part of the costs,³ but an order for the payment of disbursements will not be made before final judgment.⁴ Some of the courts have refused to allow an attorney's fee to be taxed as costs under any circumstances.⁵ Costs of partition, however, are in many of the States construed to cover reasonable counsel fees,

1. *Tanner v. Niles*, 1 Barb. (N. Y.) 560; *Boyers' Estate*, 8 Pa. Co. Ct. Rep. 177. The same rule applies to infants, lunatics and persons of unsound mind. *Daniels' Ch. Pr.* 1162.

In *New York* the guardian *ad litem* of infant parties is personally liable (Code, § 316) for their share of the deficiency where the estate is insufficient to pay costs. *Muller v. Struppman*, 6 Abb. N. Cas. (N. Y.) 343.

2. See *Askey v. Williams*, 74 Tex. 294; *Fowler v. Evans*, 26 Tex. 636; *Muller v. Struppman*, 6 Abb. N. Cas. (N. Y.) 343; *Simmons v. Baynard*, 30 Fed. Rep. 532. And see the statutes of the different States.

Under the statutes of *Maine*, no costs can be taxed for the petitioner against the respondent, after the interlocutory judgment for partition. *Ham v. Ham*, 43 Me. 285.

The *Massachusetts* statute of 1786, Ch. 52, gave costs, in petitions for partition, only on the determination of an issue either of law or fact. A case stated is not such an issue. *Reed v. Reed*, 9 Mass. 372.

Iowa Code, § 3297, declares that costs in partition shall be paid by the parties in proportion to their interests, except in cases of certain contests. If, practically, there was a contest, the case was within the exception. *Duncan v. Duncan*, 63 Iowa 150.

3. See *Schaefer v. Kienzel*, 123 Ill. 430; *Biles' Appeal*, 119 Pa. St. 105; *Redecker v. Bowen*, 15 R. I. 52; *Conkright v. Haulenbeck*, 35 N. J. Eq. 279; *Draper v. Draper*, 29 Mo. 13; *Campbell v. Campbell*, 48 How. Pr. (N. Y.) 255; *Race v. Gilbert*, 102 N. Y. 298; *Richards v. Richards*, 2 Abb. N. Cas. (N. Y.) 93. *Daby v. Jacot*, 2 Abb. N. Cas. (N. Y.) 97.

Commissioners appointed to divide land under a decree of court, in *Maryland*, were allowed \$5 a day for their

services. *Cabell v. Cabell*, 4 Hen. & M. (Va.) 436.

The fees of a referee who makes a sale of land under a decree in a partition suit, are the same as those to which a sheriff is entitled under like circumstances. If he pays over the money to those entitled to it, he is not, for such service, entitled to an additional fee for "distributing" it. The provisions of law granting compensation where a referee distributes money have no application to a case where a mere payment only is required. *Race v. Gilbert*, 32 Hun (N. Y.) 360.

A commissioner in equity, in *South Carolina*, who is directed to receive funds arising from sales for partition, and invest them, is entitled only to the fees allowed by the fee bill, and cannot claim for extra services. *Bona v. Davant*, 2 Hill Eq. (S. Car.) 528.

4. *Weeks v. Cornwell*, 38 Hun (N. Y.) 577.

Commissioners for partition have no lien on the commission for their charges. *Young v. Sutton*, 2 V. & B. 365.

By agreement of all concerned, commissioners were appointed by the court to make partition of lands on several petitions between different parties, and to perform other services. *Held*, that they could not maintain suit for their services against one alone of all the parties. And it being provided, in the agreement, that they should make an apportionment of the expenses under the commissions, they could not recover for their services until such apportionment should be made. *Hamlin v. Otis*, 36 Me. 381.

5. See *Williamson v. Williamson*, 1 Metc. (Ky.) 304; *Lucas Bank v. King*, 73 Mo. 590; *Swartzel v. Rogers*, 3 Kan. 380; *Coles v. Coles*, 13 N. J. Eq. 366.

To authorize the allowance, under § 65 of the *Missouri* Partition act,

as well as ordinary costs,¹ but even in such States they are, as a general rule, allowed to be taxed in amicable cases only and are not extended to include fees for conducting adversary proceedings.²

When a sale is had the costs are directed to be paid from the proceeds,³ and where actual partition was made they may be recovered by issuing execution against each distributee against whose shares the costs have been taxed.⁴

of a reasonable attorney's fee as costs in favor of the attorney bringing a suit for partition, it must appear of record that the plaintiffs in partition had agreed to pay the fee, to be allowed in case the judge should deem it reasonable, or an agreement must be entered of record that the judge should fix the amount of the fee. *Draper v. King*, 73 Mo. 590.

1. *Redecker v. Bowen*, 15 R. I. 52. And see *Kilgour v. Crawford*, 51 Ill. 249; *Schaefer v. Keinzel*, 123 Ill. 430; *Lowe v. Phillips*, 21 Ohio St. 657.

An allowance for counsel fees, in actions of partition, being warranted by statute, the supreme court cannot, on writ of error, inquire whether the amount allowed is excessive, where the proceedings are regular on their face. *Laird v. Walkinshaw* (Pa. 1888), 15 Atl. Rep. 898.

An appeal will not lie from an order of a chancellor making an allowance to the commissioners for services and expenses, where the ground of appeal is that the allowance was unreasonable, and the matter has been heard in the court of chancery on petition and affidavits, without counter-affidavits or an application for a hearing on depositions. *Conkright v. Haulenbeck*, 35 N. J. Eq. 279.

For Complainant's Attorney Only.—Under the *Pennsylvania* act of April 27, 1864, providing that the costs of partition suits, including petitioner's reasonable counsel fees, shall be paid by all the parties in proportion to their interests, it is error to tax, as costs, a fee for defendant's attorney, though defendant did not oppose the partition. *Biles' Appeal*, 119 Pa. St. 105.

2. *Kilgour v. Crawford*, 51 Ill. 249; *Fidelity Ins. etc. Co's Appeal*, 108 Pa. St. 339; *Mansfield v. Olsen* (Miss. 1888), 4 So. Rep. 545; *Stempel v. Thomas*, 89 Ill. 147.

In a partition suit brought by a homesteader's widow to divide the

homestead between herself and the children, it is error to allow a fee for complainant's solicitor to be taken out of the proceeds of sale, where the suit is an adversary one, and the solicitor has done all in his power to procure for complainant more than her share of the property. *Stunz v. Stunz*, 131 Ill. 210.

Where plaintiff brought a partition suit and defendant denied plaintiff's right, but failed in his defense, he cannot be charged with any part of plaintiff's attorney's fees. *Westmoreland v. Martin*, 24 S. Car. 238.

3. See *Freeman Part.*, § 549.

4. See *Redecker v. Brown*, 15 R. I. 52; *Fowler v. Evans*, 26 Tex. 636; *Langdon v. Palmer*, 133 Mass. 413.

The plaintiff's attorney acquires a lien for his fees and disbursements on the plaintiff's share of the property in suit. *Creighton v. Ingersoll*, 20 Barb. (N. Y.) 541.

The clerk of court may maintain an action for his costs against the defendants, although an allowance, by the decree, has been made to the plaintiff on account of these very costs. *Wickersham v. Denman*, 68 Cal. 383.

In *New York*, the fees of a commissioner to make partition, under the act for the partition of lands, must be taxed by the court; and until they are taxed, the commissioner cannot maintain a suit for them. *Smyth v. Bradstreet*, 5 Cow. (N. Y.) 213.

Commissioners appointed by the judge of probate to make partition of real estate among the heirs of a deceased person, may recover for their services performed faithfully and impartially, though in a mode unauthorized by and in violation of the warrant, when their report was not accepted and partition was not made, because it appeared, after their appointment, that the shares of some of the heirs were still uncertain. *Potter v. Hazard*, 11 Allen (Mass.) 187.

Where land is sold in partition pro-

15. Appeals and Reviews.—The questions arising in actions for partition are from their nature so largely within the discretion of the court that a judgment will not be overruled unless for clear and plain error.¹ Thus equal importance will be given to the report of the commissioners as to the verdict of a jury in ordinary cases,² and a finding will not be set aside merely because it is contrary to the weight of evidence,³ every presumption in favor of the regularity and validity of the proceedings below being entertained,⁴ though a decree is reversible for plain error of law.⁵

ceedings, the owners of nineteen-twentieths cannot, by an outside arrangement between themselves, affect the right of the deputy sheriff to his lawful fees, or the right to collect all the costs and the portion coming to the owner of the other twentieth. *Wiley v. Robert*, 27 Mo. 388.

1. *Scott v. Guernsey*, 48 N. Y. 106. And see *Neeld's Appeal*, 70 Pa. St. 113; *Fritz v. Fritz*, 16 Ohio St. 218; *Gore v. Gore*, 2 Ind. 55.

Where a married woman, suing for partition, obtains a decree by which one portion of the land is awarded to her husband, and none to her, and her interest in the entire estate is applied in part payment for such portion, she cannot resist the collection of the residue of the price of such portion by a suit to review the proceedings in partition; the effect of the decree being to give title to the husband for her benefit. *Barkley's Appeal* (Pa. 1888), 15 Atl. Rep. 896.

Where the grantees of partitioners hold separate and undivided interests, and the partition proceedings were not defective as to the parties, they cannot have the proceedings revived, for the purpose of barring of their rights persons who had not been made parties, so as to prevent them from asserting their legal rights by bringing ejectment. *Walsh v. Varney*, 38 Mich. 73.

A decree that a defendant in partition who is in default has no interest in the land in controversy, cannot be assigned as error by one of the other defendants. *Bowen v. Swander*, 121 Ill. 164.

2. *Livingston v. Clarkson*, 4 Edw. Ch. (N. Y.) 596; *Matter of Pearl St.*, 19 Wend. (N. Y.) 651; *Pardue v. West*, 1 Lea (Tenn.) 728; *Pierce v. Oliver*, 13 Mass. 211. But see *Buck v. Wolcott*, 13 Gray (Mass.) 268.

Ordering a sale instead of an actual partition is within the sound discretion

of the court, and therefore not appealable. *Scott v. Guernsey*, 48 N. Y. 106.

3. *Griffy v. Enders*, 60 Ind. 23.

Only questions of law decided by the trial court can be reserved and brought by appeal to the supreme court. And the question whether, on an order directing the sale of real estate in a partition suit, the same was to be sold, and was, in fact, sold, under the order of the court, subject to all existing liens thereon, is one of fact dependent for its proper answer upon the terms of that order. *Fouty v. Morrison*, 73 Ind. 333.

New Trial.—Neither the right of possession nor the title to real estate being in controversy in an ordinary partition suit, a new trial cannot be claimed as of right under the *Indiana* Rev. St., § 1064. *Gullett v. Miller*, 106 Ind. 75.

In *Georgia* where a return of partitioners is set aside by the verdict of a jury on objections filed thereto, and a new partition is awarded by order of the court, either party has the right to except to the second return before it is made the judgment of the court, and to have his objection passed upon by a jury. *Lancaster v. Morgan*, 54 Ga. 76.

4. See *Amony v. Carpenter*, 8 Blackf. (Ind.) 280; *Snyder v. Snyder*, 75 Iowa 255.

Mere Irregularities.—A decree of the ordinary ordering a sale of land for partition, will not be disturbed on appeal, on the ground that the summons in partition was served on the defendant by the applicant himself, instead of by the sheriff. *Upson v. Horn*, 3 Strobb. (S. Car.) 108; 49 Am. Dec. 633.

5. See *Chinn v. Murray*, 4 Gratt. (Va.) 348; *Henrichsen v. Hodgen*, 67 Ill. 179; *Shearer's Appeal*, 96 Pa. St. 61; *Hobart v. Hobart*, 58 Barb. (N. Y.) 296; *Field v. Hanscomb*, 15 Me. 365.

Upon a proceeding in equity for partition of real estate, if the decree

The interlocutory judgment determining the rights of the parties and appointing commissioners not being a final determination, is not, as a general rule, appealable,¹ but may be reviewed in connection with an appeal from the final decree.² When an appeal from the interlocutory judgment is permitted, this remedy is usually held to be exclusive, and an appeal in connection with the final decree is not permitted.³

A review of a judgment and proceedings on a petition for partition can be granted only upon the application of a party to the former process or of one representing the interests of a party.⁴

16. Conclusiveness and Effect of Partition.—The final judgment in proceedings for partition is conclusive not only as to the matters actually determined in the suit, but also as to every other matter which might have been litigated and decided as incident to the action.⁵

exceeds the prayer of the bill, which was taken *pro confesso*, it may be reversed. *Forquer v. Forquer*, 21 Ill. 294.

A decree in partition, to which all the co-tenants are not parties, will be reversed on appeal, though no objection for defect of parties was made until the decree was amended at a term subsequent to that at which the trial was had. *Holloway v. McIlhenny Co.*, 77 Tex. 657.

Error Without Injury.—In an action for partition of certain mining claims, a grantee of the plaintiff was made a beneficiary under the decree, though not a party to the suit. It appeared, however, that the sum to be distributed to him amounted to only \$10. *Held*, that although such grantee's right should not have been determined, the maxim, "*de minimis non curat lex*," applied, and the error was without substantial injury. *Wolff v. Prosser*, 73 Cal. 219; *Ormsby v. Ihmsen*, 34 Pa. St. 462.

1. See *Gates v. Salmon*, 28 Cal. 321; *Hastings v. Cunningham*, 35 Cal. 552; *Peck v. Courts*, 31 Cal. 208; *Peck v. Vandenberg*, 30 Cal. 21; *Tompkins v. Hyatt*, 19 N. Y. 534.

In *New York*, an appeal from the interlocutory judgment may be taken to the general term, but not to the court of appeals. *Tompkins v. Hyatt*, 19 N. Y. 534.

Beebe v. Griffing, 6 N. Y. 465.

2. *Peck v. Vandenberg*, 30 Cal. 21; *Cruger v. Douglass*, 2 N. Y. 571.

Where a party has appealed from a final judgment and afterwards accepts

his portion of the proceeds of the sale, he will be deemed to have acquiesced in the judgment and his appeal will be dismissed. *Alexander v. Alexander*, 104 N. Y. 643.

3. *Hihn v. Peck*, 30 Cal. 286; *Lorenz v. Jacobs*, 53 Cal. 24; *Regan v. McMahon*, 43 Cal. 626; *Barry v. Barry*, 56 Cal. 10.

In *Texas*, where it appears from the record that a judgment settling title in partition proceedings may have been rendered at a term preceding that at which the decree making the partition was entered, and the first judgment is not set out, errors assigned on an appeal from the second decree will not be considered, the first judgment fixing the rights of the parties upon the adjournment of the term at which it was rendered, and being the foundation for the second decree. *Scheiner v. Proband*, 73 Tex. 532.

4. *Elwell v. Sylvester*, 27 Me. 536.

The only authority for an action to review a proceeding for partition is in 2 *Indiana Rev. Stat.* 1876, p. 343, § 29. An infant defendant, whose guardian has failed to attend the partition, though represented therein by a guardian *ad litem*, cannot maintain such action until twenty-one years old. The infant's guardian cannot maintain such action. *Bundy v. Hall*, 60 Ind. 177.

5. *Jordan v. Van Epps*, 85 N. Y. 427; *Flagg v. Thruston*, 11 Pick. (Mass.) 431; *Ihmsen v. Ormsby*, 32 Pa. St. 200; *Foxcroft v. Barnes*, 29 Me. 129; *Herr v. Herr*, 5 Pa. St. 428; 47 Am. Dec. 416; *Burghardt v. Van Dusen*, 4 Allen (Mass.) 375; *Dixon v.*

Thus at common law¹ and in those States in which title cannot be put in issue in actions for partition,² the determination is conclusive as to possession only, partition being considered as purely a possessory action, which leaves the title as it found it. But even in such States it operates to estop a party from showing that at the time of the partition he was holding

Warters, 8 Jones (N. Car.) 450; Rabb v. Aiken, 2 McCord Eq. (S. Car.) 125; Forder v. Davis, 38 Mo. 107; Crane v. Kimmer, 77 Ind. 215; James v. Brown, 48 Iowa 568; Oliver v. Montgomery, 39 Iowa 601; Cooter v. Baston, 89 Ind. 185.

A decree of partition, in the orphans' court of *Pennsylvania* is necessarily as conclusive as a judgment of partition by a court of law. Herr v. Herr, 5 Pa. St. 428; 47 Am. Dec. 416.

1. Freeman on Judg., § 293; Allnat on Part. 123.

There is a difference between real and personal actions. In personal actions, a bar is perpetual, for the plaintiff cannot have an action of a real nature; but if the demandant be barred in a real action by judgment, he may have an action of a real nature to try the same right again. Ferrar's Case, 6 Coke Rep. 7.

That the law gives consecutive remedies for injuries to real estate, is recognized in all the books that treat on real actions. Vin. Abr. Judgment Q;

2. Pierce v. Oliver, 13 Mass. 212; Nash v. Cutler, 16 Pick. (Mass.) 500; Avery v. Aikens, 74 Ind. 283; Fleenor v. Driskill, 97 Ind. 27; Wade v. Deray, 50 Cal. 376; Harlan v. Langham, 69 Pa. St. 237; Nicely v. Boyles, 4 Humph. (Tenn.) 177; 40 Am. Dec. 638; Whillock v. Hale, 10 Humph. (Tenn.) 63; Richman v. Baldwin, 21 N. J. L. 398; Goundie v. Northampton Water Co., 7 Pa. St. 238; Davis v. Dickson, 13 Chic. Leg. News 117; Coates v. Street, 2 Ashm. (Pa.) 12; McBrown v. Dalton, 70 Cal. 89; Habig v. Dodge (Ind.), 25 N. E. Rep. 182; Jerauld v. Dodge (Ind. 1890), 25 N. E. Rep. 186; McBain v. McBain, 15 Ohio St. 337; 86 Am. Dec. 478; Dutch's Appeal, 57 Pa. St. 461; Griel v. Randall, 23 Vt. 236; Cane v. Halford, 3 Ves. 656; Allnat on Part. 123.

In McClure v. McClure, 14 Pa. St. 136, the court by COULTER, J., said: "What was the legal effect of that judgment? It did not determine title between tenants in common, who held

by descent from a common parent; it decided only that it should be parted and divided among them; it is the partition that is to remain firm and stable; the parties acquire no new title; there is nothing but dividing the old one among them."

Where parties are tenants in common by deed, no form of issue under a petition for partition can result in changing the operation of the deed; nor can the relation evinced thereby be altered as the result of such proceeding without impeaching the deed for fraud. Piper v. Farr, 47 Vt. 721.

The plea of a demandant of a sole seisin to the petition of partition, even if it were found against him, would only disprove his seisin at the time when the petition was filed; it would not prove that he was not seised at a time prior within the last twenty years; it could not be pleaded as a bar to a writ of right or as an estoppel thereof, since it did not and could not try the same question; the most that can be said is that it is admissible as evidence between the same parties, but it is evidence only of the very fact of sole seisin put in issue by the pleadings, and that can properly apply to sole seisin at the time when the petition was filed. Mallet v. Foxcroft, 1 Story (U. S.) 475.

A partition of land, made by order of court, on the petition of parties interested, is a good color of title; and where one takes actual possession of a part of a share allotted to him, his possession will be deemed to extend to the boundaries of the share so allotted, in the same manner as if he had taken possession under a deed. Bynum v. Thompson, 3 Ired. (N. Car.) 578.

A division was made by county court commissioners, in *Kentucky*, of a tract of land held by co-parceners, and possession was taken of the parts allotted to each, but no deeds were made. One sold to a third person, and the other united in the deed, purporting to relinquish title, but without warranty. Held, that the title only of the party selling passed to the vendee.

any part of the premises in severalty adversely to his co-tenants,¹ or that a co-tenant had no interest in the property in suit.² In those States in which title may be put in issue in such actions, however, the judgment establishes the title to the land which is the subject of the partition, and is final and conclusive as to all parties to the record and persons holding under them,³ and as each co-tenant after a compulsory partition can, if evicted, call upon the other co-tenants to contribute their proportion of his loss, each is estopped, as a general rule, from asserting any independent adverse title to the purparties assigned to the others.⁴ But it has been held that a party to a partition, who subsequently acquires a new and independent title which was in no way represented by any of the parties to the suit, may be permitted to assert it if it is paramount to the one involved in the

Murray v. Fishback, 5 B. Mon. (Ky.) 403.

1. Edson v. Munsell, 12 Allen (Mass.) 600; Oliver v. Montgomery, 39 Iowa 601; Cole v. Hall, 2 Hill (N. Y.) 627.

2. Burghard v. Van Deusen, 4 Allen (Mass.) 376; Bowers v. Dickinson, 30 W. Va. 709.

In a partition proceeding in equity between tenants in common of land, the individual land of one of the tenants was divided without objection with the land held in common. The decree purported to relieve the co-tenants from the obligation of warranty, and otherwise modified their common law rights. These modifications were understood by the parties. Held, that they were bound by the decree as rendered. Bowers v. Dickinson, 30 W. Va. 709.

3. Clapp v. Bromagham, 9 Cow. (N. Y.) 569; Forder v. Davis, 38 Mo. 107; Whittemore v. Shaw, 8 N. H. 397; Reese v. Holmes, 5 Rich. Eq. (S. Car.) 540; Muse v. Edgerton, Dud. Eq. (S. Car.) 179; Greenleaf v. Brooklyn etc. R. Co., 37 Hun (N. Y.) 435; Telford v. Barney, 1 Greene (Iowa) 575; Hart v. Steedman, 98 Mo. 452; Christy v. Spring Valley Water Works, 68 Cal. 73; Bobb v. Graham, 89 Mo. 200; Wood v. Drouthett, 44 Tex. 365. And see Mills v. Witherington, 2 Dev. & B. (N. Car.) 433; Morenhout v. Higuera, 32 Cal. 295; Short v. Prettyman, 1 Houst. (Del.) 334; Doolittle v. Don Maus, 34 Ill. 457.

Where, in a suit brought by heirs for the partition of their ancestor's land, the petition alleges that the ancestor is dead, and that the petitioners are his

heirs, a decree which finds that the allegations of the petition are true is, in a subsequent action for ejectment for the same land, *prima facie* evidence of such death and heirship. Benefield v. Albert (Ill. 1890), 24 N. E. Rep. 634.

Equitable Titles.—It has been held in *Ohio* and *Illinois*, that a proceeding in partition, under the statute of *Ohio*, deals with legal titles only, and may be had without prejudice to equities in the premises. Williams v. Van Tuyl, 2 Ohio St. 336; Greenup v. Sewell, 18 Ill. 53.

The provisions of 2 *New York* Rev. St. 316-332—have not changed the rule that partition deals only with joint or common interests. The equitable claims of a tenant in possession are not affected by the judgment in partition, although he appeared and pleaded. Esterbrook v. Savage, 21 Hun (N. Y.) 145. So in *Alabama*. Caperton v. Hall, 83 Ala. 171.

4. Venable v. Beauchamp, 3 Dana (Ky.) 325; 28 Am. Dec. 84; Walker v. Hall, 15 Ohio St. 362; 86 Am. Dec. 482; Mills v. Witherington, 2 Dev. & B. (N. Car.) 433; Davis v. King, 87 Pa. St. 261; Swinburne v. Swinburne, 28 N. Y. 568; Tittsworth v. Stout, 49 Ill. 78; Funk v. Newcomer, 10 Md. 301. And see Sned v. Atherton, 6 Dana (Ky.) 276; 33 Am. Dec. 70; Rothwell v. Dewees, 2 Black (U. S.) 613; Mandeville v. Solomon, 39 Cal. 125.

A judgment in partition is conclusive upon all the parties thereto as to whatever title or claim they had to the land at the time of the rendition of the judgment. Christy v. Spring Valley Water Works, 68 Cal. 73; Bobb v. Graham, 89 Mo. 200.

former action.¹ So it has been laid down by excellent authorities that a final judgment from which no appeal has been taken is binding and conclusive upon all parties to the action and all persons claiming under them, even though it may have been irregular,² but not so, whether regular or irregular, as to persons not parties.³ Persons not *in esse*, however, who are entitled to an interest in the premises, though not made parties and though no steps have been taken to bring in unknown parties, are considered as bound by the decree upon the theory that they are

1. Tapley *v.* McPike, 50 Mo. 592; Woodbridge *v.* Banning, 14 Ohio St. 330; Avery *v.* Atkins, 74 Ind. 283; Richardson *v.* Cambridge, 2 Allen (Mass.) 118; 79 Am. Dec. 767; Argyle *v.* Dwinel, 29 Me. 29; Morrison *v.* Laughter, 2 Jones (N. Car.) 354; Grice *v.* Randall, 23 Vt. 239; Nicely *v.* Boyles, 4 Humph. (Tenn.) 177; 40 Am. Dec. 638.

But in *Delaware*, where the decree divided the premises between the parties in fee simple, it was held, in a subsequent ejectment suit, that the heirs were estopped from denying P's title in fee simple, although they claimed as against it under title derived from persons who were not parties to the partition. Short *v.* Prettyman, 1 Houst. (Del.) 334.

2. Reed *v.* Reed, 46 Hun (N. Y.) 212; Prior *v.* Prior, 18 N. Y. St. Rep. 566; 49 Hun (N. Y.) 502; Jackson *v.* Hasbrouck, 3 Johns. (N. Y.) 331; Baggott *v.* Sawyer, 25 S. Car. 405; Williams *v.* Wescott, 77 Iowa 332; Barney *v.* Miller, 18 Iowa 460; Thompson *v.* Frew, 107 Ill. 478; Brooks *v.* Ackerly (N. Y. 1888), 17 N. E. Rep. 412; Hart *v.* Steedman, 98 Mo. 452; Williams *v.* Wescott, 77 Iowa 332; Woodward *v.* Elliott, 27 S. Car. 368; Bobb *v.* Gilmore (Mo. 1889), 7 S. W. Rep. 5; Bobb *v.* Graham, 89 Mo. 200; Society for Propagating Gospel *v.* Young, 2 N. H. 310; Dewart *v.* Purdy, 29 Pa. St. 113; Youngs *v.* Heffner, 36 Ohio St. 235; Succession of Pininger, 25 La. Ann. 53; Drane *v.* Gregory, 3 B. Mon. (Ky.) 609; Best *v.* Vanhook (Ky. 1890), 13 S. W. Rep. 119.

But if a disseisor of one tenant in common has effected a partition of the estate, the disseisee, not being bound by the partition, may recover possession for an undivided moiety, or he may waive his right of objecting to the partition, and recover the part which was assigned to the disseisor as

his property. Brown *v.* Wood, 17 Mass. 68.

In *Ohio*, persons who are made parties to a partition by publication, and without actual notice, are not estopped thereby from setting up their legal title. McBain *v.* McBain, 15 Ohio St. 337; 86 Am. Dec. 478.

When a decree is set aside, and a new decree entered at the same term as the former one, and a party who receives less land by the second decree than by the first appears and objects to the proceedings, such second decree is binding upon his vendees, who purchased after the first decree was rendered, and before any steps had been taken to set it aside. Sharp *v.* Elliott, 70 Tex. 666.

A judgment of a proper court making partition, although a part of the tenants in common may not have been made parties, is color of title, and where the other requirements of the statute have been performed, may be effectually interposed as a bar. Hassett *v.* Ridgely, 49 Ill. 197.

The Doctrine of *Lis Pendens*.—To bind innocent purchasers for a valuable consideration by the proceedings in a suit for partition, under the doctrine of *lis pendens*, the cause should be prosecuted with reasonable dispatch. A suspension of proceedings for more than five years would be an unreasonable delay. Bybee *v.* Summers, 4 Oregon 354.

3. Mead *v.* Jenkins, 27 Hun (N. Y.) 570; Cryer *v.* Andrews, 11 Tex. 170; Grice *v.* Randall, 23 Vt. 239. And see Bachman *v.* Chrisman, 23 Pa. St. 162; Nicely *v.* Boyles, 4 Humph. (Tenn.) 177; 40 Am. Dec. 638; Moore *v.* Townshend, 54 N. Y. Super. Ct. 245; Childs *v.* Hayman, 72 Ga. 791; Vogle *v.* Brown, 120 Ill. 338; Gayle *v.* Johnson, 80 Ala. 395; Caruth *v.* Grigsby, 57 Tex. 259; Leinen *v.* Elter, 43 Hun (N. Y.) 249; May *v.* Fenton, 7 J. J. Marsh. (Ky.) 306; Mellon *v.* Reed,

virtually represented by the tenant of the particular estate.¹ But where a judgment of partition of sale would have the effect of cutting off a remainder-man, whose rights were created by will, if the decree does not provide for such rights, it cannot be permitted to cut them off.²

The remedy provided for the correction of a decree in an action for partition is an appeal, and if none is taken it is conclusive, when the court had jurisdiction of the parties and subject matter, and not subject to collateral attack,³ except for

114 Pa. St. 647; *O'Conner v. McMahon* (Supreme Ct.), 7 N. Y. Supp. 225.

A father who acts as guardian *ad litem* for his children, in a suit for partition brought against them, is not thereby made a party to the suit so as to be concluded by a judgment in favor of the children, or so as to be estopped to controvert their title. *Terrill v. Boulware*, 24 Mo. 254.

A party to a proceeding for partition, in which land previously held in common is set off to her and described as leased to B for 99 years, is not thereby estopped from insisting as against B, upon defects in his title of lease, B not being a party to such suit, and her title to the land not being derived through it, and his lease being defective on its face. *Howard v. Carpenter*, 11 Md. 259.

A sale under a decree in partition proceedings, to which the husband is a party, but the wife is not, will not bar her right of dower. The statute does not cut off this right, unless the wife is made a party. *Greiner v. Klein*, 28 Mich. 12.

Jurisdiction of Person.—If an infant remainder-man is made a party, but is not properly brought before the court, the decree will be reversed on error, no matter how the question is presented. *Gayle v. Johnson*, 80 Ala. 395.

1. *Mead v. Mitchell*, 17 N. Y. 210; 72 Am. Dec. 455; *Jenkins v. Fahey*, 73 N. Y. 355; *Clemens v. Clemens*, 37 N. Y. 59; *Thompson v. Gotham*, 9 Ohio 170; *Hart v. Steedman*, 98 Mo. 452; *Cryer v. Andrews*, 11 Tex. 170; *Martyn v. Perryman*, 1 Ch. R. 235; *Brook v. Hertford*, 2 P. Wms. 418; 1 Story's Eq. Jur., § 656 a.

Unknown Owners.—If a plaintiff, tenant in common, files a bill for partition, and the bill is taken as confessed against unknown owners, and partition is made and confirmed, the unknown owners of the residue cannot

bring ejectment against the plaintiff for the part assigned to him. *Sharp v. Pratt*, 15 Wend. (N. Y.) 610. See also *Byrnes v. Sampson*, 74 Tex. 79.

2. *Monarque v. Monarque*, 80 N. Y. 320. And see *Wadhams v. Gay*, 73 Ill. 415; *McArthur v. Scott*, 113 U. S. 340.

Liens.—Where the return of a writ of partition appraised the realty at \$17,000, the personalty at \$61,000, and the debts unpaid at less than \$4,000, and the order confirming it provided that "the property," etc., should be subject, in the hands of the distributees, to the liens of any judgments or executions which might thereafter be recovered against the administratrix, held, that the order should not be construed as providing for any liens upon the lands. *Richardson v. Inglesby*, 13 Rich. Eq. (S. Car.) 59.

3. *Jordan v. Van Epps*, 85 N. Y. 427; *Lang v. Clemens*, 107 Ill. 133; *Ventress v. Brown*, 30 La. Ann. 1012; *Davis v. Wells*, 37 Tex. 606; *Vensel's Appeal*, 77 Pa. St. 71; *Brawley v. Ranney*, 67 Mo. 280; *Merklein v. Trapnell*, 34 Pa. St. 42; 75 Am. Dec. 634; *Snevily v. Wagner*, 8 Pa. St. 396; *Wilson v. Smith*, 22 Gratt. (Va.) 493; *Davis v. Wells*, 37 Tex. 606; *Bohart v. Atkinson*, 14 Ohio 228; *Waltz v. Borroway*, 25 Ind. 380; *Cole v. Hall*, 2 Hill (N. Y.) 625; *Herbert v. Smith*, 6 Lans. (N. Y.) 493; *Wright v. Marsh*, 2 Greene (Iowa) 95; *Fowler v. Gordon*, 24 La. Ann. 270; *Painter v. Henderson*, 7 Pa. St. 48. And see *Foster v. Abbot*, 8 Met. (Mass.) 596; *Crane v. Kimmer*, 77 Ind. 215; *Latrielle v. Dorleque*, 35 Mo. 233; *Lair v. Hunsicker*, 28 Pa. St. 115; *Foster v. Dugan*, 8 Ohio 87; *Wilson v. Bull*, 10 Ohio 250; *Croghan v. Livingston*, 17 N. Y. 220; *Schoen v. McComb*, 4 Houst. (Del.) 213; *Ebbs v. Commonwealth*, 11 Pa. St. 374; *Brace v. Reid*, 3 Greene (Iowa) 422; *McBrown v. Dalton*, 70 Cal. 89; *Williams v. Wes-*

fraud, surprise or mistake;¹ and every intendment will be made in support of the judgment, unless the contrary appears upon the face of the record.² But where the record affirmatively shows the omission of a jurisdictional step,³ or in some States where such omission is clearly and explicitly established by evidence

cott, 77 Iowa 332; *Johnson v. Carson*, 3 Greene (Iowa) 499; *Stark v. Carroll*, 66 Tex. 393; *Stempel v. Thomas*, 89 Ill. 147; *Bayhi v. Bayhi*, 35 La. Ann. 527.

Though petition for partition describes more land than belongs to the tenants in common, and though the commissioners who make partition may have set off to the petitioner a larger portion of the land owned in common than they would have set off if the petitioner had truly described the land, yet a judgment is not void, which establishes the partition as made by the commissioners. *Austin v. Charlestown Female Seminary*, 8 Met. (Mass.) 196; 41 Am. Dec. 497.

One not a party to a proceeding for partition cannot bring a bill to modify the decree. *Henderson v. Wallace*, 72 N. Car. 451.

When suit is brought to recover land allotted to plaintiff in partition, his right to recover against a defendant showing no title will not be defeated by showing the invalidity of the proceedings under which the partition was made. *Truehart v. McMichael*, 46 Tex. 222.

Where, in partition, the judgment determining the rights of the parties, and decreeing that the land be so divided "as to give to each party the land upon which his improvements are situated," appears to have been rendered on a trial on the merits, the court cannot, at the subsequent term, inquire into an agreement of the parties relative to the division, but must have the division made according to the decree. *Petrucio v. Seardon*, 76 Tex. 639.

On a division of land among heirs, a surplus of "third-quality lands" was left undivided. Held, that parol evidence was inadmissible to show that the third-quality lands included in the lots set off to the several heirs were also intended to be reserved for future division. *Ex parte Morel*, Charl. (Ga.) 240.

In proceedings for partition, which result in the division of the land among a part of the heirs who recog-

nize to pay the shares of the other, such recognizances are not void merely because the proceedings were erroneous. *Commonwealth v. Haffey*, 6 Pa. St. 348.

In *North Carolina* it is held that a bill cannot be supported to set aside a decree formerly made between the parties for a partition of lands held in common, though it is alleged that the facts then admitted, and found by the court, and on which the decree was founded, did not in fact exist. *Stewart v. Misell*, 8 Ired. Eq. (N. Car.) 244.

1. *Wilson v. Smith*, 22 Gratt. (Va.) 493; *Lockhart v. John*, 7 Pa. St. 137; *Nichols v. Smith*, 22 Pick. (Mass.) 316; *Bayhi v. Bayhi*, 35 La. Ann. 527.

Where a divorced woman, concealing from the court the fact of her divorce, procures a decree of partition of lands of which her former husband died seised, in a suit against his minor children, the decree is void, and should be vacated, even as against a purchaser of her share under the partition brought by him with a knowledge of such concealment by her. *Daleschal v. Geiser*, 36 Kan. 374.

2. See *Castle v. Matthews*, Hill & D. Supp. (N. Y.) 438; *Crane v. Kimmer*, 77 Ind. 215; *Davis v. Wells*, 37 Tex. 606; *Richards v. Rote*, 68 Pa. St. 248; *Girard L. Ins. Co. v. Farmers' etc. Bank*, 57 Pa. St. 388; *Wright v. Marsh*, 2 Greene (Iowa) 95; *Millican v. Millican*, 24 Tex. 426; *Stempel v. Thomas*, 89 Ill. 147.

3. *Schuyler v. Marsh*, 37 Barb. (N. Y.) 356; *Lockhart v. John*, 7 Pa. St. 137; *Castle v. Matthews*, Hill & D. Supp. (N. Y.) 438; *Tindall v. Tindall* (Miss. 1888), 3 So. Rep. 581.

Where a former partition was of part only of the land held in common, and all the co-tenants were not made parties to the suit, the judgment will not be a bar or estoppel to a subsequent petition, to which all the co-tenants are made parties. *Colton v. Smith*, 11 Pick. (Mass.) 311; 22 Am. Dec. 375; *Ramsdel v. Creasey*, 10 Mass. 170.

A decree of partition between heirs, some of whom are aliens, does not

dehors the record,¹ the matters in question are open to collateral examination, the conclusiveness, effect and immunity from collateral attack of a decree in partition being the same as that of an ordinary judgment at law.²

a. EFFECT IN PROBATE COURT.—Proceedings for partition in connection with the settlement of the estates of deceased persons must, upon principle, be regarded as binding and conclusive to the same extent as other legal proceedings,³ title to the purpart, together with all fixtures upon it and appurtenances and incidents belonging to it, vesting in the heir to whom it is assigned,⁴ paramount and superior to any conveyance or encumbrance

estop those who are not aliens from claiming the whole, in ejectment. *Contee v. Godfrey*, 1 Cranch (C. C.) 479.

In proceedings under the *Kentucky* act of 1811, in relation to partitions, the record should exhibit the prescribed proof of proper notice to all concerned. *Craig v. Barker*, 4 Dana (Ky.) 600. And see *Guyton v. Shane*, 7 Dana (Ky.) 498; *Smith v. Moore*, 5 Dana (Ky.) 417.

A partition ordered by the probate court before the decision of *Davenport v. Caldwell*, 10 S. Car. 317, which decided that the probate court had no jurisdiction of partition of real estate, will not be declared void for want of such jurisdiction. *Tederall v. Bouknight*, 25 S. Car. 275.

A married woman, is not estopped by proceedings and decree in partition, where, after the interlocutory order of partition was made, and commissioners were appointed and process was issued to them, the court, on motion, without notice to parties, permitted the petition to be amended by the insertion of other lands, and changed the order and process to agree with the amended petition. *Falls v. Hawthorn*, 30 Ind. 444.

1. *Shumway v. Stillman*, 4 Cow. (N. Y.) 294; 15 Am. Dec. 374. And see *Mills v. Martin*, 19 Johns. (N. Y.) 33; *Thomas v. Robinson*, 3 Wend. (N. Y.) 267; *Wheeler v. Raymond*, 8 Cow. (N. Y.) 311; *Van Dyke v. Bastedo*, 15 N. J. L. 224; *Smith v. Rhoades*, 1 Day (Conn.) 168; *Castle v. Mathews, Hill & Co.* Supp. (N. Y.) 438; *Granger v. Clark*, 22 Me. 128; *Peacock v. Bell*, 1 Saund. 73; *Dean v. Hooper*, 31 Me. 109; *Harris v. Preston*, 5 Eng. (Ark.) 206.

The recital, in a deed, made under an order for partition, of the term

when the order is made, is not conclusive as to that fact, but may be explained by proofs. *Glover v. Ruffin*, 6 Ohio 255.

2. See *Herr v. Herr*, 5 Pa. St. 428; 47 Am. Dec. 416; *Flagg v. Thurstont*, 11 Pick. (Mass.) 431; *Burghardt v. Van Deusen*, 4 Allen (Mass.) 375; *Foxcroft v. Barnes*, 29 Me. 129; *Guedici v. Boots*, 42 Cal. 452; *Winn v. Dickson*, 15 La. Ann. 273; *Dixon v. Warters*, 8 Jones (N. Car.) 450; *Ihmssen v. Ormsby*, 32 Pa. St. 200; *Dougllass v. Viele*, 3 Sandf. Ch. (N. Y.) 439; *Rabb v. Arken*, 2 McCord Eq. (S. Car.) 125; *Barney v. Miller*, 18 Iowa 460; *Boyd v. Doty*, 8 Ind. 373; *Ross v. Armstrong*, 25 Tex. Supp. 372; *George's Appeal*, 12 Pa. St. 260; *Manning v. Horr*, 18 Iowa 117.

3. *Freeman on Part.*, § 564; *Carpenter v. Green*, 11 Allen (Mass.) 28; *Merklein v. Trapnell*, 34 Pa. St. 42; 75 Am. Dec. 634; *Vansel's Appeal*, 77 Pa. St. 71. And see the other cases cited in this subdivision.

4. *Plumer v. Plumer*, 30 N. H. 570.

Where land has been awarded to one of the heirs subject to the payment of a sum of money, title does not vest in the heir until the payment is made or secured. *Thayer v. Thayer*, 7 Pick. (Mass.) 209; *Jenks v. Howland*, 3 Gray (Mass.) 536; *Barrington v. Clark*, 2 P. & W. (Pa.) 115; 21 Am. Dec. 432; *Smith v. Scudder*, 11 S. & R. (Pa.) 325; *Bellas v. Evans*, 3 P. & W. (Pa.) 479.

Where security by recognizance for the payment of owelty is taken, it operates as a lien upon the lands assigned to the party required to pay it. *Kean v. Franklin*, 5 S. & R. (Pa.) 147; *Riddle's Appeal*, 37 Pa. St. 177; *Share v. Anderson*, 7 S. & R. (Pa.) 43; 10 Am. Dec. 421.

which may have been made by any of his co-heirs.¹ Such a partition cannot be avoided collaterally, even if irregular,² and is binding upon minors and cannot be disaffirmed by them upon attaining their majority.³ But it may be impeached for fraud⁴ or avoided for jurisdictional defects,⁵ and the decree conveys to the heirs a contingent interest only, defeasible in behalf of the creditors of the intestate.⁶

PARTNERSHIP—(See also CONTRIBUTION, vol. 4, p. 1; GOOD WILL, vol. 9, p. 927; JOINT STOCK COMPANIES, vol. 11, p. 1036; LIMITED PARTNERSHIP, vol. 13, p. 802; NOVATION, vol. 16, p. 862; RECEIVERS).

I. Definition, 828.

II. What Constitutes Partnership, 830.

1. Intention of the Parties, 832.

a. Sharing Profit and Loss, 835.

b. Sharing Profits With No Mention as to Losses, 841.

(1) Stipulation Against Losses, 845.

c. Sharing Profits as Compensation for Services, 845.

d. Sharing Profits for Rent, 849.

e. Profits as Interest on and Payment of Loans and Advances, 850.

f. Sharing Gross Receipts, 853.

g. Sharing Losses Only, 855.

h. Independent Contractors, 856.

i. Joint Ownership (See also JOINT TENANTS, vol. 11, p. 1057), 859.

2. Associations Not for Profit, 862.

3. Associations and Defective Corporations, 863.

a. Unincorporated Associations, 865.

b. Defective Corporations, 866.

4. Mining Partnerships (See also MINES AND MINING CLAIMS, vol. 15, p. 499), 868.

5. Persons in a Representative Capacity, 870.

III. The Delectus Personarum, 872.

IV. Executory Partnerships, 873.

V. Partnership as to Third Persons, 877.

1. Holding Out, 879.

a. What Constitutes a Holding Out, 882.

b. Effect of Holding Out, 886.

VI. Kinds of Partnership, 886.

1. With Reference to the Class of Their Business, 886.

a. Trading Partnerships, 886.

b. Non-trading Partnerships, 887.

1. Steel's Appeal, 86 Pa. St. 222; Holcomb v. Sherwood, 29 Conn. 418.

A proceeding in the probate court of *Massachusetts*, pursuant to an agreement between tenants in common for partition of the estate, although incompetent to effect the partition, was held equivalent to a license to each tenant that each might enter and occupy the part assigned to him by such intended partition, so as to protect him from the penalties of the act of 1785, ch. 62, until the commencement of legal process for partition, which was holden to be a revocation of such license. Pond v. Pond, 14 Mass. 403.

The neglect of the petitionee in a petition for partition, pending in the probate court, to make any question about the title until after the appointment of the committee to make parti-

tion, is a waiver of the question, and it is then too late to dispute the title set forth in the petition, so as to oust the probate court of jurisdiction. Ela v. McConihe, 35 N. H. 279.

2. Snevily v. Wagner, 8 Pa. St. 396.

3. Gelbach's Appeal, 8 S. & R. (Pa.) 205.

4. Mitchell v. Kintzer, 5 Pa. St. 216; 47 Am. Dec. 408.

5. See Dean v. Hooper, 31 Me. 107; Richards v. Rote, 68 Pa. St. 248.

But when the name appears on the record it will be conclusively presumed that due notice has been given, even though not affirmatively shown in the record. Richards v. Rote, 68 Pa. St. 248.

6. Drescher v. Allentown Water Co., 52 Pa. St. 225; Gregory v. High, 29 Ind. 527.

2. *With Reference to the Character and Extent of Their Business*, 888.
 - a. *Universal Partnerships*, 888.
 - b. *General Partnerships*, 889.
 - c. *Particular Partnerships*, 889.
 - d. *Limited Partnerships* (See also LIMITED PARTNERSHIPS, vol. 13, p. 802), 890.
- VII. *Partnership Purposes*, 890.
 1. *Illegal Partnerships* (See also ILLEGAL CONTRACTS, vol. 9, p. 879), 891.
- VIII. *Formation of Partnership and Construction of Articles*, 895.
 1. *Formed by Agreement*, 895.
 2. *Consideration*, 897.
 3. *Effect of the Statute of Frauds* (See also FRAUDS, STATUTE OF, vol. 8, p. 657), 898.
 4. *Time of Commencement*, 900.
 5. *Duration or Continuance*, 902.
 6. *Specific Performance* (See also SPECIFIC PERFORMANCE), 903.
 7. *Construction of Partnership Articles*, 904.
 - a. *Construction of Particular Provisions*, 906.
- IX. *The Firm Name*, 912.
 1. *Use of the Firm Name by the Partners*, 916.
- X. *The Firm as an Entity*, 918.
- XI. *Persons Composing the Firm*, 920.
 1. *Who May be a Partner*, 920.
 - a. *Aliens*, 920.
 - b. *Persons Insane and Under Guardianship*, 921.
 - c. *Infants*, 921.
 - d. *Married Women*, 923.
 - e. *Partnerships*, 926.
 - f. *Corporations* (See also CORPORATIONS, vol. 4, p. 184), 926.
 2. *Kinds of Partners*, 928.
 - a. *Actual and Ostensible Partners*, 928.
 - b. *Dormant Partners*, 928.
 3. *Sub-partners*, 933.
- XII. *Partnership Property*, 934.
 1. *In General*, 934.
 - a. *What Is Partnership Property*, 935.
 - b. *Effect of Change in Partnership*, 940.
 - c. *Right of Possession*, 941.
 2. *Partnership Real Estate*, 944.
 - a. *What Is*, 944.
 - b. *Doctrine of Equitable Conversion* (See also EQUITABLE CONVERSION AND RE-CONVERSION, vol. 6, p. 664), 952.
1. *The Legal Title*, 958.
 - (1) *Conveyance to Firm in Firm Name*, 959.
 - (2) *Power of One Partner to Convey*, 960.
- d. *Proof of Partnership Character*, 962.
- XIII. *The Interests of the Partners*, 964.
 1. *Presumption of Equality*, 964.
 2. *Sale or Incumbrance of a Partner's Interest*, 966.
 3. *Separate Sale of Each Partner's Share*, 970.
- XIV. *Conversion of Joint Into Separate Property*, 971.
 1. *Changes in Partnership*, 978.
 2. *Legality of the Conversion*, 980. [987.]
- XV. *Powers and Rights of Partners*, 989.
 1. *Scope of the Business*, 989.
 - a. *Nature of the Business*, 989.
 - b. *Usage of Similar Firms*, 991.
 - c. *Former Practice of the Same Firm*, 992.
 - d. *Influence of Necessity on Scope*, 992.
 2. *Distinction Between Trading and Non-trading Firms*, 993.
 3. *Restrictions Upon the Powers of a Partner*, 995.
 4. *Power of a Majority*, 999.
 5. *Powers to Perform Particular Acts*, 1001.
 - a. *To Execute Sealed Instruments* (See also SEAL), 1001.
 - (1) *The Effect of Unauthorized Execution*, 1005.
 - (2) *The Remedy*, 1006.
 - b. *To Employ Servants and Agents*, 1007. [1008.]
 - c. *To Purchase Property*.
 - d. *To Sell or Incumber Property*, 1010.
 - e. *To Borrow Money*, 1015.
 - f. *To Make Negotiable Paper* (See also BILLS AND NOTES, vol. 2, p. 313), 1018.
 - (1) *Trading Partnerships*, 1018.
 - (2) *Non-trading Partnerships*, 1026.
 - (3) *Negotiable Paper in the Name of a Partner*, 1027.

- (4) *To Draw Checks on the Firm Deposits*, 1033.
- (5) *How Far Bona Fide Holders Are Protected*, 1033.
- g. *To Collect and Pay Debts*, 1037.
- (1) *Collection of Debts Due the Firm*, 1037.
- (2) *Payment of Debts Due from the Firm*, 1040.
- h. *To Confess Judgment for Firm Indebtedness* (See also JUDGMENTS, vol. 12, p. 58), 1042.
- i. *To Assign for the Benefit of Creditors* (See also ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 1, p. 845), 1045.
- j. *To Submit to Arbitration* (See also ARBITRATION AND AWARD, vol. 1, p. 646), 1048.
6. *Ratification Generally*, 1050.
- XVI. Duties and Liabilities of Partners**, 1054.
1. *As Between Themselves*, 1054.
- a. *Competition With the Firm*, 1058.
- b. *Obtaining Benefits Which Should Equitably Belong to the Firm*, 1058.
- c. *Purchase of a Partner's Interest*, 1061.
2. *As to Third Parties*, 1062.
- a. *Liability on Contracts*, 1062.
- b. *Liability for Torts*, 1065.
- (1) *Fraud and Misrepresentation*, 1068.
- (2) *Moneys or Property Wrongfully Obtained*, 1069.
- (3) *Misapplication of Money or Property*, 1070.
- (4) *Trust Funds Used by a Partner for the Firm*, 1071.
- (5) *Contribution Between Partners* (See CONTRIBUTION, vol. 4, p. 1), 1073.
- c. *Criminal Liability*, 1074.
- XVII. Matters Relating to the Conduct of the Business**, 1074.
1. *Contracts, Acts and Admissions of One Partner*, 1074.
2. *Notice to or Knowledge of One Partner*, 1080.
3. *The Firm as an Agent*, 1083.
4. *Insurance of Partnership Property* (See FIRE INSURANCE, vol. 7, p. 1002), 1084.
5. *Application of Payments* (See also PAYMENTS), 1086.
6. *Novation of Partnership Obligations* (See NOVATION, vol. 16, p. 862), 1088.
7. *Merger of Partnership Indebtedness* (See also MERGER, vol. 15, p. 336), 1088.
8. *Assignment for the Benefit of Creditors* (See also ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 1, p. 845), 1090.
- XVIII. Dissolution**, 1093.
1. *Partnerships at Will*, 1095.
2. *Partnerships for a Fixed Term*, 1097.
- a. *Mutual Consent*, 1098.
- b. *Death*, 1098.
- c. *Sale of a Partner's Interest*, 1099.
- (1) *Sale of the Whole Property*, 1100.
- d. *Fraud Vitiating the Partnership Contract*, 1101.
- e. *Insanity*, 1102.
- f. *Insolvency*, 1103.
- g. *Hopelessness of Success*, 1104.
- h. *War*, 1105.
- i. *Marriage*, 1106.
- j. *Misconduct*, 1106.
- (1) *Abandonment*, 1108.
- k. *Abandonment of the Enterprise*, 1109.
- l. *Completion of the Enterprise*, 1109. [1109.]
3. *Dissolution by Contract*,
- a. *Purchase by One Partner of the Interest of Another*, 1109.
- b. *Assumption of Debts by Purchasing Partner*, 1111.
- (1) *What Debts Are Included*, 1115.
- c. *Taking in a New Partner*, 1116.
4. *Notice of Dissolution*, 1117.
- a. *When Necessary*, 1118.
- b. *How Given*, 1122.
- (1) *Former Dealers or Customers*, 1122.
- (2) *Non-dealers*, 1126.
- c. *Notice by Changes in the Firm*, 1127.
- d. *Holding Out After Dissolution*, 1129.

5. *Effect of Dissolution*, 1129.
 - a. *Effect on the Firm Sureties*, 1131.
- XIX. *Provision for Continuance After Death*, 1134.
- XX. *Powers and Rights of Partners after Dissolution*, 1137.
 1. *To Collect Debts*, 1140.
 2. *Power to Pay Firm Indebtedness*, 1141.
 3. *To Dispose of Firm Property*, 1142.
 4. *To Create New Indebtedness*, 1143.
 5. *To Revive Old Debts* (See also *LIMITATION OF ACTIONS*, vol. 13, p. 667), 1146.
 6. *To Complete Unfulfilled Contracts*, 1150.
 7. *Power After Dissolution by Bankruptcy of a Partner*, 1151.
 8. *Power After Dissolution by Sale of an Interest*, 1153.
 9. *Compensation for Winding Up*, 1154.
- XXI. *Surviving Partners*, 1154.
 1. *Who Is a Surviving Partner*, 1157.
 2. *Powers of a Surviving Partner*, 1159.
 - a. *As Against the Representatives of the Deceased Partner* (See also *EXECUTORS AND ADMINISTRATORS*, vol. 7, p. 165), 1161.
 - (1) *The Administrator's Rights and Duties*, 1164.
 - b. *Power of Disposition*, 1167.
 - (1) *Purchase by the Survivor of the Decedent's Interest*, 1169.
 - c. *Power to Contract*, 1170.
 - (1) *Unfulfilled Contracts*, 1171.
 - d. *Action by and Against Surviving Partners*, 1172.
 - (1) *The Remedy of Firm Creditors*, 1175.
 - e. *The Surviving Partner as the Executor of the Deceased Partner* (See also *EXECUTORS AND ADMINISTRATORS*, vol. 7, p. 165), 1178.
 - f. *The Statutory Partnership Administrator*, 1180.
 - g. *Compensation for Winding Up*, 1183.
- XXII. *Good Will* (See also *GOOD WILL*, vol. 8, p. 1366), 1184.
1. *Protection and Disposition of Good Will*, 1186.
2. *Effect of Sale*, 1188.
3. *The Use of the Old Firm Name*, 1189.
4. *Professional Partnerships*, 1192.
5. *Agreements Not to Compete* (See also *ILLEGAL CONTRACTS*, vol. 9, p. 879), 1193.
- XXIII. *Winding Up and Distribution*, 1195.
 1. *As to Creditors and Third Persons*, 1199.
 - a. *Effect of Partner's Lien*, 1199.
 - (1) *No Joint Estate*, 1205
 - (2) *Proof by One Estate Against the Other*, 1207.
 2. *As Between the Partners*, 1213.
 - a. *Payment of Losses*, 1215.
 - (1) *Losses Caused by a Partner*, 1217.
 - b. *Return of Premium*, 1221.
 - c. *Allowance for Compensation*, 1223.
 - d. *Allowance for Expenses and Outlays*, 1225.
 - e. *Allowance for Interest*, 1227.
 - f. *Secret Profits or Profits Made at the Expense of the Firm*, 1232.
 - XXIV. *Actions By and Against Partners*, 1236.
 1. *Parties Plaintiff*, 1236.
 2. *Parties Defendant*, 1243.
 3. *Appeals*, 1246.
 4. *Removal to the United States Courts*, 1247.
 5. *Recovery of Property Wrongfully Disposed of by a Partner*, 1247.
 - XXV. *Actions in Firm Name*, 1250.
 - XXVI. *Actions at Law Between Partners*, 1254.
 1. *Matters Distinct from the Partnership Accounts*, 1257.
 - a. *Transactions Independent of the Partnership Relations*, 1257.
 - b. *Transactions Connected With the Partnership, but Distinct from Its Accounts*, 1262.
 - c. *Torts*, 1266.
 2. *Final Balances*, 1267.
 3. *Common Law Action of Account*, 1270.
 4. *Provisional Remedies Between Partners*, 1271.

XXVII. Actions Between Firms Having Common Members, 1271

XXVIII. Actions in Equity Between Partners, 1273.

1. *Actions for an Accounting, 1273.*
 - a. *Who May Maintain the Action, 1277.*
 - b. *Parties Defendant, 1279.*
 - c. *Defenses, 1282.*
 - (1) *Statute of Limitations, 1282.*
 - (2) *Account Stated, 1285.*
 - (3) *Pendency of Another Action, 1289.*
 - d. *Practice, 1289.*
 - (1) *The Direction to Account, 1289.*
 - (2) *Taking the Account, 1290.*
 - (3) *The Master's Report, 1293.*
 - (4) *Costs, 1295.*
 - e. *Sale and Distribution, 1296.*
2. *Injunctions (See INJUNCTIONS, vol. 10, p. 950), 1298.*
3. *Receivers (See also RECEIVERS), 1298.*
 - a. *When Appointed, 1298.*
 - b. *Who May be Appointed, 1302.*
 - c. *Continuance of the Business, 1302.*

XXIX. Pleading, 1303.

1. *Set-off, 1307.*

2. *In Actions at Law Between Partners, 1309.*

3. *In Actions for an Accounting, 1310.*

XXX. Evidence of Partnership, 1312.

1. *As Between the Partners, or in Actions Between Themselves, 1312.*
2. *Proof by Alleged Partners of Their Own Partnership, 1314.*
3. *Proof of the Partnership of Third Persons, 1316.*

XXXI. Judgments Against Partnerships, 1324.

1. *Against Part of the Partners, 1326.*
2. *The Judgment Lien, 1328.*

XXXII. Attachment, Garnishment, and Execution (See also ATTACHMENT, vol. 1, p. 894; GARNISHMENT, vol. 8, p. 1096, and EXECUTION, vol. 7, p. 117), 1329.

1. *Against the Firm, 1330.*
 - a. *Attachments, 1330.*
 - b. *Partners as Garnishees, 1333.*
 - c. *Executions, 1335.*
 - d. *Exemptions, 1335.*
2. *Of the Interests of the Partners, 1336.*
 - a. *Garnishments, 1339.*
 - b. *Levy and Sale, 1340.*

I. DEFINITION.—A partnership is the contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business, as principals, for the purpose of joint profit.¹

1. 1 Bates' Law of Part., § 1. And see *Howell v. Harvey*, 5 Ark. 270; *Perry v. Butt*, 14 Ga. 699; *Solomon v. Solomon*, 2 Ga. 18; *Gregory v. Dodge*, 14 Wend. (N. Y.) 593; *Chapman v. Wilson*, 1 Rob. (Va.) 267; *Hendy v. March*, 75 Cal. 566; *Whiting v. Leakin*, 66 Md. 255.

Kent defines partnership to be (3 Kent's Com. 23) "A contract of two or more competent persons to place their money, effects, labor and skill, or some, or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions."

Where persons agreed to enter into and carry on a certain mercantile business under such circumstances as to show that the several parties to the agreement placed their money, effects, labor and skill, or some or all of them, in such business, with the understanding that there should be a communion

of the profits thereof between them, it is sufficient to constitute, or tends to constitute, the parties to said agreement partners in said business. *Dubos v. Hoover*, 25 Fla. 720.

Partnership is "an agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership." Stroud's Dict., tit. Partnership.

The definition given by Story (*Story Part.*, § 2) and that of Watson (*Wats. Part.* 1) are substantially the same as that of Kent, and Parsons defines partnership as the combination by two or more persons of capital or labor, or skill for the purpose of business, for their common benefit. *Parson's Part.* (3rd ed.) 6.

Partnership is "an agreement between two or more persons for joining

The partnership relation does not arise from mere operation of law, but can be created only by the voluntary act or contract, express or implied from their acts, of the parties entering into it;¹ and mutual agency and a communion of profit and loss is its true criterion; each member standing in the relation of principal to the others, who in that regard are his agents,² differing from

together their money, goods, labor and skill, or either or all of them for the purpose of advancing fair trade, and of dividing the profits and losses arising from it, proportionally or otherwise, between them." Bouv. Law Dict., tit., Partnership.

Contractus socielatis est, quo duo plures ve inter se pecuniam res, aut operas conferunt eo fine, ut quad inde relict lucri inter singulos pro rata dividatur. Puff, Nat. B. 5, ch. 8, § 1.

Where between two or more persons there is an agreement to speculate and to divide profit and loss, a partnership in that speculation exists between the parties so agreeing. Cruickshank v. McVicar, 8 Beav. 106.

A partnership is a voluntary unincorporated association of individuals standing to one another in the relation of principals, for carrying out a joint operation or undertaking for the purpose of joint profit. Dixon's Law of Part. 1. For a collection of the definitions of the term partnership as given by different writers on that subject, see Lindley on Part. 2.

Bates says (1 Law of Part., § 1) "All the definitions, including my own would be open to criticism unless the word 'persons' be interpreted to include conventional and artificial persons as well as natural, for a firm may be a member of another firm, and a corporation also; for while a corporation does not generally have capacity, as we shall see, to become a partner, the reason is not in the nature of partnership but in want of power in the corporation, and power being granted in the charter, it may enter a partnership with an individual or another corporation."

1. See Bishop v. Georgeson, 60 Ill. 484; Metcalf v. Redmon, 43 Ill. 264; Kingman v. Spurr, 7 Pick. (Mass.) 235; Freeman v. Bloomfield, 43 Mo. 391; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Murray v. Bogert, 14 Johns. (N. Y.) 318; Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 522; Channel v. Fassitt, 16 Ohio 166; Hedge's Appeal, 63 Pa. St. 273; Mod-

dewell v. Keever, 8 W. & S. (Pa.) 63; Mathewson v. Clark, 6 How. Pr. (N. Y.) 122; Goddard v. Hodges, 1 Cromp. & M. 33; Bray v. Fromont, 6 Madd. 5; Brown v. De Tastet, Jacob 284; Ex parte Barrow, 2 Rose 255; Story Part., §§ 3, 4, 5, 6.

Partnership and community are not to be confounded. The first is based on the contract of the parties, which thus creates a community. The latter may exist independently of any contract whatsoever. Pickerell v. Fisk, 11 La. Ann. 277.

Where sons worked for their father under a sort of patriarchal system, without salary and without any understanding between them, and their business increased to a great extent, no partnership can be created between them by implication of law. Phillips v. Phillips, 49 Ill. 437.

Where a man living apart from his wife, lives with another woman, with whom he accumulates property, upon his death the wife can claim the inheritance, and no partnership having been contemplated between them, the woman who assisted in the accumulation of the property, cannot claim it as surviving partner. Estate of Winters. 1 Myr. Prob. (Cal.) 131.

Two persons uniting in litigation to establish the validity of bonds owned by them, do not become partners, so that a subsequent purchase of bonds by one will inure to the benefit of both. Wilson v. Cobb, 28 N. J. Eq. 177.

2. Cox v. Hickman, 8 H. of L. C. 268; 9 C. B., N. S. 47. And see Decker v. Howell, 42 Cal. 636; Zuel v. Bowen, 78 Ill. 234; Pahlman v. Taylor, 75 Ill. 629; First Nat. Bank v. Carpenter, 41 Iowa 518; Kenney v. Altwater, 77 Pa. St. 34; Edwards v. Tracy, 62 Pa. St. 374; Winship v. U. S. Bank, 5 Pet. (U. S.) 529.

"A partner virtually embraces the character, both of a principal and of an agent, so far as he acts for himself and his own interests in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners, he

ordinary agents only in having an interest in the subject matter of the agency,¹ the interest of each being joint, though not necessarily equal.²

Sometimes partnership signifies a moral being, composed of a reunion of all the partners;³ but a partnership is not, as a general rule, considered as a body distinct from the members composing it, the rights and liabilities of the firm being the same as those of its members.⁴

II. WHAT CONSTITUTES PARTNERSHIP.—In general, community of interest,⁵

may as properly be deemed an agent. Story Part., § 1.

1. *Baring v. Lyman*, 1 Story (U. S.) 396.

2. 2 W. Bl. 938. See *Boeklen v. Hardenbergh*, 60 N. Y. 8; *Porter v. McClure*, 15 Wend. (N. Y.) 187.

Partnership is defined to be a joint interest in the net profits of an adventure or business, or in the profits as affected by the losses. *Chapman v. Devereux*, 32 Vt. 616.

3. 4 Pard. N. 966.

Bates in his *Law of Partnership*, § 1, says: "Should it be determined in the future that a partnership is an entity distinct from the persons composing it, my definition should not describe it as a relation but as a union or body formed by persons who have combined their property, labor or skill, etc."

4. See *Baker v. Backus*, 32 Ill. 79; *Shaw v. Boylan*, 16 In. 384. And see also *infra*, this title, *The Firm as an Entity*.

Origin and History.—The origin of partnerships can be found only in the law-merchant. Commercial partnerships were known to the Romans, and recognized and regulated by their laws, and so far as commerce was then conducted in a similar manner as at present, those laws are still applicable. Many of the principles applicable to partnership, however, are the same as those which regulate the common transactions of men, and to that extent it is modified by, and may be said to have been founded upon the common law. When partnerships were first brought before the courts of England they were new to them and their laws, and they naturally sought to bring them within the rules and principles applicable to the classes of joint ownership then known. But the law of partnership has now grown to be an entirely distinct and independent branch of the law. Partnerships have grown to be

more common in the United States than anywhere else, and are, consequently, of more importance and more difficult and its rules and principles seem to have acquired greater development and precision in this country than elsewhere, the jurisprudence of England having in some instances borrowed from and patterned after them. See Pars. Part. (3rd ed.) 1, 5.

5. See *McCrary v. Slaughter*, 58 Ala. 230; *McGill v. Dowdle*, 33 Ark. 311; *Dubois v. Hoover*, 25 Fla. 720; *Heard v. Wilder* (Iowa 1890), 46 N. W. Rep. 1075; *Robbins v. Laswell*, 27 Ill. 365; *Mullan v. Mackenzie*, 2 Greene (Iowa) 368; *Ferguson v. Alcorn*, 1 B. Mon. (Ky.) 160; *Marks v. Stein*, 11 La. Ann. 509; *Dwight v. Brewster*, 1 Pick. (Mass.) 50; *Dix v. Otis*, 5 Pick. (Mass.) 38; *Pulford v. Morton*, 62 Mich. 25; *Hunt v. Erickson*, 57 Mich. 330; *Bohrer v. Drake*, 33 Minn. 408; *Smith v. Small*, 54 Barb. (N. Y.) 223; *Vassar v. Camp*, 14 Barb. (N. Y.) 341; *Hulett v. Fairbanks*, 40 Ohio St. 233; *Ludlow v. Cooper*, 4 Ohio St. 1; *Bloomfield v. Buchanan*, 13 Oregon 108; *Cogswell v. Wilson*, 11 Oregon 371; *Simpson v. Feltz*, 1 McCord (S. Car.) 213; *Winslow v. Chefefe*, 1 Harp. Ch. (S. Car.) 25; *Rogers v. Nichols*, 20 Tex. 719; *Flint v. Eureka Marble Co.*, 53 Vt. 669; *Owen v. Oviatt*, 4 Utah 95; *Tyler v. Waddingham*, 58 Conn. 375; *Danforth v. Allen*, 8 Met. (Mass.) 339.

A plantation and all stock, farm implements, provender, etc., "to use, occupy, and enjoy the same jointly," was devised to plaintiff and his aunt by his uncle; plaintiff "being required to supervise the same, and expend no money without his aunt's approval," etc. Held, that plaintiff and his aunt were joint owners of the plantation, and partners in the business transacted thereon. *Vaiden v. Hawkins* (Miss., 1889), 6 So. Rep. 227.

a sharing in the profits and losses as such,¹ the existence of the mutual relationship of principal and agent,² and an intention on the part of the persons interested, and uniting in the prosecution of the common enterprise to become and act as partners,³ are the proximate tests as to the existence of a partnership between them; what constitutes a partnership being a ques-

A contract between a debtor and his creditors, whereby the debtor transfers his business to the creditors, and agrees to continue to carry it on for their benefit on a salary, under the direction of a committee of creditors, makes the creditors partners, though it contains a statement that it shall not involve them in any partnership liability. *Righter v. Farrell*, 134 Pa. St. 482; *Fell v. Farrel*, 134 Pa. St. 403.

A declaration of trust whereby the owner of land agrees to share the net profits of selling the land with certain persons does not give them an interest in the land itself, but constitutes all the parties co-partners as to the profits. *Roby v. Colehour* (Ill. 1890), 25 N. E. Rep. 777.

1. See *Mayrant v. Marston*, 67 Ala. 453; *Hendy v. March*, 75 Cal. 566; *Plunkett v. Dillon*, 3 Del. Ch. 496; *Huguley v. Morris*, 65 Ga. 666; *Dubois v. Hoover*, 25 Fla. 720; *Wilcox v. Dodge*, 12 Ill. App. 517; *Scott v. Colmesnil*, 7 J. J. Marsh. (Ky.) 416; *Miller v. Hughes*, 1 A. K. Marsh. (Ky.) 181; *Aultman v. Fuller*, 53 Iowa 60; *Barrett v. Swann*, 17 Me. 180; *LaMont v. Fulham*, 133 Mass. 483; *Rice v. Austin*, 17 Mass. 197; *Smith v. Walker*, 57 Mich. 456; *Bohrer v. Drake*, 33 Minn. 408; *Priest v. Chouteau*, 12 Mo. App. 252; *St. Louis Bank v. Altheimer*, 91 Mo. 190; *Brown v. Robbins*, 3 N. H. 64; *Newman v. Bean*, 21 N. H. 93; *Manhattan Brass etc. Co. v. Sears*, 45 N. Y. 797; *Mohawk Bank v. VanSlyck*, 29 Hun (N. Y.) 188; *Wills v. Simmonds*, 51 How. Pr. (N. Y.) 48; *Arguimbo v. Hieler*, 49 N. Y. Super. Ct. 253; *Pattison v. Blanchard*, 5 N. Y. 186; *Smith v. Small*, 54 Barb. (N. Y.) 223; *Humstreet v. Howland*, 5 Den. (N. Y.) 68; *Cumpston v. McNair*, 1 Wend. (N. Y.) 457; *Mumford v. Nicoll*, 20 Johns. (N. Y.) 611; *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522; *Jones v. Call*, 93 N. Car. 170; *Day v. Stevens*, 88 N. Car. 83; 43 Am. Rep. 732; *Curtis v. Cash*, 84 N. Car. 41; *McDonald v. Matney*, 82 Mo. 358; *Hulett v. Fairbanks*, 40 Ohio St. 233; *Cogswell v. Wilson*, 11 Oregon 371; *Purviance v. McClintee*, 6

S. & R. (Pa.) 259; *Chapman v. Lipscomb*, 18 S. Car. 222; *Osborne v. Brennan*, 2 Nott. & M. (S. Car.) 427; *Mallory v. Hananer Oil Works*, 86 Tenn. 598; *Canada v. Barksdale*, 76 Va. 899; *Dils v. Bridge*, 23 W. Va. 20; *Bybee v. Hawckett*, 8 Sawy. (U. S.) 176; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529.

An agreement by which two persons undertake to do a joint business, to be carried on in the name of one of them, the profits and losses to be divided between them, makes them partners. *Galway v. Nordlinger* (Supreme Ct.), 4 N. Y. Supp. 649.

2. See *Ashby v. Slaw*, 82 Mo. 76; *Eastman v. Clark*, 53 N. H. 176; *Campbell v. Dent*, 54 Mo. 325; *Seabury v. Bolles*, 51 N. J. L. 103; *Wild v. Davenport*, 48 N. J. L. 129; *Bendel v. Hettrick*, 35 N. Y. Super. Ct. 405; *Harvey v. Childs*, 28 Ohio St. 319; *Kilshaw v. Jukes*, 3 B. & S. 847; *Bullen v. Sharp*, L. R., 1 C. P. 56; *In re English and Irish etc. Socce.*, 1 Hen. & M. 85.

A partnership between two persons, as to third persons, is not established, as matter of law, by proof that they were associated in business, and participated in the profits; that one collected money due in the business, and gave receipts therefor in the name of both, the authority or assent of the other not being shown; and that both or either hired laborers in the business, and sometimes one and sometimes the other paid them. *Roper v. Schaefer*, 35 Mo. App. 30.

3. See *Pollard v. Stanton*, 7 Ala. 761; *Bennett v. Pulliam*, 3 Ill. App. 185; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230; *Niehoff v. Dudley*, 40 Ill. 406; *Stevens v. Faucet*, 24 Ill. 483; *Macy v. Combs*, 15 Ind. 469; *Choffraix v. Lafitte*, 30 La. Ann. 631; *Marks v. Stein*, 11 La. Ann. 509; *Reddington v. Lanahan*, 59 Md. 429; *Kerr v. Potter*, 6 Gill (Md.) 404; *Runnels v. Moffat*, 73 Mich. 188; *Gray v. Gibson*, 6 Mich. 300; *Clifton v. Howard*, 80 Mo. 192; *Kellogg Newspaper Co. v. Farrell*, 88 Mo. 594; *Pillsbury v. Pillsbury*, 20 N. H. 90; *Salter v. Ham*, 31 N. Y. 321; *Gill v. Kuhn*, 6 S. & R. (Pa.) 333;

tion of law for the court;¹ while the question as to the existence of the constituent elements of a partnership is one of fact for the jury.²

1. Intention of the Parties.—Whether the association of several persons in business constitutes a partnership as between themselves depends upon their intention as legally ascertained.³ This, however, does not mean their arbitrary intention; uncontrolled by the facts; their declarations, contained either in the articles of agreement or elsewhere, if consistent with the other terms, will

Cook v. Carpenter, 34 Vt. 121; *Hazard v. Hazard*, 1 Story (U. S.) 371.

Persons who acquire fractional interests in personal property do not thereby become partners, so that one has the right to inspect the books kept by the others with respect to such property; his only remedy being an action for a division of the property. *Hedges v. Wear*, 28 Mo. App. 575.

1. *Chisholm v. Cowles*, 42 Ala. 179; *Everitt v. Champn*, 6 Conn. 347; *Doggett v. Jordan*, 2 Fla. 541; *Lintner v. Millikin*, 47 Ill. 178; *Kingsbury v. Thorp*, 61 Mich. 216; *Randolph v. Govan*, 14 S. & M. (Miss.) 9; *Cumpston v. McNair*, 1 Wend. (N. Y.) 457; *Jones v. Call*, 93 N. Car. 170; *Farmers' Ins. Co. v. Ross*, 29 Ohio St. 429; *Boston etc. Smelting Co. v. Smith*, 13 R. L. 27; 43 Am. Rep. 3; *Williams v. Connor*, 14 S. Car. 621.

If the court construe a writing as not constituting a partnership it is not on that account to be excluded, for it, with other facts, may show that the parties are liable as partners. *Williams v. Soutter*, 7 Iowa 435.

2. *McDonald v. Matney*, 82 Mo. 358; *Meriden Nat. Bank v. Gallaudet*, 120 N. Y. 298. And see *Kingsbury v. Tharp*, 61 Mich. 216; *Scranton v. Rentfrow*, 29 Ga. 341.

When the question whether a partnership exists is a matter of doubt, to be decided from inferences to be drawn from all the evidence, it is one of fact for the jury. *Seabury v. Bolles*, 51 N. J. L. 103.

Where two creditors claimed the same fund, one as the creditor of A, B, C and Co., and the other under D and C, and there was evidence that they were composed of the same persons, and known under the different names, it was left to the jury to decide the fact. *McDuffie v. Bartlett*, 3 Pa. St. 317.

The question of the existence of a partnership must usually be submitted to the jury as a mixed question of law

and fact. *Robinson v. Green*, 5 Harr. (Del.) 125; *Pardridge v. Ryan*, 14 Ill. App. 598; *McMullen v. Mackenzie*, 2 Greene (Iowa) 368; *Chamberlain v. Jackson*, 44 Mich. 320; *Densmore v. Mathews*, 58 Mich. 616; *Pfeifer v. Chamberlain*, 52 Miss. 89; *Chase v. Stevens*, 19 N. H. 465; *Drake v. Elwyn*, 1 Cai. (N. Y.) 184; *Butler v. Finck*, 21 Hun (N. Y.) 210; *Hunter v. Hubbard*, 26 Tex. 537; *Smith v. Hollister*, 32 Vt. 695.

3. *Niehoff v. Dudley*, 40 Ill. 406; *Stevens v. Faucet*, 24 Ill. 483; *Macy v. Combs*, 15 Ind. 469; *Chaffraix v. Lafitte*, 30 La. Ann. 631; *Gray v. Gibson*, 6 Mich. 300; *Salter v. Ham*, 31 N. Y. 321; *Klosterman v. Hayes*, 17 Oregon 325; *Hazard v. Hazard*, 1 Story (U. S.) 371.

So far as two parties are themselves concerned, there can be no partnership without the consent of both, one's unaccepted proposition is insufficient. *Bennett v. Pulliam*, 3 Ill. App. 185.

When two or more persons agree to become partners, and actually proceed to carry into execution the joint undertaking, the relation of partners will exist as to third persons, although the conditions of the partnership are not understood alike by the partners. *Cook v. Carpenter*, 34 Vt. 121.

A, B, and C entered into an agreement reciting that A and B had been partners, C having an interest in the profits, in satisfaction for services, by which A sold his interest to B, who covenanted to pay him a certain sum therefor, and to assume the partnership liabilities; and the only covenant on the part of C was one jointly by him and B, releasing A from all the partnership liabilities. *Held*, that the above article clearly evinced that C was not a partner with A and B, as between themselves; and that C's execution of the articles, under a protest that he was not a partner, was a substantial compliance with the condition of a bond

control, the association being a partnership if they have so agreed;¹ or, not being one, if that is their arrangement, irrespective of responsibilities otherwise assumed.² But if the effect of the whole contract is inconsistent with the declared purpose and intention of the parties, the contract controls, and if the rights and obligations thereby created are those of partners, such will be deemed to have been their legal intention, without regard to their declared purpose,³ and if their contract is inconsistent with the

for the unqualified execution of the articles. *Wright v. Taylor*, 9 Wend. (N. Y.) 538.

1. *Smith v. Walker*, 57 Mich. 456; *Pillsbury v. Pillsbury*, 20 N. H. 90; *Paul v. Cullum*, 132 U. S. 539.

Where A gave B money to purchase sheep, and stated that he was to have half the profits, but to have no interest on his money if there were losses; and declared to a witness that he and B were partners, such transactions do not constitute a loan, but the parties thereto are partners as to the whole subject in controversy. *Newbrau v. Snider*, 1 W. Va. 153.

2. *Pollard v. Stanton*, 7 Ala. 761; *Phillips v. Phillips*, 49 Ill. 437; *Marks v. Stein*, 11 La. Ann. 509; *Reddington v. Lanahan*, 59 Md. 429; *Runnels v. Moffat*, 73 Mich. 188; *Clifton v. Howard*, 89 Mo. 192; *Kellogg Newspaper Co. v. Farrel*, 88 Mo. 594; *Gill v. Kuhn*, 6 Serg. & R. (Va.) 333; *Klosterman v. Hayes*, (Oregon) 20 Pac. Rep. 426; *Hazard v. Hazard*, 1 Story (U. S.) 371.

The mere fact that a person puts a certain amount of money into a business, and permits his name to be used as a partner, will not make him a joint owner of the goods used in the business, unless that was so agreed and understood at the time he so placed his money and permitted the use of his name. It does not render the goods partnership property, so as to affect the right of the original owner to recover on a policy of insurance issued to him. *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230.

An agreement by a non-resident banking firm with two resident firms, whereby one, a sugar firm, was to purchase molasses, ship it in the name of the other, a cotton firm, delivering to the latter the bills of lading, the latter to pay for it with the money of the banking firm, the two resident firms to receive for their services certain proportions of the profits to arise from the subsequent sales, and to share in any losses resulting therefrom—does not constitute the three firms commercial

partners, even as to third parties, they not having held themselves out as such, nor intended to form a partnership. *Chaffraix v. Lafitte*, 30 La. Ann., pt. 1, 631.

An agreement expressly provided that the relation between the parties should not be one of partnership. By a new agreement plaintiff agreed to act under defendant's management, at such times and places, during theatrical seasons, as he might elect, and that she would not act under the management of any other person; that a correct account should be kept, the books to be open to plaintiff's inspection at all times, and that the personal expenses, except railway tickets of each party, should be an individual matter, but that all other expenses of the company should be deducted from the receipts, and the residue be equally divided between plaintiff and defendant, is not a co-partnership. *Haberkorn v. Hill* (Supreme Ct.), 2 N. Y. Supp. 243.

Consent of All.—Where A and B by a written contract, agreed to carry on a trade or business in partnership, and in the same instrument B and C agreed to carry on a different trade or business in partnership, the relation of partners was not created between the three, so as to enable a person dealing with A and B, or with B and C to commence an action against the whole. *Elderkin v. Winne*, 1 Chand. (Wis.) 27.

The members of a partnership received from their treasurer certificates of stock containing the provision, that no share should be transferred without consent of the treasurer and directors. A's share was assigned to the plaintiff without such consent, and he brought a bill to compel the company to account, alleging himself to be a partner. *Held*, that he was not a partner, and that the bill must be dismissed. *Kingman v. Spurr*, 7 Pick. (Mass.) 235.

3. *Pooley v. Driver*, 5 Ch. D. 458, *Ex parte Delhasse*, 7 Ch. D. 511; *Moore v. Davis*, 11 Ch. D. 261; *Cooley v. Broad*, 29 La. Ann. 345; *Mullhall v.*

partnership relations, they are not partners, even though they may have so called themselves.¹

It is not necessary that the term partnership be used in the articles in order to constitute one,² nor is it necessary to use the word agent, manager, servant or otherwise to indicate that an employment was intended;³ and where the parties to the contract have failed to use any term indicative of their purpose, the intention will be gathered from the effect of the whole contract.⁴ Where the rights of third persons are not in question, the contract will be liberally construed with reference to the actual understanding of the parties and the purposes they had in view.⁵

Cheatham, 1 Mo. App. 476; Beecher v. Bush, 45 Mich. 188, 40 Am. Rep. 465; Manhattan Brass & Mfg. Co. v. Sears, 45 N. Y. 797; 6 Am. Rep. 177; rev. 1 Sweeny (N. Y.) 426; Cothran v. Mar-maduke, 60 Tex. 370, 372; Stevens v. Gainesville Nat. Bank, 62 Tex. 499; Duryea v. Whitcomb, 31 Vt. 395; Rosenfield v. Haight, 53 Wis. 260.

1. Oliver v. Gray, 4 Ark. 425; Dwinel v. Stone, 30 Me. 384; Sailors v. Nixon-Jones Printing Co., 20 Ill. App. 509; McDonald v. Matney, 82 Mo. 358, 366; Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573, 592.

A written statement by A and B, two of the five members of a firm, with S, that S is a co-partner in the firm, "and entitled to receive from A and B one-third of the profits earned and received by each, S to pay one-third of any losses sustained by either, by reason of their connection as co-partners, or otherwise, with the firm—held, not to constitute S a partner, the three other members not concurring in the agreement, and not to render S liable to a firm creditor, who did not give credit on account of S's declaration of copartnership; the stipulation as to profits and losses not referring to those of the entire firm or its property. Burnett v. Snyder, 76 N. Y. 344.

2. Kayser v. Maugham, 8 Colo. 232.

It is not necessary that a firm should be agreed upon in partnership articles. If there was evidence of an agreement to buy and sell on joint account for mutual profit, and if one, with the knowledge and assent, express or implied, of the other, was in the habit of using a certain name, it is sufficient to fix the liability of the firm upon a note signed with that name. Parsley v. Ramsey, 31 Ga. 403.

3. See Van Kuren v. Trenton Locomotive etc. Mfg. Co., 13 N. J., Eq. 302; Bloomfield v. Buchanan, 13 Oregon 108;

Ryder v. Wilcox, 103 Mass. 24, 27; Greenham v. Gray, 4 Irish Com. L. 501.

4. See Hendrick v. Gunn, 35 Ga. 234; Heshion v. Julian, 82 Ind. 576; Chandler v. Brainard, 14 Pick. (Mass.) 285; Clark v. Reed, 11 Pick. (Mass.) 450; Kellogg Newspaper Co. v. Farrell, 88 Mo. 594; Hills v. Bailey, 27 Vt. 548.

Where one who had been sent, by Kansas creditors of a merchant of Salt Lake City, to collect their claims, arranged with him, with their consent, to take payment in flour, salt, etc., ship the same to Montana, and there sell the same; but owing to a decline in prices the venture resulted in a loss.—Held, that the creditors became partners, and should share the loss *pro rata*. Stattauer v. Carney, 20 Kan. 474.

Two persons carried on the business of planting together for more than fourteen years, commencing with nearly equal means, and making additions not disproportionate. During the time they occupied and resided on three different plantations, taking conveyances in the name of one of them only. No division of profits was ever made, and on the death of one of them, held, that they carried on the business in partnership, and that each was entitled to one-half of all the profits, and of the property bought during the time, whether real or personal. Quine v. Quine, 9 Smed. & M. (Miss.) 155.

Where C and N purchased a grist-mill and privilege, under an agreement to rebuild the same, and share equally in the expense, and afterwards sold one-sixth of the same to M, under an agreement that he should be at one-sixth of the expense, held, that their mutual obligation to rebuild did not necessarily constitute them partners. Noyes v. Cushman, 25 Vt. 390.

5. Stephens v. Gainesville Bank, 62 Tex. 499; Hitchings v. Ellis, 12 Gray

a. SHARING PROFIT AND LOSS.—Participation in the profits and losses of a joint business or undertaking affords the usual, and, perhaps, the most cogent test of the existence of an intention to form a partnership.¹ An agreement for such participa-

(Mass.) 449, 452; *Couch v. Woodruff*, 63 Ala. 466; *Talbot v. Bush*, 75 Ala. 432.

1. *Jones v. Call*, 93 N. Car. 170. And see *Quinn v. Quinn*, 81 Cal. 14; *Beckwith v. Talbot*, 2 Colo. 639; *Price v. Drew*, 18 Fla. 670; *Holifield v. White*, 52 Ga. 567; *Sankey v. Columbus Iron Works*, 44 Ga. 228; *Scott v. Colmesnil*, 7 J. J. Marsh. (Ky.) 416; *Miller v. Hughes*, 1 A. K. Marsh. (Ky.) 181; *Bullfinch v. Winchenbach*, 3 Allen (Mass.) 161; *Kingsbury v. Tharp*, 61 Mich. 216; *Priest v. Choriteau*, 12 Mo. App. 252; *Brown v. Robbins*, 3 N. H. 64; *Manhattan Brass Co. v. Seers*, 45 N. Y. 797; *Mohawk Bank v. Van Slyck*, 29 Hun (N. Y.) 188; *Arguimbo v. Hillier*, 49 N. Y. Super. Ct. 253; *Mumford v. Nicoll*, 20 Johns. (N. Y.) 611; *Heimstreet v. Howland*, 5 Den. (N. Y.) 68; *Cumpston v. McNair*, 1 Wend. (N. Y.) 457; *Cox v. Delano*, 3 Dev. (N. Car.) 89; *Day v. Stevens*, 88 N. Car. 83; 43 Am. Rep. 732; *Curtis v. Cash*, 84 N. Car. 41; *Cogswell v. Wilson*, 11 Oregon 371; *Purviance v. McClintee*, 6 S. & R. (Pa.) 259; *Chapman v. Lipscomb*, 18 S. Car. 222; *Osborne v. Brennan*, 2 Nott & M. (S. Car.) 427; *Flint v. Eureka Marble Co.* 53 Vt. 669; *Duryea v. Whitcomb*, 31 Vt. 395; *Scott v. Campbell*, 30 Ala. 728; *Morse v. Richmond*, 97 Ill. 303; *Aultman v. Fuller*, 53 Iowa 60; *Somerby v. Buntin*, 118 Mass. 279; *Nebraska R. Co. v. Lett* 8 Neb. 251; *Cully v. Edwards*, 44 Ark. 423; *Lockwood v. Doane*, 107 Ill. 235; *Southern Fertilizer Co. v. Reams*, 105 N. Car. 283; *Dils v. Bridge*, 23 W. Va. 20; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529.

Joint purchasers of land intended to be sold for joint profits are partners. *Hulett v. Fairbanks*, 40 Ohio St. 233; *Canada v. Barksdale*, 76 Va. 899; *Ludlow v. Cooper*, 4 Ohio St. 1. And where the money was advanced by one who was to be repaid principal and interest with two-thirds of the profits, and the loss was to be borne equally it was held, to constitute a partnership, and not simply a cover for usury under guise of a partnership. *Plunkett v. Dillon*, 3 Del. Ch. 496.

An agreement between A and B,

that A shall remit to B goods and merchandise, to be disposed of according to instructions from A, and in such other manner as he shall think proper, the profit and loss to be equally divided, constitutes a partnership. *Gregory v. Dodge* 14 Wend. (N. Y.) 593.

An agreement which purports on its face to be a co-partnership agreement, and which provides that the parties shall share equally in the expense, losses, and gains, cannot be treated as a mere contract of employment. *Smith v. Walker*, 57 Mich. 456.

Owners of the freight and cargo of a ship, who share the profit and loss, are partners, and the assignee of one partner, takes his share subject to an account of the voyage. *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522.

Under Civil Code *California* § 2395, declaring a partnership to be an association of persons for the purpose of carrying on business together, and dividing the profits, two persons having agreed that one should furnish money to keep a ship in repairs, collect the earnings, divide the surplus with the other, and, in case the earnings were not sufficient, to pay the advances, such other was to pay a portion of the deficiency, are partners. *Hendy v. March*, 75 Cal. 566.

A contract whereby plaintiff was to receive \$1.50 per foot for boring an oil well, and one-eighth interest in the leases held by the defendant, bearing one-eighth of the working expenses, creates a partnership, and an action of debt for the price of the boring cannot be maintained without a previous settlement. *Kifer v. Smyers* (Pa. 1888), 15 Atl. Rep. 904.

A and B agreed to work together in the business of manufacturing marble. B was to furnish the marble and A was to pay him one-half the cost of it. B was to board A, and both were to contribute their labor and skill in the business, and the products and avails of the business were to be equally divided between them. Held, that they became partners as between themselves. *Griffith v. Buffin*, 22 Vt. 181.

Continuing Business of Insolvent.—

Where creditors agreed with each other

tion is not, however, a conclusive test, and does not absolutely constitute a partnership as a conclusion of law, if other circumstances show that no partnership was intended.¹ It is only *prima facie* proof which may be rebutted by evidence of other facts and controlling circumstances.²

Where, in addition to the participation in the profits and losses, it appears that the capital, or property, or both, is contributed by all to be used in common for their joint benefit, it clearly constitutes a partnership.³ And the rule is the same even though the pur-

to advance the moneys necessary to continue and carry on the business of their debtor, for their own profit, they to contribute funds necessary for the purchase of stock for the business in equal proportions, and the profits to be realized to belong to the creditors advancing the moneys equally, the losses of the business being borne by them in the same proportion, a co-partnership relation in respect to such enterprise was established between the parties. *Wills v. Simmonds*, 51 How. Pr. (N. Y.) 48.

Associations of Corporations.—An agreement among a number of corporations engaged in the manufacturing of cotton-seed oil, to select a committee composed of representatives from each corporation, and to turn over to such committee the properties and machinery of each company, to be managed and operated by the committee for the common benefit, the profits and losses to be shared in agreed proportions, and the arrangement to last for a specified time, is a contract of partnership. *Mallory v. Hananer Oil Works*, 86 Tenn. 598.

1. See *Snell v. Deland*, 43 Ill. 323; *Faucett v. Osborn*, 32 Ill. 411; *Stevens v. Faucet*, 24 Ill. 483; *Chaffraix v. Lafitte*, 30 La. Ann. 631; *Dwinel v. Stone*, 30 Me. 384; *Monroe v. Greenhoe*, 54 Mich. 9; *State v. Finn*, 11 Mo. App. 546; *Clifton v. Howard*, 89 Mo. 192; *McDonald v. Matney*, 82 Mo. 358; *Newburger v. Friede*, 23 Mo. App. 631; *Ashby v. Shaw*, 82 Mo. 76; *Musser v. Brink*, 68 Mo. 242; *Donnell v. Harshe*, 67 Mo. 170; *Osbray v. Reimer*, 51 N. Y. 630; *Smith v. Wright*, 5 Sandf. (N. Y.) 113. But see same case on appeal, 4 Abb. App. Dec. (N. Y.) 274; *Edwards v. Tracy*, 62 Pa. St. 374; *Farrand v. Gleason*, 56 Vt. 633; *Morgan v. Stearns*, 41 Vt. 398; *Chapline v. Conant*, 3 W. Va. 507; *Marsh v. Northwestern Nat. Ins. Co.*, 3 Biss. (U. S.) 351; *Ex parte Delhaese* 7 Ch. D. 511; *Walker v. Hirsch*, 27 Ch. D. 460; *Noakes v. Barlow*, 136 L. T. N. S. 36; *Bullen v.*

Sharp, L. R., 1 C. P. 86; *Kilshaw v. Jukes*, 3 Best & Sm. 847.

An arrangement by which one person is to share the profits of a business with another does not make him a general partner in any such sense as to deprive him of his right to certain additional specific compensation which has been agreed upon. *Hamper's Appeal*, 51 Mich. 71.

The simple fact that the partner who advances the capital charges interest on it cannot change the relation of partnership to that of creditor and debtor. *Southern Fertilizer Co. v. Reames*, 105 N. Car. 183.

2. *Rice v. Austin*, 17 Mass. 197; *St. Louis Bank v. Attheimer*, 91 Mo. 190; *State v. Finn*, 11 Mo. App. 546; *McDonald v. Matney*, 82 Mo. 358; *Newman v. Bean*, 21 N. H. 93; *Lamb v. Grover*, 47 Barb. (N. Y.) 317.

Sharing in the profits and loss of a business is not decisive in imposing upon two parties, as between themselves, the rights and liabilities of co-partners. It may be merely an arrangement with a view to compensation for services rendered by one in the employment of the other, the amount of compensation to depend upon the success of the business in which they are engaged or interested. *Morgan v. Stearns*, 41 Vt. 398.

3. *Meaher v. Cox*, 37 Ala. 201; *Autrey v. Frieze*, 59 Ala. 587; *Beckwith v. Talbot*, 2 Colo. 639; *Laffan v. Naglee*, 9 Cal. 662; *Price v. Drew*, 18 Fla. 670; *Solomon v. Solomon*, 2 Ga. 18; *Camp v. Montgomery*, 75 Ga. 795; *Sankey v. Columbus Iron Works*, 44 Ga. 228; *Morse v. Richmond*, 97 Ill. 303; *Aultman v. Fuller*, 53 Iowa 60; *Starbuck v. Shaw*, 10 Gray (Mass.) 492; *Dix v. Otis*, 5 Pick. (Mass.) 38; *Somerby v. Buntin*, 118 Mass. 279; *Bohrer v. Drake*, 33 Minn. 408; *Cumpston v. McNair*, 1 Wend. (N. Y.) 457; *Vassar v. Camp*, 14 Barb. (N. Y.) 341; *Smith v. Small*, 54 Barb. (N. Y.) 223; *Arguimbo v.*

chase of the property be on separate account, if the interests of the purchasers be afterwards mingled with a view to joint profit,¹ although each partner may retain the exclusive ownership of the property contributed by him to the use of the firm.² The same rule applies in cases where the transactions are not in goods or manufactures but in rendering services, in which cases a communion of the profits and losses of such services constitute a partnership,³ as well as in cases where partners agree to perform a different class of work in the firm business,⁴ or contribute different kinds of

Hillier, 17 Jones & Sp. (N. Y.) 253; Chase v. Barrett, 4 Paige (N. Y.) 148; Jones v. Call, 93 N. Car. 170; Choteau v. Raitt, 20 Ohio 132; Ludlow v. Cooper, 4 Ohio St. 1; Hulett v. Fairbanks, 40 Ohio St. 233; Cogswell v. Wilson, 11 Oregon 371; Credit Mobilier v. Com., 67 Pa. St. 233; Burnley v. Rice, 18 Tex. 481, 496; Duryea v. Whitcomb, 31 Vt. 395; Flint v. Eureka Marble Co., 53 Vt. 669; Chapman v. Wilson, 1 Rob. (Va.) 267; Cole v. Moxley, 12 W. Va. 730. *In re Warren*, 1 Dav. (U. S.) 322; Felichy v. Hamilton, 1 Wash. C. C. 491; Moore v. Davis, 11 Ch. D. 261.

Proof that two persons have been engaged together in the same undertaking, that they have sold goods, sued and been sued, jointly, is sufficient evidence of partnership. Winslow v. Cheffelle, 1 Har. Eq. (S. Car.) 25.

Where two firms agreed to buy hogs and pack pork one season on joint account, a partnership was constituted as to that adventure. It did not consolidate the firms or make either liable for the previous debts of the other. The fact that one firm had control of the product, and could alone sell, did not destroy the right of the other to have the partnership assets applied to the payment of the partnership debts. Meador v. Hughes, 14 Bush (Ky.) 652.

An agreement between two partners, on the dissolution of their firm, to the effect that one should take all the goods on hand, and the notes and accounts due the firm, and, in consideration of the other's interest therein, should pay all the outstanding debts of the firm, and give him, from that time forward, one-third interest in the profits, arising from the sale of such goods, the latter "agreeing to share one-third of the losses that might accrue from said sale of said goods, and to act as clerk in the sale of said goods" for the former, constitutes them partners *inter sese*. Scott v. Campbell, 30 Ala. 728. And see McGill Dowdle, 33 Ark. 311.

1. Rogers v. Nichols, 20 Tex. 719; Duryea v. Whitcomb, 31 Vt. 395. And see Dwight v. Brewster, 1 Pick. (Mass.) 50.

A contract between three persons to operate a "mining property as a company," creates a partnership between such persons from the date thereof, and makes each of them liable for the debts contracted in the prosecution of said enterprise; and this, notwithstanding the fact that such contract also provided that there shall be no division of profits between the parties until two of them are reimbursed therefrom, the money expended in the purchase of two-thirds of the property from the other one, and the cost of improving the same. Bybee v. Hawkett, 8 Sawy. (U. S.) 176.

2. McCrary v. Slaughter, 58 Ala. 230.

Where two steamboat owners agreed each to furnish a certain number of boats in which the respective owners should retain the property and assume the risk, and be liable for losses by accident and negligence, but the compensation of joint agents, and damages or losses on cotton should be a joint charge, and the profit, less running expenses, should be divided, this is a partnership *inter se*. Meaher v. Cox, 37 Ala. 201.

3. See Meador v. Hughes, 14 Bush (Ky.) 652; Bulfinch v. Winchenbach, 3 Allen (Mass.) 161; Belknap v. Wendell, 21 N. H. 175; Cole v. Moxley, 12 W. Va. 730; Brett v. Beckwith, 3 Jur., N. S. 31.

Where one party agrees to furnish a horse and cart and the other to pay him an agreed price per annum therefor, expenses for repairing and losses of packages and receipts to be borne equally, it is a partnership. Green v. Beesley, 2 Bing. N. C. 108.

4. A contract, however obscurely or artificially drawn, by which the parties agree to contribute merchandise to "a certain concern," one to be the

property to the partnership stock.¹ So, labor, as viewed from a partnership standpoint, being capital, where one person contributes money or property and another his personal services to the capital stock, there being a community of interest in the profits and losses, it is likewise a partnership,² though in such

salesman, the other to pass as the proprietor, and both to share equally in the expenses and profits, will be a partnership. *Marks v. Stein*, 11 La. Ann. 509.

In an action against two defendants as partners, the evidence showed that one of the defendants and a third person had been running a livery stable, and the third person owning the horses; that the other defendant bought out the third person, and told plaintiff he had made the purchase, and had assumed the contracts of the old firm. *Held*, that a finding that defendants were partners would not be set aside. *Jenkins v. Barrows*, 73 Iowa 438.

1. B orally agreed to contribute his inchoate interest in an invention, and S to furnish the money necessary to make that invention available in the form of a patent, both to contribute their services to make it remunerative. *Held*, to be an agreement for a partnership, and not a contract for the sale of goods, wares, and merchandise, within the Statutes of Frauds. The patent, when obtained, would be, in equity, partnership property, no matter in whose name it might be taken out. *Somerby v. Buntin*, 118 Mass. 279.

A, being the owner of a zinc mine, entered into a written agreement with B, by which he agreed to furnish him a certain quantity of ore per annum, for three years, on being paid therefor \$10 per ton, and B agreed to provide suitable buildings and machinery for its conversion into paints, etc., and to divide with A the profits of the enterprise in the proportion of one-fourth to himself and the remainder to A, and the cost of the buildings and machinery to be paid out of the profits after a specified time. *Held*, that this constituted A and B partners. *Wadsworth v. Manning*, 4 Md. 59.

An agreement provided that the party of the first part should obtain in his own name, but for the joint account of himself and the parties of the second part, a lease of a railroad, and manage the same at a designated salary for their mutual benefit; and that the parties of the second part

should furnish the money necessary to carry out the enterprise, to be reimbursed with interest out of its annual profits; and that, after the payment of the capital thus invested and interest, the annual profits should be equally divided between the parties, and that all losses should be equally borne between them constituted a partnership. *Beauregard v. Case*, 91 U. S. 134. And see *Teas v. Woodruff* (N. J. 1887), 10 Atl. Rep. 392.

2. *Emanuel v. Draughn*, 14 Ala. 303; *Autrey v. Frieze*, 59 Ala. 587; *Couch v. Woodruff*, 63 Ala. 466; *Clark v. Gridley*, 49 Cal. 105; *Holifield v. White*, 52 Ga. 567; *Adams v. Carter*, 53 Ga. 160; *Robbins v. Laswell*, 27 Ill. 365; *Pierce v. Shippee*, 90 Ill. 371; *Kuhn v. Newman*, 49 Iowa 424; *Clark v. Ware*, 8 Ky. Law Rep. 438; *Getchell v. Foster*, 106 Mass. 42; *Pettee v. Appleton*, 114 Mass. 114; *Dame v. Kempster*, 146 Mass. 454; *Brownlee v. Allen*, 21 Mo. 123; *Mulhall v. Cheatham*, 1 Mo. App. 476; *Wright v. Davidson*, 13 Minn. 449; *Hayes v. Voegel*, 14 Daly (N. Y.) 486; *Curtis v. Cash*, 84 N. Car. 41; *Reynolds v. Pool*, 84 N. Car. 37; 37 Am. Rep. 607; *Dob v. Halsey*, 16 Johns. (N. Y.) 34; *Kiefer v. Smyers* (Pa. 1888), 15 Atl. Rep. 904; *Simpson v. Feltz*, 1 McCord Eq. (S. Car.) 213; *Brown v. Higginbotham*, 5 Leigh (Va.) 583; *Sprout v. Crowley*, 30 Wis. 187; *Gilbank v. Stephenson*, 31 Wis. 592; *Tibbatts v. Tibbatts*, 6 McLean (U. S.) 80; *Pawsey v. Armstrong*, 18 Ch. D. 698.

In an action to recover for goods sold and delivered one of the defendants denied co-partnership. There was introduced in evidence an agreement signed by defendants wherein they agreed to carry on a billiard hall, one of them furnishing the hall with tables, fixtures, etc., and the other to devote his time to running the business, the profits to be divided. One of the defendants testified that all goods were bought in the name of the firm, and that the other member had furnished money for the concern and had received money from the business. Plaintiff's salesman testified that the

case the party contributing services acquires no interest in any of the partnership capital, that is not converted into profits,¹ and in order to constitute the partnership in such case, community of losses as well as profits is essential.²

The participation in profits and losses, however, to constitute a partnership, must be one founded on a right of the alleged partner to take a part of the profits as a principal in the joint busi-

goods were sold on the credit of the defendant denying the partnership, that the bill for the goods had been presented to him, and he promised to settle it. Letters were also introduced in evidence signed in the firm name. *Held*, sufficient to authorize a finding that there was a partnership. *Atwood v. Perego*, 22 Neb. 238; *Atwood v. Kennard*, 22 Neb. 246.

An action against A and B, partners under the firm name of A, was tried on a plea denying that B was a partner. The court instructed that if B contributed a dwelling house, storehouse and \$200, and A contributed \$200 and his time and services, and B was to receive no compensation for the houses and money except a share of the profits of the business, B was in law a partner. *Held*, that these facts gave B a joint interest in the profits, and constitute him a partner as to third persons. *Marbut v. Moore* (Ga. 1887), 4 S. E. Rep. 383.

An agreement between T, a tinner owning a shop, and D a plumber of large experience, to work together, T to be allowed out of the profits of the business, ten per cent. on his stock invested, and the remainder of the profits to be divided equally between them. *Held* to constitute a partnership, though the business proceeded in T's name, and D's share of the profits remained in the concern. *Tyler v. Scott*, 45 Vt. 261. And see *Pierce v. Shippee*, 90 Ill. 371.

P and L entered into a written agreement whereby they contracted to embark together in the enterprise of raising and dismantling a sunken steamer. L was to furnish certain necessary machinery and appliances named, and with these P was to do the work, and furnish labor, provisions, money, and such further appliances as were necessary for the work. The material to be saved from the wreck was to be turned over to L, who was to control and sell the same for their joint account, first repaying to P the

amounts paid by him. *Held*, that this agreement constituted the parties partners in the enterprise both *inter sese* and as to third persons. *Lynch v. Thompson*, 61 Miss. 354.

H and E made an agreement whereunder H was to look up desirable lands and bid them in at tax sales, E furnishing the money. Both were to control alike the subsequent disposition of the lands, and, after E was repaid his advances, profits were to be divided equally. The community of interest extended to both profit and loss. Titles were to be taken in E's name. *Held*, that there was a partnership. *Hunt v. Erikson*, 57 Mich. 330.

1. *Conroy v. Campbell*, 45 N. Y. Super. Ct. 326.

The fact that one participates in the profits and losses of a firm does not necessarily make his interest in the firm property such as to subject it to seizure under execution for his individual debts; any presumption arising from the fact of such participation may be rebutted by proof of the real agreement. *State v. Finn*, 11 Mo. App. 546.

2. *Ferguson v. Alcorn*, 1 B. Mon. (Ky.) 160.

Certain cattle were delivered to plaintiff and two other persons, to be kept for a time, at the expiration of which they were to be sold by defendant. After deducting the first cost of the cattle, defendant was to retain one-half of the remainder of the proceeds, the other half to be equally divided between the plaintiff and the other persons. *Held*, that in this there was no partnership, for there was no community of profit and loss, or of ownership in the subject of the contract. *Beckwith v. Talbot*, 2 Colo. 639.

Where the landlord furnishes the land and teams and feeds them, and the tenant provides the labor and provisions for the laborers, in the cultivation of a crop, the gross product to be divided between them, without any account of expenditures made by either—

ness,¹ and the liability of one partner for the contracts of another must be founded on a relationship of each being a principal and also an agent as to the other.²

An agreement for a community of interest may constitute a partnership without an express stipulation that profits and losses shall be shared.³ An agreement to share net profits necessarily implies a sharing of losses,⁴ and the sharing of profits and losses is an ordinary incident of a joint business.⁵ So, one may be a partner

the agreement does not constitute an agricultural partnership. *Day v. Stevens*, 88 N. Car. 83; 43 Am. Rep. 732.

1. *Hunt v. Erickson*, 57 Mich. 330; *Harvey v. Childs*, 28 Ohio St. 319; *Bendel v. Hettrick*, 35 N. Y. Super. Ct. 405; *Cox v. Hickman*, 8 H. of L. Cas. 268; *Bullen v. Sharp*, L. R., 1 C. P. 86; *Kilshaw v. Jukes*, 3 Best & Sm. 847; *In re Eng. & Irish Church etc. Soc.*, 1 Hen. & M. 85.

It is held in *Missouri* that the relation of partnership does not exist between persons associated in a common undertaking, unless each one has the right to manage the whole business and to dispose of the entire property involved in the enterprise for its purposes, in the same manner and with the same power as all can when acting together. *Ashby v. Shaw*, 82 Mo. 76.

This view of the law of partnership has been criticised in some of the *English* cases, on the ground that several persons may be partners because that is their intention, while one or more of them may be, by their partnership agreement, deprived of all power to act for or in conjunction with the firm, either as principal or agent. *Holme v. Hammond*, L. R., 7 Ex. 218; *Pooley v. Diver*, 5 Ch. Div. 458. And see *Wheatcroft v. Hickman*, 9 C. B., N. S. 47.

Bates, in his *Law of Partnership*, vol. 1, p. 18, gives his view that "agency is in such cases deduced from partnership rather than partnership from agency."

2. *Seabury v. Bolles*, 51 N. J. L. 103; *Harvey v. Childs*, 28 Ohio St. 319. And see *Hunt v. Erickson*, 57 Mich. 330; *Cox v. Hickman*, 8 H. of L. Cas. 268; *Kilshaw v. Jukes*, 3 Best & Sm. 847; *Bullen v. Sharp*, L. R., 1 C. P. 86.

An agreement by which a person is to have a share of the profits of a business, is competent evidence on the question of his liability as a partner in that business; but sharing profits, in

any other sense than sharing them as a principal, is not an absolute legal test of his liability. The ground of liability should be either that defendant is a principal, bound by a contract made by himself, or his agent acting by his authority, or that he is estopped to deny that he is a principal under the general doctrine of estoppel. *Eastman v. Clark*, 53 N. H. 276.

Dormant Partners. — A person not actually engaged in the business as a principal, and not holding himself out as a partner, cannot be held for debts incurred in the business as a dormant partner, unless in virtue of some contract, express or implied, on his part in legal effect creating, as between him and the persons actually carrying on the business, the relation of principal and agent. *Wild v. Davenport*, 48 N. J. L. 129.

3. *Richards v. Grinnell*, 63 Iowa 44; 50 Am. Rep. 727; *Barrett v. Swann*, 17 Me. 180; *Bloomfield v. Buchanan*, 13 Oregon 108.

Before enactment of *Georgia Code*, § 1890, there might be a partnership without a community of property or agreement to share in the profits and losses. *Huguley v. Morris*, 65 Ga. 666.

4. *Wilcox v. Dodge*, 12 Ill. App. 517; *Lengle v. Smith*, 48 Mo. 276.

Three persons owned and ran a saw-mill jointly, on the agreement that one of them was to conduct its operations, pay all its expenses from the proceeds, and divide the net profits equally between the three. *Held*, a partnership. *Camp v. Montgomery*, 75 Ga. 795.

5. *Barrett v. Swann*, 17 Me. 180.

While it is true that the mere participation in the profits of a business does not constitute a partnership between the parties to the transaction, yet it is not necessary, in order to constitute one, that there be an express agreement that each party shall bear a share of any losses which may occur. This may be inferred from the other provisions of the contract, the nature

in the profits of a business enterprise without being a partner or a part owner in the property with which it is conducted.¹

b. SHARING PROFITS WITH NO MENTION AS TO LOSSES.—It has been laid down in quite a large number of cases that there must be a sharing in losses as well as in profits to constitute a partnership,² but the later and better rule would seem to be that a community of interest in the profits as such is sufficient,³ community of interest in the profits meaning a proprietorship, or a property right in them from the start, as much in one as in the other, as distinguished from a personal claim by the one against the other.⁴ And whether it is such depends upon no arbitrary use of phrases, but may apply as well to the receipt of a certain sum equal to a share of the profits, as to a share of the profits by that name.⁵

Participation in the profits of a business raises a presumption of the existence of a partnership.⁶ This presumption is not con-

of the business, and the relation of the parties to the business to be transacted. *Richards v. Grinnell*, 63 Iowa 44; 50 Am. Rep. 727.

1. *Hankey v. Becht*, 25 Minn. 212; *Moore v. Huntington*, 7 Hun (N. Y.) 425.

2. *Mayrant v. Marston*, 67 Ala. 453; *Pattison v. Blanchard*, 5 N. Y. 186; *Fitch v. Hall*, 25 Barb. (N. Y.) 13; *Vanderburgh v. Hull*, 20 Wend. (N. Y.) 70; *Cummings v. Mills*, 1 Daly (N. Y.) 520; *Lowry v. Brooks*, 2 McCord (S. Car.) 421.

A writing, "Received of G \$2,000, to invest in wool, said G to receive two-thirds of the net profits on the sale of the wool, and O one-third (signed) O," does not establish a partnership, there being no provision for sharing losses. *Ruddick v. Otis*, 33 Iowa 402.

3. See *Parker v. Canfield*, 37 Conn. 250; 9 Am. Rep. 317; *Beecher v. Bush*, 45 Mich. 188; 40 Am. Rep. 465; *Bromley v. Elliot*, 38 N. H. 287; *Meriden Nat. Bank v. Gallaudet*, 120 N. Y. 298; *Cothran v. Marmaduke*, 60 Tex. 370; *Goode v. McCartney*, 10 Tex. 195; *King v. Remington*, 36 Minn. 15; *Farr v. Morrill*, 53 Hun (N. Y.) 31; *Fay v. Waldron* (Supreme Ct.) 3 N. Y. Supp. 894.

An agreement between two persons, providing that they shall together work a quarry and share equally in the profits, and that the manager thereof shall pay the expenses out of the proceeds of the same, constitutes a partnership between such persons, as defined by Civil Code *California*, § 2395, being "an association of two or more

persons for the purpose of carrying on business together, and dividing its profits between them." *Quinn v. Quinn*, 81 Cal. 14.

Where a complaint alleges that plaintiff was entitled to share in the profits of a transaction set out in the complaint, that he was to contribute more or less of his time, and was to repay to defendants money advanced by them for his interest, without regard to profit or loss, it alleges facts constituting him a partner, and when the business is at an end, and the assets reduced to money, he is entitled to an accounting. *Stern v. Harris*, 40 Minn. 209.

4. See *Bates' Law of Part.* 38; *Campbell v. Sherman* (Supreme Ct.), 8 N. Y. Supp. 630; *Hyman v. Peters*, 30 Ill. App. 134.

An agreement between two persons by which they are to divide the profits of a business between them, "share and share alike," constitutes them partners as to third persons, whatever may be the arrangement between themselves. *Caldwell v. Miller*, 127 Pa. St. 442.

5. *Parker v. Canfield*, 37 Conn. 250.

6. *Parker v. Canfield*, 37 Conn. 250; *Lockwood v. Doane*, 107; *Ryder v. Wilcox*, 103 Mass. 24; *Parchen v. Anderson*, 5 Mont. 438; 51 Am. Rep. 65; *St. Louis Bank v. Altheimer*, 91 Mo. 190; *Cothran v. Marmaduke*, 60 Tex. 370; *Meehan v. Valentine*, 29 Fed. Rep. 276; *Re Ward*, 2 Flip. (U. S.) 462; *Re Francis*, 2 Sawy. (U. S.) 286; 7 Nat. Bank Reg. 359; *Pooley v. Driver*, 5 Ch. D. 458; *Greenham v. Gray*, 4 Irish Com. L. 501.

Community of profits is essential to a

clusive;¹ but if not rebutted, it is sufficient to establish a partnership.²

In such cases, where there is a joint ownership of the subject matter of the agreement, one having as much right as another in the subject matter, the claim to the profits would necessarily be a like proprietary right, and a partnership would result;³ except, perhaps, in cases of joint ownership where a part of the profits is taken as rent.⁴ Where, however, the whole of the capital stock is contributed by one, it is much more difficult to ascertain the intention of the parties.⁵ Whether a sharing the profits constitutes a partnership in such case, depends upon the nature of the contract and the real consideration upon which the money is received.⁶ The labor, skill or experience contributed by the one is a contribution to the joint enterprise as well as the capital of the other,⁷

complete partnership. Where there is no express stipulation to the contrary, it will be presumed that the losses are to be shared in proportion to the profits. *Oppenheimer v. Clemmons*, 18 Fed. Rep. 886.

In determining the question of partnership *vel non*, the court will look to the actual relation of the parties consequent upon their engagements, and in favor of creditors they will ordinarily apply the doctrine that the party who shares in the profits must also bear his share of the liabilities. *Stevens v. Gainesville Bank*, 62 Tex. 499.

1. *Lockwood v. Doane*, 107 Ill. 235; *Parchen v. Anderson*, 5 Mont. 438; 51 Am. Rep. 65; *Fourth Nat. Bank v. Altheimer*, 91 Mo. 190; *Meehan v. Valentine*, 29 Fed. Rep. 276; *Re Ward*, 2 Flip. (U. S.) 462.

Participation in profits, or the right to participate in the profits of a business, is not an invariable test of a partnership, even as to creditors. *Wild v. Davenport*, 48 N. J. L. 129.

2. See *Lockwood v. Doane*, 107 Ill. 235; *Fourth Nat. Bank v. Altheimer*, 91 Mo. 190; *Meehan v. Valentine*, 29 Fed. Rep. 276.

The question is one of fact for the jury. *Re Ward*, 2 Flip. (U. S.) 462.

3. *Mumford v. Nicoll*, 20 Johns. (N. Y.) 611.

On a petition averring a joint adventure in real estate, by parol agreement, and that the deeds were to be taken in the name of the plaintiff, and to be held in trust for both parties, "who should have equal interests and share in the common venture," the plaintiff's investment with interest to be first returned to him, it was held that the parties were partners. *Rich-*

ards v. Grinnell, 63 Iowa 44; 50 Am. Rep. 727.

Where two persons agree to raise together a crop of corn, on certain agreed terms, and divide the product, the agreement constitutes a partnership, and the product, until divided, is joint property, and in the joint possession of the parties. *Allen v. Davis*, 13 Ark. 28.

B and H, sole managers of the business of a brewing, malting and distilling company, received for their services five per cent. on all sales, which commission, by an agreement between themselves, they divided, three per cent. to H and two per cent. to B. In order to raise money to pay for purchases made in the name of B and H, they gave their joint and several notes signed in their individual names. *Held*, to be a partnership. *Heise v. Barth*, 40 Md. 259.

Sale of Joint Interest.—A, the owner of an invoice of goods in the city of New York, sold one-half of his interest therein to B, who was to proceed to San Francisco and there dispose of the goods on joint account. *Held*, that this constituted them partners. *Soule v. Hayward*, 1 Cal. 345. And see *Fay v. Waldron* (Supreme Ct.), 3 N. Y. Supp. 894.

4. See *Quackenbush v. Sawyer*, 54 Cal. 439; *Chapman v. Eames*, 67 Me. 452.

5. *Bates' Law of Part.* 46, says: "There is a proportionately greater tendency in the courts to disagree, and to decide so as to avoid a hardship rather than to ascertain and apply a logical test."

6. *Parker v. Canfield*, 37 Conn. 250.

7. See *Ward v. Thompson*, 22 How.

and such a combination will be deemed to constitute a partnership unless something appears to indicate the absence of a joint ownership of the business and profits;¹ the question in such case being whether or not there is a joint ownership in the business or enterprise and the profits, as partners, the same as in case of the joint contribution of capital.² The existence of a power of dis-

Pr. (N. Y.) 330; *Sankey v. Columbus Iron Works*, 44 Ga. 228.

A contract that A shall furnish and replenish a stock of goods which B is to take charge of and sell, deducting from the proceeds the expenses and a fixed sum for himself, the profits to be divided equally, and B to take his share at the expiration of the contract out of the goods on hand, creates a partnership, notwithstanding a stipulation that the goods are to remain A's property. *Kuhn v. Newman*, 49 Iowa 424.

1. See *Fisher v. Sweet*, 67 Cal. 228; *Hill v. Sheibley*, 68 Ga. 556; *Perry v. Butt*, 14 Ga. 699; *Hackett v. Stanley*, 115 N. Y. 625; *Farmers' Ins. Co. v. Ross*, 29 Ohio St. 429; *Miller v. Sullivan*, 1 Cin. (Ohio) 271; *Knight v. Ogden*, 2 Tenn. Ch. 473.

Agreement to Furnish Capital.—Plaintiff and defendant agreed that plaintiff was to furnish the capital to carry on the business of manufacturing and selling woodenware, defendant to receive one-third and plaintiff two-thirds of the profits, nothing being said about any losses. *Held*, that the mere fact that no provision was made in the agreement, whereby defendant was bound to pay his proportion of the losses, if any, did not prevent the parties to the agreement from becoming partners as between themselves. *Munro v. Whitman*, 8 Hun (N. Y.) 553.

Where M and H agreed to purchase pork on joint account, M to furnish all money necessary in excess of advances obtained on the pork and to receive back his advances, the balance to be divided, it was held to be a partnership, and not a loan. *Miller v. Price*, 20 Wis. 117.

T bought negroes and turned them over to M. It was agreed that the latter, being a skillful trader, should take charge of them, carry them to a point some distance off and sell them; that the money invested by T should be returned, the expenses paid and net profits divided. M was allowed to purchase other negroes and draw on T for the price of them. No agreement was

made as to losses. M sold a negro to H, using the firm name of M and T, and warranted soundness. The negro proving unsound, M took him back and gave a note signed with the partnership name for the amount to be paid back. *Held*, that prior to the code these facts would seem to make M & T partners and as such liable on the note. *Huguley v. Morris*, 65 Ga. 666.

Agreement to Furnish Property.—The parties joined to carry on a mutual adventure for mutual profit, one contributing the vessel, the other his skill, labor, experience, etc., and agree upon a communion of profits on a fixed ratio. *Held*, that it was a partnership, and that admiralty had no jurisdiction over such a contract. *Ward v. Thompson*, 22 How. Pr. (N. Y.) 330. And see *Julio v. Ingalls*, 1 Allen (Mass.) 41; *Reynolds v. Pool*, 84 N. Car. 37; 37 Am. Rep. 607.

An agreement by A and his wife with B, to work on the latter's farm, all sharing jointly in the proceeds of the joint labor, constitutes a partnership. *Plummer v. Trost*, 81 Mo. 425.

An agreement between T and L, whereby L was to furnish the necessary machinery for raising a sunken steamer and T the necessary labor, the raised material to be sold by L for their joint account, L first to repay T the amounts paid by him, constitutes them partners, both *inter sese* and as to third persons. *Lynch v. Thompson*, 61 Miss. 354.

Agreements to Perform Different Services.—Where two persons agreed to burn lime on shares, one to fill the kiln with stone, and the other to burn the kiln and furnish the wood, the lime to be equally divided between them, it was held, that a technical partnership existed between the parties. *Musier v. Trumbour*, 5 Wend. (N. Y.) 275.

2. *Dalton City Co. v. Dalton Mfg. Co.*, 33 Ga. 243; *Robbins v. Laswell*, 27 Ill. 365; *Bearce v. Washburn*, 43 Me. 564; *Wright v. Davidson*, 13 Minn. 449; *Lengle v. Smith*, 48 Mo. 276; *Holt v. Kernodle*, 1 Ired. (N. Car.) 199; *Newbrau v. Snider*, 1 W. Va. 153; *Gilbank v. Stephenson*, 31 Wis. 592.

position over the profits or property of the business in each is an important test as to the existence of a partnership;¹ and where such power is restricted on the part of the party performing services, the intention not to become partners will be inferred.²

Commercial Partnerships.—A, B and C entered into articles of agreement with each other to fit out an adventure to Texas for the mutual benefit of all. A and B were to furnish all the capital and make the purchases here in their own names. B and C were to go out to Texas with the goods. C was to travel about the country there, dispose of the goods and procure remittances. B was to receive a certain sum per month for his services, C was to receive one-fifth part of the net profits of the adventure, and the remaining four-fifths were to be divided equally between A and B. *Held*, that A and B were liable as partners with C, especially as between them and third persons who found them carrying on joint adventure for their mutual benefit. *Bucknam v. Barnum*, 15 Conn. 67. And see *Ruchman v. Decker*, 23 N. J. Eq. 283; reversed on appeal in 28 N. J. Eq. 614, but without affecting this point.

B advanced \$20,000 to H to invest in the purchase and sale of cotton goods, the business to be attended to by H, and after repaying the advance, to divide the profit equally. Afterwards real estate was purchased with a part of the proceeds and title taken in the name of H. This resulted in a loss. They were held to be partners *inter sese*, the loss falling upon both. *Brinkley v. Harkins*, 48 Tex. 225.

Manufacturing Partnerships.—A entered into an agreement with B, etc., to manufacture and sell roller skates. A was to furnish the capital, do the buying and selling, and have general charge of the financial department; B and C to perform the specific duties, each to receive certain compensation for his services, and the net profits to be equally divided among all three. *Held*, that this agreement showed that A, B and C were partners. *Dame v. Kemster*, 164 Mass. 454.

A owning a factory, agreed to contribute it at a certain rent and supply funds for the business, B to work it, employ and dismiss hands, not to enter into any other business and have full and absolute control, and have for his management \$150 per annum, and one-fifth of the profits, nothing

being said about losses, and the word partner not having been used. A discharged B for alleged misconduct, acting on the theory that he was an employee only. They were held to be partners, the word management by construed to relate to a managing partner. *Greenham v. Gray*, 4 Irish Com. Law 501. And see *Whitney v. Ludington*, 17 Wis. 140.

Applying Profits to Mutual Support.—A mother, on her husband's death, took her son, seventeen years old from school, and put him in charge of his father's business, she and her daughter assisting in carrying on the business, and the profits being used for the support of the family. The mother, in her bill in equity, claimed a partnership; the son denied it. *Held*, that there was sufficient evidence of partnership to justify the granting of an issue. *Huston v. Huston*, 13 Phila. (Pa.) 183.

1. See *Antry v. Frieze*, 59 Ala. 587; *Hunt v. Erickson*, 57 Mich. 330; *Cox v. Delano*, 3 Dev. (N. Car.) 89; *Farmers' Ins. Co. v. Ross*, 29 Ohio St. 429; *Whitney v. Ludington*, 17 Wis. 140; *Moore v. Davis*, 11 Ch. D. 261.

This power has been held to constitute the body a partnership, even where the gross receipts were to be divided, in the absence of such disposition. *Antry v. Frieze*, 59 Ala. 587; *Farmers' Ins. Co. v. Ross*, 29 Ohio St. 429.

2. *Dwinel v. Stone*, 30 Me. 384; *Tharp v. Marsh*, 40 Miss. 158; *Newberger v. Friede*, 23 Mo. App. 631; *Ashby v. Shaw*, 82 Mo. 76; *Musser v. Brink*, 68 Mo. 242; s. c. 80 Mo. 350; *Donnell v. Harshe*, 67 Mo. 170; *Conklin v. Barton*, 43 Barb. (N. Y.) 435; *Voorhees v. Jones*, 29 N. J. L. 270; *Kellogg v. Griswold*, 12 Vt. 291. And see *Woodward v. Cowing*, 41 Me. 9.

G having the exclusive right to cut timber from certain lands, agreed with B to furnish teams, money and supplies, and B was to devote his whole time to the work of cutting the timber and taking it to market, profits to be divided, and if B desired to sell his share of the lumber, he could do so upon G's approving the price and the buyer, but G was entitled to take it at that price. This was held not to constitute a partner-

If, however, there is otherwise a true partnership in respect to a joint adventure with participation in profit and loss, even though one party is restricted from controlling the product for sale, it will still be one.¹

Participation in the profits of a firm gives the person so participating no title to the capital stock, where his interest is merely in the profits, and the same is subject to restoration to the contributor.²

(1) *Stipulation Against Losses*.—It is competent for partners to stipulate that some of their number shall be guaranteed or indemnified against loss³ such a stipulation does not prevent their contract from being one of partnership, if it otherwise would be so, and does not alter the presumption of partnership arising from a community of interest in the profits,⁴ though a person dealing with a partnership who has notice that no personal responsibility is to be assumed by one of its members, cannot hold him liable as a partner.⁵

c. SHARING PROFITS AS COMPENSATION FOR SERVICES.—The receipt of a share of the profits as compensation for services as agent, servant, clerk, manager, broker or other person acting in a

ship, B not having a partner's right of disposition. *Brale v. Goddard*, 49 Me. 115.

F agreed with C, who owned a mill, farm and wood lot, to cut the timber, draw it to mill and manufacture it into chair-backs, or otherwise as directed by C, carrying on the farm in connection with the mill, taxes on the mill and farm, expenses of drawing, freight and proceeds to be equally divided, C to furnish lumber, market the goods and make collections. It was held that F was not a partner. *Clark v. Smith*, 52 Vt. 529.

1. *Meador v. Hughes*, 14 Bush (Ky.) 652.

2. *Bartlett v. Jones*, 2 Strobb. (S. Car.) 471; *Bartlett v. Levy*, 2 Strobb. (S. Car.) 471; *Knight v. Ogden*, 2 Tenn. Ch. 473.

3. *Hazard v. Hazard*, 1 Story (U. S.) 371; *Bond v. Pittard*, 3 M. & W. 357; *Gilpin v. Enderly*, 5 B. & A. 954; *Fereday v. Horden*, Jac. 144.

4. *Pollard v. Stanton*, 7 Ala. 761; *Camp v. Montgomery*, 75 Ga. 795; *Robbins v. Laswell*, 27 Ill. 365; *Consolidated Bank v. State*, 5 La. Ann. 44; *Rowland v. Long*, 45 Md. 439; *Bank of Rochester v. Monteath*, 1 Den. (N. Y.) 402; *Walden v. Sherburne*, 15 Johns. (N. Y.) 409; *Bond v. Pittard*, 3 M. & W. 357; *Brown v. Tapscott*, 6 M. & W. 119; *Geddes v. Wallace*, 2 Bligh 270. But see *Buzard v.*

First Nat. Bank, 67 Tex. 83; *Ruddick v. Otis*, 33 Iowa 402; *Whitehill v. Shickle*, 43 Mo. 537; *Marston v. Gould*, 69 N. Y. 220.

To the contrary, see *Ruddick v. Otis*, 33 Iowa 402; *Whitehill v. Shickle*, 43 Mo. 537; *Marston v. Gould*, 69 N. Y. 220.

An agreement between A and B, stipulated that A should use B's name in the firm of A & Co., bankers; that B was not to participate in profits or losses, but to have for his share of the profits 10 per cent. per annum on all deposits he might make with said firm; and that A was to keep B harmless from all losses, etc. *Held*, that A and B were partners. *Clift v. Barrow*, 108 N. Y. 187.

A and H entered into an agreement whereby A leased to H a certain lot of land, on which the former was to make improvements at once, and the latter might add others from the profits of the concern, if both parties agreed thereto. H was to manage the concern and give A half the net profits, and to render A liable for no sum over \$100, without his consent. H furnished the materials to fit up the buildings. *Held*, that A was liable thereto as a partner. *Brownlee v. Allen*, 21 Mo. 123; *Morgan v. Allen*, 21 Mo. 127.

5. *Burritt v. Dickson*, 8 Cal. 113; *Bailey v. Clark*, 6 Pick. (Mass.) 372; *Elderly v. Gardner*, 9 Neb. 130; *Ben-*

fiduciary capacity, is inconsistent with the idea of a joint proprietorship of the business and profits as such and does not constitute a partnership between the parties.¹ Such receipt of a part of the profits, however, has been held by some of the courts to

del *v. Hettrick*, 35 N. Y. Super. Ct. 405; *Jordan v. Wilkns*, 3 Wash. (U. S.) 110.

1. *Tayloe v. Bush*, 75 Ala. 432; *Merchants etc. Nat. Bank v. Rice*, 89 Ala. 201; *Randle v. State*, 49 Ala. 14; *Dillard v. Schruggs*, 36 Ala. 570; *Moore v. Smith*, 19 Ala. 774; *Hodges v. Dawes*, 6 Ala. 215; *Shropshire v. Shepperd*, 3 Ala. 733; *Romero v. Dalton* (Ariz. 1886), 11 Pac. Rep. 863; *Gardenhire v. Smith*, 39 Ark. 280; *Christian v. Crocker*, 25 Ark. 327; *Olmstead v. Hill*, 2 Ark. 346; *Hanna v. Flint*, 14 Cal. 73; *Darrow v. St. George*, 8 Colo. 592; *LeFevre v. Castagnio*, 5 Colo. 564; *Morgan v. Farrel*, 58 Conn. 413; *Pond v. Cummins*, 50 Conn. 372; *Morrow v. Cloud*, 77 Ga. 114; *Gurr v. Martin*, 73 Ga. 528; *Sankey v. Columbus Iron Works*, 44 Ga. 228; *Burton v. Goodspeed*, 69 Ill. 237; *Fawcett v. Osborn*, 32 Ill. 411; *Porter v. Ewing*, 24 Ill. 617; *Stevens v. Faucet*, 24 Ill. 483; *Blue v. Leathers*, 15 Ill. 31; *Heshion v. Julian*, 82 Ind. 576; *Boyce v. Brady*, 61 Ind. 432; *Keiser v. State*, 54 Ind. 379; *Emmons v. Newman*, 38 Ind. 372; *Ellsworth v. Pomeroy*, 26 Ind. 158; *Macy v. Combs*, 15 Ind. 469; *Holbrook v. Oberne*, 56 Iowa 324; *Ruddick v. Otis*, 33 Iowa 402; *Reed v. Murphy*, 2 Green (Iowa) 574; *Price v. Alexander*, 2 Greene (Iowa) 427; 52 Am. Dec. 526; *Shepard v. Pratt*, 16 Kan. 209; *Heran v. Hall*, 1 B. Mon. (Ky.) 159; *Halliday v. Bridewell*, 36 La. Ann. 238; *Maunsell v. Willett*, 36 La. Ann. 322; *Chaffraix v. Price*, 29 La. Ann. 176; *Miller v. Chandler*, 29 La. Ann. 88; *Hallet v. Desban*, 14 La. Ann. 535; *Taylor v. Sotolingo*, 6 La. Ann. 154; *St. Victor v. Daubert*, 9 La. 314; *Cline v. Caldwell*, 4 La. 137; *Bulloc v. Paithos*, 10 Mart. (La.) 86; *Braley v. Goddard*, 49 Me. 115; *Dwinel v. Stone*, 30 Me. 384; *Weems v. Stallings*, 2 Har. & J. (Md.) 365; *Whiting v. Leakin*, 66 Md. 255; *Reddington v. Lanahan*, 59 Md. 429; *Sangston v. Hack*, 52 Md. 173; *Crawford v. Austin*, 34 Md. 49; *Benson v. Ketchum*, 14 Md. 331; *Bull v. Schuberth*, 2 Md. 38; *Kerr v. Potter*, 6 Gill (Md.) 404; *Partridge v. Kingman*, 130 Mass. 476; *Commonwealth v. Bennett*, 118 Mass. 443; *Haskins v. Warren*,

115 Mass. 514; *Meserve v. Andrews*, 104 Mass. 360; *Holmes v. Old Colony R. R.*, 5 Gray (Mass.) 58; *Buck v. Dowley*, 16 Gray (Mass.) 555; *Bradley v. White*, 10 Met. (Mass.) 303; 43 Am. Dec. 435; *Denny v. Cabot*, 6 Met. (Mass.) 82; *Judson v. Adams*, 8 Cush. (Mass.) 556; *Blanchard v. Coolidge*, 27 Pick. (Mass.) 151; *St. Denis v. Saunders*, 36 Mich. 369; *Morrison v. Cole*, 30 Mich. 102; *Wass v. Atwater*, 33 Minn. 83; *Gill v. Feris*, 82 Mo. 156; *Wiggins v. Graham*, 51 Mo. 17; *State v. Donnelly*, 9 Mo. App. 519; *Mason v. Hackett*, 4 Nev. 420; *Atherton v. Tilton*, 44 N. H. 452; *Newman v. Bean*, 21 N. H. 93; *Clement v. Hadlock*, 13 N. H. 185; *Voorhees v. Jones*, 29 N. J. L. 270; *Smith v. Perry*, 29 N. J. L. 74; *McMahon v. O'Donnell*, 20 N. J. Eq. 306; *Hargrave v. Conroy*, 19 N. J. Eq. 281; *Nutting v. Colt*, 7 N. J. Eq. 539; *Walker v. Spencer*, 86 N. Y. 162; *Smith v. Bodine*, 74 N. Y. 30; *Prouty v. Swift*, 51 N. Y. 594; *Osbrey v. Reimer*, 51 N. Y. 360; *Lewis v. Greider*, 51 N. Y. 231; *Leonard v. New York Tel. Co.* 41 N. Y. 544; *Hodges v. Grapel*, 112 N. Y. 419; *Butler v. Finck*, 21 Hun (N. Y.) 210; *Moore v. Huntington*, 7 Hun (N. Y.) 425; *Beudel v. Hettrick*, 45 How. Pr. (N. Y.) 198; 3 Jones & Sp. (N. Y.) 405; *Strong v. Place*, 4 Robt. (N. Y.) 385; 51 N. Y. 627; *Lamb v. Grover*, 47 Barb. (N. Y.) 317; *Conklin v. Barton*, 43 Barb. (N. Y.) 435; *Clark v. Gilbert*, 32 Barb. (N. Y.) 576; *Brockway v. Burnap*, 16 Barb. (N. Y.) 309; *Hodgman v. Smith*, 13 Barb. (N. Y.) 302; *Mohawk R. R. v. Niles*, 3 Hill (N. Y.) 162; *Ross v. Drinker*, 2 Hall (N. Y.) 415; *Burckle v. Eckart*, 1 Den. (N. Y.) 337; 3 N. Y. 132; *Vanderburg v. Hull*, 20 Wend. (N. Y.) 70; *Muzzy v. Whitney*, 10 Johns. (N. Y.) 226; *Covington v. Leak*, 88 N. Car. 133; *Johnson v. Miller*, 16 Ohio 431; *McArthur v. Ladd*, 5 Ohio 514; *Dale v. Pierce*, 85 Pa. St. 474; *Raiguel's Appeal*, 80 Pa. St. 234; *Dunham v. Rogers*, 1 Pa. St. 255; *Miller v. Bartlett*, 15 S. & R. (Pa.) 137; *Blight v. Ewing*, 1 Pittsb. (Pa.) 275; *Ditsche v. Becker*, 6 Phila. (Pa.) 176; *Bentley v. Harris*, 10 R. I. 434; *Potter v. Moses*, 1 R. I. 430; *Lowrey*

. Brooks, 2 McCord (S. Car.) 421; *impson v. Feltz*, 1 McCord (S. Car.) h. 213; *Bartlett v. Jones*, 2 Strobh. (S. ar.) 471; 49 Am. Dec. 606; *Bell v. Hare*, 12 Heisk. (Tenn.) 615; *Whitmore v. Patterson*, 6 Lea (Tenn.) 119; *uzard v. Greeneville Bank*, 67 Tex. 3; *Grabenheimer v. Rindskoff*, 64 ex. 49; *Cothran v. Marmaduke*, 60 ex. 370; *Bradshaw v. Apperson*, 36 ex. 133; *Goode v. McCartney*, 10 ex. 103; *Brown v. Watson*, 72 Tex. 16; *Buzard v. First Nat. Bank of Greeneville*, 67 Tex. 83; *Missouri Pa. y. Co. v. Johnson*, 72 Tex. 95; *Cher- v. Owsley* (Tex. 1888), 10 S. V. Rep. 519; *Clark v. Smith*, 52 Vt. 29; *Bruce v. Hastings*, 41 Vt. 380; *fason v. Potter*, 26 Vt. 722; *Stearns v. Haven*, 16 Vt. 87; *Kellogg v. Gris- old*, 12 Vt. 291; *Bowman v. Bailey*, 5 Vt. 170; *Ambler v. Bradley*, 6 Vt. 19; *Broadman v. Keeler*, 2 Vt. 65; *Vilkinson v. Jett*, 7 Leigh (Va.) 115; 5 Am. Dec. 493; *Sodiker v. Applegate*, 24 W. Va. 411; 49 Am. Rep. 252; *Nils v. Bridge*, 23 W. Va. 20; *La Flex v. Burss*, 77 Wis. 538; *Nicholaus v. hielges*, 50 Wis. 491; *Ford v. Smith*, 7 Wis. 261; *Berthold v. Goldsmith*, 4 How. (U. S.) 536; *Seymour v. reer*, 8 Wall. (U. S.) 202-215; *Eins- in v. Gourdin*, 4 Wood (U. S.) 415; *azard v. Hazard*, 1 Story (U. S.) 371; *de Blumenthal*, 18 Nat. Bankr. Reg. 55; *The Crusader*; *Ware* (U. S.) 437; *larsh v. Northwestern Ins. Co.*, 3 iss. (U. S.) 351; *Blair v. Shaeffer*, 33 ed. Rep. 218; *Brown v. Hicks*, 24 Fed. ep. 811; *Ross v. Parkyns*, L. R. 20 q. 331; *Stocker v. Brockelbank*, 3 M. : G. 250; *Rawlinson v. Clark*, 15 M. : W. 292; *Pott v. Eyton*, 3 C. B. 32; *ieddes v. Wallace*, 2 Bligh 270; *Reg. v. McDonald*, 7 Jur., N. S. 1127; 31 . J., M. C. 67; *Northern Ry. Co. v. atton*, 15 Up. Can. C. P. 332.

An agreement between A and B, whereby the former was to receive twenty per cent. net of all claims collected against the United States, and the latter fifty per cent. for collecting, does not make them partners. *Logie v. Black*, 24 W. Va. 1.

In consideration of the right granted him by the plaintiff to make use, and sell at the defendant's expense, and on his own account, within the British dominion, certain machines which the plaintiff had invented, and sell the right to others to make, use and sell the same, the defendant undertook and agreed to procure from the British authorities let-

ters patent to the plaintiff for the machines, and to pay over, quarterly, to plaintiff one-half the proceeds of all sales made by him. *Held*, not a contract of partnership. *Wheeler v. Farmer*, 38 Cal. 203.

M took a job of finishing a church at a certain price. Afterwards H agreed to do it with him; the work of each to offset the work of the other, and the expense of material and other help to be deducted from the contract price, and the balance divided equally between them. They did it accordingly, H working 30 days more than M. *Held*, that they were not partners, as between themselves, and that H could maintain assumpsit for the balance due him from M. *Hawkins v. McIntyre*, 45 Vt. 496.

The master and crew of a ship engaged in a whaling voyage, who are to receive, in lieu of wages, a proportion of the net proceeds of the oil which shall be obtained, are not partners with the owner of the ship. *Baxter v. Rodman*, 3 Pick. (Mass.) 435.

A lay or share in the proceeds or catching of a whaling voyage, does not create a partnership in the profits of the voyage, but it is in the nature of seaman's wages, and governed by the same rules. *Coffin v. Jenkins*, 3 Story (U. S.) 108.

Farming Contract.—A father agreed with his sons and a son-in-law that they should cultivate all his land, and should put in all their property, for his benefit; that he should furnish all the teams and farming utensils which he then owned; that, at the expiration of five years, the sons and son-in-law should have one-half of the chattels owned by the father at the time of the agreement, and one-half of the products of the farm, after deducting the expenses, and one-half the real estate owned by the father at the time of the agreement. In the mean time, the parties were to have their support and expenses out of the produce of the farms, and all the farming implements which might be necessary during the five years were to be purchased out of said produce. *Held*, that this agreement did not constitute the parties partners as between themselves, and that the administrator of the son-in-law, who died within the five years, could not call upon one of the parties to the agreement, who had paid to the widow of the son-in-law an equal share with the others, of the personal property, for an account and distribution of it as

constitute a partnership between the parties so sharing them as to third parties;¹ but the better, later and more universal rule seems

partnership funds. *Chase v. Barrett*, 4 Paige (N. Y.) 148.

An agreement between parties that one "shall cut and haul saw-logs from certain lands of the other during a specified season, at \$4.50 per thousand feet," the money to be advanced as the job progresses, and as necessary to prosecute the same, "the advancing party to receive one-third of the net profits of the said job above expenses." *Held*, not to constitute a partnership, if at all, except for the season. *Hall v. Edson*, 40 Mich. 651.

Commercial Contracts.—An agreement by S to divide his commissions for purchasing cotton with T, in consideration of T's having procured for S the agency for the principal, does not constitute S and T partners. *Southworth v. Thompson*, 10 Heisk. (Tenn.) 10.

An agreement between two houses to share commissions on sales of goods forwarded by one to the other, does not constitute a partnership. *Pomeroy v. Sigerson*, 22 Mo. 177.

A contract between wholesale and retail dealers, by which the former furnishes stock and the latter stores, insures and sells for a share of the profits does not create a partnership. *Brown v. Watson*, 72 Tex. 216.

An agreement to purchase goods at a fixed price, and to allow the seller a certain portion of the profits of their resale by the purchaser, does not constitute the parties partners. The purchaser is the agent of the seller in respect to the latter's interest in the profits. *Donley v. Hall*, 5 Bush (Ky.) 549; see *Edwards v. Tracy*, 62 Pa. St. 374.

Contracts for Manufacturing.—A contract, whereunder a manufacturer is supplied with stock and materials which are to continue the property of the capitalist by whom they were furnished, although it is stipulated that the party who carries on the business shall ultimately receive any surplus which may remain after reimbursing their cost to the party furnishing them, with interest or a percentage of profit by way of compensation for his capital, constitutes the relation of principal and agent and not of partnership, and, if *bona fide*, is not contrary to the policy of the law. *Emmons v. Westfield Bank*, 97 Mass. 230.

By a written contract between B and R, B agreed to furnish R for one year with wool, to be worked into satinetes, and R is to deliver to B all the satinetes which the wool will make, and is to find and pay for warps for the same. For working the wool, finding the warps, etc., B is to pay R forty per cent. on the sales of the satinetes. Each is to pay half of the charges. B is to have the whole direction of the sales, and should he make sales himself, he is to have one and one-half per cent. on forty per cent. of the sales. In an action against B and R for the price of the warps furnished by the plaintiff to R, it was held that B was not a partner to R, and consequently was not liable to the action. *Turner v. Bissell*, 14 Pick. (Mass.) 192.

I entered into an agreement with defendants, whereby the latter agreed to manufacture and sell, as general agents for the former, a medical compound, the recipe whereof was owned by him, for a term of years, for a commission of fifty per cent. net proceeds, of all sales; defendants agreeing to account for all proceeds, less expense. It was also agreed that after a specified sum had been paid to J, the recipe and process of manufacturing should belong jointly to the parties, each owning one-half. The stipulated sum was paid. In an action thereafter brought for an accounting, it was held that, as between themselves, the parties were not partners; and that, upon the accounting, defendants were properly charged with the actual proceeds of all sales, including sums which came to the hands of their agents or employees, although the same were embezzled or not accounted for by them. *Walker v. Spencer*, 86 N. Y. 162.

1. *Miller v. Hughes*, 1 A. K. Marsh. (Ky.) 181; *Taylor v. Terme*, 3 Har. & J. (Md.) 505; *Rowland v. Long*, 45 Md. 439; *Strader v. White*, 2 Neb. 348. And see *Lewis v. Greider*, 51 N. Y. 231; *Hackett v. Stanley*, 115 N. Y. 625.

A special agreement between two persons by which one of them is to receive one-third of the profits of a business for his services, and the other is to be liable for the debts, is no defense to an action commenced against them as partners by a creditor, who had no

to be that no partnership is created even as to them,¹ though where the arrangement is a mere device to avoid a partner's liability the former rule prevails.²

d. SHARING PROFITS FOR RENT.—Upon the same principle as that above stated a contract for the use of real or personal property, for a speculative compensation, consisting of a part of the profits growing out of such use, and dependent upon the success of the business, does not constitute a partnership, either *inter se*,³

notice or knowledge of the agreement before the liability occurred. *Lomme v. Kintzing*, 1 Mont. 290.

An employee whose compensation depends on the profits of the business, and who, if nothing be made, is to receive nothing, and who on several occasions held himself out as a partner, will be responsible as such to third persons, though *inter sese* the parties never intended a partnership. *Lee v. Bullard*, 3 La. Ann. 462.

1. *Hodges v. Dawes*, 6 Ala. 215; *Loomis v. Marshall*, 12 Conn. 69; *Burton v. Goodspeed*, 69 Ill. 237; *Parker v. Fergus*, 43 Ill. 437; *Macy v. Combs*, 15 Ind. 469; *Price v. Alexander*, 2 Greene (Iowa) 427; *Shepard v. Pratt*, 16 Kan. 209; *Chaffraix v. Lafitte*, 30 La. Ann. 631; *Hallett v. Desban*, 14 La. Ann. 535; *Taylor v. Sotolingo*, 6 La. Am. 254; *Partridge v. Kingman*, 130 Mass. 476; *Com. v. Bennett*, 118 Mass. 443; *Meserve v. Andrews*, 104 Mass. 360; *Holmes v. Old Colony R. Co.*, 5 Gray (Mass.) 58; *Bradley v. White*, 10 Met. (Mass.) 303; 43 Am. Dec. 435; *Denny v. Cabot*, 6 Met. (Mass.) 82; *Blanchard v. Coolidge*, 22 Pick. (Mass.) 151; *Turner v. Bissell*, 14 Pick. (Mass.) 192; *Hall v. Edson*, 40 Mich. 651; *Wiggins v. Graham*, 51 Mo. 17; *Voorhees v. Jones*, 29 N. J. Eq. 270; *Smith v. Bodine*, 74 N. Y. 30; *Butler v. Finch*, 21 Hun 210; *Hotchkiss v. English*, 4 Hun 369; *Conklin v. Barton*, 43 Barb. (N. Y.) 435; *Fitch v. Hall*, 25 Barb. (N. Y.) 13; *Beudel v. Hettrick*, 45 How. Pr. (N. Y.) 198; *Burckle v. Eckhart*, 1 Den. (N. Y.) 337; *Dale v. Pierce*, 85 Pa. St. 474; *Edwards v. Tracy*, 62 Pa. St. 374; *Dunham v. Rogers*, 1 Pa. St. 255; *Miller v. Bartlett*, 15 S. & R. (Pa.) 137; *Polk v. Buchanan*, 5 Sneed (Tenn.) 721; *Goode v. McCartney*, 10 Tex. 193; *Buzard v. First Nat. Bank*, 67 Tex. 83; *Bowman v. Bailey*, 10 Vt. 170; *Chapline v. Conant*, 3 W. Va. 507; *Marsh v. North Western Ins. Co.*, 3 Biss. (U. S.) 351; *Re Francis*, 2 Sawy. (U. S.) 286; 7 Nat. Bankr. Reg. 359; *Berthold*

v. Goldsmith, 24 How. (U. S.) 536; *Hazard v. Hazard*, 1 Story (U. S.) 371; *Einstein v. Gourdin*, 4 Woods. (U. S.) 415; *Oppenheimer v. Clemmons*, 18 Fed. Rep. 886; *Shaw v. Galt*, 16 Irish Com. L. 357. And see *Re Blumenthal*, 18 Nat. Bankr. Reg. 555.

S, a broker engaged largely in discounting a peculiar class of securities, agreed with E in writing, that the latter should furnish money with which S should buy such securities. When purchased they were not to be mingled with other securities bought by S, but were to be placed in E's possession, and when due were to be exchanged for other similar securities, or for cash. They were to yield a specified profit to E, and S was to retain all above that rate, and S guaranteed their genuineness as well as the stipulated profit. E was to hold possession of them to the extent of the money loaned and the profit, and an additional two per cent. to insure their prompt payment. A large business was carried on by S with which E neither had nor was supposed by creditors or others to have any connection, and their dealings with the securities so purchased were consistent with the agreement so made. *Held*, that he was not a partner of S, so as to render the securities purchased with his funds liable for the debts of S incurred in his general business. *Wilson v. Edmonds*, 130 U. S. 472.

2. *Motley v. Jones*, 3 Ired. Eq. (N. Car.) 144; *Purviance v. McClintee*, 6 S. & R. (Pa.) 259; *Ditsche v. Becker*, 6 Phila. (Pa.) 176.

3. *McDonnell v. Battle House Co.*, 67 Ala. 90; 42 Am. Rep. 99; *Quackenbush v. Sawyer*, 54 Cal. 439; *Beckwith v. Talbot*, 2 Cal. 639; *Augusta Bank v. Bones*, 75 Ga. 246; *Holloway v. Brinkley*, 42 Ga. 226; *Parker v. Fergus*, 43 Ill. 437; *Smith v. Vanderburg*, 46 Ill. 34; *Keiser v. State*, 58 Ind. 379; *Reed v. Murphy*, 2 Greene (Iowa) 574; *Price v. Alexander*, 2 Greene (Iowa) 427; 52 Am. Dec. 526; *Thomp-*

or as to third parties.¹

e. PROFITS AS INTEREST ON AND PAYMENT OF LOANS AND ADVANCES.—A loan or advance of money to be invested in some business or enterprise, the lender to share in the profits as or in lieu of interest on, or in repayment of such loan or advance, does not constitute a partnership; it is a mere loan on contingent compensation,² and this is so even though the loan may have been

son *v.* Snow, 4 Me. 264; 16 Am. Dec. 263; Bridges *v.* Sprague, 57 Me. 543; Holmes *v.* Old Colony R. R., 5 Gray (Mass.) 58; Cutler *v.* Winsor, 6 Pick. (Mass.) 335; 17 Am. Dec. 385; Reynolds *v.* Toppan, 15 Mass. 370; Thayer *v.* Augustine, 55 Mich. 187; 54 Am. Rep. 361; Beecher *v.* Bush, 45 Mich. 188; 40 Am. Rep. 465; Musser *v.* Brink, 80 Mo. 350; Kellogg Newspaper Co. *v.* Farrell, 88 Mo. 594; Donnell *v.* Harshe, 67 Mo. 170; Campbell *v.* Dent, 54 Mo. 325; Ward *v.* Bodeman, 1 Mo. App. 272; Pinckney *v.* Keyler, 4 E. D. Smith (N. Y.) 469; Heimstreet *v.* Howland, 5 Den. (N. Y.) 68; Johnson *v.* Miller, 16 Ohio 431; Brown *v.* Jaquette, 94 Pa. St. 113; 39 Am. Rep. 770; Irwin *v.* Bidwell, 72 Pa. St. 244; Dunham *v.* Rogers, 1 Pa. St. 255; England *v.* England, 1 Baxt. (Tenn.) 108; Felton *v.* Deall, 22 Vt. 170; Tobias *v.* Blin, 21 Vt. 544; Bowyer *v.* Anderson, 2 Leigh (Pa.) 550; Chapline *v.* Conant, 3 W. Va. 507; Wood *v.* Beath, 23 Wis. 254; Great Western Ry. *v.* Preston etc. R. Co., 17 Up. Can., Q. B. 477; Hawley *v.* Dixon, 7 Up. Can., Q. B. 218; Hayden *v.* Crawford, 3 Up. Can., Q. B., O. S. 583; Lyon *v.* Knowles, 3 Best & Sm. 556; Wish *v.* Small, 1 Camp. 331.

An agreement by a landlord with his tenant to take a share of the profits of the demised premises by way of rent does not constitute a partnership between them and does not prevent an action at law by the landlord against the tenant for the rent. Perrine *v.* Hankinson, 11 N. J. L. (6 Hals.) 181.

1. McDonnell *v.* Battle House Co., 67 Ala. 90; 42 Am. Rep. 99; Parker *v.* Fergus, 43 Ill. 437; Smith *v.* Vanderburg, 46 Ill. 34; Bridges *v.* Sprague, 57 Me. 543; Holmes *v.* Old Colony R. R., 5 Gray (Mass.) 58; Cutler *v.* Winsor, 6 Pick. (Mass.) 335; 17 Am. Dec. 385; Reynolds *v.* Toppan, 15 Mass. 370; Beecher *v.* Bush, 45 Mich. 188; 40 Am. Rep. 465; Kellogg Newspaper Co. *v.* Farrell, 88 Mo. 594; Campbell *v.* Dent, 54 Mo. 325; Ward *v.* Bodeman, 1 Mo. App. 272; Heim-

street *v.* Howland, 5 Den. (N. Y.) 68; Dunham *v.* Rogers, 1 Pa. St. 255; England *v.* England, 1 Baxt. (Tenn.) 108; Felton *v.* Deall, 22 Vt. 170; Bowyer *v.* Anderson, 2 Leigh (Va.) 550; Chapline *v.* Conant, 3 W. Va. 507.

To the contrary as to third parties, see Buckner *v.* Lee, 8 Ga. 285; Dalton City Co. *v.* Dalton Mfg. Co., 33 Ga. 243; Dalton City Co. *v.* Hawes, 37 Ga. 115.

2. Smith *v.* Garth, 32 Ala. 368; Culley *v.* Edwards, 44 Ark. 423; 51 Am. Rep. 614; LeFevre *v.* Castagnio, 5 Colo. 564; Parker *v.* Canfield, 37 Conn. 250; 9 Am. Rep. 317; Plunkett *v.* Bilson, 4 Del. Ch. 198; Slade *v.* Paschal, 67 Ga. 541; Butler *v.* Merrick, 24 Ill. App. 628; Smith *v.* Knight, 71 Ill. 148; 22 Am. Rep. 94; Hefner *v.* Palmer, 67 Ill. 161; Adams *v.* Funk, 53 Ill. 219; Lintner *v.* Millikin, 47 Ill. 178; Smith *v.* Vandenberg, 46 Ill. 34; Niehoff *v.* Dudley, 40 Ill. 406; Williams *v.* Fletcher, 129 Ill. 356; Hubbell *v.* Woolf, 15 Ind. 204; Williams *v.* Souter, 7 Iowa 435; Greend *v.* Kummel, 41 La. Ann. 65; Owens *v.* Mackall, 33 Md. 382; Robinson *v.* Simmonds, 146 Mass. 167; Emmonds *v.* Westfield Bank, 97 Mass. 230; Rice *v.* Austin, 17 Mass. 197; Buck *v.* Dowley, 16 Gray (Mass.) 555; Wall *v.* Balcom, 9 Gray (Mass.) 92; Gallop *v.* Newman, 7 Pick. (Mass.) 282; Bailey *v.* Clark, 6 Pick. (Mass.) 372; Parchen *v.* Anderson, 5 Mont. 438; Jones *v.* O'Farrel, 1 Nev. 354; Cassidy *v.* Hall, 97 N. Y. 159; Curry *v.* Fowler, 87 N. Y. 33; 41 Am. Rep. 343; Eager *v.* Crawford, 76 N. Y. 97; Richardson *v.* Hughitt, 76 N. Y. 55; Arnold *v.* Angell, 62 N. Y. 508; Salter *v.* Ham, 31 N. Y. 321; Manhattan Brass Mfg. Co. *v.* Sears, 1 Sweeny (N. Y.) 426; Peyser *v.* Halsted (Supreme Ct.), 5 N. Y. Supp. 827; Osbrey *v.* Reimer, 49 Barb. (N. Y.) 265; Krogh *v.* Minrath (Supreme Ct.), 8 N. Y. Supp. 816; Muzzy *v.* Whitney, 10 Johns. (N. Y.) 226; Harvey *v.* Childs, 28 Ohio St. 319; 22 Am. Rep. 387; Klosterman *v.*

made in consideration of a future partnership which was never consummated.¹ Nor is it a partnership as to third persons.² The

Hayes, 17 Oregon, 325; *Hart v. Kelley*, 83 Pa. St. 286; *Eshleman v. Harnish*, 76 Pa. St. 97; *Irwin v. Bidwell*, 72 Pa. St. 244; *Lord v. Proctor*, 7 Phila. (Pa.) 630; *Boston etc. Smelting Co. v. Smith*, 13 R. I. 27; 43 Am. Rep. 3; *Polk v. Buchanan*, 5 Sneed (Tenn.) 721; *Cooper v. Tappan*, 9 Wis. 361; *Dils v. Bridge*, 23 W. Va. 20; *Swann v. Sanborn*, 4 Woods (U. S.) 625; *Re Francis*, 2 Sawy. (U. S.) 286; 7 Nat. Bankr. Reg. 359; *Moore v. Walton*, 9 Nat. Bankr. Reg. 402; *Blair v. Shaefter*, 33 Fed. Rep. 218; *Meehan v. Valentine*, 29 Fed. Rep. 276; *Munson v. Hall*, 10 Grant's Ch. Up. Can. 61.

An agreement between a sawyer in Wisconsin, and a lumber merchant in Chicago, whereby the latter was to advance \$10,000 to be used by the former in sawing, etc., and the former to deliver all the lumber produced to the latter at \$1.00 per M less than the market rates at the time of the arrival of each cargo in Chicago, does not create a partnership. *Freese v. Ideson*, 49 Ill. 191.

In a suit to charge defendant as a partner with K, for debts incurred by K, evidence that the defendant had procured for K a loan of money to be used in a purchase of cotton and that K had voluntarily promised to give the defendant a part of the profits, if any were made, for his assistance in procuring the loan, when no sum or proportion of profits was named, is wholly insufficient to establish partnership. *Pleasants v. Fant*, 22 Wall. (U. S.) 116.

A purchased a permit to cut timber, and paid for it; and made a conditional assignment of it, and the timber cut under it, to D, as security for the payment of goods furnished by him for the undertaking. A afterwards agreed to share the profits and loss with B and C. This assignment did not make A, B, and C partners. *Dwinel v. Stone*, 30 Me. 384.

A contract in form of a lease does not constitute lessor and lessee partners because the lessor is to advance money and not to exact rent on certain conditions. *Agusta Bank v. Bones*, 75 Ga. 246.

The fact of a party advancing money to pay the wages of the employees of a commercial partnership and to dis-

charge its other expenses, does not constitute him a partner. *Greend v. Kummel*, 41 La. Ann. 65.

One who, in writing, lent to a firm of furniture manufacturers his notes for \$15,000, in consideration of their transfer to him of their entire stock, fixtures, debts, good will, etc., with a view that they, as his agents, close the business, and deliver to him the proceeds, the same to pay, firstly their outstanding liabilities; secondly, his notes, and the balance, if any, to them, was held not liable for articles afterwards purchased by them in their own names to complete unfinished work. His frequent presence at the store, seeing the work go on, raised no presumption of silent partnership, or of an implied contract to pay for the articles. *Noblitt v. Bonaffon*, 81 Pa. St. 15.

1. *Hubbell v. Woolf*, 15 Ind. 204.

2. *Cully v. Edwards*, 44 Ark. 423; *LeFevre v. Castagnio*, 5 Cal. 564; *Smith v. Knight*, 71 Ill. 148; 22 Am. Rep. 34; *Hefner v. Palmer*, 67 Ill. 161; *Williams v. Soutter*, 7 Iowa 435; *Parthen v. Anderson*, 5 Mont. 438; *Cassidy v. Hall*, 97 N. Y. 159; *Curry v. Fowler*, 87 N. Y. 33; 41 Am. Rep. 343; *Eager v. Crawford*, 76 N. Y. 97; *Richardson v. Hughitt*, 76 N. Y. 55; 32 Am. Rep. 267; *Magovern v. Robertson*, 40 Hun (N. Y.) 166; *Harvey v. Childs*, 28 Ohio St. 319; 22 Am. Rep. 387; *Boston etc. Smelting Co. v. Smith*, 13 R. I. 27; 43 Am. Rep. 3; *Polk v. Buchanan*, 5 Sneed (Tenn.) 721; *Kelly v. Scotto*, 49 L. J. Ch. 383; *Dean v. Harris*, 33 L. T., N. S. 639; *Mollwo v. Court of Wards*, L. R., 4 P. C. 419; *Ex parte Tennant*, 6 Ch. D. 303; *Bullen v. Sharp*, L. R., 1 C. P. 86.

The above rule is adopted by statute in *Pennsylvania*. See *Irwin v. Bidwell*, 72 Pa. St. 244; *Hart v. Kelly*, 83 Pa. St. 286; *Lord v. Proctor*, 7 Phila. (Pa.) 630; *Eshleman v. Harnish*, 76 Pa. St. 97.

Where B advanced \$16,500 to P to be used in buying cattle, P having been B's agent, P to buy and sell the cattle and to keep them, and use the proceeds to repay the advance, and divide the net profits equally, and if there were no profits, B was to get his money back, and P was to receive nothing, his share of the profits being in lieu of his former salary, P to use his discretion in

opposite theory, however, was adhered to formerly in the *English* courts, and in the earlier American cases;¹ the reason for the application of a different principle to contracts for a share of the profits as compensation for the use of money, from that applied to like contracts for services or the use of property being, probably, the fact that such compensation for a loan constitutes in some cases an interest in excess of the usury laws.² That doctrine, however, must now be considered as obsolete;³ the fact that the interest expected or received renders the contract usurious not being permitted to affect its construction with reference to partnership.⁴

To constitute a loan, the money advanced must be returnable in any event. It is not a loan if repayment is contingent upon the profits, for in such case it is made, not upon the personal responsibility of the borrower, but upon the security of the busi-

ness subject to certain limitations, it was held in an action on a note given by P in his own name for money advanced and put into the cattle that B not intending or believing himself to be a partner, was not liable on the note as such. *Buzard v. First Nat. Bank*, 67 Tex. 83.

1. *Parker v. Canfield*, 37 Conn. 250; 9 Am. Rep. 317; *Leggett v. Hyde*, 58 N. Y. 272; *Manhattan Co. v. Sears*, 45 N. Y. 797; *Haas v. Roat*, 16 Hun (N. Y.) 526; *Everett v. Coe*, 5 Den. (N. Y.) 180; *Cushman v. Bailey*, 1 Hill (N. Y.) 526. And see *Haas v. Roat*, 26 Hun (N. Y.) 632. For the former English rule see *Bloxham v. Pill*, 2 Wm. Blacks. 999; *Gilpin v. Enderby*, 5 B. and Ald. 954; *Grace v. Smith*, 2 Wm. Blacks. 998; *Fereday v. Hordern*, Jac. 144.

Where C furnished money to B, to be employed in trade, either by D alone or in partnership with a third person, the net profits to be equally divided between C and D, and D entered into partnership with B, it was held that, as between C and D, this was only a loan, but as to creditors dealing with D, they would have been considered partners; but, that as B, before he entered into the partnership, knew the nature of the transaction between C and D, was not entitled to claim against C, as a partner of D. *Bailey v. Clark*, 6 Pick. (Mass.) 372.

2. *Bates' Law of Part.*, § 47. See *Hargrave v. Conroy*, 19 N. J. Eq. 281; *Brigham v. Dana*, 29 Vt. 1; *Oppenheimer v. Clemmons*, 18 Fed. Rep. 886;

Re Francis, 2 Sawy. (S. C.) 586; 7 Nat. Bank Reg. 359.

3. See cases above cited, and see also *Pettee v. Appleton*, 114 Mass. 114; *Bailey v. Clark*, 6 Pick. (Mass.) 372; *Sheridan v. Madam*, 10 N. J. Eq. 469; *Pierson v. Steinmyer*, 4 Rich. (S. Car.) 309; *Buzzard v. First Nat. Bank*, 67 Tex. 83; *Cothran v. Marmaduke*, 60 Tex. 370.

Some of the later cases, however, seem to cling to the old rule. See *Wells v. Babcock*, 56 Mich. 276; *Rosenfeld v. Haight*, 53 Wis. 260; 40 Am. Rep. 770.

4. *Curry v. Fowler*, 87 N. Y. 33; 41 Am. Rep. 343; *Richardson v. Hughitt*, 76 N. Y. 55; 32 Am. Rep. 267; *Irwin v. Bidwell*, 72 Pa. St. 244.

An agreement by plaintiff to pay defendant \$3,000, to purchase land to be improved for building, the title being taken by defendant and secured by his judgment bond, he agreeing to assume all expense and to pay plaintiff, in addition to legal interest, two-thirds of the profits, was held not to constitute a partnership, but a loan, and as such to be usurious. *Plunkett v. Dillon*, 4 Del. Ch. 198.

A firm in a written contract, agreed, in consideration of \$10,000 loaned by a third person, to pay, one year from date to such third person, one-tenth of the firm's net profits over and above \$10,000, but if the firm's net profits did not exceed \$10,000, then to merely pay interest on the sum loaned—it was held that this agreement was merely a contingent promise to pay more than usual interest, and did not constitute such third person a partner in the firm. *Meehan v. Valentine*, 29 Fed. Rep. 276.

ness,¹ and where the transaction is a mere device to obtain the benefits of a partnership without incurring its responsibilities, whatever the parties may call it, it will be construed to be a partnership.²

f. SHARING GROSS RECEIPTS.—A mere division of the gross receipts, whether arising from joint labor or labor upon the property of another, the benefit not being dependent upon the success of the enterprise, and no division of profit or loss being involved, does not constitute a partnership³ and the rule is the same where the recipient of a part of the gross receipts contributes to the expenses, or furnishes tools, materials or property.⁴

1. *Harris v. Hilligass*, 54 Cal. 463; *Liggett v. Hyde*, 58 N. Y. 272; *Wood v. Vallette*, 7 Ohio St. 172; *Brigham v. Dana*, 29 Vt. 1; *Rosenfeld v. Haight*, 53 Wis. 260; 40 Am. Rep. 770; *Pooley v. Driver*, 5 Ch. D. 458; *Ex parte Delhasse*, 7 Ch. D. 511; *Magovern v. Mattison*, 116 N. Y. 61.

Under Civil Code, *California*, § 2395, declaring that a partnership is an association of persons, for the purpose of carrying on business together and dividing the profits, two persons who have agreed that one shall furnish money to keep a ship in repair, collect the earnings, divide the surplus with the other, and in case the earnings are not sufficient to pay the advances, such other shall pay a portion of the deficiency, are partners. *Hendy v. March*, 75 Cal. 566.

2. *Badely v. Consolidated Bank*, 34 Ch. D. 536; *Ex parte Mills*, 6 Ch. D. 594; *In re Francis*, 2 Sawy. (U. S.) 286; 7 Nat. Bankr. Reg. 359.

The defendants loaned to a partnership, £2,500, the agreement reciting that the loan was made under an act of Parliament providing that lenders of money payable in profits in lieu of interest, should not be considered partners. The defendants were to receive a share of the profits in lieu of interest, which they were to refund if the profits annually received exceeded their share of the total profits, thus compelling the lender to pay back a part of his interest, if the borrowers should subsequently incur losses. This arrangement was held to be an elaborate device and contrivance to give the lenders all the advantages of a partnership without being subject to any of the liabilities, and that, consequently, they should be regarded as partners, and held liable for the partnership debts. *Pooley v. Driver*, 5 Ch. D. 458.

Retention of Control.—Where one lends money to another "expressly for use in 'a certain business,' and for no other use whatsoever," and that other is to make regular statements of the condition of the business, the two dividing equally the yearly net profits, they are partners. *Hackett v. Stanley*, 14 Daly (N. Y.) 210.

3. See *Bates' Law of Part.*, § 58; *Quackenbush v. Sawyer*, 54 Cal. 439; *La Mont v. Fullam*, 133 Mass. 583; *Murphy v. Craig*, 76 Mich. 155.

Where a partner disposed of his share of the good will, and the new firm agree to allow him a percentage upon the gross sales of the firm it was held that this percentage did not constitute him a member of the new firm. *Gibson v. Stone*, 43 Barb. (N. Y.) 285; 28 How. Pr. (N. Y.) 468.

An agreement between A and B that A should use B's name in the firm of A & Co., bankers, and that B should not participate in the profits and losses, but have for his share of the profits, ten per cent. per annum on all deposits, that he might make with the firm, A to indemnify B against all loss is not void for want of consideration moving from B, as A's undertaking to save him harmless from all losses is a contract of indemnity, and not a covenant preventing B's liabilities to creditors of the firm. *Clift v. Barrow*, 108 N. Y. 187.

4. See *Robinson v. Bullock*, 58 Ala. 618; *Moore v. Smith*, 19 Ala. 774; *Blue v. Leathers*, 15 Ill. 31; *Kelly v. Gaines*, 24 Mo. App. 506; *Musser v. Brink*, 68 Mo. 242; *Stoallings v. Baker*, 15 Mo. 481; *Putnam v. Wise*, 1 Hill (N. Y.) 234; *Day v. Stevens*, 88 N. Car. 83; 43 Am. Rep. 732; *Brown v. Jaquette*, 94 Pa. St. 113; 39 Am. Rep. 770; *Clark v. Smith*, 52 Vt. 529; *Ambler v. Bradley*, 6 Vt. 119.

The contrary doctrine seems to be

But if there is a joint business, or a joint capital, or a common stock, the division of the product in kind is a sharing in the profits as well as a division of the proceeds, and constitutes a partnership.¹

Thus the joint cultivation of land with an agreement to divide the profits is a partnership,² but its rental or cultivation for a share of the crops is not one.³ The same rule applies to letting or renting property for a portion of the gross receipts,⁴ and to herding or keeping the stock of another upon a contract to return

held in *Allen v. Davis*, 13 Ark. 28; *Holifield v. White*, 52 Ga. 567; *Adams v. Carter*, 53 Ga. 160; *Jones v. McMichael*, 12 Rich. (S. Car.) 176.

An agreement whereby A. is to cut the timber on the land of B, each to pay a part of the expenses and divide the profits, is not a partnership. *St. Denis v. Saunders*, 36 Mich. 369.

Where one furnishes a brick yard, and the other the labor and materials, and they agree to divide the brick that is made, there is no partnership. *La Mont v. Fullam*, 133 Mass. 583; *Chapman v. Lipscomb*, 18 S. Car. 222. But it would be one if their contract gave each a power to sell them. *Farmers' Ins. Co. v. Rocs*, 29 Ohio St. 429. And see *Autrey v. Frieze*, 59 Ala. 587; *Mussier v. Trumbour*, 5 Wend. (N. Y.) 274.

Where it is agreed that B is to build a house on the land of A, the proceeds to be divided between them after deducting the cost of the houses and the value of the land, there is no partnership between them. *Bisbee v. Taft*, 11 R. I. 307.

1. *Autrey v. Frieze*, 59 Ala. 587; *Fail v. McRee*, 36 Ala. 61; *Everitt v. Chapman*, 6 Conn. 347; *Stapleton v. King*, 33 Iowa 28; 11 Am. Rep. 109; *Brown v. Robbins*, 3 N. H. 64; *Mussier v. Trumbour*, 5 Wend. (N. Y.) 274; *Brady v. Calhoun*, 1 Pa. 140; *Curtis v. Cash*, 84 N. Car. 41; *Jones v. McMichael*, 12 Rich. (S. Car.) 176.

2. *Urquhart v. Powell*, 54 Ga. 29; *Plummer v. Trost*, 81 Mo. 425; *Reynolds v. Pool*, 84 N. Car. 37; s. c., 37 Am. Rep. 607; *Brown v. Higginbotham*, 5 Leigh (Va.) 583; 27 Am. Dec. 618. But see *Donnell v. Harsche*, 67 Mo. 170.

3. *Taylor v. Bush*, 75 Ala. 432; *Courts v. Happle*, 49 Ala. 254; *Randle v. State*, 49 Ala. 14; *Gardenhire v. Smith*, 39 Ark. 280; *Christian v. Crocker*, 25 Ark. 327; *Gurr v. Martin*, 73 Ga. 528; *Smith v. Summerlin*, 48 Ga. 425; *Holloway v. Brinkley*, 42 Ga.

226; *Blue v. Leathers*, 15 Ill. 31; *Front v. Hardin*, 56 Ind. 165; *McLauren v. McCall*, 3 Strobb. (S. Car.) 21; *Mann v. Taylor*, 5 Heisk. (Tenn.) 267; *Albee v. Fairbanks*, 10 Vt. 314; *Hayden v. Crawford*, 3 Up. Can., Q. B. 583.

The North Carolina statute expressly provides that landlord and tenant shall not be regarded as partners, because of an agreement under which the landlord is to receive a share of the crop. Where, therefore, the landlord furnishes the land and teams, and the tenants, the laborers and provisions for them, the gross product to be divided without any account of expenditures made by either, an agricultural partnership is not created. *Day v. Stevens*, 88 N. Car. 83; 43 Am. Rep. 732.

One who is working a plantation on an agreement that he is to receive a fixed share of the crop, irrespective of profits or losses, is not a partner, but an employee, and may be discharged for cause. His loss of health preventing him from superintending the work, is cause justifying a discharge. But he is entitled to compensation for the time prior to the discharge; and a proper mode of computing it is to divide the total value of the crop by the number of days in one year, and allow him to share according to the number of days he served. *Jeter v. Penn*, 28 La. Ann. 230.

4. *O'Donnell v. Battle House Co.*, 67 Ala. 90; 42 Am. Rep. 99; *Wheeler v. Farmer*, 38 Cal. 203; *Knowlton v. Reed*, 38 Me. 246; *Cutler v. Winsor*, 6 Pick. (Mass.) 335; 17 Am. Dec. 385; *Beecher v. Bush*, 45 Mich. 188; 40 Am. Rep. 465; *Heimstreet v. Howland*, 5 Den. (N. Y.) 68; *Farrand v. Gleason*, 56 Vt. 633; *Tobias v. Blin*, 21 Vt. 544; *Bowman v. Bailey*, 10 Vt. 170; *Gillies v. Colton*, 22 Grant's Ch. (Up. Can.) 123; *The Daniel Kaine*, 35 Fed. Rep. 785.

the original number and divide the increase.¹ And generally to all contracts whereby a portion of the gross products of an enterprise or undertaking, is taken for services in obtaining such products.²

g. **SHARING LOSSES ONLY.**—Contracts between parties for sharing the losses or expenses, but not the profits, as where two joint owners agree to share in the expense of keeping property, do not constitute a partnership,³ even though they may call themselves partners.⁴ Where such arrangement is made with reference to an enterprise for profit, the exclusion of some of the parties from sharing the benefits deprives it of the controlling characteristic of a partnership.⁵

1. *Robinson v. Haas*, 40 Cal. 474; *Ashby v. Shaw*, 82 Mo. 76; *Beckwith v. Talbot*, 95 U. S. 289.

2. Where sailors are paid a portion of the oil secured on a whaling voyage, it does not constitute them partners. See *Bridges v. Sprague*, 57 Me. 543; *Moore v. Curry*, 106 Mass. 409; *Holden v. French*, 68 Me. 241; *Rice v. Austin*, 17 Mass. 197; *Turner v. Bissell*, 14 Pick. (Mass.) 192; *Grozier v. Atwood*, 4 Pick. (Mass.) 234; *Baxter v. Rodman*, 3 Pick. (Mass.) 435; *Coffin v. Jenkins*, 3 Story (U. S.) 108; *Duryee v. Elkins*, 1 Abb. Adm. (U. S.) 529; *Wilkinson v. Frasier*, 4 Esp. 182; *Mair v. Glennie*, 4 M. & S. 240. And see *Reed v. Hussey, Blatchf. & H. Adm.* (U. S.) 525; *The Frederick*, 5 Rob. Adm. (U. S.) 8; *Perrott v. Bryant*, 2 Young, etc., Ex. 61; *Joy v. Allen*, 2 Woodb. & M. (U. S.) 303.

Neither is a person taking cut a cargo belonging to another to sell and bring back a return load receiving half the proceeds. *Lowery v. Brooks*, 2 McCord (S. Car.) L. 421. Nor seamen to be paid in proportion to the fish caught. *Holden v. French*, 68 Me. 241. Or a collector of wharfage paid by a share of the gross receipts. *Maunsell v. Willett*, 36 La. Ann. 322. Or a person performing services on property for a part interest in it. See *Smith v. Moynihan*, 44 Cal. 53; *Barber v. Cazalis*, 30 Cal. 92; *Hawkins v. McIntyre*, 45 Vt. 496.

So, two workmen agreeing to divide their wages, *Finckle v. Stacey*, Sel. Cas. in Ch. 9, or persons agreeing to divide the fish in a joint haul, *Hurley v. Walton*, 63 Ill. 260. Or to divide a reward when obtained, *Dawson v. Gurley*, 22 Ark. 381; or coach owners dividing the gross receipts of a line of coaches, *Eastman v. Clark*, 53 N. H.

276; 16 Am. Rep. 192, are not partners.

3. *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497; *Oliver v. Gray*, 4 Ark. 425. And see *Irwin v. Nashville etc. R. Co.*, 92 Ill. 103; 34 Am. Rep. 116.

Where an agreement is entered into between two railroads that any losses to persons or goods which are not traceable to either road shall be shared in proportion to the share of the freight to which each is entitled, they are not partners, and the agreement merely furnishes a rule for settlement as between themselves. *Aigen v. Boston etc. R. Co.*, 132 Mass. 423.

An agreement between persons having similar causes of action against a village, that each shall bear half the costs of an action by one of them as a test case, does not constitute them partners; and the plaintiff in the test case may sue the other for his share of the costs under the agreement without any accounting or settlement between them. *Carter v. Carter*, 28 Ill. App. 340.

4. *Oliver v. Gray*, 4 Ark. 425.

5. *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497; *Bailey v. Clark*, 6 Pick. (Mass.) 372; *Moss v. Jerome*, 10 Bosw. (N. Y.) 220; *Lowry v. Brooks*, 2 McCord (S. Car.) 421.

Hence it will be seen that nominal partners are not partners as between themselves. *Jones v. Howard*, 53 Miss. 707.

But, on the other hand, where A permitted B to purchase and sell goods in their joint names as a firm name, seven per cent. to be paid to A, on his advances to the firm, but taking no part of the profits, it was held that on the death of B, A could sue as surviving partner for debts due the firm. *Hendrick v. Gunn*, 35 Ga. 234.

h. INDEPENDENT CONTRACTORS.—There is a distinction between sharing profits, and sharing avails between persons each of whom are independent contractors; and one person owning or purchasing material may procure the services of another, upon or about that material, for a compensation to consist of a share of the avails, without the parties becoming partners,¹ even though each incurs certain expenses.² So an agreement between two independent firms or persons conducting an entirely separate business, to divide their net profits does not create a partnership between them.³ And a like rule is applied to agreements to pro-

1. See *Loomis v. Marshall*, 12 Conn. 69; 30 Am. Dec. 596; *Fawcett v. Osborn*, 32 Ill. 411; *Ellsworth v. Pomeroy*, 26 Ind. 158; *Clark v. Barnes*, 72 Iowa 563; *Judson v. Adams*, 8 Cush. (Mass.) 556; *Hitchings v. Ellis*, 12 Gray (Mass.) 449; *Turner v. Bissell*, 14 Pick. (Mass.) 192; *Denny v. Cabot*, 6 Met. (Mass.) 82; *Herbert v. Callahan*, 35 Mo. App. 498; *Kelly v. Gaines*, 24 Mo. App. 506; *Stoallings v. Baker*, 15 Mo. 481; *Mears v. James*, 2 Nev. 342; *Clement v. Hadlock*, 13 N. H. 185; *Mohawk R. Co. v. Niles*, 3 Hill (N. Y.) 162; *Muzzy v. Whitney*, 10 Johns. (N. Y.) 226; *Johnson v. Miller*, 16 Ohio 431; *McArthur v. Ladd*, 5 Ohio 514; *Eshleman v. Harnish*, 76 Pa. St. 97; *Dale v. Pierce*, 85 Pa. St. 474; *Flint v. Eureka Marble Co.*, 53 Vt. 669; *Kellogg v. Griswold*, 12 Vt. 291; *Brown v. Watson*, 72 Tex. 212; *Wilson v. Edmonds*, 130 U. S. 472; *Friedlander v. Hillcoat* (Tex. 1890), 14 S. W. Rep. 786.

A made an agreement with B, by which A was to purchase a certain quantity of hides and deliver them to B's tannery, and B was to tan them at his own expense, being answerable for all damages the hides should sustain while they remained in his care; after which, A was to send them to market and sell them at his own expense, and B was to have one-half of what the hides should bring more than their original cost. This agreement did not constitute a partnership between the parties, and a subsequent agreement, that each party might use such part of the leather as he desired, keeping an account of it, did not change the case in this respect. *Clement v. Hadlock*, 13 N. H. 185.

A and B entered into a contract for the manufacture and sale of hat bodies. B was to furnish the wool and sell the hats, charging nothing for his time in selling; each was to pay half the expense of extra labor, fuel and use and wear

of the machinery; A was to manufacture and charge nothing for his time while so engaged; and B, after selling the hats, was to retain from the proceeds the cost of the wool, and the profits, after paying for the fuel, were to be equally divided; it was held that this did not create a partnership between the parties. *Mason v. Potter*, 26 Vt. 722.

If two persons enter into a joint contract in writing, to perform certain labor and furnish certain materials for another, which contract does not define the relations of such persons as between themselves, and one is to perform one part of the labor and the other another, and each is to receive a proportional sum of the money paid for the whole; the relation of partnership does not by reason of these facts exist between them. *Smith v. Moynihan*, 44 Cal. 53.

Where two persons associate themselves in the sale of fertilizers on commissions, the only interest of one of them being that he should have what fertilizers he desired for his own use, with a discount from the price of any commissions for selling, no partnership *inter se* exists. *Alabama Fertilizer Co. v. Reynolds*, 85 Ala. 19.

2. See *Cutler v. Winsor*, 6 Pick. (Mass.) 335, and cases above cited.

3. *Mayrant v. Marston*, 67 Ala. 453; *Snell v. De Land*, 43 Ill. 323; *Heckert v. Fegeley*, 6 W. & S. (Pa.) 139; *Jordan v. Wilkins*, 3 Wash., N. S. 110. See *Hawkins v. McIntyre*, 45 Vt. 436.

A and B, having no previous connection in business, furnished distinct shares of the money to purchase a cargo for an adventure at sea, which was to be sold at the port of destination by a common agent, and the proceeds were to be and were invested in a return cargo, but there was no evidence of an agreement to share in the ultimate profit and loss of the adventure. It was held that the adventure did not constitute a partnership, and that the agent

cure the sale of property for a certain percentage of the proceeds of sale,¹ and contracts with a broker for sales on a commission, the compensation of the broker to be a share of the net profits, are not contracts of partnership.²

Where such an agreement is entered into for the purpose of arranging an indebtedness between the parties, this will go far to indicate that no intention to form a partnership existed,³ and an agreement between creditors to advance money to continue the debtor's business for their own benefit creates a partnership between them.⁴ In all such cases where the intention appears to be to regard the profits as a joint fund belonging to all with a lien existing upon the whole in favor of each, it may be a partnership.⁵

for the purchase of the outward cargo, who had received the whole proceeds of the voyage, could retain, to reimburse himself for advances toward the purchase of A's share of the outward cargo, only his share of the proceeds. *Post v. McKimberly*, 9 Johns. (N. Y.) 470.

An agreement between B and C for "mutually keeping house," by which C is to pay the house rent and butcher's bills and B is to pay the other bills for the family expenses, did not, as matters of law, make B and C partners, or authorize C to bind B to third parties for the rent. *Austin v. Thomson*, 45 N. H. 113.

Where two mercantile firms agree to make contracts in the names of their respective firms, for the purchase and sale of merchandise, to be executed with its separate funds, and to share profits and loss on such contracts, they are not co-partners, either as between themselves, or with respect to third persons. *Smith v. Wright*, 5 Sandf. (N. Y.) 113.

1. *Morrison v. Cole*, 30 Mich. 102.

2. See *Hanna v. Flint*, 14 Cal. 73; *Gibson v. Stone*, 43 Barb. (N. Y.) 285; 28 How. Pr. (N. Y.) 468; *Hillard v. Scruggs*, 36 Ala. 670.

Where commission merchants in one city agree with their correspondents in another, that part of the latter's commission should be paid to the former on all sales of produce shipped by the former to the latter, it is not a partnership. *Pomeroy v. Sigerson*, 22 Mo. 177.

A agreed to give B half his commissions for the sale of defendant's real estate, if he would assist him in making the sale. B sold the real estate and received payment from the defendant. Upon his attempt to release A's claim

it was held that, being the mere agent of A, he had no power to do so. *Wass v. Atwater*, 33 Minn. 83. Such an agreement to share the commissions with another, however, has been held to be a partnership to the extent of rendering the broker liable for the fraud of the agent perpetrated in effecting a sale. *Thwing v. Clifford*, 136 Mass. 482.

3. *Cox v. Hickman*, 8 H. of L. Cas. 268. And see *Delaney v. Timberlake*, 23 Minn. 383; *Johnson v. Miller*, 16 Ohio 431; *Drake v. Ramey*, 3 Rich. (S. Car.) 37; *Dils v. Bridge*, 23 W. Va. 20; *Clark v. McKellar*, 12 Up. Can. C. P. 562.

4. *Mills v. Simmonds*, 51 How. Pr. (N. Y.) 48; 8 Hun (N. Y.) 189.

Where two creditors obtain all of the stock of goods of their common creditor by making a payment on them, with a view to selling them again to reimburse themselves and satisfy their claims, if there is a loss by a decline of prices they must both share it. *Stettauer v. Carney*, 20 Kan. 474.

5. See *Darrow v. St. George*, 8 Colo. 592; *Howe v. Dupoyster* (Ky. 1888), 7 S. W. Rep. 627; *Cooley v. Broad*, 29 La. Ann. 345; *Pratt v. Langdon*, 97 Mass. 97; 12 Allen (Mass.) 546; *Meyers v. Fields*, 37 Mo. 434; *Wilkinson v. Jett*, 7 Leigh (Va.) 115; 30 Am. Dec. 493.

Where it was agreed between W. and M. S. & Co., that the former, who was the owner of a zinc mine, should furnish the latter with a given quantity of ore per year at a stated price per ton, and the latter agreed to furnish proper buildings and machinery which were to be paid for out of the profits, and to manufacture the ore into paints and divide the profits, they were held to be

Agreements between carriers having connecting lines, to transport persons or property over the continued line and divide the compensation for such carriage between them, are not partnership contracts; they are merely pooling arrangements.¹ But where their capital is a joint fund and profits as such are divided,² or where the earnings or passage money constitute a common fund, each having a vested interest in it as such before division,³ the rule is different, and where the agents and servants are jointly employed, all are jointly liable for their defaults.⁴

partners. *Wadsworth v. Manning*, 4 Md. 59.

Where a broker agrees to share in the speculation, he becomes a partner, *inter se*. *Reed v. Hollinshead*, 4 B. & C. 867.

1. *Hot Springs R. v. Trippe*, 42 Ark. 465; 48 Am. Rep. 65; *Irwin v. Nashville etc. R. Co.*, 92 Ill. 103; 34 Am. Rep. 116; *Atchison etc. R. Co. v. Roach*, 35 Kan. 740; *Algen v. Boston etc. R. Co.*, 132 Mass. 423; 6 Am. and Eng. R. Cas. 562; *Hartan v. Eastern R. Co.*, 114 Mass. 44; *Pratt v. Ogdensburg etc. R. Co.*, 102 Mass. 557-567; *Gass v. Providence etc. R. Co.*, 99 Mass. 220; *Darling v. Boston etc. R. Co.*, 11 Allen (Mass.) 295; *Watkins v. Terre Haute etc. R. Co.*, 8 Mo. App. 570; *Merrick v. Gordon*, 20 N. Y. 93; *Pattison v. Blanchard*, 5 N. Y. 186; *Wright v. Delaware etc. Canal Co.*, 40 Hun (N. Y.) 343; *Wetmore v. Baker*, 9 Johns. (N. Y.) 307; *Briggs v. Vanderbilt*, 19 Barb. (N. Y.) 222; *Mohawk etc. R. Co. v. Niles*, 3 Hill (N. Y.) 162; *Nashville etc. R. Co. v. Sprayberry*, 9 Heisk. (Tenn.) 853; *Railroad v. Sprayberry*, 8 Baxt. (Tenn.) 341; *Crofts v. Baltimore etc. R. Co.*, 1 McArthur (D. C.) 492; *St. Louis Ins. Co. v. St. Louis etc. R. Co.*, 104 U. S. 146; 3 Am. & Eng. R. Cas. 562.

A pool arrangement between the owners of different steamboats, whereby the excess of net earnings of one boat over the other is to be divided at the end of the season, does not, alone, constitute a partnership so as to create a joint liability for the negligence of either. *Fay v. Davidson*, 13 Minn. 523.

If the several proprietors of different portions of a public line of travel, by agreement among themselves, appoint a common agent at each end of the route to receive the fare and give through tickets, this does not, of itself, constitute them partners

as to passengers who purchase through tickets, so as to render each one liable for losses occurring on any portion of the line. *Ellsworth v. Tartt*, 26 Ala. 733; 62 Am. Dec. 749.

An association of separate owners of several steamboats into a joint concern, to run their vessels and to collect and receive the earnings of the boat in a common fund, out of which the expenses of all the boats are to be paid, is no more than a private co-partnership in a particular business or transaction. *The Swallow*, *Olcott*, *Amd.* (U. S.) 334; *Runnels v. Moffat*, 73 Mich. 188.

2. See *Cooley v. Broad*, 29 La. Ann. 345; 29 Am. Rep. 332; *Dow v. Sayward*, 12 N. H. 271.

Four steamboats separately owned constituted together the "Kountz Line." They had a common agent. Contracts were always made in the name of "Kountz Line." *Held*, that the owners and their boats were jointly liable for a loss caused by the unseaworthiness of one of the boats. *Sun Ins. Co. v. Kountz Line*, 122 U. S. 583.

3. *Meaher v. Cox*, 37 Ala. 201; *Champion v. Bostwick*, 18 Wend. (N. Y.) 175; 31 Am. Dec. 376; *Bowas v. Pioneer Tow Line*, 2 Sawy. (U. S.) 21; *Weland v. Elkins*, 1 Stark 272; *Holt N. P.* (Eng.) 227; *Fromont v. Coup-land*, 2 Bing. 170.

4. *Cobb v. Abbot*, 14 Pick. (Mass.) 289; *Dwight v. Brewster*, 1 Pick. (Mass.) 50; *Barrett v. Indianapolis etc. R. Co.*, 9 Mo. App. 226; *Fairchild v. Slocum*, 19 Wend. (N. Y.) 329; *Champion v. Bostwick*, 18 Wend. (N. Y.) 175.

The owner of a tug agreed with the owner of a barge that both vessels should be employed in a freighting business, the wages of the servants of the association, and expenses, except for repairs, to be paid out of the earnings, and the balance or profits to be divided between them in proportion to the stipulated value of the vessels—it was held

i. JOINT OWNERSHIP—(See also JOINT TENANTS, vol. 11, p. 1057).—A mere joint ownership or community of interest in property does not constitute a partnership,¹ even though the income from it is divided.² Where a joint purchase of property is made as an investment merely, each paying his proportion of the purchase money, they are joint tenants or tenants in common, not partners,³ as where land is purchased jointly with the intention either of dividing it or making separate sales.⁴ So the mere utilization of

that this agreement constituted a partnership, and that either partner was liable in an action of tort for damages caused by the negligence of the servants and agents of the partnership while conducting the business. *Bowas v. Pioneer Tow Line*, 2 Sawy. (U. S.) 21.

1. *Quackenbush v. Sawyer*, 54 Cal. 439; *Donnan v. Gross*, 3 Ill. App. 409; *Hawes v. Tillinghast*, 1 Gray (Mass.) 289; *Bocklen v. Hardenburgh*, 37 N. Y. Super. Ct. 110; *Auten v. Ellingwood*, 51 How. Pr. (N. Y.) 359; *Schaffer v. Fowler*, 111 Pa. St. 451; *Brady v. Calhoun*, 1 Pa. 140; *French v. Styring*, 2 C. B., N. S. 357.

The joint prosecution of a law suit does not, as between the parties themselves, in the absence of any agreement to that effect, create a partnership as to the subject matter in dispute. *Wilson v. Cobb*, 28 N. J. Eq. 177.

Where several parties had subscribed for the purpose of building, and, by the terms of the contract, the property was to be owned by them in common in proportion to the amount subscribed by each, and was to be sold only with the approval of a majority, they did not thereby become partners, and under *Maine Rev. Stat.*, ch. 96, § 10, the supreme judicial court had no jurisdiction in equity for the adjustment of their affairs. *Woodward v. Cowing*, 41 Me. 9.

2. *Quackenbush v. Sawyer*, 54 Cal. 439; *Donnan v. Gross*, 3 Ill. App. 409. And see *Chapman v. Eames*, 67 Me. 452.

A large manufacturer, who has acquired a joint interest with another person to manufacture and sell a patented article, and begins the manufacture of such article at his shops, does not hold himself out as a partner of such other person. *Morgan v. Farrel*, 58 Conn. 413.

3. *Chisholm v. Cowles*, 42 Ala. 179; *Iliff v. Brazill*, 27 Iowa 131; *Bruce v. Hastings*, 41 Vt. 380; *Oliver v. Gray*, 4 Ark. 425; *Goell v. Morse*, 126 Mass. 480.

A series of independent transactions wherein one finds money and buys lands selected by the other, profits being divided when the lands are sold again, does not make the parties partners. *Wells v. Babcock*, 56 Mich. 276.

A contract between two persons to purchase a certain lot of land and erect a mill upon it, to share the expenses and divide the profits arising from a sale or lease of it, is a mere tenancy in common and not a partnership. *Farrand v. Gleason*, 56 Vt. 633.

An agreement between A and B that A will buy an undivided half of B's land and divide it into lots and sell it, sharing profits and dividing the unsold lots, does not constitute a partnership *inter se*. *Munson v. Sears*, 12 Iowa 172; *Sears v. Munson*, 23 Iowa 380.

A father conveyed to his three sons all his estate in consideration that they should pay his debts then existing and give him and his wife a life support. One of the sons took from the others a power of attorney to hold the property, manage the farm and fulfill their joint promise, and by virtue thereof paid the debts, furnished the life support, and carried on the farm, supposing that if it should yield a profit over his expenditures, they should share it equally, otherwise share the loss—it was held that there was no partnership in the property, but only in such sharing of profit and loss. *Howe v. Howe*, 99 Mass. 71.

4. *Huckabee v. Nelson*, 54 Ala. 12; *Sikes v. Work*, 6 Gray (Mass.) 433; *Schaeffer v. Fowler*, 111 Pa. St. 451; *Gibson v. Lupton*, 9 Bing. 297; *Hoare v. Dawes*, 1 Doug. (Eng.) 371; *Coope v. Eyre*, 1 H. Bl. 37; *Reid v. Hollinshead*, 4 B. & C. 867.

The plaintiffs and defendants purchased jointly real estate, which they subsequently conveyed to a petroleum company, receiving in part payment shares of the company's stock which were distributed among the parties proportionately to their several inter-

the common property by tenants in common, if no community of interest in the profits is contemplated, does not make them partners.¹ Nor will the receipt and division of the rents of the joint premises,² or the rental of the undivided interest of one joint tenant to the other.³

But if the property owned in common was procured for the express purpose of carrying on a business with it,⁴ or if the joint owners or contractors have agreed for a community of interest in

ests in the land. *Held* that there was not such a mutuality of interest between the parties as to make applicable the rule which precludes one partner from suing another, and therefore that the plaintiffs could maintain an action against the defendants to recover damages for fraud practiced on them in the purchase of the land. *Dart v. Walker*, 3 Daly (N. Y.) 136.

Where one of the partners in a company, formed for the purpose of buying and selling lands on speculation, after the company have ceased operations, transfers to a stranger one-half of the net profits of his share in the company, the residue of his interest, together with the entire control and direction of his share having been previously assigned to one of his co-partners, in consideration of moneys advanced to him on account of it, this creates between the two assignees not a partnership but a tenancy in common in the share of their assignor; nor does it constitute the second assignee a partner in the company. *Cowles v. Garrett*, 30 Ala. 341.

1. See *Fail v. McRee*, 36 Ala. 61; *Millet v. Holt*, 60 Me. 169.

An agreement between A, B and C, that the firm business be carried on as before, except that for the next two years A be released from all active responsibility therein, and have no pecuniary interest or liability, but a right to a reasonable inspection of the books, B and C meanwhile sharing between themselves all profits and losses, renders A merely a joint owner and not a partner. *Sailors v. Nixon-Jones Printing Co.*, 20 Ill. App. 509.

Cheese Factories.—A agreed with B and other persons to manufacture cheese at his cheese factory from milk to be furnished by B and the others, and to sell the cheese and pay B and the others the proceeds, each according to the quantity of milk by him furnished, less a certain rate of charge for manufacturing. A having sold the cheese made from B's milk, and accounted to

him therefor, and deposited the proceeds in a bank, it was held that the failure of the bank and the loss of the money deposited did not release A from liability to pay B the amount due. There is no defense open, in such a case, on the grounds of partnership. *Sargent v. Downey*, 45 Wis. 498.

The defendants were patrons of a cheese factory owned by T under an arrangement by which each one was to take the milk from his cows to the factory, so long and in such quantities as he pleased, and could have as much of the cheese that was manufactured at the factory as his milk made, paying T one cent per pound for making the cheese; or he could have his cheese sold with the other cheese that was made at the factory, and receive the proceeds. The milk that each person took to the factory was credited to him, each having an interest in the cheese made, in proportion to the quantity of milk he furnished. The cheese was not divided, but was sold from time to time to the patrons. It was held that the defendants were not partners, but were tenants in common of the cheese. But when all the defendants consented that a committee of three, appointed for that purpose, should sell the whole of the cheese belonging to all, they became jointly liable to perform any valid contract their committee made for the sale of the cheese. *Hawley v. Keeler*, 62 Barb. (N. Y.) 231. See also *Butterfield v. Lathrop*, 71 Pa. St. 225; *Gill v. Morrison*, 26 Up. Can. C. P. 124.

2. *Treiber v. Lanahan*, 23 Md. 116.

Where one who rents land on shares agrees with a third person that if the latter will help sow and harvest the grain, he shall have one-half of the tenant's portion, they become tenants in common of the grain and not partners. *Sims v. Dame*, 113 Ind. 127.

3. *McIlvaine v. Armfield*, 5 La. Ann. 302.

4. *Leiden v. Lawrence*, 2 N. R. Exch. 283.

the profits and losses arising from the use of the joint property,¹ it is a partnership. The joint ownership of land, however, though not a partnership, is controlled in some respects by analogous rules.²

Neither co-ownership in a patent³ nor in a copyright⁴ constitutes a partnership between the owners; and neither an agreement whereby an inventor gives another the exclusive right to make and sell his invention in consideration of a part of the proceeds,⁵ nor one in which the inventor contracts with another to obtain a patent in their joint names and sell the right to use it, dividing the proceeds,⁶ creates a partnership in the invention.

The mere fact of part ownership of a ship does not constitute a partnership between the co-owners.⁷ They are rather tenants

1. *Belknap v. Wendell*, 21 N. H. 175; *Boeklen v. Hardenburgh*, 37 N. Y. Super. Ct. 110; *Penniman v. Munson*, 26 Vt. 164.

Where grain received at a mill as toll, was mixed up, and became the subject of traffic between the defendants, each being part owners, and interested in the proceeds of the sale, they became partners in that particular business. *Benson v. McBee*, 2 McMull (S. Car.) 91.

An agreement between parties in regard to the transaction of a certain business, wherein all jointly own the property purchased, which is to be sold for their joint and mutual benefit, and each is to contribute his skill and assistance to the business, and share in specified proportions in the final profit or loss thereof, which are to be ascertained at the close of the business, will, as between the parties themselves, although they may not have been aware that such was its legal effect, create a partnership. *Duryea v. Whitcomb*, 31 Vt. 395.

Where four out of five tenants in common of a paper mill, for the more convenient management of their business, entered into an agreement that one of their number should be sole manager, foreman and book-keeper, another should perform the general labor in the mill, another should be engineer, and the fourth should "collect stock and market the paper," at a fixed compensations to each, it was held that this constituted a partnership of those who signed it in the business of making and vending the paper, and that a promissory note, given for stock, in the name of the company, by the party appointed to the charge of that department, was binding on all the parties to the agree-

ment. *Doak v. Swann*, 8 Me. 170.

2. *Smith v. Wilson*, 10 La. Ann. 255. And see JOINT TENANTS, vol. II, p. 1057.

3. *Carter v. Bailey*, 64 Me. 458; *Pennman v. Munson*, 26 Vt. 164; *Parkhurst v. Kinsman*, 1 Blatchf. (U. S.) 488; *Pitts v. Hall*, 3 Blatchf. (U. S.) 201.

4. See *Carter v. Bailey*, 64 Me. 458, in which it was also held that the remedies as between partners is not applicable where one co-owner uses the plates, and prints and sells copies. The same rule is applicable to trade marks. *Dent v. Turpin*, 2 J. & H. 139;

5. *Wheeler v. Farmer*, 38 Cal. 203; *Vose v. Singer*, 4 Allen (Mass.) 226; *Lillies v. Colton*, 22 Grant's Ch. (Up. Can.) 123; *Mathers v. Greene*, L. R., 1 Ch. App. 29.

6. *Hermanos v. Du Vigneaud*, 10 La. Ann. 114.

7. *Donald v. Hewitt*, 33 Ala. 534; *Bacon v. Cannon*, 2 Houst. (Del.) 47; *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 198; *Loubat v. Nourse*, 5 Fla. 350; *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 595; *Theriot v. Michel*, 28 La. Ann. 107; *Owens v. Davis*, 15 La. Ann. 22; *Little v. Merrill*, 62 Me. 328; *Knowlton v. Reed*, 38 Me. 246; *Harding v. Foxcroft*, 6 Me. 76; *Moor v. Curry*, 106 Mass. 409; *Thorndike v. De Wolf*, 6 Pick. (Mass.) 120; *Cinnamon v. Greenlee*, 10 Mo. 578; *Ward v. Bodeman*, 1 Mo. App. 272; *Williams v. Lawrence*, 47 N. Y. 462; *Stedman v. Feidler*, 20 N. Y. 437; *Mumford v. Nicoll*, 20 Johns. (N. Y.) 611; *Coursin's Appeal*, 79 Pa. St. 220; *Hopkins v. Forsyth*, 14 Pa. St. 34; *Coe v. Cook*, 3 Whart. (Pa.) 569; *Jackson v. Robinson*, 3 Mason (U. S.) 138; *Macy v. De Wolf*, 3 Woodb. & M. (U. S.)

in common.¹ But a vessel may be the subject of partnership as well as any other property, as, for instance, when she is owned by, and is a part of the assets of a partnership;² in which case the rules governing ordinary partnerships apply.³

Part owners of a ship may be partners in her earnings.⁴ But persons having no business connection contributing specifically to a cargo, and ship owners merely taking an interest in the proceeds of a cargo sent out by them, are not partners.⁵

2. Associations Not for Profit.—If the joint or common enterprise is not one entered into for the purpose of profit, as an agreement to buy and hold property or to erect a building⁶ or such an

377; *Berthold v. Goldsmith*, 24 How. (U. S.) 536; *The William Bagaley*, 5 Wall. (U. S.) 377; *Green v. Briggs*, 6 Hare 395; *Helme v. Smith*, 7 Bing. 709; *Ex parte Harrison*, 2 Rose 76; *Ex parte Young*, 2 V. & B. 242; *Baker v. Casey*, 19 Grant's Ch. (Up. Can.) 537. But see *Hinton v. Law*, 10 Mo. 701; *Seabrook v. Rose*, 2 Hill Ch. (S. Car.) 553.

Running a steamboat on shares does not make the owners partners in respect to the vessel. *The Daniel Kaine*, 35 Fed. Rep. 785.

The fact that two persons own and run boats together, paying expenses out of the earnings, and dividing the profits proportionately, does not create a partnership, as between themselves, where there is no partnership name, and there is no understanding between the parties that such relation existed. *Runnels v. Moffat*, 73 Mich. 188.

1. *Macy v. De Wolf*, 3 Woodb. & M. (U. S.) 193.

2. *Nugent v. Locke*, 4 Cal. 318; *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 198; *Loubat v. Nourse*, 5 Fla. 350; *Hewitt v. Sturdevant*, 4 B. Mon. (Ky.) 453-459; *Phillips v. Purington*, 15 Me. 425; *Lamb v. Durant*, 12 Mass. 54; 7 Am. Dec. 31; *Williams v. Lawrence*, 47 N. Y. 462; *Mumford v. Nicoll*, 20 Johns. (N. Y.) 611; *Lape v. Parvin*, 2 Disn. (Ohio) 560; *Campbell v. Mullett*, 2 Swanst. 551.

An agreement to purchase and run a ferry boat, to be owned by the subscribers in proportion to the amounts subscribed by each, the toll to be applied to pay expenses, and the balance if any, to be divided among them *pro rata*, each subscriber to have the right to sell his stock, the purchaser to have all the rights of an original subscriber, and the association to continue as long as a majority of subscribers shall determine, constitutes the subscribers

partners, and one of them can maintain a bill in equity against all the others, within the jurisdiction of the court, to compel them to contribute the sum subscribed for the use of the association; and the amount of the defendants, liability is to be determined by an apportionment among them of the amount paid, without regard to subscribers out of the jurisdiction. *Whitman v. Porter*, 107 Mass. 522.

3. *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 198; *Loubat v. Nourse*, 5 Fla. 350; *Williams v. Lawrence*, 47 N. Y. 462; *Wright v. Hunter*, 1 East 20.

A ship so owned, being held the same as other property, may be sold by one of the partners. See *Hewitt v. Sturdevant*, 4 B. Mon. (Ky.) 453; *Lamb v. Durant*, 12 Mass. 54; 7 Am. Dec. 131; *The William Bagaley*, 5 Wall. (U. S.) 377; *Ex parte Howden*, 2 M. D. & D. 574.

4. *Phillips v. Pennywit*, 1 Ark. 59; *Starbuck v. Shaw*, 10 Gray (Mass.) 492; *Russell v. Minnesota Outfit*, 1 Minn. 162; *Reeves v. Goff*, 2 N. J. L. 143; *Young v. Brick*, 3 N. J. L. 663; *Williams v. Lawrence*, 47 N. Y. 462; *Merritt v. Walsh*, 32 N. Y. 685; *Mumford v. Nicoll*, 20 Johns. (N. Y.) 611; *Coe v. Cook*, 3 Whart. (Pa.) 569; *Baker v. Casey*, 19 Grant's Ch. (Up. Can.) 537.

5. *Harding v. Foxcroft*, 6 Me. 76; *Post v. Kimberly*, 9 Johns. (N. Y.) 470; *Holmes v. United F. Ins. Co.*, 2 Johns. Cas. (N. Y.) 329; *French v. Price*, 24 Pick. (Mass.) 13; *Coe v. Cook*, 3 Whart. (Pa.) 569; *Jackson v. Robinson*, 3 Mason (U. S.) 138; *DeWolf v. Howland*, 2 Paine (U. S.) 356; *Saville v. Robertson*, 4 T. R. 720; *Hoare v. Dawes*, 1 Dougl. 371; *Coope v. Eyre*, 1 H. Bl. 37.

6. *Huckabee v. Nelson*, 54 Ala. 12; *Gilmore v. Black*, 11 Me. 485; *Treiber*

agreement with the intention of dividing the property or making separate sales,¹ it does not constitute a partnership. So, even if the original intention were to sell and divide the profits, this alone does not make it a partnership if it was not incorporated in the original agreement,² and after a partnership has ceased active operations, persons owning the interests of former partners, though recognized as members of the firm, are not partners, but mere tenants in common.³

3. Associations and Defective Corporations—*a.* UNINCORPORATED ASSOCIATIONS—(See also JOINT STOCK COMPANIES, vol. II, p. 136).—Joint stock companies and unincorporated associations, unless otherwise provided by statute, are treated as, and have all the attributes of a common partnership, there being no intermediate step between a partnership and a corporation known to the common law.⁴ And this is the case even though the members

v. Lanahan, 23 Md. 116; *Sikes v. Work*, 6 Gray (Mass.) 433; *Ballow v. Spencer*, 4 Cow. (N. Y.) 163; *Brady v. Calhoun*, 1 Pa. 140; *White v. Fitzgerald*, 19 Wis. 480. And see *Austin v. Thompson*, 45 N. H. 113; *DeWolf v. Howland*, 2 Paine (U. S.) 356.

The fact that others are co-owners with the defendant in land does not make them partners in the defendant's scheme to open a mine on the premises. *Stannard v. Smith*, 40 Vt. 513.

Where several contributed money to buy a drove of stock, and one of them afterwards withdraws his share by consent, there is no partnership, and the rest can maintain a suit without joining him. *Humphries v. McCraw*, 5 Ark. 61.

Being jointly concerned in the erection of a building, does not constitute the parties partners, and each is liable on his own contracts for material and labor. *Porter v. McClure*, 15 Wend. (N. Y.) 187; *Noyes v. Cushman*, 25 Vt. 390. And see *Morris v. Litchfield*, 14 Ill. App. 83.

1. *Hoare v. Dawes*, 1 Doug. 371; *Gibson v. Lupton*, 9 Bing. 297; *Reid v. Hollinshead*, 4 B. & C. 867. See also *Huckabee v. Nelson*, 54 Ala. 12.

2. See *Baldwin v. Burrows*, 47 N. Y. 199.

3. *Cowles v. Garrett*, 30 Ala. 341; *Goddard v. Pratt*, 16 Pick. (Mass.) 412; *Parchen v. Anderson*, 5 Mont. 438; *Vere v. Ashby*, 10 B. & C. 288.

But if they have become partners in a succeeding business, the contrary rule seems to obtain. *McGill v. Doudle*, 33 Ark. 311.

4. *Grady v. Robinson*, 28 Ala. 289;

Montgomery v. Elliott, 6 Ala. 701; *McConnell v. Denver*, 35 Cal. 365; *Smith v. Fagan*, 17 Cal. 178; *Pettis v. Atkins*, 60 Ill. 454; *Manning v. Gasharie*, 27 Ind. 399; *Pipe v. Bateman*, 1 Iowa 369; *Greenup v. Barbee*, 1 Bibb (Ky.) 320; *Frost v. Walker*, 60 Me. 468; *Ricker v. American L. & T. Co.*, 140 Mass. 346; *Phillips v. Blatchford*, 137 Mass. 510; *Boston etc. R. Co. v. Pearson*, 128 Mass. 445; *Machinists' Nat'l Bank v. Dean*, 124 Mass. 81; *Taft v. Warde*, 111 Mass. 518; *Gott v. Dinsmore*, 111 Mass. 45; *Whitman v. Porter*, 107 Mass. 522; *Bodwell v. Eastman*, 106 Mass. 525; *Taft v. Ward*, 106 Mass. 518; *Tyrrell v. Washburn*, 6 Allen (Mass.) 466; *Kingman v. Spurr*, 7 Pick. (Mass.) 235; *Haskell v. Adams*, 7 Pick. (Mass.) 59; *Alvord v. Smith*, 5 Pick. (Mass.) 232; *Willson v. Owens*, 30 Mich. 474; *Whipple v. Parker*, 29 Mich. 369; *Butterfield v. Beardsley*, 28 Mich. 412; *Burgan v. Lyell*, 2 Mich. 102; 55 Am. Dec. 53; *Boisgerard v. Wall*, 1 Smed. & M. (Miss.) 404; *Farnum v. Patch*, 60 N. H. 294; 49 Am. Rep. 313; *Atkins v. Hunt*, 14 N. H. 205; *Moore v. Brink*, 4 Hun (N. Y.) 402; *Niven v. Spickerman*, 12 Johns. (N. Y.) 401; *Rianhard v. Hovey*, 13 Ohio 300; *Kelly v. Bourne*, 15 Oregon 476; *Shamburg v. Abbott*, 112 Pa. St. 6; *Hedge & Horn's Appeal*, 63 Pa. St. 273; *Kramer v. Arthurs*, 7 Pa. St. 165; *Thomson's Estate*, 12 Phila. (Pa.) 36; *Cochran v. Perry*, 8 W. & S. (Pa.) 262; *McNeish v. Hulless Oat Co.*, 57 Vt. 316; *Walker v. Wait*, 50 Vt. 668; *Chapman v. Devereux*, 32 Vt. 616; *Cutler v. Thomas*, 25 Vt. 73; *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404; *Kimmins v. Wilson*, 8 W. Va. 584; *Werner*

may have supposed their liability to be limited to the amount of their shares.¹ The shares in such associations are usually transferrable, and they are not, therefore, like ordinary partnerships based upon the mutual trust and confidence of each in every other member,² and purchasers of shares become partners and liable as such,³ though where it is provided that shares are transferrable only on consent of the directors, the purchaser is not a partner until such consent is obtained.⁴

One may become a member to whom shares have been delivered, though he has not signed the articles;⁵ and he may become one by signature of the subscription and payment to the executive committee without delivery,⁶ though the actual organization of the company is a condition precedent to membership in it.⁷

v. Leisen, 31 Wis. 169; *First Nat'l Bank v. Goff*, 31 Wis. 77; *Clagg v. Kilbourne*, 1 Black (U. S.) 346; *Fox v. Clifton*, 6 Bing. 776; *Perring v. Hone*, 4 Bing. 28. But see to the contrary *Cox v. Bodfish*, 35 Me. 302; *Ash v. Guie*, 97 Pa. St. 493; 39 Am. Rep. 818.

Unincorporated associates, who have not attempted to become incorporated, are liable as partners, and cannot get rid of that liability except by a transfer of stock made in exact accordance with the articles of association. *Robbins v. Butler*, 24 Ill. 387.

A voluntary unincorporated association, for manufacturing purposes, provided in their articles of agreement that each stockholder should pay a certain sum per share, at the time of subscribing, and all subsequent assessments, or forfeit his stock, it was held that this was a partnership, and that the stockholders could not escape liability for debts, contracted within the scope of the partnership business, by a forfeiture of their stock. *Skinner v. Dayton*, 19 Johns. (N. Y.) 513; 10 Am. Dec. 286.

Voluntary mutual relief associations are so far partnerships that a court of equity may dissolve them if they improperly exclude a member from voting. *Gorman v. Russell*, 14 Cal. 531.

The members of a private association, however, as a telegraph company, are not partners. They are tenants in common of the property and franchise belonging to the company, and the majority cannot bind the minority, unless by special agreement. *Irvine v. Forbes*, 11 Barb. (N. Y.) 587.

Where a trust is created by deed which contemplates the purchase of municipal bonds (the legal title to which is vested in the trustees) by a fund

raised by the sale of certificates payable to bearer, which entitles the holder to participate in the income and in the distribution of the securities by a drawing, in a mode prescribed in the deed, the relation of partners does not exist between the certificate holders. *Johnson v. Lewis*, 2 McCrary (U. S.) 479.

1. *Farnum v. Patch*, 60 N. H. 294; 49 Am. Rep. 313.

2. *Baird's Case*, L. R., 5 Ch. App. 725.

3. *Machinists' Nat. Bank v. Dean*, 124 Mass. 81.

Purchasers of shares become liable on notes given after their purchase for prior debts. *McConnel v. Denver*, 35 Cal. 365.

On the question of contribution between partners, those are not counted who are insolvent or have been removed from the jurisdiction. *Whitman v. Porter*, 107 Mass. 522.

4. *Kingman v. Spurr*, 7 Pick. (Mass.) 235; *Perring v. Howe*, 4 Bing. 28. And see *Alvord v. Smith*, 5 Pick. (Mass.) 232, holding, that where the provision is merely affirmative, it is for the convenience of the company, and does not invalidate a sale otherwise made.

5. *Butterfield v. Beardsley*, 28 Mich. 412; *Perring v. Howe*, 4 Bing. 28.

Where, at a meeting of the association, a share was assigned to one not present, but who had agreed to take it, he becomes a member, although there has been neither payment nor delivery. *Grady v. Robinson*, 28 Ala. 289.

6. *Frost v. Walker*, 60 Me. 468; *Boston & Albany R. v. Pearson*, 128 Mass. 445.

7. *Hedge & Horn's Appeal*, 63 Pa. St. 273; *Fox v. Clifton*, 6 Bing. 776.

Unincorporated Associations and clubs, the object of which is social, political or otherwise, and not for purposes of trade or profit are not partnerships,¹ and this is true though they may have common property or a joint fund,² and their members are not personally liable on contracts made by their officers.³ But those who made or authorized the contract are liable.⁴ The rights of the members in the property and contracts belonging to the association, however, are in many respects similar to those of a partnership.⁵

1. *Burt v. Lathrop*, 52 Mich. 106; *Richmond v. Judy*, 6 Mo. App. 465; *Austin v. Thomson*, 45 N. H. 113; *Andrews v. Alexander*, L. R., 8 Eq. 176; *Re St. James Club*, 2 De G. M. & G. 383. To the contrary see *Babb v. Reed*, 5 Rawle (Pa.) 151; 28 Am. Dec. 650. But a limit has been put upon the principles of this case by *Ash v. Guie*, 97 Pa. St. 493.

The prosecution of the work of extending and grading a street not for gain does not make the associates co-partners, they having failed to effect an incorporation. *Johnson v. Corser*, 34 Minn. 355.

This category includes incorporated associations for various purposes, as social or pleasure clubs, political clubs, associations for mutual benefit, church associations, library associations, secret societies, lodges and the like. *Bates Law of Part.*, § 75.

2. See *Danbury Cornet Band v. Bean*, 54 N. H. 524; *Lafond v. Deems*, 81 N. Y. 507.

3. *Burt v. Lathrop*, 52 Mich. 106; *Richmond v. Judy*, 6 Mo. App. 465; *De Voss v. Gray*, 22 Ohio St. 159; *Fleming v. Hector*, 2 M. & W. 172.

The members of a Masonic lodge, an incorporated body, appointed a committee to erect a building for the use of the lodge, authorizing them to borrow money for that purpose. The committee accordingly borrowed various sums, giving to the lenders certificates of indebtedness in the name of the lodge, signed by the officers thereof. In a suit brought upon one of the said certificates wherein all the members of the lodge were joined as defendants and alleged to be partners, it was held that all the members of the lodge were not liable as partners upon the certificate, and that the members of the committee or those members of the lodge who participated in the erection of the building by voting for or advising it, and those members who, in any way assented to the under-

taking or subsequently ratified it, were alone liable for the amount of the certificate. *Ash v. Guie*, 97 Pa. St. 493; 39 Am. Rep. 818.

4. *Lewis v. Tilton*, 64 Iowa 220; 52 Am. Rep. 436; *Ray v. Powers*, 134 Mass. 22; *Heath v. Goslin*, 80 Mo. 310; 50 Am. Rep. 505; *Blakely v. Bennecke*, 59 Mo. 193; *Ferris v. Thaw*, 5 Mo. App. 279; *Eichbaum v. Irons*, 6 W. & S. (Pa.) 67; *Cockerell v. Aucumpte*, 2 C. B., N. S. 440; *Cross v. Williams*, 7 H. & N. 675; *Burls v. Smith*, 7 Bing. 705; *Braithwaite v. Skofield*, 9 B. & C. 401; *Luckombe v. Ashton*, 2 F. & F. 705; *Delauney v. Strickland*, 2 Stark. 416.

Associations and clubs, the objects of which are social or political, and not purposes of trade or profit, are not partnerships, and pecuniary liability can be fastened upon individual members thereof, only by reason of their acts, or the acts of their agents; and agency is not implied from the mere fact of association, but must be proved, though a course of dealing may amount to proof of original authority. *Richmond v. Judy*, 6 Mo. App. 465.

5. A court of equity may entertain a bill to wind up such an association. *Gorman v. Russell*, 14 Cal. 531; *Beaumont v. Meredith*, 3 Ves. & B. 180. But see to the contrary *Burke v. Roper*, 79 Ala. 138. And part of the members cannot sue the rest at law on the contract of the association. *McMahon v. Rauhr*, 47 N. Y. 67. But a member who has paid more than his share toward the common object of the association cannot maintain a bill in equity for an accounting and contribution. *Woodward v. Cowing*, 41 Me. 9. But see to the contrary, *Cheeny v. Clark*, 3 Vt. 431. Actions at law may be brought against the members for their subscriptions. *Hall v. Thayer*, 12 Met. (Mass.) 130. And a member who abstracts the funds may be prosecuted for embezzlement. *Queen v. Robson*, 16 Q.

Co-operative stores or granges, where the stores are owned by the association, and sales are made to the members alone for the purpose of obtaining for them the advantages of wholesale purchases of miscellaneous commodities, there being no design to make profit, are not partnerships.¹ But when one of the objects of the association is to make sales to the outside world, they must be deemed partnerships.²

b. DEFECTIVE INCORPORATIONS.—The rule has been adopted by quite a large number of cases that where several parties attempt to form a corporation, but by reason of a failure to comply with the statute or otherwise, no corporate organization has been perfected, but have nevertheless proceeded to transact business, sharing in the gains and losses, they thereby become partners and liable as such;³ but the weight of authority, perhaps, sustains the contrary rule that if they were acting under the supposition that they were incorporated and were assuming only the liability of stockholders and not that of partners, they will not be held liable as such.⁴ But the officers and participating stock-

B. D. 137. So suits should be brought against the members and not against the society. *Wilkens v. Wardens etc. of St. Mark's Church*, 52 Ga. 351. And in an action to obtain title to a church lot, the elder cannot sue alone, but must join the members, or part may sue in behalf of the rest if they are numerous. *McConnell v. Gardner, Morris* (Iowa) 272; *Lloyd v. Loaring*, 6 Ves. 773.

1. See *Edgerly v. Gardner*, 9 Neb. 130; *Henry v. Jackson*, 37 Vt. 431. And see *Bates' Law of Part.*, § 76.

2. *Hodgson v. Baldwin*, 65 Ill. 532; *Manning v. Gasharie*, 27 Ind. 399; *Beaman v. Whitney*, 20 Me. 413; *Atkins v. Hunt*, 14 N. H. 205; *Farnum v. Patch*, 60 N. H. 294; *Henry v. Jackson*, 37 Vt. 431; *Tenney v. New England etc. Union*, 37 Vt. 64; *Stimson v. Lewis*, 36 Vt. 91; *Smith v. Hollister*, 32 Vt. 695.

3. *Garnett v. Richardson*, 35 Ark. 144; *Flagg v. Stowe*, 85 Ill. 164; *Bigelow v. Gregory*, 73 Ill. 197; *Coleman v. Coleman*, 78 Md. 344; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa 104; *Vredenburg v. Behan*, 33 La. Ann. 627; *Chaffe v. Luddington*, 27 La. Ann. 607; *Field v. Cooks*, 16 La. Ann. 153; *Martin v. Fewell*, 79 Mo. 401; *Richardson v. Pitts*, 71 Mo. 128; *Hurt v. Salisbury*, 55 Mo. 310; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Haslett v. Wotherpoon*, 2 Rich. Eq. (S. Car.) 395. And see *Shorb v. Beaudry*, 56 Cal. 446; *Cambridge Water Works v. Somer-*

ville etc. Co., 14 Gray (Mass.) 193; *Holbrook v. St. Paul etc. Ins. Co.*, 25 Minn. 229; *Merchants' etc., Bank v. Stone*, 38 Mich. 779; *London Assurance Co. v. Drennen*, 116 U. S. 401.

In *Jessup v. Carnegie*, 80 N. Y. 441; 12 Jones & Sp. (N. Y.) 260, it was held that persons are liable as partners if they undertake to act as a corporation without legal organization, no matter what may have been the intention of the parties, or the belief of the persons with whom they dealt. And see *Marseilles etc. Co. v. Aldrich*, 86 Ill. 504.

Persons associating themselves together under articles, to purchase property and carry on a manufacturing business, if their organization be so defective as to come short of creating a corporation within the statute, become in legal effect partners; and their rights as members of the company to the property acquired by such company, will be recognized and protected. *Whipple v. Parker*, 29 Mich. 369.

4. *Humphreys v. Mooney*, 5 Colo. 282; *Tumbell v. Page*, 24 Ill. 46; *McClinch v. Sturgis*, 72 Me. 288; *Ward v. Brigham*, 127 Mass. 24; *First Nat. Bank v. Almy*, 117 Mass. 476; *Russell v. McLellan*, 14 Pick. (Mass.) 63; *New York Iron Mine v. Negaunee*, 39 Mich. 644; *State v. How*, 1 Mich. 512; *Stout v. Zulick* (N. J.), 7 Atl. Rep. 362; *Merchants' Nat. Bank v. Pendleton*, 55 Hun (N. Y.) 579; *West Point etc. Assoc. v. Brown*, 3 Edw. (N. Y.) 284;

holders who incur indebtedness, knowing that their incorporation is ineffective, are usually held to the liability of partners.¹ And where their organization as a corporation is complete, if they knowingly conduct a business not authorized by their charter, as to that business they are partners.² So, where an existing partnership attempts to become incorporated but fails to effect a valid

Rowland *v.* Meader Furniture Co., 38 Ohio St. 269; Bank *v.* Hall, 35 Ohio St. 158; Medill *v.* Collier, 16 Ohio St. 599; Harrod *v.* Hamer, 32 Wis. 162; Gartside Coal Co. *v.* Maxwell, 22 Fed. Rep. 197. And see Blanchard *v.* Kaull, 44 Cal. 440; Planters' etc. Bank *v.* Padgett, 69 Ga. 159; Merchants' etc. Bank *v.* Stone, 38 Mich. 779; Fay *v.* Noble, 7 Cush. (Mass.) 188; Trowbridge *v.* Scudder, 11 Cush. (Mass.) 83; Second Nat. Bank *v.* Hall, 35 Ohio St. 158; Stafford Nat. Bank *v.* Palmer, 47 Conn. 443; Central City Sav. Bank *v.* Walker, 66 N. Y. 424; McClinch *v.* Sturgis, 72 Me. 288; Humphreys *v.* Mooney, 5 Colo. 282; Glen *v.* Breard, 35 La. Ann. 875; Fuller *v.* Rowe, 57 N. Y. 23; National Union Bank *v.* Landon, 45 N. Y. 410; Chaffe *v.* Ludeling, 27 La. Ann. 607.

A creditor who obtains a judgment against a corporation as such is estopped from claiming that the stockholders are partners. Creswell *v.* Oberly, 17 Ill. App. 281; Pochelu *v.* Kemper, 14 La. Ann. 308.

Where, on one's contract made with a company as a corporation, both parties believing the corporation to exist *de jure* as well as *de facto*, and with no intention at the time of giving credit to or binding the members individually or as partners, an action cannot be maintained against them as partners. Planters' & Miners' Bank *v.* Padgett, 69 Ga. 159.

The stockholders of a corporation do not become liable as partners, on notes given by the trustees of the corporation, merely because, after organizing under the act of incorporation, no corporate business is transacted, or because the notes were given for debts beyond the corporate authority of the company. Trowbridge *v.* Scudder, 11 Cush. (Mass.) 83.

A and B, partners, agree to receive D into their firm on condition that it should become incorporated, and that B should pay to the firm, for its use, a certain sum of money to be put into the corporation. *Held*, that the payment by D to the firm did not make

him a partner. Drennen *v.* London Insurance Co., 113 U. S. 51.

1. Stafford Bank *v.* Palmer, 47 Conn. 443; National Bank of Watertown *v.* Landon, 45 N. Y. 410; Bank *v.* Hall, 35 Ohio St. 158; Medill *v.* Collier, 16 Ohio St. 599. See also Blanchard *v.* Kaull, 44 Cal. 440; Gartside Coal Co. *v.* Maxwell, 22 Fed. Rep. 197.

This rule does not apply to the case of a solicitor who assisted in the organization knowing that there were more than the statutory number of members. *In re* South Wales etc. Co., 2 Ch. D. (Eng.) 763. Nor does it apply to contracts made before the party sought to be held liable because a member. Fuller *v.* Rowe, 57 N. Y. 23.

Several persons signed articles of association, elected officers and took preliminary steps for the formation of a corporation under Mass. St. 1866, ch. 290, but the association failed to become a corporation. Several of the signers subscribed for stock and received certificates therefor. A and B, two of the subscribers, who were elected, respectively, president and treasurer, advanced money and carried on the business, intending to give it into the hands of the corporation when it should be legally qualified to take it. On a bill in equity by A and B, claiming to be partners, against the other subscribers, to settle the affairs of the alleged partnership, it was held that the complainants acted as agents for the inchoate corporation upon their own risk, and could not hold the other subscribers as partners. Ward *v.* Brigham, 127 Mass. 24.

Since the persons forming the contract do not do so as partners, their liability is in tort for acting as agents without authority, and not in contract. See Trowbridge *v.* Scudder, 11 Cush. (Mass.) 83; Sullivan *v.* Sullivan, 20 S. Car. 509.

2. See Ridenour *v.* Mayo, 40 Ohio St. 9; Rianhard *v.* Hovey, 13 Ohio 300. To the contrary see Trowbridge *v.* Scudder, 11 Cush. (Mass.) 83.

Where incorporation is procured in another State apparently for the purpose of doing business in the State

organization, it remains a partnership¹ and the members remain liable on contracts entered into before such attempt.² The same rule applies where a firm, having been incorporated, continues to transact business in the partnership name,³ as well as where the members of a corporation knowingly continue their business after the expiration of their charter,⁴ though the contrary rule applies where they are acting in ignorance of the fact, being then regarded as trustees rather than partners,⁵ and persons engaged in taking the necessary preliminary steps towards the formation of a corporation, are not partners if they do not begin business.⁶

Where an incorporation is fatally defective, the rights of partners in the property of the concern will be preserved to the members;⁷ but not so if the defect was intentional.⁸

4. Mining Partnerships—(See also MINES AND MINING CLAIMS,

where the corporators live, presumably to escape liability under the laws of that State, they will be considered as partners, on the ground that such act is a fraud on the laws of the latter State. *Hill v. Beach*, 12 N. J. Eq. 31. In *Second Nat. Bank v. Hall*, 35 Ohio St. 158; however, it is held that such act is not a fraud.

1. Bates' Law of Part., § 8.

Where A and B doing business as a firm, entered into a contract with C and D to form a joint stock corporation for the prosecution of the same business, the capital to be taken equally by the four, and in consideration of C and D advancing money, they were to share equally in the profits, it was held that C and D were liable as partners, or debts incurred after that date, but not for notes given thereafter in renewal of others given before. *Citizens' Bank v. Hine*, 49 Conn. 236.

2. *Whipple v. Parker*, 29 Mich. 369; *Haslett v. Wotherspoon*, 2 Rich. Eq. (S. Car.) 395.

A corporation formed by the members of a firm without change of membership, where the organization is valid and effectual, is not liable for the debts of the partnership. *McLellan v. Detroit File Works*, 56 Mich. 579.

3. See *Garnett v. Richardson*, 35 Ark. 144; *Witmer v. Schlatter*, 2 Rawle (Pa.) 359; *Bank v. Smith*, 26 W. Va. 541.

Where stockholders represent themselves as personally liable for the debts of the corporation, they will be held as partners. *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98.

4. *National Bank v. Landon*, 45 N.

Y. 410; *In re Mendenhall*, 9 Nat. Bankr. Reg. 497.

5. In an action upon a promissory note dated June 3rd, 1867, made by one of the defendants as agent for the *Utica Steam Woolen Mills Co.*, a corporation whose charter had expired by statutory limitations on Feb. 27, 1866, in ignorance of which fact the business had thereafter been carried on by the trustees as usual, the action being brought against certain of the stockholders, plaintiff claiming that they were liable as co-partners for debts contracted after the expiration of the charter, it was held that the action could not be maintained; that the business must be deemed to have been carried on by the directors acting as trustees, and that persons dealing with the said officers must be considered as contracting with them in their representative capacity, and as relying upon their responsibility in such capacity. *Central etc. Institution v. Walker*, 5 Hun (N. Y.) 34.

6. See *West Point Foundry Assoc. v. Brown*, 3 Edw. Ch. (N. Y.) 284; *Sylvester v. McCinag*, 28 Up. Can. C. P. 443; *Reynell v. Lewis*, 15 M. & W. 517; 1 Sim., N. S. 178; *Hamilton v. Smith*, 5 Jur., N. S. 32.

7. See *Connor v. Abbott*, 35 Ark. 365; *Short v. Beandry*, 56 Cal. 446; *Flagg v. Stowe*, 85 Ill. 164; *Whipple v. Parker*, 29 Mich. 369; *Holbrook v. St. Paul etc. Ins. Co.*, 25 Minn. 229.

The fact that the parties held for two years, without doing any corporate act, makes them partners, instead of corporators. *Russell v. M'Lellan*, 14 Pick. (Mass.) 63.

8. *London Assur. Co. v. Drennen*, 116 U. S. 461.

vol. 15, p. 499).—A mining partnership is a cross between a tenancy in common and a regular partnership, its principle point of difference being that the death of a partner, or the transfer of an interest does not dissolve it,¹ and that the death of a partner does not as a general rule effect dissolution of the firm.²

In other respects in the absence of provision in the articles, mining associations are governed by the law of ordinary partnerships, unless general mining usages, or established practice have changed or modified the rule.³

But where persons engage in a mining venture, adopting a firm name and agreeing to share the profits and losses between them, a partnership in the ordinary sense as distinguished from a min-

1. Bates' Law of Part., § 14.

As in other cases of partnership, there must be some community of profit and loss. A simple agreement to convey an interest in the mine, on the one hand, and on the other to perform certain services, the conveyance being in consideration of such services, does not constitute a mining partnership. *Barber v. Cazalis*, 30 Cal. 92.

In some of the western territories an agreement by which one party is to prospect for mines, and the other furnish money and provisions, for which the latter is to receive in interest in the mining ground that may be discovered, constitutes what is termed a "mining prospecting partnership," not governed by ordinary partnership rules. *Boucher v. Mulverhill*, 1 Mont. 306.

Where the evidence showed that parties owned certain mining grounds as tenants in common; that they worked it together, and the gold extracted went first to pay the expenses of working, and the residue, if any, was to be divided among them in proportion to the interest of each in the mining ground, they were held to be mining partners. *Nolan v. Lovelock*, 1 Mont. 224.

2. See *Jones v. Clark*, 42 Cal. 193; *Taylor v. Castle*, 42 Cal. 367; *Firedy v. Wightwick*, 1 Russ. & My. 45; *Bainbridge on Mines* 425. And see *Dougherty v. Creary*, 30 Cal. 290; *Taylor v. Castle*, 42 Cal. 367; *Nisbet v. Nash*, 52 Cal. 540; *Campbell v. Colorado Coal etc. Co.*, 9 Colo. 60; *Southmayd v. Southmayd*, 4 Mont. 100; *Lamar v. Kale*, 79 Va. 147; *Kahn v. Central Smelting Co.*, 102 U. S. 641; *Bentley v. Gates*, 4 G. & C. 182; *Redmayne v. Foster*, L. R., 2 Eq. 467.

An agreement between parties to act together in obtaining a lease of mining property and to work such property as

a partnership after the acquisition of the lease does not of itself constitute a partnership, and before the execution of the agreement one party may withdraw with the consent of the others, and another be substituted, without producing any of the consequences of a dissolution. *Meagher v. Reed*, 4 Colo. 335.

3. *Blanch. & W. L. C. on Mines and Minerals*, 553.

In *Bradbury v. Barnes*, 19 Cal. 123, the court declined to decide the question whether associates in a mining claim were to be regarded as general partners or not, but if they were, it was held that one might purchase with his own funds and on his own account the interest of his co-partner in real estate at public sale, and if there were no circumstances of fraud, or of a trust apart from this relation, the purchaser might hold the property as a stranger might.

In *Gore v. McBrayer*, 18 Cal. 582, it was conceded, for the purpose of the decision, that a partnership for the purchase of a mining claim is a partnership for dealing in land, and that such an agreement must be in writing, within the Statute of Frauds, in order to entitle the several partners to any interest or shares in the lands purchased by one.

But where several verbally agreed to prospect for quartz, and to be equally interested in claims taken up, and one discovered a lead or claim and located it by putting up a written notice with the names of himself and others on it appropriating the lead, these parties were held to be not partners but tenants in common, and one could bring his action against the other who ousted him from the possession. *Blanch. & W. L. C. on Mines and Min.* 552.

ing partnership, is constituted.¹

5. Persons in a Representative Capacity.—Where the executor or administrator of a deceased partner, pursuant to directions in the will or otherwise, leaves the assets of the deceased in the business without, personally engaging in it, he does not become a partner nor render the estate liable to the creditors of the firm, except as to the assets so left in.² The rule formally was that any representative of a deceased partner who receives a part of the profits of a firm, even though it be without personal interest or participation in the business, and pursuant to instructions in the will, is nevertheless a partner as to third persons.³ Owing to the hardship of this rule an executor was permitted to withdraw and dissolve the firm, even though the testator had directed its continuance.⁴ Later authorities appear to make a distinction between a mere delay or failure to compel a dissolution and winding up, and leaving the assets in the firm as a permanent investment,

1. *Bradley v. Harkness*, 26 Cal. 76; *Decker v. Howell*, 42 Cal. 636; *Duryea v. Burt*, 28 Cal. 569; *Stapleton v. King*, 33 Iowa 28; *Feredy v. Wightwick*, 1 Russ. & My. 45; *Bainbridge on Mines*, 439; *Jeffreys v. Smith*, 3 Russ. 158; *Crawshay v. Maule*, 1 Swanst. 518.

In *Missouri*, two persons jointly interested in a mining venture are considered as partners without regard to whether they so agreed or not. *Snyder v. Burnham*, 77 Mo. 52.

An agreement to engage in the business of prospecting for a lode of mining property and developing it, for the joint use of all, is in the nature of the partnership, and renders each party thereto the agent of the other. *Lawrence v. Robinson*, 4 Colo. 567.

An agreement between parties to act together in obtaining a lease of mining property and to work such property as a partnership after the acquisition of the lease does not of itself constitute a partnership, and before the execution of the agreement one party may withdraw with the consent of the others, and another be substituted, without producing any of the consequences of a dissolution. *Meagher v. Reed*, 14 Colo. 334.

2. *Brower v. Creditors*, 11 La. Ann. 117; *Avery v. Myers*, 60 Miss. 367; *Wild v. Davenport*, 48 N. J. L. 129; 57 Am. Rep. 552; *Holme v. Hammond*, L. R., 7 Ex. 218. And see also *post*, subtit., *Provisions for Continuance After Death*.

Where a testator directed that all his "interest in the copartnership existing between another and himself

should be continued therein until the expiration of the term limited by the articles between them, the business to be conducted by the survivor, and the profit or loss to be distributed in a manner the said articles provided," it was held that the general assets of the testator in the hands of his executor were not thereby pledged for the future debts, responsibilities, or capital of the firm. *Burwell v. Mandeville*, 2 How. (U. S.) 560.

A company was formed to go to California. Among other articles of agreement was one that in case of the death of a party his nearest relative should receive one-half his share of the profits, so long as the concern lasted. This was held not to be a partnership, and that the court had no equity power over it as such. *Knowlton v. Reed*, 38 Me. 246.

3. *Wild v. Davenport*, 48 N. J. L. 129; *Barker v. Parker*, 1 T. R. 287, *Ex parte Garland*, 10 Ves. 110; *In re Leeds Banking Co.*, L. R., 1 Ch. App. 231; *Wightman v. Townroe*, 1 M. & S. 412.

Where the children of a deceased partner, *sui juris*, in pursuance of a provision in the articles that they should succeed to his interest, drew the amount monthly which he was allowed to draw, it was held that this was an acceptance of the successorship, and that they were liable at suit of a creditor of the firm. *Nave v. Sturges*, 5 Mo. App. 557.

4. See *Edgar v. Cook*, 4 Ala. 588; *Phillips v. Blatchford*, 137 Mass. 510; *Berry v. Folkes*, 60 Miss. 576; *Jacquin*

in which latter case, the executor becomes personally liable as a partner, though he does not bind the estate.¹ But it is now well settled that he will not be held as a partner, even though the assets are intentionally left in as a permanent investment under the will,² and the will is to be looked to to ascertain if the executor is acting in pursuance of its provisions.³ Where, however, an executor engages personally in the business of the firm, though acting pursuant to the will and the partnership articles, if it amounts to such an interference as to render him a principal in the business, he becomes personally liable for its debts.⁴

So where a testator directs the continuance of his assets in the partnership business, the profits to be paid to the beneficiaries under his will in the form of annuities, they are not partners, but receive them in lieu of interest on their money.⁵ And a parent

v. Buisson, 11 How. Pr. (N. Y.) 385; *Downs v. Collins*, 6 Hare 418; *Page v. Cox*, 10 Hare 163; *Pigott v. Bagley*, McCl. & G. 569.

1. *Owens v. Mackall*, 33 Md. 382; *Avery v. Myers*, 60 Miss. 367; *Citizens' Mut. Ins. Co. v. Ligon*, 59 Miss. 305; *Richter v. Poppenhausen*, 42 N. Y. 373; 9 Abb. Pr., N. S. (N. Y.) 263; 39 How. Pr. (N. Y.) 82.

2. See *Phillips v. Blatchford*, 137 Mass. 510, *Brasfield v. French*, 59 Miss. 632; *Wild v. Davenport*, 48 N. J. L. 129; *Richter v. Poppenhausen*, 42 N. Y. 373; 9 Abb. Pr., N. S. (N. Y.) 263; *Holme v. Hammond*, L. R., 7 Ex. 218; *Price v. Groom*, 2 Ex. 542.

3. *Owens v. Mackall*, 33 Md. 382.

4. Also *v. Mather*, 8 Conn. 584; 21 Am. Dec. 703; *Citizens' Mut. Ins. Co. v. Ligon*, 59 Miss. 305; *Wild v. Davenport*, 48 N. J. L. 129; *Richter v. Poppenhausen*, 42 N. Y. 373; 9 Abb. Pr. (N. S.) 263; *Kreis v. Gorton*, 23 Ohio St. 468.

Where there is a direction in a will to one of the executors to carry on the business in his own name and turn it over together with one-half of the profits, to the heir when he becomes of age, the executor does not become a partner, he is a trustee. And if he continues the business after the majority of the heir under a power of attorney from him, he is then an agent rather than a partner. *Gibson v. Stevens*, 7 N. H. 352.

The legal representatives and widow of a deceased partner suffered his share to remain in the firm, which was continued for some years, when a new firm was formed between the surviving partner and the widow's second hus-

band. She intervened in the contract, and consented that the balance due her as widow in community should remain with the new firm as a loan, on which she was to receive interest. This made her a creditor of the new firm and not a partner. *Brower v. Creditors*, 11 La. Ann. 117.

New Firm.—Where the widow and next of kin put in more capital and enter into an agreement with the surviving partner regulating the amount of profits to be received by each, a new partnership is formed, and all are liable to third persons. *Delaney v. Dutcher*, 23 Minn. 373.

A husband and wife owned a stock of goods as community property. The husband died, and the widow carried on the business with the consent of the husband's heirs. Held, that for debts contracted in keeping up the business, the property of the widow and of those heirs engaged in conducting the business was liable. *Cleveland v. Harding*, 67 Tex. 396.

5. *Pitkin v. Pitkin*, 7 Conn. 807; 18 Am. Dec. 111; *Heighe v. Littig*, 63 Md. 301; *Philips v. Samuel*, 76 Mo. 657; *Jones v. Walker*, 103 U. S. 444. To the contrary, see *Nave v. Sturges*, 5 Mo. App. 557.

If the firm afterwards becomes insolvent annuities thus paid cannot be recovered back. See *Pitkin v. Pitkin*, 7 Conn. 307; 18 Am. Dec. 111; *Jones v. Walker*, 103 U. S. 444.

The former English rule, as in the case of an executor, was that an annuity taken from the profits of the business rendered the annuitant liable as a partner. *Ex parte Hamper*, 17 Ves. 403; *Bond v. Pittard*, 3 M. & W. 357; *E* &

investing money in a partnership for the benefit of his infant son, the son's share of the profits to be accounted for to the father, does not become a partner and liable as such, if such was not his intention;¹ though if the money was in fact his own and he appropriates the profits to his own use, having reserved a partner's right of control in the business, a partner's liability will be imposed upon him.²

III. THE DELECTUS PERSONARIUM.—The partnership relation is one founded upon mutual trust and confidence, and the right rests with each and every partner, therefore, to say what, if any new members shall be admitted to the firm,³ the executors of a deceased partner not being entitled to become members of the firm without the consent of the surviving partner.⁴ So the purchaser of an interest from one partner acquires no right to interfere in any manner with the partnership affairs;⁵ and a partner cannot embark his firm in enterprises in which third persons are partners with him.⁶

The consent of the other co-partners to the admission of the new partner or to the nomination of a successor, however, may be given at any time, even though in advance of the nomination or

parte, Chuck, 8 Bing. 469; *In re Colbeck*, Buck 48.

In *Goddard v. Hodges*, 1 Cr. & M. 33, it was held that the *cestuis que trustent* could have been held liable as partners instead of the executor.

1. *Barklie v. Scott*, 1 Hud. & B. (Irish) 83. And see *Owens v. Mackall*, 33 Md. 382.

2. *Miles v. Wann*, 27 Minn. 56. And see *Williams v. Rogers*, 14 Bush (Ky.) 776.

For the Benefit of Another.—Where A owned two of the four shares of the stock of a partnership, and B the other two, and A desiring to purchase B's shares, but not having the money, agreed with C to buy them in his, A's, name from whom he would re-purchase them at a stated time at a designated advance in price, giving C a mortgage to secure the agreement, it was held that the beneficial ownership of the shares was in C, and that he must be deemed a partner. *Starr v. Dugan*, 22 Md. 58.

3. Story on Part. §§ 5, 195; Bouv. Law Dict., *Delectus Personarum*.

4. *Pearce v. Chamberlain*, 2 Ves. Sr. 33; *Crawford v. Hamilton*, 3 Madd. 254; *Bray v. Fromont*, 6 Madd. 5; *Crawshay v. Maule*, 1 Swanst. 495; *Tatam v. Williams*, 3 Hare 347.

And see also *infra*, this title, *Provisions for Continuance After Death*.

5. *Jones v. Scott*, 2 Ala. 58; *Meaher*

v. Cox, 37 Ala. 201; *Miller v. Brigham*, 50 Cal. 615; *Love v. Payne*, 73 Ind. 80; 38 Am. Rep. 111; *Taylor v. Penny*, 5 La. Ann. 7; *Merrick v. Brainard*, 38 Barb. (N. Y.) 574; *Mason v. Connell*, 1 Whart. (Pa.) 381; *McGlensy v. Cox*, 1 Phila. (Pa.) 387; *Setzer v. Beale*, 19 W. Va. 274; *Jeffreys v. Smith*, 3 Russ. 158. And see also, *infra*, this title, *Dissolution by Sale of an Interest*.

It is not within the power of a partner, by retiring from the firm, either to introduce another partner or to deprive the remaining partners of their right to have all the partnership property held for partnership purposes. *Fourth Nat. Bank v. New Orleans etc. R.*, 11 Wall. (U. S.) 624.

6. See *Reis v. Hellman*, 25 Ohio St. 180; *Freeman v. Bloomfield*, 43 Mo. 391; *Campbell v. Hastings*, 29 Ark. 512.

And see also, *infra*, this title, *Sub-partners*.

Plaintiff, two years after the devise of the farm to him and his aunt, who was his partner, joined a mercantile firm, which furnished supplies for the farm until he bought out his partner, when he supplied the farm himself until he sold the business to one W on credit. W agreed to furnish supplies, charging the tenants credit prices, and plaintiff credited the cash prices of the same upon W's notes for the purchase price of the stock of goods bought of him.

other designation,¹ and a recognition of the third person as partner, or a failure to dissent will be as effective as a ratification as a prior assent.²

So if the members of a partnership have agreed among themselves that their shares shall be transferrable at will, though technical obstacles may exist, a court of equity will enforce the transfer as a trust according to the true intent of the parties.³

IV. EXECUTORY PARTNERSHIPS.—Executory contracts to form a partnership, as agreements to take effect at a future date and the like, do not constitute a partnership.⁴ Neither does a mere intention to form one,⁵ and contracts entered into by individuals

Held, that the estate of plaintiff's aunt was not liable for losses from credit given to laborers on the farm by plaintiff, or the firm of which he was a member, or by W. Vaiden v. Hawkins (Miss. 1889), 6 So. Rep. 227.

1. See *Foxcraft v. Clifton*, 9 Bing. 119; *Mayhew's Case*, 5 De G. M. & G. 837; *Lovecraft v. Nelson*, 3 M. & K. 1; *Fay v. Waldron* (Supreme Ct.), 3 N. Y. Supp. 894.

A mere right of a partner to assign his share reserved in the articles is not equivalent to an agreement to admit the assignee to membership in the firm. *Jefferys v. Smith*, 3 Russ. 158.

A provision in the partnership agreement that one partner cannot sell his interest without giving his co-partner the first chance to purchase does not imply a right to introduce a stranger into the firm, upon their refusal to buy. *McGlensey v. Cox*, 1 Phila. (Pa.) 387; 1 Am. Law. Reg., O. S. 34.

2. *Tabb v. Gist*, 1 Brock. (U. S.) 33; *Wood v. Connell*, 2 Whart. (Pa.) 542; *Mason v. Connell*, 1 Whart. (Pa.) 381; *Meaher v. Cox*, 37 Ala. 201; *Rosenstiel v. Gray*, 112 Ill. 282. And see *Jones v. Scott*, 2 Ala. 58.

Mere acquiescence in the admission of a new partner is not a ratification of terms differing from the articles and unknown to them. *Love v. Payne*, 73 Ind. 80; 30 Am. Rep. 111.

That other similar contracts had previously been recognized is evidence from which ratification may be inferred. *Buckingham v. Hanna*, 20 Ind. 110. But where a partner attempts to take in a third person as a partner without the consent of his co-partner, the co-partner is not bound to notify the world that he is not a partner with such third person. *Jones v. O'Farrell*, 1 Nev. 354.

3. See *Lovegrove v. Nelson*, 3 M. & K. 20; *Page v. Cox*, 10 Hare 163.

The fact that partnership articles of a banking firm allow members thereof to sell their stock, after offering it to the bank at a stated price, and require the transfer to be made on the bank's books, and provide that all stockholders are individually bound to make good to all depositors the amount of their deposits, does not render a purchaser of stock liable for antecedent deposits. *Christy v. Sill*, 131 Pa. St. 492.

4. *Cline v. Wilson*, 26 Ark. 154; *Powell v. Maguire*, 43 Cal. 11; *Reboul v. Chalker*, 27 Conn. 114; *Doyle v. Bailey*, 75 Ill. 418; *Wilson v. Campbell*, 10 Ill. 383; *Taylor v. Penny*, 5 La. Ann. 7; *Beckford v. Hill*, 124 Mass. 588; *Brink v. New Amsterdam F. Ins. Co.*, 5 Robt. (N. Y.) 104; *Vance v. Blair*, 18 Ohio 532; 51 Am. Dec. 467; *Meyer v. Schacher*, 38 L. T., N. S. (Eng.) 97.

Where a person contracts for a lease with the growing crop on the land, getting a part of the sum paid for it from a third person, under an understanding if he acquired possession the latter should become his partner, possession never having been obtained, the lessee can sue the lessor for breach of his contract to lease without joining the third person, no partnership having been consummated between them. *Snodgrass v. Reynolds*, 79 Ala. 452.

Where an offer of partnership is made and accepted, but no change is made in the business, and no property turned over or money paid, it is not conclusive evidence of the formation of a partnership. *Hutchins v. Buckner*, 3 Mo. App. 594. See also *Gray v. Gibson*, 6 Mich. 300.

5. *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230; *Chandler v. Brainard*, 14 Pick. (Mass.) 285; *Reynell v. Lewis*, 15 M. & W. 517; *Bourne v. Freeth*, 9 B. & C. 632.

Where goods are purchased by several parties, under an agreement to

pursuant to such an intention, but before the actual formation, can produce no partnership liability;¹ though where such contracts are entered into upon the credit of the supposed firm, they may be adopted and ratified by the other members by the acceptance of the benefits arising from them.²

An advance of money or property with a view to a future partnership does not of itself constitute a present partnership.³ Nor does an agreement whereby one is given an option to become a partner, while such option remains open,⁴ though if such agreement is not *bona fide*, or made for the purpose of concealment, it

hold them in aliquot shares, and with no arrangement for a joint sale, but with the intention of subsequently forming a co-partnership in regard to the goods, until the partnership agreement is actually made, the purchasers are not co-partners, but only tenants in common. *Baldwin v. Burrows*, 47 N. Y. 199.

S, in contemplation of forming a partnership with P, went into P's store, assisted him as a clerk with the business, and allowed P to hold him out as a partner, but no inventory was taken, no terms of partnership agreed upon and no money paid in by S, or promised to be paid in. The cash book showed that the current receipts were constantly applied to the payment of P's debts contracted before S went into the store, and a clerk, without the knowledge or direction of either P or S, wrote the firm name "P & S" over one page in the journal, and the initials of the same name in a few places in the ledger, it was held that there was no partnership between P and S in the absence of an express agreement to that effect, as to debts contracted by P prior to S's coming into P's store. *Miller v. Stone*, 69 Wis. 617.

1. See *Gause v. Hobbs*, 18 Kan. 500; *Monseilen v. Thebeus*, 19 La. Ann. 516; *Hall v. Edson*, 40 Mich. 651; *Webb v. Leggett*, 6 Mo. App. 345; *Valentine v. Hickie*, 39 Ohio St. 19; *Brooke v. Evans*, 5 Watts (Pa.) 196; *Baxter v. Plunkett*, 4 Houst. (Del.) 450; *Heckert v. Figely*, 6 W. & S. (Pa.) 139; *McGar v. Drake* (Tenn. 1877), 5 Reporter 347; *Davis v. Evans*, 39 Vt. 182; *Sarille v. Robertson*, 4 T. R. 720; *Coope v. Eyre*, 1 H. Bl. 37; *Young v. Hunter*, 4 Taunt. 582; *Heap v. Dobson*, 15 C. B., N. S. 460; *Hutton v. Bullock*, L. R., 8 Q. B. 331.

An inchoate partnership must become complete before liability to creditors

can attach. *Irwin v. Bidwell*, 72 Pa. St. 244.

An advance of money to a person engaged in business, and which was used by him for the purchase of goods, does not create a partnership, although it may be made in anticipation of a future partnership, which is never consummated. *Hubbell v. Woolf*, 15 Ind. 204.

Where one permits another to buy stock on their joint account, in anticipation of forming a partnership, and immediately afterwards repudiates the agreement to become a partner, he is not entitled to any of the property bought, nor are his individual creditors. *Rice v. Sherman*, 43 Pa. St. 37.

The contrary doctrine seems to have been held in the following cases: *Lowe v. Dixon*, 16 Q. B. D. 455; *Gouthwaite v. Duckworth*, 2 East 421; *Sauley v. Howard*, 7 Dana (Ky.) 367. And see *Everitt v. Clapman*, 6 Conn. 347.

2. *Pike v. Douglass*, 28 Ark. 59; *Fleshman v. Collier*, 47 Ga. 253; *Westcott v. Price*, *Wright* (Ohio) 220; *Buzard v. McNulty*, 77 Tex. 438.

Where specified portions of a debt incurred by one member is assumed by the others it does not amount to an assumption by the partnership. *Mousseau v. Thebeus*, 19 La. Ann. 516.

3. *Hubbell v. Woolf*, 15 Ind. 204; *Atkins v. Hunt*, 14 N. H. 205; *Haile v. York*, 27 Wis. 209; *Dickinson v. Valpy*, 10 B. & C. 128.

Where negotiations were entered into for the admission of an additional partner into a firm, who was to pay in a certain sum and "& Co." was to be added to the firm name, and the money was paid in and the "& Co." added, but the proposed partner afterwards refused to go farther, it was held that this was not sufficient to make him a partner. *Ex parte Turquand*, 2 M. D. & D. 339.

4. *Adams v. Pugh*, 7 Cal. 150; *Wil-*

would be different.¹ It is competent to contract for a future or a conditional partnership,² and if certain acts are conditions precedent to the existence of a partnership, the parties cannot be held as partners until the performance of such acts,³ though a requirement will not be deemed a condition precedent unless it is so stated in the contract, or of such a nature as to render its prece-

liams v. Soutter, 7 Iowa 435; *Irwin v. Bidwell*, 72 Pa. St. 244; *Moore v. Walton*, 9 Nat. Bank v. Reg. 402; *Darling v. Bellhouse*, 19 Up. Can., Q. B. 268; *Hill v. Bellhouse*, 10 Up. Can. C. P. 122; *Howell v. Brodie*, 6 Bing. N. C. 44; *Price v. Groom*, 2 Ex. 542.

Where A advanced money to B to be used in his business upon an agreement that A might become an equal partner and the money considered as his capital if he desired, and B thereafter credited A with interest on his advance, against his protest that he should be credited with one-half the profits, it was held in a suit by A, to recover his advances, that there was no partnership, and that an action at law would lie. *Morrill v. Spurr*, 143 Mass. 257.

On the other hand, where several partners agree that one of them may at the end of a year elect to consider himself as an employee from the beginning upon a salary, and he so elected, it was held not to work a dissolution and the formation of a new firm, but that, as between themselves, the other partners must be regarded as constituting the firm from the beginning. *Bidwell v. Madison*, 10 Minn. 13.

1. See *Courtenay v. Wagstaff*, 16 C. B., N. S. 110.

2. *Sailors v. Nixon-Jones Printing Co.*, 20 Ill. App. 509; *Handlin v. Davis*, 81 Ky. 34; *Avery v. Lauve*, 1 La. Ann. 457.

Such a contract may be enforced. *Handlin v. Davis*, 81 Ky. 34.

Where there is an unexecuted contract for the purchase of property, and an agreement that the seller and buyer shall form a partnership conducted by the use of the property so contracted for, and the business contemplated is actually carried on and the profits therefrom divided among and appropriated by the partners, there is an executed contract of partnership which cannot be rescinded by either party, and the buying partner's right to abandon the contract of purchase because unexecuted, does not carry with it the right to abandon the partnership and recover from the other for

services rendered the firm. *Gullick v. Alford*, 61 Miss. 224.

3. *Johnston v. Eichelberger*, 13 Fla. 230; *Stevenson v. Mathers*, 67 Ill. 123; *Metcalf v. Redmon*, 43 Ill. 264; *James v. Stratton*, 32 Ill. 202; *Hobart v. Ballard*, 31 Iowa 521; *Napoleon v. State*, 3 Tex. App. 522; *Hoile v. York*, 27 Wis. 209; *Dickinson v. Valpy*, 10 B. & C. 128. And see *Hedge & Horn's Appeal*, 63 Pa. St. 273.

An agreement was entered into by which the plaintiff was to render services in a factory which he had recently become owner of, at a fixed annual compensation. The defendant was—if the incumbrances on the property were paid as they became due, from the profits of the business, and the plaintiff's notes on demand given at the time—to convey to the plaintiff one-half of the property and business, and not otherwise. *Held*, not a partnership, on the ground that the agreement was executory. *Haskins v. Burr*, 106 Mass. 48.

Where the defendants subscribed for shares in a company to be formed, it being understood that it was to have a capital of \$600,000, divided into 12,000 shares, and paid the first installment, thereby assenting to the proposed terms, but only 7,500 shares in all were taken, and the defendants had never attended any of the meetings or in any way interfered as partners, it was held that they were not bound by the acts of the directors in purchasing goods and employing labor; their assent to become partners, having been given on the understanding that the concern was to have \$600,000 capital. *Fox v. Clifton*, 6 Bing. 776.

It is not contrary to equity for partners in an existing firm, upon taking in of a new member, to put in the stock and machinery of the old business, at a price fixed arbitrarily between the parties as one of the conditions of the new arrangement. There is no confidential relation between the parties until the partnership is formed; in the negotiations concerning it the parties deal as strangers. *Uhler v. Semple*, 20 N. J. Eq. 288.

dent performance necessary.¹ Such conditions may be waived, however, by proceeding with the joint enterprise before their performance, the partnership dating from the time of such waiver.²

The manifest purpose of the parties is usually the controlling element as to whether a contract of partnership is to take effect at once as an executed contract or in the future,³ and the language

Where it is clear from the articles that the parties contemplate an immediate commencement of business as a firm, the failure of one of them to pay in his part of the capital as agreed does not render him any the less a partner as of the date of the execution of the articles. *Southern White Lead Co. v. Haas*, 73 Iowa 399.

1. *Gince v. Thornton*, 76 Ala. 466; *Brisban v. Boyd*, 4 Paige (N. Y.) 17. And see *Grady v. Robinson*, 28 Ala. 289; *Saufley v. Howard*, 7 Dana (Ky.) 367.

Where it was agreed between D. W. & Co. and R. that R. was to prepare ice for the Southern market, and D. W. & Co. were to furnish the money and were to go South and look over the market and ascertain whether it was safe to proceed, and after doing so wrote to R. to prepare the ice, but failed to furnish the money, though they were ready to do so when called upon, and R. proceeded to put up the ice and sold it at a profit of \$2,500, it was held in an action for an accounting brought by D. W. & Co. that a partnership *in presenti* was formed and not one to begin on the sending of the notice and the payment of the money. *Durant v. Rhener*, 26 Minn. 362.

Parol evidence, is admissible to show that the written co-partnership articles were to be held by one of the partners until certain debts were paid. *Beall v. Poole*, 27 Md. 645; though as a general rule oral conditions cannot be engrafted upon such a contract where it is completed and delivered. See *Dix v. Otis*, 5 Pick. (Mass.) 38; *Williams v. Jones*, 5 B. & C. 108.

2. *Stein v. Robertson*, 30 Ala. 286; *Campbell v. Whitley*, 39 Ala. 172; *Boyd v. Mynatt*, 4 Ala. 79; *Palmer v. Tyler*, 15 Minn. 106; *Hartman v. Woehr*, 18 N. J. Eq. 383; *Cogswell v. Wilson*, 11 Oregon 371; *Jackson v. Sedgwick*, 1 Swanst. 460. And see *Perkins v. Perkins*, 3 Gratt. (Va.) 364; *Phillips v. Nash*, 47 Ga. 218; *Gullick v. Alford*, 61 Miss. 224.

Where partners agree to act together as such, without waiting for the signa-

ture of one who is absent, such persons thereby become partners as between themselves. *Hubbard v. Matthews*, 54 N. Y. 43; 13 Am. Rep. 562; *McStea v. Matthews*, 50 N. Y. 466; *Ontario Salt Co. v. Merchants Salt Co.*, 18 Grant's Ch. (Up. Can.) 551.

A partner who had not signed the articles was held liable in *Wood v. Cullen*, 13 Minn. 394.

Where the partnership articles were signed and business commenced under them, but afterwards discontinued and the partnership given up because the partners found that they could not obtain goods on credit, it was held that that attempt to purchase was an act of partnership, and notice of dissolution was therefore necessary to relieve one of the partners from liability on subsequent contracts made with apparent authority. *Thurston v. Perkins*, 7 Mo. 29.

B, of the firm of A & B, agreed with C to take him into the firm, A agreeing to it provided B and C would furnish all the money necessary to carry on their business of cattle dealing, A to guarantee the sales. C accepted the proposition, not knowing of the condition imposed by A, and stock was purchased for which the note of all three was given, and A, being obliged to pay the note, sued B and C, claiming that the minds of the parties had not met and that consequently there was no partnership, but he was merely a surety. It was held that persons who agree to become partners and actually act as such, must be held to be partners, even though they may not have understood the conditions of agreement alike. *Cook v. Carpenter*, 34 Vt. 121.

3. See *Kerrick v. Stevens*, 55 Mich. 167; *Noyes v. Cushman*, 25 Vt. 390; *Lucas v. Cole*, 57 Mo. 143; *Aspinwall v. Williams*, 1 Ohio, 84; *Beauregard v. Case*, 91 U. S. 134.

Articles of association subscribed at a meeting which provided that the business should be transacted by a majority of those present constitutes a present partnership and not a proposi-

used may usually be looked to to ascertain this purpose,¹ though the use of either the present or the future tense will not be allowed to control if a different intention appears.²

V. PARTNERSHIP AS TO THIRD PARTIES.—The older English and American doctrine was that parties who could not be regarded as partners as between themselves, might nevertheless be regarded as such as to third persons,³ and that an agreement to share the profits of a business or enterprise constitutes a partnership as to third parties whatever may have been the relation of the parties as between themselves.⁴

tion to form one. *Atkins v. Hunt*, 14 N. H. 205.

Where A stated to B that he desired a partner so that in case of his death there would be some one to close up his business, and agreed with him to take him in and pay him \$1,500 the first year and thereafter a share of the profits, and a firm name was adopted and business transacted in that name, each acting as a full partner, it was held, on A's death within the first year, that B was a surviving partner, even though he had received a fixed sum as compensation. *Adams Bank v. Rice*, 2 Allen (Mass.) 480.

1. Where there is no time fixed for the commencement a recital that the parties "have entered" into a partnership will be construed to mean an existing partnership. *Ingraham v. Foster*, 31 Ala. 123.

Where A was admitted into a business upon the agreement that they should form an incorporation, A to pay into the firm \$5,000, which was to be put into the corporation when formed, but no change was to be made in the character or name of the firm until the incorporation, it was held that, until that time, A could not act for, and had no interest in the property of the firm. *Drennen v. London Assur. Co.* 113, U. S. 51.

Where A and B entered into an agreement that A should be employed at a certain salary and give his notes for a certain sum, and that if certain incumbrances on the property were paid out of the profits, and the notes paid, B would convey one-half of his factory business to A but before the notes or incumbrances were paid off, B sold the property, and A then demanded an accounting as a partner from the time of the agreement, it was held that the agreement was executory, that A was not a partner, and that his remedy was at law for breach of contract and

not in equity for an accounting. *Haskins v. Burr*, 106 Mass. 48.

2. *Kerrick v. Stevens*, 55 Mich. 167. And see *Vassar v. Camp*, 14 Barb. (N. Y.) 341.

Several persons agreed to buy out the interest of a deceased member of the firm of P & Co., they to be interested in the profits, and survivors to get the concern incorporated, and they were then to form a co-partnership. It was held that the parties became partners from the time of payment, and that it was not an executory agreement. *Goddard v. Pratt*, 16 Pick. (Mass.) 412.

3. *Stauchfield v. Palmer*, 4 Greene (Iowa) 23; *Baldy v. Brackenridge*, 39 La. Ann. 660; *Gill v. Kuhn*, 6 S. & R. (Pa.) 333; *Kellogg v. Griswold*, 12 Vt. 291.

4. *Dalton City Co. v. Hawes*, 37 Ga. 115; *Rowland v. Long*, 45 Md. 439; *Bromley v. Elliott*, 38 N. H. 287; *Sheridan v. Medara*, 10 N. J. Eq. 469; *Cushman v. Bailey*, 1 Hill (N. Y.) 526; *Oakley v. Aspinwall*, 2 Sandf. (N. Y.) 7; *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 471; *Motley v. Jones*, 3 Ired. Eq. (N. Car.) 144; *Wood v. Vallette*, 7 Ohio St. 172; *Osborne v. Brennan*, 2 Nott & M. (S. Car.) 427; *Grace v. Smith*, 2 W. Bl. 998; *Waugh v. Carver*, 2 H. Bl. 235; 1 Smith Lead. Cas. 968; *Cheap v. Cramond*, 4 B. & Ald. 663. And see *Bank v. Hine*, 49 Conn. 236; *Lynch v. Thompson*, 61 Miss. 354; *Van Kuren v. Trenton Locomotive etc. Co.*, 13 N. J. Eq. 303; *Voorhees v. Jones*, 29 N. J. L. 270; *Vassar v. Camp*, 14 Barb. (N. Y.) 341; *Wilkes v. Clark*, 1 Dev. (N. Car.) 178; *Tyler v. Scott*, 45 Vt. 261; *Upham v. Hewitt*, 42 Wis. 85; *Appleton v. Smith*, 24 Wis. 331.

Upon an agreement between A and B, that A should take certain negroes of B, and work them in a blacksmith's shop, furnish all supplies, pay all expenses, and give B one half of the net

Some of the courts have continued to hold the same rule in the later cases,¹ but the prevalent modern doctrine seems to be that the mere sharing of profits, although cogent evidence of partnership, does not create one as to third parties.²

proceeds of the shop for the use of the negroes, it was held that, as to third persons, A and B were partners. *Buckner v. Lee*, 8 Ga. 285.

C and D agreed in writing that D should furnish a stock of goods and shop fixtures, valued at \$4,000; that C should pay rent for the shop, manage the shop, and pay D interest on half of \$4,000, and that they should divide the profits equally. It was held that they were partners as to third persons, notwithstanding an oral agreement between themselves that C should receive a moiety of the profits instead of a salary. *Brigham v. Clark*, 20 Pick. (Mass.) 43.

But when it was agreed between A, who had no money, and B, that A, who had a contract to furnish timber for a U. S. navy yard, should go to Florida, purchase, load and ship timber to B for delivery, and that B should furnish the money and receive payment for the lumber from the United States authorities, the profits to be divided, it was held that it was not a partnership but in the nature of a mariner's contract in a whaling voyage for payment from a share of the cargo, or a division of the profits of a voyage by freighters. *Rice v. Austin*, 17 Mass. 197.

1. See *Lycoming Ins. Co. v. Baringer*, 73 Ill. 230; *Baldy v. Brackenridge*, 39 La. Ann. 660; *Leggett v. Hyde*, 58 N. Y. 272; *Haas v. Roat*, 16 Hun (N. Y.) 526; *Williams v. Gillies*, 53 How. Pr. (N. Y.) 429; *Getchell v. Foster*, 106 Mass. 42; *Pettee v. Appleton*, 114 Mass. 114.

If B contributed a dwelling house, store house, and \$200, and A contributed \$200, and his time and services, and B was to receive no compensation for the houses and money except a share of the profits of the business, B was in law a partner. As to third persons, *Marbut v. Moore* (Ga. 1887), 4 S. E. Rep. 383.

In an action against joint owners of a vessel, engaged in trading, to recover the value of a cargo purchased and afterwards sold by the captain, one of the owners, it appeared that the other owner had admitted the partnership in the trading business, after the sale, and that though not actively en-

gaged, he was to receive a share of the earnings of the vessel; and that the plaintiff dealt with the captain on the supposition that he had a partner, and did not rely on his credit alone. It was held sufficient to justify the refusal of a nonsuit as against the joint owner with the captain. *Manegold v. Grange*, 70 Wis. 575.

2. See *Cully v. Edwards*, 44 Ark. 423; *Le Fevre v. Castinago*, 5 Colo. 564; *Smith v. Knight*, 71 Ill. 148; 22 Am. Rep. 94; *Burton v. Goodspeed*, 69 Ill. 237; *Macy v. Combs*, 15 Ind. 469; *Williams v. Soutter*, 7 Iowa 435; *Shepard v. Pratt*, 16 Kan. 209; *Chaffraix v. Lafitte*, 30 La. Ann. pt. 1, 631; *Com. v. Bennett*, 118 Mass. 443; *Colwell v. Britton*, 59 Mich. 350; *Beecher v. Bush*, 45 Mich. 188; 40 Am. Rep. 465; *Kelly v. Gaines*, 24 Mo. App. 506; *Kellogg Newspaper Co. v. Farrell*, 88 Mo. 594; *Parchen v. Anderson*, 5 Mont. 438; 51 Am. Rep. 65; *Eastman v. Clark*, 53 N. H. 276; 16 Am. Rep. 192; *Wild v. Davenport*, 48 N. J. L. 129; *Brundred v. Muzzy*, 25 N. J. L. 268; *Central Savgs. Bank v. Walker*, 66 N. Y. 428; *Harvey v. Childs*, 28 Ohio St. 319; 22 Am. Rep. 387; *Hart v. Kelly*, 83 Pa. St. 286; *Boston etc. Smelting Co. v. Smith*, 13 R. I. 27; 43 Am. Rep. 3; *Polk v. Buchanan*, 5 Smed. (Tenn.), 721; *Buzzard v. First Nat. Bank (Tex.)* 2 S. W. 54; *Chapline v. Conant*, 3 W. Va. 507; *Darling v. Bellhouse*, 19 Up. Can., Q. B. 268; *Hill v. Bellhouse*, 10 Up. Can., C. P. 122; *Meehan v. Valentine*, 29 Fed. Rep. 276; *Re Ward*, 8 Repr. (U. S. D. C. Tenn.) 136; *In re Francis*, 2 Sawy. (U. S.) 286; 7 Nat. Bankr. Reg. 359; *Cox v. Hickman*, 8 H. of L. Cas. (Eng.) 268; *Bullen v. Sharp*, L. R. 1 C. P. 86; *Molwo v. Court of Wards*, L. R., 4 P. C. 419; *Kilshaw v. Jukes*, 3 Best & Sm. 847.

In *Pennsylvania*, the old distinction between an agreement to receive a share of the profits, and a sum equal to a share of the profits seems to be still recognized. *Irwin v. Bidwell*, 72 Pa. St. 244; *Lord v. Proctor*, 7 Phila. (Pa.) 630.

Many of the earlier cases recognized the principle that to constitute one a partner, even as to third persons, he

1. **Holding Out.**—The doctrine formerly prevailing, and not yet obsolete, was that a person holding himself out, or permitting himself to be held out as a partner in a firm, will be held liable as such as to third parties, whatever may have been his actual relations with the firm or its members;¹ but the theory now in the ascendency is that one not a partner cannot be held liable to third persons on the ground of having been held out as such, except upon the principle that where third persons have been misled by such holding out, he is equitably estopped from denying that he is a partner,² and consequently, he is now held liable, as a general rule, only to such persons as have been misled by or who have acted upon such holding out.³ A holding out has

must receive a part of the profits as a proprietor or as a principal trader. *Loomis v. Marshall*, 12 Conn. 69; 30 Am. Dec. 596; *Campbell v. Dent*, 54 Mo. 325; *Burnett v. Snyder*, 81 N. Y. 550; 37 Am. Rep. 527; *Polk v. Buchanan*, 5 Sneed (Tenn.) 721; *Berthold v. Goldsmith*, 24 How. (U. S.) 536.

1. *Brugman v. McGuire*, 32 Ark. 733; *Hunter v. Martin*, Cal. 365; *Bowie v. Maddox*, 29 Ga. 285; *Fisher v. Bowles*, 20 Ill. 396; *Stephenson v. Cornell*, 10 Ind. 475; *Sherrod v. Langdon*, 21 Iowa 518; *Craig v. Alverson*, 6 J. J. Marsh. (Ky.) 609; *Grieff v. Boudousquire*, 18 La. Ann. 631; *Grumble v. Abrams*, 20 La. Ann. 568; *Perry v. Randolph*, 6 Smed. & M. (Miss.) 335; *Wood v. Cullen*, 13 Minn. 394; *Young v. Smith*, 25 Mo. 341; *Shackleford v. Smith*, 25 Mo. 348; *Smith v. Smith*, 27 N. H. 214; *Mershon v. Hobensack*, 22 N. J. L. 372; *Poillon v. Secor*, 61 N. Y. 456; *McSted v. Matthews*, 50 N. Y. 167; *Pringle v. Leverich*, 16 Jones & Sp. (N. Y.) 90; *Ihmsen v. Lathrop*, 104 Pa. St. 365; *Craige v. Warren*, 3 Phila. (Pa.) 298; *Furber v. Carter*, 11 Humph. (Tenn.) 271; *Crozier v. Kirker*, 4 Tex. 252; *Cottrill v. Vanduzen*, 22 Vt. 511; *Hicks v. Cram*, 17 Vt. 449; *Stearns v. Haven*, 14 Vt. 540; *Buckingham v. Burgess*, 3 McLean (U. S.) 364; *Benedict v. Davis*, 2 McLean (U. S.) 347.

The fact that a number of persons held themselves out as partners in the transaction of their business will, *prima facie*, establish a partnership in an action by the partners against third persons, or by one standing in the same position. *McCarthy v. Nash*, 14 Minn. 127.

Where one, without authority, purchases goods for persons about to enter into partnership, and in their name and

on their credit as partners, and they receive the goods and dispose of them for their own purposes, after being informed that the goods were so purchased, whether they are partners in fact or not they are liable as partners to the seller for the value of the goods. *Pike v. Douglass*, 28 Ark. 59.

To authorize another person to hold himself out as a partner, is, after he had done so, tantamount in law to representing such person to be a partner. *Hinman v. Littell*, 23 Mich. 484.

2. *Marble v. Lypes*, 82 Ala. 322; *Fitch v. Harrington*, 13 Gray (Mass.) 468; 8 Am. Law Reg., N. S. 688; *Cirkel v. Ellis*, 36 Minn. 323; *Beecher v. Bush*, 45 Mich. 188; 40 Am. Rep. 465; *Eye v. Tasker*, 77 Iowa 48; *Parthen v. Anderson*, 5 Mont. 438; 51 Am. Rep. 65; *Thompson v. Toledo Bank*, 111 U. S. 529.

Although a person may not be, in fact, a partner as between himself and another, yet if, by his conduct, including acts or declarations, he holds himself out to a third person as a partner, he is bound to make good that character to prevent fraud and deception upon others, and he will be held a partner, as to such persons. *Thomas v. Green*, 30 Md. 1.

3. *Campbell v. Hastings*, 29 Ark. 512; *Slade v. Paschal*, 67 Ga. 541; *Car-michael v. Greer*, 55 Ga. 116; *Hancock v. Hintrager*, 60 Iowa 374; *Woodward v. Clark*, 30 Kan. 78; *Markham v. Jones*, 7 B. Mon. (Ky.) 456; *Walrath v. Viley*, 2 Bush (Ky.) 478; *Rice v. Barrett*, 116 Mass. 312; *Kritzer v. Sweet*, 57 Mich. 617; *Cirkel v. Ellis*, 36 Minn. 323; *Hahlo v. Mayer* (Mo. 1890), 13 S. W. Rep. 804; *Shafer v. Randolph*, 99 Pa. St. 250; *Harris v. Seasler* (Tex.), 3 S. W. 316;

the same effect whether done as to a particular person whose conduct alone is influenced by it, or when intended to be repeated and acted upon by third persons.¹

Such a holding out cannot, however, effect an estoppel to deny partnership unless it was done by the person so held out,² or with his knowledge, consent and acquiescence,³ though such knowl-

Walker v. Brown, 66 Tex. 556; *Dickinson v. Valpy*, 10 B. & C. 128.

When persons hold themselves out to the public as doing a particular business in a firm name, the law will imply a partnership agreement as to persons who contract with them in that firm name, whatever may be the real nature of their connection as between themselves. *Barnett Line of Steamers v. Blackmar*, 53 Ga. 98.

A and B held themselves out as partners by advertisements. A purchased of one who supposed them to be partners, goods within the business of the pretended firm, though as matter of fact A did not intend to bind B by the purchase. It was held that B was liable, unless the vendor knew that B was not concerned in the purchase. *Booe v. Caldwell*, 12 Ind. 12.

The plaintiff signed a subscription paper payable to B and S for the purpose of purchasing a building owned by them, and to be by them conveyed, to aid a manufacturing enterprise of which M was the proprietor, and plaintiff furnished material to M for the repair of said building, and was told by B that B and S would pay for it. B and S were not partners, and B had no authority to bind S in that behalf, but it appeared that S consented that the subscription might be paid in that way, that he had a real interest in the property and security, and that he permitted his interest to appear to the plaintiff as a joint interest. It was held that there was such a joint interest that plaintiff was entitled to a judgment against B and S for the balance found due him from his subscription. *Smith v. Sowles* (Vt. 1887), 10 Atl. Rep. 536.

Evidence.—A creditor of a partnership is at liberty to prove the fact of the partnership as he alleges it to be, without regard to the manner in which the partners have arranged their affairs between themselves. One obtaining goods from another upon the representation that he is a member of a firm, is liable therefor as a partner, without regard to the terms of the partnership, and even though there is no partner-

ship. *Reed v. Cremer*, 111 Pa. St. 482; 56 Am. Rep. 295.

1. *Martyn v. Gray*, 14 C. B., N. S. 824.

Where one gives information to a mercantile agency to the effect that he is a partner, or where he permits his name to appear in the firm style, he will be held liable to persons who are misled by such representations, *Waugh v. Carver*, 2 H. Bl. 235.

2. See *Campbell v. Hastings*, 29 Ark. 512; *Bishop v. Georgeson*, 60 Ill. 484; *Potter v. Greene*, 9 Gray (Mass.) 309; *Cole v. Butler*, 24 Mo. App. 76; *Cassiday v. Hall*, 97 N. Y. 159; *Seabury v. Bolles*, 51 N. J. L. 103; *Denithorn v. Hook*, 112 Pa. St. 240; *Lincoln v. Craig*, 16 R. J. 564; *Hastings v. Hopkinson*, 28 Vt. 108; *Benjamin v. Covert*, 47 Wis. 375; *Gay v. Fretwell*, 9 Wis. 186; *Swann v. Sanborn*, 4 Wood (U. S.) 625; *Re Jewett*, 7 Biss. (U. S.) 328; 15 Nat. Bankr. Reg. 126; *Pott v. Eyton*, 3 C. B. 32; *Fox v. Clifton*, 6 Bing. 776; 4 M. & P. 713.

W furnished the defendant's firm a stock of goods on consignment, the latter to receive for their services in making sales a share of the profits. In other business of the firm W had no interest whatever. It was held that he could not be made liable as a member of the firm by a creditor who acted solely upon commercial reports, based upon a newspaper statement of which W was ignorant. *Cherry v. Owsley* (Tex. 1888), 10 S. W. Rep. 519.

Persons dealing in New York with one who claimed to be a partner of A, under the name of A & Co., and who represented that the firm was engaged in manufacturing a machine on a certain street in New York, made inquiry of the commercial agencies and found no such firm, but did find that A was a wealthy manufacturer in Connecticut. Held, that they did not use due diligence in dealing with such person without communicating by telegram, or otherwise, with A. *Morgan v. Farrel*, 58 Conn. 413.

3. *Nicholson v. Moog*, 65 Ala. 471; *Slade v. Paschal*, 67 Ga. 541; *Bartlett*

edge and consent may be inferred from the circumstances of the case.¹

On the same principle, a person who is held out as a partner, can be held liable as such only when the person seeking to take advantage of it knew of such holding out and acted upon it at the time it was done,² and although there had been acts of holding out previous to the ones relied on but unknown at the time, they

v. Powell, 90 Ill. 331; *Craig v. Alverson*, 6 J. J. Marsh. (Ky.) 609; *Wood v. Pennell*, 51 Me. 52; *Kritzer v. Sweet*, 57 Mich. 617; *In re Jewett*, 15 Nat. Bankr. Reg. 126.

Where H, on being told that his name was being used by T in a business wherein they were not partners, requested T not to use it to his, H's injury, and T said he would not, and T thereupon, without H's knowledge, signed a note "H & Co. by T," it was held that H was liable thereon. *Smith v. Hill*, 45 Vt. 90.

A notice by surviving partners that the business of the late firm would be carried on in the same name by a certain one of them who is duly authorized to settle all matters and transact all business, makes them all partners by holding out. *Casco Bank v. Hills*, 16 Me. 155.

Where a note was made by A in the name of A and B for work done, and a title bond had been given for the purchase of the property in the names of A & B composing the firm of A & Co., with the knowledge of B as well as A who made most of the payments, B was held liable to the plaintiff on the note, although he was not a partner as between him and A. *Wheeler v. McEldowney*, 60 Ill. 358.

In *Polk v. Oliver*, 56 Miss. 566, the court suggests that if a person knows that he is being held out as a partner, he need not interfere; but if he was once a partner, and his notice of withdrawal was not extensively published and known, he cannot, without effort to prevent it, permit the world to be ignorant of the unauthorized use of his name.

It would seem that where one has been held out as a partner, upon such fact coming to his knowledge, he should publicly disclaim it, and use reasonable diligence to make known his dissent. See *Rittenhouse v. Leigh*, 57 Miss. 697; *Bowie v. Maddox*, 29 Ga. 285; *Wright v. Boynton*, 37 N. H. 9; *Ihmson v. Lathrop*, 104 Pa. St. 365. *Com-*

pare Newsome v. Coles, 2 Camp. 617; *Potter v. Greene*, 9 Gray (Mass.) 309; *Benjamin v. Covert*, 47 Wis. 375.

1. *Holland v. Long*, 57 Ga. 36; *In re Jewett*, 15 Nat. Bankr. Reg. 126.

2. *Wright v. Powell*, 8 Ala. 560; *Marble v. Lypes* (Ala.), 2 So. 701; *Vinson v. Beveridge*, 3 McArthur (D. C.) 597; *Carmichael v. Greer*, 55 Ga. 166; *Bowie v. Maddox*, 29 Ga. 285; *Hefner v. Palmer*, 67 Ill. 161; *Markham v. Jones*, 7 B. Mon. (Ky.) 456; *Walrath v. Viley*, 2 Bush (Ky.) 478; *Grieff v. Goudousquire*, 18 La. Ann. 631; *Wood v. Pennell*, 51 Me. 52; *Palmer v. Pinkham*, 37 Me. 252; *Allen v. Dunn*, 15 Me. 292; 33 Am. Dec. 614; *Fitch v. Harrington*, 13 Gray (Mass.) 468; 8 Am. Law Reg., N. S. 688; *Rimel v. Hayes*, 83 Mo. 200; *Seabury v. Bolles*, 51 N. J. L. 103; *Pringle v. Leverich*, 48 N. Y. Super. Ct. 90; *Cassidy v. Hall*, 97 N. Y. 159; *Irvin v. Conklin*, 36 Barb. (N. Y.) 64; *Cook v. Slate Co.*, 36 Ohio St. 135; *Denithorne v. Hook*, 112 Pa. St. 340; *Kirk v. Hatman*, 63 Pa. St. 97; *Wallis v. Wood* (Tex. 1888), 7 S. W. Rep. 852; *Thompson v. First Nat. Bank*, 111 U. S. 530; *Benedict v. Davis*, 2 McLean (U. S.) 347; *Dickinson v. Valpy*, 10 B. & C. 128; *Vice v. Lady Anson*, 7 B. & C. 409; *DeBrekon v. Smith*, 1 Esp. 29; *Baird v. Planque*, 1 F. & F. 344; *Edmundson v. Thompson*, 2 F. & F. 564.

Where J conducted a shop for E, paying him a percentage of the sales, keeping a bank account in his own name, which he overdraw, the license to sell being in E's name and his name being over the door, it was held in a suit by the bank against E as a partner of J, that as the bank did not know these facts, and had never dealt with J as a partner of E, E was not liable. *Pott v. Eyton*, 3 C. B. 32.

Where T's name had been signed to articles of co-partnership by another without his knowledge, and upon discovery he immediately withdrew it, but cards, letterheads, circulars, etc., printed with his name upon them were

are not admissible either to establish liability or to corroborate those known and relied upon.¹

It is immaterial whether knowledge of the holding out came direct from the person held out, or from repetition by third persons,² and even if there is a holding out, if the person seeking to take advantage of it, knew what the real relations were, there is no estoppel.³

Liability arising from holding out as a partner may arise in cases of tort as well as in actions on contract where the person so held out participates in the wrong.⁴

a. WHAT CONSTITUTES A HOLDING OUT.—While the question of what constitutes a holding out as a partner is one of fact for the jury,⁵ the courts have, nevertheless, held that the acts or language of the parties, or the circumstances of the case, must reasonably import membership in the firm and not merely an interest in it.⁶ Where one expresses an intention or a willingness

sumption that the creditor knew of it, or he must prove that he gave credit on face of it. *Bowen v. Rutherford*, 60 Ill. 41. And see *Hefner v. Palmer*, 67 Ill. 161; *Benedict v. Davis*, 2 McLean (U. S.) 347.

1. *Rimel v. Hayes*, 83 Mo. 200. But see *Slade v. Paschal*, 67 La. 541; *Conklin v. Barton*, 43 Barb. (N. Y.) 435; *Smith v. Hill*, 45 Vt. 90; 12 Am. Rep. 189, in which a different doctrine seems to be held.

One who contracted with two persons engaged in running a steamboat as pilot, cannot charge a third person as partner, who was not in fact a partner, and had never held himself out to the world as such, but who had done some acts from which it might have been inferred that he was a partner, but of which the person so contracting was at the time wholly ignorant, and did not engage as pilot in reference to his responsibility. *Wright v. Powell*, 8 Ala. 560.

The mere stating of an account between actually contracting parties does not impose a liability upon another who, after the dealings in question, may be discovered to have been held out as a partner of one of the contracting parties. *Brown v. Grant*, 39 Minn. 404.

2. *Martyn v. Gray*, 14 C. B., N. S. 824; *Shott v. Strealfeld*, 1 Moo. & Rob. 9.

The holding out may be so public and long continued that the jury could infer that the plaintiff knew of it. *Thompson v. First Nat. Bank*, 111 U. S. 530.

There must either be such publicity to the holding out as to raise a pre-

sumption that the creditor knew of it, or he must prove that he gave credit on face of it. *Bowen v. Rutherford*, 60 Ill. 41. And see *Hefner v. Palmer*, 67 Ill. 161; *Benedict v. Davis*, 2 McLean (U. S.) 347.

3. *Pratt v. Langdon*, 97 Mass. 97; *Alderson v. Pope*, 1 Camp. 404. But see *Stearns v. Haven*, 14 Vt. 540.

4. *Maxwell v. Gibbs*, 32 Iowa 32; *Sherrod v. Langdon*, 21 Iowa 518.

An express receipt issued in Paris by A was headed "American-European Express," with the name of B in the margin, and the bill rendered by B in New York similarly headed, with the words, "Foreign Agencies, Paris," charged the whole freight from Paris. A letter from B after the accident stated that "the American-European Express," is not a corporation. The proprietors in Paris are A, and in New York, B. It was held that the jury was justified in finding B jointly liable with A. *Case v. Baldwin*, 136 Mass. 90.

Where a retired partner's name was used by the continuing partners, and remained upon a wagon used by them, and one of their drivers negligently drove over plaintiff, the retired partner was held liable. *Stables v. Eley*, 1 C. & P. 614. The doctrine of this case, however, is very ably criticised in *Bates, Law of Part.*, § 102, on the ground that such holding out had nothing to do with his injury, and was in no way conducive to it.

5. See *Wood v. Duke of Argyle*, 6 M. & G. 928; *Lake v. Duke of Argyle*, 6 Q. B. 477.

6. *Vinson v. Beveridge*, 3 McArthur

to become a partner, it is not a holding out that he is one,¹ but taking part in the transaction of the partnership business in a way, or using such language, as to lead to the belief that the party so acting or speaking was a principal,² or silence when referred to as

(D. C.) 597; *Porter v. Wilson*, 113 Ind. 350; *Hancock v. Hintrager*, 60 Iowa 374; *Howe v. Dupoyser* (Ky. 1888), 7 S. W. 627; *Grabenheimer v. Rindskoff*, 64 Tex. 49; *Mathews v. Felch*, 25 Vt. 536; *McLewee v. Hall*, 103 N. Y. 639; *Parker v. Fergus*, 43 Ill. 437; *Gilbraith v. Lineberger*, 69 N. Car. 145.

If a person holds himself out as a member of a firm, being authorized by the firm to do so, it is equivalent to a holding out of themselves by the partners as partners of the person so held out. *Hinman v. Littell*, 23 Mich. 484.

The person held out need not be designated by name. A description of him sufficiently identifying him given by his authority is sufficient. *Martyn v. Gray*, 14 C. B., N. S. 824.

In an action against joint owners of a vessel, engaged in trading, for the value of a cargo purchased and afterwards sold by the captain, one of the owners, it appeared that the other owner had admitted the partnership in the trading business, after the sale, and that, though not actively engaged, he was to receive a share of the earnings of the vessel; and that plaintiffs dealt with the captain supposing that he had a partner and did not rely on his credit alone, held sufficient to justify the refusal of a nonsuit as against the joint owner with the captain. *Manegold v. Grange*, 70 Wis. 575.

If a married woman, on hearing that a firm is using her name, forbids it, and never hears that her prohibition is violated, she is not estopped to deny that she is a partner. *Rittenhouse v. Leigh*, 57 Miss. 697.

1. *Bourne v. Freeth*, 9 B. & C. 632; *Reynell v. Lewis*, 15 M. & W. 517. And see *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230; *Chandler v. Brainard*, 14 Pick. (Mass.) 285; *Baldwin v. Burrows*, 47 N. Y. 199.

In an action for the price of goods sold, it appeared that defendant, in order to compromise plaintiff's claim against his son, represented to them that he would go into partnership with his son, and that plaintiffs could then sell them goods. Afterwards, goods were ordered by the son. *Held*, that there was no

evidence to render defendant liable as his son's partner. *Wolf v. Strahl* (Supreme Ct.), 7 N. Y. Supp. 593.

2. *Burgman v. McGuire*, 32 Ark. 733; *Sherrod v. Langdon*, 21 Iowa 518; *Parshall v. Fisher*, 43 Mich. 529; *Smith v. Smith*, 7 Foster (N. H.) 244; *Shafer v. Randolph*, 99 Pa. St. 250; *Sun Ins. Co. v. Kountz Line*, 122 U. S. 583. And see *Cassidy v. Hall*, 97 N. Y. 159; *Ihmson v. Lathrop*, 104 Pa. St., 365; *Town v. Hendie*, 27 Vt. 258; *Davenport Woolen Mills Co. v. Meinsledt* (Iowa, 1890), 46 N. W. Rep. 1085.

An advertisement, "People's Bank Stockholders;—every stockholder individually responsible for all liabilities." *Held*, to show a partnership. *Uhl v. Harvey*, 78 Ind. 26.

The fact that two persons are partners in a farming business may raise an inference that one of them was held out as the other's partner in a store. *Humes v. O'Bryan*, 74 Ala. 64.

Receiving goods in boxes marked with a firm name including the name of the person alleged to have been held out, and giving a note therefor was held to be sufficient evidence of holding out in *Saufley v. Howard*, 7 Dana (Ky.) 367.

Where an obligation, signed by two persons with the defendant, is, on his representation that he is a member of a partnership, exchanged for another signed by the latter alone, he cannot, in an action by the holder, deny that he is a partner. *Burbank v. Haas*, 9 La. Ann. 528.

L represented to P that M was his nephew, and that they intended to purchase some cattle together, and M afterwards presented to P an order purporting to be signed by L, stating that he had bought the cattle, and asking a loan of \$900; P, after obtaining the money, admitted that the signature was not genuine. He was held liable. *Peck v. Lusk*, 38 Iowa 93.

Where the owner of a business employs a clerk on a share of the profits, using the words "& Co." after his name, it is a holding out as to one who believed the clerk to be a partner and acted on such belief. *French v. Barrow*, 49 Vt. 471; *Brown v. Pickard*, 4 Utah 292; 9 Pac. Rep. 573. Though

a partner,¹ or using the word "we" in firm transactions,² though manifestly weak³ is evidence of a holding out as a partner.

The continued use of the old firm name by the continuing partner with the acquiescence of the retiring one, after a duly advertised dissolution not occasioned by death is a sufficient holding out.⁴

A partner may make himself severally liable by holding himself out as the only member of the firm.⁵ So where there are

such an addition to the employer's name may not constitute a holding out of himself as a partner. *Edmundson v. Thompson*, 2 F. & F. 564.

A private creditor of a person who has allowed his property to be held out as partnership property, who holds a mortgage upon such property, given subsequently to such use by the partnership, is not estopped to show the true ownership against a partnership creditor claiming under an attachment subsequent to the mortgage. *Taylor v. Wilson*, 58 N. H. 465.

1. *Manson v. Ware*, 63 Iowa 345; *Bancroft v. Hawarth*, 29 Iowa 462; *Bengan v. Cahoon*, 1 Pennypacker (Pa.) 320; *Lewis v. Alexander*, 51 Tex. 578; *Davenport Woolen Mills Co. v. Mienstedt* (Iowa, 1890), 46 N. W. Rep. 1085.

Where it is stated that a designated person is to become a partner at a certain date, this statement having been made in his presence without contradiction, and goods were there sold to the firm to be paid for after that date, it is a sufficient holding out to render the person liable. *Bliss v. Schwartz*, 7 Lans. (N. Y.) 187; 64 Barb. (N. Y.) 215.

2. *Woodward v. Clark*, 30 Kan. 78; *Thomas v. Green*, 30 Md. 1; *Riphey v. Evans*, 22 Mo. 157; *Gates v. Watson*, 54 Mo. 585.

C, a retail dealer at Cherokee, and a customer of plaintiff's, wrote to them that he intended to put in a small stock at McCune, and ordered goods therefor. The goods were shipped and the store at McCune started. Subsequently, in writing to them, he spoke of such store as his branch. He in fact owned the goods and placed them there under a contract with one H, by which the title of the goods was to remain in C. After running about a year, C took possession of the goods unsold. The plaintiff knew nothing of the terms of this agreement between C and H. *Held*, that they had a right to consider C as either partner or sole owner of the branch store at McCune, and to recover

from him for goods sold and shipped to such store. *Woodward v. Clark*, 30 Kan. 78.

3. See *Cassidy v. Hall*, 97 N. Y. 159.

4. *Fleming v. Dorn*, 34 Ga. 213; *Gammon v. Huse*, 100 Ill. 234; *Ellis v. Bronson*, 40 Ill. 455; *Tregerthen v. Lohrum*, 6 Mo. App. 576; *In re Krueger*, 2 Low. (U. S.) 66; 5 Nat. Bankr. Reg. 439; *Jordan v. Smith*, 17 Up. Can. Q. B. 590. And see *Speer v. Bishop*, 24 Ohio St. 598; *Wait v. Brewster*, 31 Vt. 516; *Farmers' Bank v. Smith*, 26 W. Va. 541; *Rogers v. Murray*, 110 N. Y. 658; *McGowan v. American Tan Bark Co.*, 121 U. S. 575.

It was remarked in *Hastings Nat. Bank v. Hibbard*, 48 Mich. 452, that persons dealing with business houses, pay very little attention to their letter heads.

Merely keeping the old name over the door is not sufficient of itself to render the retired partner liable. *Boyd v. McCann*, 10 Md. 118. See *Newsome v. Coles*, 2 Camp. 627.

In an action against two defendants as partners, the evidence showed that one of the defendants and a third person had been running a livery stable, defendant owning the stable, and the third person the horses; that the other defendant bought out the third person, and told plaintiff he had made the purchase and had assumed the contract of the old firm. A finding on these facts that defendants were partners would not be set aside. *Jenkins v. Barrows*, 73 Iowa 438.

5. *Bonfield v. Smith*, 12 M. & W. 405. And see *Miller v. Creditors*, 37 La. Ann. 604; *Scully's Appeal*, 115 Pa. St. 141; 2 Bell's Com. Law of Scotland 625.

Where defendants E and J (the latter the son of E) executed a written contract by which E's business was to be carried on in the name of E and Son; J not to have any interest in the profits but to be paid a salary, the trading sign, bill heads, etc., being

several firms doing business under the same name, if the different concerns are composed of the same individuals they are identical,¹ but if there are members in one who are not in another, the intent will govern when the difference is known, and the fact that the transaction is within the scope of the business of one firm and not the other,² or that one of the firms has gone out of

changed, and the notes in suit executed in the name of E and Son, J was a partner as to all persons, except as to such as had actual notice to the contrary. *Entwistle v. Mulligan* (Pa. 1888), 12 Atl. Rep. 766.

An attachment was levied on a firm property of H and Co. doing business in R county. Service was by publication. Under Code Nebraska, § 25, providing therefor, when no member of the firm or clerk can be found at the place of business. H objected to the jurisdiction, alleging that he alone was the firm, and that he was a resident of A county. *Held*, that he was estopped from denying the existence of the firm as to creditors for debts contracted in the firm name. *Rosenbaum v. Hayden*, 22 Neb. 744; *Lee v. Hayden*, 22 Neb. 750.

Where one allowed his partner to bring an action in his own name, on a demand due the partnership, he cannot impeach the title of another, who had, in good faith, without notice, purchased the judgment recovered from the former, who was plaintiff on the record. *McCotter v. McCotter*, 16 Abb. Pr. (N. Y.) 265; 25 How. Pr. (N. Y.) 478. And see *Bemis v. Becker*, 1 Kan. 226.

1. *Bates' Law of Part.*, § 107.

2. *Elkin v. Green*, 13 Bush (Ky.) 612; *Hastings Nat. Bank v. Hibbard*, 48 Mich. 452; *Mechanics' etc. Bank v. Dakin*, 24 Wend. (N. Y.) 411; *Cushing v. Smith*, 43 Tex. 261; *In re Munn*, 3 Biss. (U. S.) 442.

Where one person sells out his business to another of the same name, who continues it without change of name, the former owner is not liable to persons who never dealt with the concern before. *Preston v. Foellinger*, 24 Fed. Rep. 680. But to a former dealer who has not had due notice of dissolution, he is liable. *Eltersen v. Leeds*, 97 Ind. 336; 49 Am. Rep. 458.

Where two persons are partners in two different kinds of business, with a dormant partner in one of them, it has been held that a note made in the common firm name is presumably the note

of the firm not containing the dormant partner. *Fosdick v. Van Horn*, 40 Ohio St. 459.

Two firms of the same firm name did business in the same town. Defendant, who was a partner in one firm, but not in the other, was sued as a member of the firm to which he did not belong, for the value of goods which had not been purchased by him individually nor by his authority. It was held, that he could only be held liable as a partner in the firm to which he did not belong, where the two firms conducted their business in such a manner as to justify the conclusion by their customers that there was an identity of interest. *Cushing v. Smith*, 43 Tex. 261.

K and M were partners in the hotel business. K and P were partners in the grocery business. It was doubtful whether either had a well-settled firm name, and there was evidence that each sometimes used and recognized the name of K and Co. It was held, that one selling goods to K, and taking reasonable care to ascertain for which firm K was dealing, and believing that firm to be K and M, and the goods being adapted to the business of that firm, could hold that firm for the price of the goods. *Baker v. Nappier*, 19 Ga. 520.

In a suit on a note by T Bros., it appeared that there were five brothers named T, engaged in farming and dealing in stock and grain in the same neighborhood. Plaintiff loaned \$500 on a note signed by T Bros., giving the money to T G T, one of the brothers, whom though a member of the firm of T Bros., and who signed the note in the name of T Bros., T G T, testified that he and his brother, A C T were not partners in the firm of T Bros., but were in a separate business, though they shipped cattle in the name of T Bros., and did all their banking business in that name. *Held*, that T G T and A C T, if not members of the firm, having held themselves out as such, were liable on the notes as partners. *Eye v. Tasker* (Iowa), 41 N. W. 561.

business¹ is controlling as to the intent; but where a person is deceived by the name and circumstances into believing that he is dealing with the other firm, he can hold that other firm liable.² The same rule applies where several firms have designedly adopted names so similar that they are mistaken for each other.³

b. EFFECT OF HOLDING OUT.—Holding one out as a partner confers no rights upon him, as between him and the other partners,⁴ he has no lien upon the assets of the firm; and the creditors derive none through him,⁵ and his personal creditors have no right or claim of any nature as against the assets of the firm,⁶ while the creditors of the firm whose rights were derived through such holding out have no preference over the individual creditors of the actual owner of the business.⁷

VI. KINDS OF PARTNERSHIPS—1. With Reference to the Class of Their Business.—Partnerships, when considered with reference to the class of business in which they are engaged, may be divided into trading partnerships and non-trading partnerships.⁸

a. TRADING PARTNERSHIPS.—A trading partnership is one the principal part of the business of which is buying and selling or manufacturing or otherwise preparing for sale and selling articles or commodities for profit.⁹ They differ from non-trading part-

1. *Jones v. Parker*, 20 N. H. 31.

2. *Adams v. Brown*, 16 Ohio St. 75; *Beall v. Lowndes*, 4 S. Car. 258; *Cushing v. Smith*, 43 Tex. 261; *Swan v. Steele*, 7 East 210; *Spencer v. Billing*, 3 Camp. 310. And see *Hastings Nat. Bank v. Hibbard*, 48 Mich. 452; *Tams v. Hitner*, 9 Pa. St. 441.

3. *Adams v. Brown*, 16 Ohio St. 75; *Beall v. Lowndes*, 4 S. Car. 258; *Cushing v. Smith*, 43 Tex. 261.

4. *Glenn v. Gill*, 2 Md. 1. And see *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230.

5. See *Stone v. Manning*, 3 Ill. 530; *Kerr v. Potter*, 6 Gill (Md.) 404; *Glenn v. Gill*, 2 Md. 1; *Nutting v. Colt*, 7 N. J. Eq. 539.

But a person who holds out and recognizes another as a co-partner is estopped to deny the partnership, and an assignment of the firm property, by himself in the firm name, requiring releases of all accepting creditors in which the nominal partner does not join, is void as to the firm's creditors. *Baynor Co. v. Craig* (Tex.), 6 S. W. Rep. 305.

6. See *Allen v. Dunn*, 15 Me. 292; 33 Am. Dec. 614; *Kerr v. Potter*, 6 Gill (Md.) 404; *Glenn v. Gill*, 2 Md. 1; *Partridge v. Kingman*, 130 Mass. 476. To the contrary see *Somerset Potter Works v. Minot*, 10 Cush. (Mass.) 592.

7. *Glenn v. Gill*, 2 Md. 1; *Grab-*

heimer v. Rindskoff, 64 Tex. 49. And see *Taylor v. Wilson*, 58 N. H. 465; *Whitworth v. Patterson*, 6 Lea (Tenn.) 119; *Kerr v. Potter*, 6 Gill (Md.) 404.

If two persons, who are not in fact partners, hold themselves out to certain creditors as partners of a stock in trade, so as to become liable to them as such, although the stock belongs exclusively to one, the right of their creditors would rest upon estoppel, which would be personal to the parties bound, or their privies, not upon a lien on, or an equity in, the stock, and, therefore, in a controversy between such creditors and a purchaser of the stock at execution sale, under a judgment against the actual owner of the goods, as the sole proprietor, the purchaser would have the better right. *Hillman v. Moore*, 3 Tenn., ch. 454.

Where two persons are conducting business in such manner that they may be holden as partners to third persons dealing with them as such, but where, as between themselves, no partnership in fact exists, goods put into the business, purchased by one in his own name and with his own funds, cannot be holden to pay a private debt of the other, contracted in his own name and entirely unconnected with the business. *Allen v. Dunn*, 15 Me. 292.

8. *Bates' Law of Part.*, § 12.

9. See *Winship v. Bank of U. S.*, 5

nerships only in respect to the power of the several partners to bind the firm by their acts.¹

b. NON-TRADING PARTNERSHIPS.—A non-trading partnership is one engaged in the prosecution of some occupation or calling not of a commercial character.² Partnerships in occupations,

Pet. (U. S.) 529; Kimbro *v.* Bullitt, 22 How. (U. S.) 256; Holt *v.* Simmonds, 16 Mo. App. 97; Hefferman *v.* Brenham, 1 La. Ann. 146; Pinkleton *v.* Ross, 33 Up. Can., Q. B. 508.

Thus partnerships formed for the following purposes are deemed to be trading partnerships: Wholesale lumber dealing, Feurt *v.* Brown, 23 Mo. App. 332. Dry goods store, Walsh *v.* Lennon, 98 Ill. 27; 38 Am. Rep. 75. General store, Dow *v.* Moore, 47 N. H. 419. Dealing in cattle, Smith *v.* Collins, 115 Mass. 388. Dealing in hogs and meat, Gano *v.* Samuel, 14 Ohio 592. Drug store, Gregg *v.* Fisher, 3 Ill. App. 261; Lindh *v.* Crowley, 29 Kan. 756. Buying and killing cattle and selling meat and vegetables, Wagner *v.* Simmons, 61 Ala. 143. Clothing and furnishing store, Palmer *v.* Scott, 68 Ala. 380. Merchant tailoring, Ah Lep *v.* Gong Choy, 13 Oregon, 205. Sugar refinery, Twibill *v.* Perkins, 8 La. Ann. 132. Manufacture and sale of soap and candles, Winship *v.* Bank of U. S., 5 Pet. (U. S.) 529; Deitz *v.* Regmir, 27 Kan. 94. The manufacture and sale of refrigerators and saloon fixtures, Holt *v.* Simmons, 16 Mo. App. 97. Of pressed brick, Hoskinson *v.* Eliot, 62 Pa. St. 393. Of carriages, Cowand *v.* Pulley, 11 La. Ann. 1. Buying and selling lumber and running a saw mill, Copley *v.* Lawhead, 11 La. Ann. 615. Farming and cooerage, McGregor *v.* Cleveland, 5 Wend. (N. Y.) 471. Pork packing, Benninger *v.* Hess, 41 Ohio St. 64. Tannery, Stinson *v.* Whitney, 130 Mass. 591. But see to the contrary, Newell *v.* Smith, 23 Ga. 170.

In Kimbro *v.* Bullitt, 22 How. (U. S.) 256, a partnership for running a farm and a steam saw mill was held to be a trading firm. See also Johnston *v.* Dutton, 27 Ala. 245. But the contrary was held in Lanier *v.* McCabe, 2 Fla. 32; 48 Am. Dec. 173.

An agreement between several persons to buy what goods they could either separately or in connection with each other, and to sell them for their joint benefit upon reaching market, constitutes a trading partnership.

Howze *v.* Patterson, 53 Ala. 205; 25 Am. Rep. 607.

Quaere whether partners doing business as wharfingers are a trading firm, Van Brunt *v.* Mather, 48 Iowa, 503; Roth *v.* Colvin, 32 Vt. 125.

1. See Hefferman *v.* Brenham, 1 La. Ann. 146; Howze *v.* Patterson, 53 Ala. 205; 25 Am. Rep. 607; Marsh *v.* Gold, 2 Pick. (Mass.) 285; Pooley *v.* Whitmore, 10 Heisk. (Tenn.) 629; 27 Am. Rep. 733; Judge *v.* Braswell, 13 Bush (Ky.) 67; Miller *v.* Hines, 15 Ga. 197.

And see *infra*, this title, *Powers and Duties of Partners*.

But in Hoskinson *v.* Eliot, 62 Pa. St. 393, the court held that there was no distinction between mechanical manufacturing and commercial partnerships, as the necessity for borrowing might be as great in the former as in the latter.

2. The following partnerships are non-trading ones: Attorneys, Friend *v.* Duryea, 17 Fla. 111; 35 Am. Rep. 89; Miller *v.* Hines, 15 Ga. 197; Breckenridge *v.* Shrieve, 4 Dana (Ky.) 375; Marsh *v.* Gold, 2 Pick. (Mass.) 285; Pooley *v.* Whitmore, 10 Heisk. (Tenn.) 629; 27 Am. Rep. 733; Smith *v.* Sloan, 37 Wis. 285; 19 Am. Rep. 757; Wilson *v.* Brown, 6 Ont. App. (Ca.) 411; Workman *v.* McKinstry, 21 Up. Can., Q. B. 623; Levy *v.* Pyne, Car. & M. 453; Harman *v.* Johnson, 2 E. & B. 61; Garland *v.* Jacob, L. R., 8 Ex. 814; Hedley *v.* Bainbridge, 3 Q. B. 316; Forster *v.* Mackreth, L. R., 2 Ex. 163; Third Nat. Bank *v.* Snyder, 10 Mo. App. 211. Real estate, insurance and collecting, Deardorf *v.* Thacher, 78 Mo. 128; 47 Am. Rep. 95. But see Freeman *v.* Carpenter, 17 Wis. 126. Contractors, Roberts' Appeal, 92 Pa. St. 407; Gavin *v.* Walker, 14 Lea (Tenn.) 643; McCord *v.* Field, 27 Up. Can., C. P. 391. Mining and quarrying, Skillman *v.* Lachman, 23 Colo. 199; Decker *v.* Howell, 42 Cal. 636; Jones *v.* Clark, 42 Cal. 180; Charles *v.* Eshelman, 5 Colo. 107; Manville *v.* Parks, 7 Colo. 128; Higgins *v.* Armstrong, 9 Colo. 38; Judge *v.* Braswell, 13 Bush (Ky.) 67; 26 Am. Rep. 185; Shaw *v.* McGregor, 105 Mass. 96; Pooley *v.*

however, may be so formed by the incorporation of the elements of a commercial concern, as to constitute in reality a trading partnership.¹

2. With Reference to the Character and Extent of Their Business.—Partnerships when considered with respect to the character and extent of the business in which they are engaged may be divided into universal, general, particular and limited partnerships.²

a. UNIVERSAL PARTNERSHIPS.—A universal partnership is one in which all the property of every nature owned by the parties, is contributed, and all profits, however made, are for the joint benefit.³

Such partnership contracts are of very rare existence,⁴ though we have, in the *United States*, some associations which might be regarded as universal partnerships.⁵ A partnership not embrac-

Whitmore, 10 Heisk. (Tenn.) 629; 27 Rep. 733; Dickinson v. Valpy, 10 Am. B. & C. 128; Brown v. Kidger, 3 H. & N. 853. Farming or planting, McCrary v. Slaughter, 58 Ala. 230; Ulery v. Ginrich, 57 Ill. 531; Prince v. Crawford, 50 Miss. 344; Davis v. Richardson, 45 Miss. 499; Hunt v. Chapin, 6 Lans. (N. Y.) 139; Kimbro v. Bullitt, 22 How. (U. S.) 256; Greenslade v. Dower, 7 B. & C. 635; Brown v. Byers, 16 M. & W. 252. Livery stable, Hickman v. Kunkle, 27 Mo. 401; Levi v. Latham, 15 Neb. 509; 48 Am. Rep. 361. Printing, Bays v. Conner, 105 Ind. 414. But see to the contrary, Porter v. White, 39 Md. 613. Manufacture of pottery ware, Bradley v. Linn, 19 Ill. App. 322. Running thrashing machine, Horn v. Newton City Bank, 32 Kan. 518; Stevedores, Benedict v. Thompson, 33 La. Ann. 196. Tavern keepers, Cocke v. Branch Bank, 3 Ala. 175. Running a theater, Pease v. Cole, 53 Conn. 53.

A firm of mere brokers is not a trading partnership. Third Nat. Bank v. Snyder, 10 Mo. App. 211.

Co-partners, who are owners of a saw-mill and of timber land, and engaged in the manufacture and sale of lumber, and in the purchase of stumpage, which they manufacture into lumber, but who do not purchase manufactured lumber to sell again, form a non-trading or non-commercial partnership; and an accommodation note made by one of the partners, and signed with the partnership name, without the knowledge or consent of the other partner, is fraudulent and void as against him. National State Capital Bank v. Noyes, 62 N. H. 35.

In an action by the assignee of a

contracting partnership to recover a balance for paving and curbing the streets, it appeared that the city held the balance simply as stakeholder, it being claimed by a bank under a prior assignment from one of the partners, who made notes and assigned the assets of the firm as security therefor without authority from his co-partner. *Held*, that this was not a commercial or trading partnership, and, in the absence of proof of the necessity or custom or of express authority from his co-partner, the individual member had no power to bind the firm by notes or assignments of its assets in security. Harris v. Baltimore (Md. 1890), 20 Atl. Rep. 111.

1. See Thickneese v. Bromilow, 2 Cr. & J. 425; Brown v. Kedger, 3 H. & N. 853; Decker v. Howell, 42 Cal. 636.

2. Bates' Law of Part., § 12.

3. Bates' Law of Part., § 13; Story Part., § 72; Bouv. L. Dict., tit., Partnership.

4. Story Part., § 72.

5. Gaselys v. Separatists Soc., 13 Ohio St. 144. And see Goesele v. Bimeler, 14 How. (U. S.) 589; Lyman v. Lyman, 2 Paine (U. S.) 11.

As to the Shakers see Gass v. White, 2 Dana (Ky.) 170; Waite v. Merrill, 4 Me. 102. As to the Harmony Society, see Schriber v. Rapp, 5 Watts (Pa.) 351; Baker v. Nachtrieb, 19 How. (U. S.) 126.

In Gray v. Palmer, 9 Cal. 616, where two persons contributed all that each possessed for the purpose of accumulation, debts to be paid out of the joint fund, the court said that there was nothing impracticable or against morality or public policy in a universal partnership.

ing all the property of each partner is not a universal one.¹ There are other partnerships, however, in which the whole capital of each is not contributed, but the scope of the business is to deal in anything and everything from which financial advantage can be derived.² A universal partnership will not be presumed unless the intention to form one is clearly expressed.³

b. GENERAL PARTNERSHIPS.—A general partnership is one in which the parties carry on all their trade and business, whatever it may be, for the joint benefit and profit of all concerned, whether or not the contributions are equal or the capital stock is limited.⁴ While this class represents the great majority of associations, all partnerships may be considered as limited to some extent,⁵ and, on the other hand, those restricted to one adventure or enterprise may possess the incidents of a general partnership.⁶

c. PARTICULAR PARTNERSHIPS.—A particular partnership is one formed for a special or particular branch of business, as contradistinguished from the general business or employment of the parties or of one of them.⁷ Where they extended to but a single

In *Rice v. Barnard*, 20 Vt. 479, the court said that the partnership was "not strictly a partnership, but rather a universal hotchpot of all the property and liabilities, present and prospective of both the persons concerned." See also *U. S. Bank v. Binney*, 5 Mason (U. S.) 176.

An act of universal partnership in *Louisiana*, to be valid as such between the partners, must be registered. *Murrell v. Murrell*, 33 La. Ann. 1233.

The civil law recognizes two kinds of universal partnerships, the one comprising a union of all property, present or to be acquired in any manner, while in the other the real estate and subsequent acquisitions by gift or descent are not included, nor are past debts a charge. Those partnerships are recognized by the Code in *Louisiana*. *Murrell v. Murrell*, 33 La. Ann. 1233.

A planting partnership between two persons which includes all property of every nature, whether purchased in their individual or joint names, if it can be proved by conversations only, gives no right of survivorship. *Quine v. Quine*, 9 Smed. & M. (Miss.) 155. And see *Houston v. Stanton*, 11 Ala. 412.

1. *Murrell v. Murrell*, 33 La. Ann. 1233.

Where the partnership included everything except furniture and wearing apparel, it was regarded rather as a tenancy in common than as a partnership, and it was held that partnership creditors could have no priority over

the separate creditors of each partner on distribution. *Rice v. Barnard*, 20 Vt. 479; 50 Am. Dec. 54.

2. See *Catlin v. Gilders*, 3 Ala. 536; *Princeton etc. Co. v. Gulick*, 16 N. J. L. 161; *Goldsmith v. Sachs*, 17 Fed. Rep. 726; 8 Sawy. (U. S.) 110.

3. *Gray v. Palmer*, 9 Cal. 616; *Mitchell v. O'Neale*, 4 Nev. 504.

4. Story Part., § 74; Bouv. L. Dict., tit., Partnership. See *Bates' Law of Part.*, § 12.

5. *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251; 4 Am. Dec. 273; *Walden v. Sherburne*, 15 Johns. (N. Y.) 409.

6. *Horsey v. Heath*, 5 Ohio 353.

7. Story Part., § 75; *Willett v. Chambers*, Cowp. 814. And see *Heshion v. Julian*, 82 Ind. 577; *Bentley v. White*, 3 B. Mon. (Ky.) 263; *Solomon v. Solomon*, 2 Kelly (Ga.) 18; *Ripley v. Colby*, 3 Fost. (N. H.) 438; *Mumford v. Nicoll*, 20 Johns. (N. Y.) 611; *Ensign v. Wands*, 1 Johns. Cas. (N. Y.) 171; *Reynolds v. Cleveland*, 4 Cow. (N. Y.) 282; *Cumpston v. McNair*, 1 Wend. (N. Y.) 457; *Miffin v. Smith*, 17 S. & R. (Pa.) 165; *Pitrikin v. Collier*, 1 Barr. (Pa.) 247; *Benson v. McBee*, 2 McMull. (S. Car.) 91; *Salmons v. Nissen*, 2 T. R. 674; *De Berkorn v. Smith*, 1 Esp. 29; *Holmes v. Higgins*, 1 B. & C. 74.

A partnership may exist in a single as well as in a series of transactions. If there is a joint purchase with a view to a joint sale and a communion of profit and loss, this will constitute a partner-

adventure or transaction, they were formerly called limited partnerships.¹ This distinction, however, is of little importance, as the laws of partnership apply so far, and only so far, as the partnership extends.²

d. LIMITED PARTNERSHIPS.—See LIMITED PARTNERSHIPS, vol. 13, p. 802.

VII. PARTNERSHIP PURPOSES.—Partnerships are not confined to mere commercial trade or business, but may extend to manufactures, professions and all lawful occupations and business,³ as farming, manufacturing, mining, lumbering, as well as the business of lawyers, physicians, artists, mechanics and nearly all other employments.⁴ There can be no partnership in a mere personal office or position of trust and confidence however as in case of a guardian, trustee, executor and the like,⁵ though persons holding

ship. *In re Warren*, 1 Dav. (U. S.) 320.

Several persons separately purchased goods to be put on board of a ship for a voyage, in the profits and loss of which they were to share in proportion to the value of the goods shipped by each. It was held that this was a limited partnership for the purposes of the voyage, and that a person, to whom the share of one of the partners was hypothecated, with the knowledge of the others, to secure a loan to such partner for the purposes of the voyage, had a right to insist that the share so hypothecated should not be sold for the repairs of the ship so long as the interests of those concerned could be protected by any other arrangement. *American Ins. Co. v. Coster*, 3 Paige Ch. (N. Y.) 323.

1 Story Part., § 75.

An association of persons agreeing to pay a particular sum for the erection of a house of worship, which, when completed, is to be owned by all the members of the association in proportion to the amount paid by each, is not a special partnership. *Woodward v. Cowing*, 41 Me. 1.

2. Pars. Part. (3rd ed.), p. 40.

3. Bouv. L. Dict. tit. Partnership. See Pars. Part. (3rd ed.), p. 36; *Chester v. Dickinson*, 52 Barb. (N. Y.) 349.

4. As to farming, see *Allen v. Davis*, 13 Ark. 28; *Roach v. Perry*, 16 Ill. 37; *Lansdale v. Brashear*, 3 T. B. Mon. (Ky.) 330; *Quine v. Quine*, 9 Smed. & M. (Miss.) 155; *Coope v. Eyre*, 1 H. Bl. 37. As to manufacturing and mining, see *Jeffreys v. Smith*, 1 Jac. & Wal 298; *Fereday v. Wightwick*, Tamlyn. 250; *Wren v. Kirton*, Ves. 502; *Crawsley v. Maule*, 1 Swanst. 495. As to law-

yers, see *Smith v. Hill*, 13 Ark. 173; *Marsh v. Gold*, 2 Pick. (Mass.) 286; *Westerlo v. Evertson*, 1 Wend. (N. Y.) 532; *Livingston v. Cox*, 6 Barr. (Pa.) 360. As to physicians, see *Thompson v. Howard*, 2 Ind. 245; *Allen v. Blanchard*, 7 Cow. (N. Y.) 631. And see generally *Hefferman v. Brenham*, 1 La. Ann. 146; *Chester v. Dickinson*, 52 Barb. (N. Y.) 349; *Bowyer v. Anderson*, 2 Leigh. (Va.) 550; *Waugh v. Carver*, 2 H. Bl. 235; *Beaumont v. Meridith*, 3 Ves. & B. 180; *Cheap v. Cramond*, 4 B. & A. 663; *Bovill v. Hammond*, 9 D. & R. 186.

There may be a partnership for buying and selling land. *Dudley v. Littlefield*, 21 Me. 418. And see *Pitts v. Waugh*, 4 Mass. 424; *Fall River W. Co. v. Borden*, 10 Cush. (Mass.) 458; *Dudley v. Littlefield*, 21 Me. 418; *Smith v. Jones*, 12 Me. 332; *Chester v. Dickinson*, 54 N. Y. 1; *Patterson v. Brewster*, 4 Edw. Ch. (N. Y.) 352; *Ludlow v. Cooper*, 4 Ohio St. 1; *Livingston v. Cox*, 6 Pa. St. 360; *Kramer v. Arthurs*, 7 Pa. St. 165; *Smith v. Burham*, 3 Sumn. (U. S.) 435; *Dawson v. Ward*, 71 Tex. 72; *Sauntry v. Dunlap*, 12 Wis. 364; *Claggett v. Kilbourne*, 1 Black (U. S.) 346; *Olcott v. Wing*, 4 McLean (U. S.) 15; *In re Warren*, Dav. (U. S.) 320; *Dale v. Hamilton*, 5 Hare 369.

Under an act providing that each subscriber to the articles of incorporation shall subscribe thereto "his name, place of residence, and amount by him subscribed," a subscription in a partnership name is valid and the members of the firm are jointly liable. *Ogdenburgh etc. R. Co. v. Frost*, 21 Barb. (N. Y.) 541. Compare *Troy etc. R. Co. v. Warren*, 18 Barb. (N. Y.) 310.

5. Pars. Part. (3rd ed.), pp. 37, 38.

such offices sometimes become partners and share in the profits of the offices held by them.¹

So there may be partnerships for the purpose of the transaction of all the business of the parties, or one or more branches of such business, or a single adventure or thing,² the duration of a partnership for a single adventure being limited by implication to the completion of the venture.³

1. Illegal Partnerships—(See also **ILLEGAL CONTRACTS**, vol. 9, p. 879).—The object of a partnership must be legal; all, therefore, which are formed for any purpose forbidden by law or contrary to good morals, are null and void;⁴ though all the partners in such a partnership are jointly liable to third persons, dealing with them in ignorance of such illegality.⁵ Illegality, however, will not be presumed unless it plainly appears to enter into the essence of the partnership.⁶

A partnership may be illegal because of the disqualification of one or more of the members composing it to engage in a particu-

The principle of personal selection and responsibility make it difficult if not impossible that a firm should hold such an appointment. *Pars. Part.* (3rd ed.), p. 38.

The office of sheriff or bailiff is personal and cannot be held by two persons in partnership. *Jons v. Pirchard*, 2 Esp. 507. And see *Canfield v. Hard*, 6 Conn. 180.

While a mercantile partnership may act as executor it cannot be a guardian. *De Mazar v. Pybus*, 4 Ves. 644. And see *Townsend v. Neale*, 2 Camp. 190; *Clark v. Richards*, 1 Young & C. Exch. 351; *Brandon v. Hubbard*, 4 J. B. Moore 367.

1. See *Caldwell v. Leiber*, 7 Paige (N. Y.) 483.

Where an attorney holding a large number of clerkship offices and positions of trust, entered into a partnership with another in which it was agreed that the proceeds of such positions as should be held by either of them during the partnership, should be considered as partnership property and be distributable between them accordingly, it was held that such contract did not constitute the sale of an office, and was not therefore void. *Sterry v. Clifton*, 9 C. B. 110.

2. *Bouv. L. Dict.*, tit., Partnership; *Story Part.*, § 74. And see *Goesele v. Brimler*, 14 How. (U. S.) 589; *Baker v. Machtrieb*, 19 How. (U. S.) 126; *Lyman v. Lyman*, 2 Paine (U. S.) 11. As to a single transaction, see *Kaysor v. Mangham*, 8 Colo. 232. And see *Galloway v. Hughes*, 1 Bailey (S. Car.) 553.

3. *Hubbell v. Buhler*, 43 Hun (N. Y.) 82. And see *infra*, this title, *Duration or Continuance*.

4. *Bouv. L. Dict.*, tit., Partnership. And see *Stewart v. McIntosh*, 4 Harr. & J. (Ind.) 233; *Anderson v. Whetlock*, 2 Bush (Ky.) 398; *Snell v. Dwight*, 120 Mass. 9; *Dunham v. Presby*, 120 Mass. 285; *Warren v. Chapman*, 105 Mass. 87; *McGunn v. Hanlin*, 29 Mich. 476; *Durant v. Rhener*, 26 Minn. 362; *Tucker v. Adams*, 63 N. H. 361; *Kelly v. Devlin*, 58 How. (N. Y.) Pr. 487; *Gould v. Kendall*, 15 Neb. 549; *Sharp v. Taylor*, 2 Phil. Eq. (N. Car.) 801; *Lewis v. Alexander*, 51 Tex. 578; *Pfeuffer v. Maltby*, 54 Tex. 454; *U. S. v. Hallock*, U. S. Supreme Ct., Book 17, Lawy. Co-op. Pub. Assoc., p. 568; *The Cheshire*, 3 Wall (U. S.) 231; *Prize Cases*, 2 Black (U. S.) 635. See also *Harvey v. Varney*, 98 Mass. 118; *Decker v. Ruckman*, 28 N. J. Eq. 614.

Where a partner is to receive interest on his capital in excess of the amount allowed by the usury laws, not being a loan of money, it is illegal or usurious. *Cunningham v. Green*, 23 Ohio St. 296; *Case v. Fish*, 58 Wis. 56.

An agreement between partners to keep their partnership a secret, and maintain a fictitious competition for the purpose of deceiving the public, would be illegal and void; but such a purpose will not be imputed, by construction, to partnership articles, unless clearly evinced. *Fairbank v. Leary*, 40 Wis. 637.

5. *Bouv. L. Dict.*, tit., Partnership.

6. *Williams v. Connor*, 14 S. Car.

lar kind of business,¹ or by reason of being formed for the purpose of carrying on an unlawful trade or enterprise, as a partnership in a gambling establishment,² or one organized to perform acts which are contrary to public policy, as an agreement to regulate prices and stifle competition.³ But it is not so if the effect is not to prevent a healthy competition or to raise prices.⁴

The fact that the partnership business is illegal does not affect the title or rights of the partners in the assets of the concern as

621; *Whitcher v. Morey*, 39 Vt. 459. And see *Cameron v. Bickford*, 11 Ont. App. 52.

1. As to partnerships between alien enemies in time of war and citizens, see *McAdam v. Hawes*, 9 Bush (Ky.) 15; *Evans v. Richardson*, 3 Mer. 469; *Brandon v. Nesbitt*, 6 T. R. 23. Though if domiciled here it is different. *McConnell v. Hector*, 3 B. & P. 113. A partnership between one citizen and another domiciled in a country at war with this. *McConnell v. Hector*, 3 B. & P. 113. Or a partnership between a citizen and a neutral domiciled in such country. *O'Mealey v. Wilson*, 1 Camp. 482; *Albretch v. Sussman*, 2 Ves. & B. 323.

A partnership between a qualified person and a disqualified one is not presumed to be illegal for the reason that there is no presumption that the disqualified one was to perform any part of the duties for which he was disqualified. See *Harland v. Lillenthal*, 53 N. Y. 438; *Swan v. Scott*, 23 Up. Can., Q. B. 434; *Cameron v. Bickford*, 11 Ont. App. 52; *Tench v. Roberts*, 6 Madd. 145; *Re Jackson*, 1 B. & C. 270; *Hopkinson v. Smith*, 1 Bing 13; 7 Moo. 237; *In re Clark*, 3 D. & R. 260; *Turner v. Reynall*, 14 C. B. N. S. 328.

Where a statute prohibits a lawyer or a physician not licensed, from practicing, a partnership between him and a licensed practitioner is not illegal, if his share of the profits is not in consideration of his practicing. *Scott v. Miller*, Johns. Eng. Ch. 220.

Where a sheriff is forbidden to buy county scrip and he does it indirectly by forming a partnership for that purpose, the partnership is illegal. *Read v. Smith*, 60 Tex. 379.

2. *Watson v. Murray*, 23 N. J. Eq. 257; *Bogges v. Lilly*, 18 Tex. 200; *Watson v. Fletcher*, 7 Gratt. (Va.) 1; *Sykes v. Beadon*, L. R., 11 Ch. D. 170.

This rule applies to partnerships to speculate on margins or in futures. *Tenney v. Foote*, 95 Ill. 99; *Patterson's*

Appeal, 13 W. N. C. (Pa.) 154; *Faikney v. Reynous*, 4 Burr. 2069; *Williams v. Connor*, 14 S. Car. 621; *Petrie v. Hannay*, 3 T. R. 419.

Partners in a lease of the penitentiary can make no contract for the use or hire of the negro convicts, except in the employments required by law. Any contract, express or implied, for any other use is against public policy, and cannot be enforced; and all items for such services, in the liquidation of the partnership, must be struck from the account between the partners. *Pratt v. McHaton*, 11 La. Ann. 260.

3. *Craft v. McConoughy*, 79 Ill. 346; *Sampson v. Shaw*, 101 Mass. 145; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173.

A partnership between persons bidding on a public contract, the purpose of which is to prevent competition, is illegal. *Hunt v. Pfeiffer*, 108 Ind. 197; *King v. Winants*, 71 N. Car. 469.

A partnership formed to manage a ferry, the franchise of which was to be obtained from the legislature by one partner, is void, on the ground that if the names of the grantees are not known to the legislature, powerful and obnoxious combinations might be formed without its knowledge or intention. *Powell v. Maguire*, 43 Cal. 11.

A partnership for the purpose of speculation in the purchase of land at tax sales has been held to be illegal. *Dudley v. Little*, 2 Ohio 502.

4. *Breslin v. Brown*, 24 Ohio St. 565; *Fairbank v. Newton*, 50 Wis. 628; *Fairbank v. Leary*, 40 Wis. 637. But see *Woodworth v. Bennett*, 43 N. Y. 273.

A partnership to buy lands at a public sale by the *United States*, when it does not amount to an agreement between the partners not to bid against each other, is not illegal. *Piatt v. Oliver*, 2 McLean (U. S.) 267.

A partnership to furnish recruits to the government was held legal in *Marsh v. Russell*, 66 N. Y. 288; even though it

against third parties,¹ and the rights of third persons against an illegal firm will be protected when they are not parties to the illegality.² So, the business of a partnership may be severable, being legal as to some of its adventures, and illegal as to others.³

The courts will not aid in the accounting and settlement of the partnership transactions of an illegal partnership, nor of the illegal gains of a legal partnership, either for the purpose of division of the profits or contribution for losses,⁴ though the partner who has provided the funds can recover back an unexpended balance where such return was not a part of the illegal partnership agreement.⁵ The same rule applies to partnerships in the duties of

was provided in the articles that the partners should not come into competition or to furnish recruits below a fixed price. But it would be so if there was proof that it was a part of a conspiracy to create a monopoly or control prices.

1. Where a sheriff levied on the interest of one partner in certain partnership stock and left it in the hands of another partner as receptor and afterwards attempts to replevin it, the partners can set up the title of the partnership as a defense. *Tucker v. Adams*, 63 N. H. 361.

The surviving partner cannot impeach the title of his partner's grantor of a house used for gaming purposes on the ground of the illegality of the business. *Watson v. Fletcher*, 7 Gratt. (Va.) 1.

But where a partnership was formed in order to hinder and delay the creditors of one of the partners, they cannot jointly maintain an action of trespass against one who seized their goods. *McPherson v. Pemberton*, 1 Jones (N. Car.) 378.

2. Where a clergyman who is prohibited by statute from trading, becomes a secret partner in a trading firm, he is liable to become a bankrupt in respect to the partnership concerns. *Meymot's Case*, 1 Atk. 198.

3. See *Northrup v. Phillips*, 99 Ill. 449; *Wilson v. Owen*, 30 Mich. 474; *Todd v. Rafferty*, 30 N. J. Eq. 254.

Where the law partner of the master in Chancery who took a deposition, acted as attorney for one of the parties in taking it, an objection to it on that ground was overruled on the ground that it would not be presumed that the partnership extended to sharing each other's fees in the matter. *Whitcher v. Morey*, 39 Vt. 459.

4. See *Stewart v. McIntosh*, 4 Harr. & J. (Md.) 233; *Craft v. McConoughy*,

79 Ill. 346; *Dunham v. Presby*, 120 Mass. 285; *Snell v. Dwight*, 120 Mass. 9; *Sampson v. Shaw*, 101 Mass. 145; *King v. Wirants*, 71 N. Car. 469; *Read v. Smith*, 60 Tex. 379; *Lane v. Thomas*, 37 Tex. 157; *Fairbank v. Leary*, 40 Wis. 637.

As to partnerships in a lottery or gambling business see *Watson v. Murray*, 23 N. J. Eq. 257; *Watson v. Fletcher*, 7 Gratt. (Va.) 1; *Sykes v. Beadon*, 11 Ch. D. 170. This rule was applied even where the contract was legal in the State where made but unlawful by the *lex fori*. *Watson v. Murray*, 23 N. J. Eq. 257.

Where the State engineer formed a partnership with W and B to bid on a State contract in the name of W, and they obtained the contract and sold out their bid at a profit, the money coming into W's hands, B cannot compel W to pay him his share. *Woodworth v. Bennett*, 43 N. Y. 273.

One of the partners in a firm formed to trade with the Indians in violation of a statute of the *United States*, cannot claim damages for a breach of the articles. *Gould v. Kendall*, 15 Neb. 549.

A partnership contract between an American and a Scotchman to export goods from *England* to *America* during war time, though the goods did not sail till after peace was made, is illegal and the courts will not interfere. *Evans v. Richardson*, 3 Mer. 469.

Where the partnership contract was made on Sunday a suit for dissolution and accounting cannot be maintained. *Durant v. Rhener*, 26 Minn. 362.

As between partners, one cannot deny the fact of partnership because sharp practices were to be resorted to by them in their prosecution of what otherwise would be a legitimate business. *Shriver v. McCloud*, 28 Neb. 474.

5. *Sampson v. Shaw*, 101 Mass. 145.

most public offices and in trusts, executorships and administration.¹ Where a part of the business is legal and a part illegal the court will usually take charge of and settle the legal part, ignoring that which is illegal;² but when the two classes cannot be separated, the accounting will be refused.³

While the fact that a partnership had been engaged in illegal transactions which have been completed and the proceeds divided, has no influence on an accounting for subsequent lawful enterprises,⁴ the question as to whether or not the courts will compel the payment of a balance in cases where the transactions were illegal, but where the partners themselves have had an accounting and have ascertained the balances and arrived at the point of paying differences or dividing property, is a mooted question, the weight of authority, however, appearing to be in favor of compelling such payment or division;⁵ though it will be seen that many of the cases sustaining this doctrine are put upon the ground of an express promise to pay the balance,⁶ or of a reinvestment of the

1. See *Woodworth v. Bennett*, 43 N. Y. 273.

But where C and B agreed together jointly to carry out a contract to construct a railroad, the fact that C had been the legal adviser, and was one of the directors of the road, will not excuse B from accounting, the ineligibility arising from his contract relations with third persons, and no fraud or abuse of trust appearing. *Cameron v. Bickford*, 11 Ont. App. 52.

2. See *Northrup v. Phillips*, 99 Ill. 449; *Dunham v. Presby*, 120 Mass. 285; *Todd v. Rafferty*, 30 N. J. Eq. 254. But see *Woodworth v. Bennett*, 43 N. Y. 273.

Where a part of the business consisted in keeping a gambling house and the illegal sale of liquors, a large stock of which was on hand, an accounting of the legal part only was granted. *Anderson v. Powell*, 44 Iowa 20.

Where the business of a partnership was made illegal by statute, but was still carried on, an accounting for the time it was legal may be obtained. *Bennet v. Woolfolk*, 15 Ga. 213.

Where a partnership is formed for the purpose of hindering and delaying the creditors of one of the partners, the business being legal as between themselves, and the partnership voidable only as to the creditors, an accounting and settlement may be had. *Harvey v. Varney*, 98 Mass. 118; *Brigham v. Smith*, 3 E. & A. (Up. Can.) 46. But see *McPherson v. Pemberton*, 1 Jones (N. Car.) 378.

3. *Lane v. Thomas*, 37 Tex. 157.

4. *Bates' Law of Part.*, § 123. And see *Anderson v. Whitlock*, 2 Bush (Ky.) 398.

5. See *McGunn v. Hanlin*, 29 Mich. 476; *Willson v. Owen*, 30 Mich. 474; *Pfeiffer v. Maltby*, 38 Tex. 523; *Sharp v. Taylor*, 2 Phil. 801.

Where a partnership was formed to buy up soldiers' claims for land warrants, contrary to an act of Congress, one of the partners contributing all the funds and the other buying the warrants and locating and taking possession of the lands, and the latter converted a part of the lands into money and mortgages, and by fraudulently concealing the value of the assets, bought out the former's interest for a trifle, the court held, on a suit to compel an accounting and division, that, as the illegal transactions had become an accomplished fact and could not be affected by any action of the court in the case, the partner who had by fraudulent means obtained possession and control of the funds could not be permitted to refuse to do equity to his other partner because of the wrong originally done or intended to the soldier. *Brooks v. Martin*, 2 Wall (U. S.), 70.

6. See *Crecent Ins. Co. v. Baer* (Fla.), 1 So. Rep. 318; *Leftwich v. Clinton*, 4 Lans. (N. Y.) 176; *King v. Winants*, 71 N. Car. 469; *Faikney v. Reynous*, 4 Burr 2069; *Bogges v. Lilly*, 18 Tex. 200; *DeLeon v. Trevins*, 49 Tex. 88; *Watson v. Fletcher*, 7 Gratt. (Va.) 1; *Petrie v. Hanway*, 3 T. R. 418. A partnership was formed in *South*

profits in other forms.¹

VIII. FORMATION OF PARTNERSHIPS AND CONSTRUCTION OF ARTICLES

—1. **Formed by Agreement.**—A partnership as between the parties is a contract relation and can only be formed by the voluntary agreement of the parties.² So, no third person can be introduced into a firm without his concurrence as well as that of all the part-

Carolina to buy slaves. The constitution of that State made contracts, the consideration of which is the purchase of slaves, null and void, the court maintained an action for an accounting upon the theory that the liability to account was based upon the mutual covenants and promises of the parties and not on the purchase of slaves. *Belcher v. Conner*, 1 S. Car. 88.

There is a distinction between partnership contracts made with specific reference to direct aid in the actual prosecution of hostilities in time of war, and such as might be made in the ordinary transactions of social and business life, even though tending to supply the wants of people in the hostile territory. *Pfeuffer v. Maltby*, 54 Tex. 454.

1. See *Attaway v. Third Nat. Bank*, 15 Mo. App. 577; *Gould v. Rendall*, 15 Neb. 549; *Pfeuffer v. Maltby*, 54 Tex. 454; *Lewis v. Alexander*, 51 Tex. 578; *Watson v. Fletcher*, 7 Gratt. (Va.) 1; *Wann v. Kelly*, 5 Fed. Rep. 584.

The Contrary Doctrine.—*Stewart v. McIntosh*, 4 Harr. & J. (Ind.) 233; *Northrup v. Phillips*, 99 Ill. 449; *Tenney v. Foote*, 95 Ill. 99; *Hunt v. Pfeiffer*, 108 Ind. 197; *Dunham v. Presby*, 120 Mass. 285; *Warren v. Chapman*, 105 Mass. 87; *Gould v. Kendal*, 15 Neb. 549; *Todd v. Rafferty*, 30 N. J. Eq. 254; *Woodworth v. Bennett*, 43 N. Y. 273; *Patterson's Appeal*, 13 W., N. C. (Pa.) 154; and *Forsyth v. Woods*, 11 Wall. (U. S.) 484, hold the contrary doctrine refusing to enforce division or payment of an ascertained balance, or of an obligation based upon such a balance.

In *Sykes v. Beadon*, 11 Ch. D. 170. the court says: "The notion that because a transaction which is illegal, is closed, that therefore a court of equity is to interfere in dividing the proceeds of the illegal transaction, is not only opposed to principle but to authority."

2. *Freeman v. Bloomfield*, 43 Mo. 391; *Graves v. Tallman*, 8 Nev. 178; *Channil v. Fassett*, 16 Ohio 166; *James v. Bostwick*, *Wright (Ohio)* 142; *Hedge's Appeal*, 63 Pa. St. 273. And see *Maclay v. Freeman*, 48 Mo. 234;

Ellsworth v. Pomeroy, 26 Ind. 158; *Nat. Union Bank v. Landon*, 66 Barb. (N. Y.) 189.

An agreement forming an association stating that it was formed for the mutual benefit and profit of the parties thereto; that its business should be buying, selling, renting, leasing and mortgaging real estate, and that each of the parties should have a certain specified interest, constitutes the parties signing it partners *inter se*, for all purposes specified. *Kelley v. Bourne*, 15 Oregon 476.

Where, by articles of association, each of the associates severally, bound himself to pay a ratable proportion of all expenditures for improvements made or to be made—it was held that the undertaking was mutual, the covenants of the associates being made with each other, and that the liability arose on the promise by each party to the other, which could only be enforced by an action among themselves. *Troy etc. Factory v. Corning*, 45 Barb. (N. Y.) 231.

When an agreement to become stockholders in specified shares in a partnership, and to pay the amounts subscribed, is signed by a number of persons with the number of shares and the aggregate amount thereof annexed to their names, though no promise is named in the agreement in effect, each party promises to the other to pay the amount, and the promises of the others are a consideration for the promises of each, and the parties are sufficiently definite. *Kimmins v. Wilson*, W. Va. 584.

An agreement to sell, only as an auxiliary to the higher object of forming a partnership, subjects the property to the terms of the partnership, and the intention of the partners are evidenced by the double contract of sale and partnership. *Thompson v. Mylne*, 6 La. Ann. 80.

An agreement is binding, although the parties understood it differently, as neither party knew the construction which the other party put upon it, and as it could be construed by the court. *Miller v. Lord*, 11 Pick. (Mass.) 11.

ners who composed the original partnership.¹ Such an agreement need not be express, but may be implied from the acts of the parties, and from the circumstances of the case.² As to third parties, however, a partnership may be created by construction of law where the parties had no such intention.³ A partnership agreement must be mutual and based on a sufficient consideration.⁴

1. *Wells v. Turner*, 16 Md. 133; *Kingman v. Spurr*, 7 Pick. (Mass.) 235; *Freeman v. Bloomfield*, 43 Mo. 391; *Murray v. Bogert*, 14 Johns. (N. Y.) 318; *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522; *Channel v. Fassitt*, 16 Ohio 166; *Moddewell v. Keever*, 8 W. & S. (Pa.) 63; *Tabb v. Gist*, 6 Call (Va.) 579; *Tabb v. Gist*, 1 Brock. (U. S.) 33.

The purchase of the shares of a deceased partner does not of itself create a new partnership between the purchaser and the surviving partner, as the assets purchased are primarily liable to the payment of the claims of the partnership creditors, and to the balance of advances made by the surviving partner during its existence. It is merely a purchase of the residuum, and the purchaser becomes therein in equity only a tenant in common with the surviving partner. *Noonan v. Nunan*, 76 Cal. 44.

If several persons enter into a written agreement of partnership, and the majority alter the agreement in a material point, those who do not assent may retire from the firm, provided they do it within a reasonable time and under reasonable circumstances. *Abbot v. Johnson*, 32 N. H. 9.

One not named in the articles of a co-partnership, and afterwards rejected upon his application for admission into the firm, and never admitted as a member by the assent of all the partners, is not a partner so as to be personally liable to the other members, who have paid certain debts of the firm for his share of its losses, although he has assented to one of the partners, a joint owner with him of real estate contributing it to the firm's business, in consideration that such partner would divide his portion of the profits with him. *Riedeburg v. Schmitt*, 71 Wis. 644.

2. *Mason v. Connell*, 1 Whart. (Pa.) 381; *Pursley v. Ramsey*, 31 Ga. 403.

It is usually necessary to show that the partner sought to be held, knew of the new arrangement and made no objection to it. *Tabb v. Gist*, 2 Brock. (U. S.) 33.

After receiving the services of one as a partner, and recognizing him as such for years, it is too late to set-up the non-payment of his portion of the capital stock, or the non-execution of articles of partnership, as a proof that no partnership existed. *Campbell v. Whitley*, 39 Ala. 172.

Two surviving partners publish notice "that the business of the late firm will be for the present carried on in the same name, under the charge of J. H." (one of the partners), "who will continue, and who is duly authorized to adjust and settle matters relative to the same." *Held*, that the surviving partners held out to the world that they would continue to transact business under that name, and that a note given by J. H. in the name of the firm was binding on both. *Casco Bank v. Hills*, 16 Me 155.

Where the acquiescence of one of two partners in the articles of an association is but an inference from his attendance at meetings, and otherwise participating in promoting its objects, the consent of the other partner cannot be inferred therefrom. *Wells v. Turner*, 16 Md. 133.

3. *New Orleans v. Gauthreaux*, 32 La. Ann. 1126; *Hazard v. Hazard*, 1 Story (U. S.) 371.

4. *See Consolidation Bank v. State*, 5 La. Ann. 44.

A co-partnership agreement in which one of the partners promises to give the other partner an equal interest in the profits of the enterprise, without anything being furnished by the latter to accomplish the object of the co-partnership, is without mutuality, and accordingly void. *Mitchell v. O'Neale*, 4 Nev. 504.

A partner sold his interest in the firm property to F, and executed a bill of sale thereof, F assuming the undivided firm debts. The remaining partner consented to the agreement. *Held*, that F became a partner with the remaining partner, though they did not then execute written articles of partnership, but agreed to do so thereafter. *Harvey v. Ford*, 83 Mich. 506.

And where it is induced by fraud, deceit or undue influence, it is entirely void as between the parties.¹ A binding partnership contract may be made through an agent, or by means of the subsequent ratification of the act of an unauthorized person.²

2. Consideration.—Any contribution in the shape of capital or labor, or any act which may result in liability to third parties, is a sufficient consideration to support a partnership agreement.³ But where the agreement consists of a mere promise by one person to permit another to share in the profits of an enterprise without furnishing any capital or labor or otherwise promoting their common interests, it is void for want of consideration.⁴

The payment or agreement to pay a sum of money to a partnership or to a person established in business, for the privilege of being taken into partnership is valid and based upon a good consideration.⁵

1. *Howell v. Harvey*, 5 Ark. 270; *Fogg v. Johnston*, 27 Ala. 432; *Hynes v. Stewart*, 10 B. Mon. (Ky.) 429; *Tattersall v. Grote*, 2 Bos. & Pul. 131; *Green v. Barrett*, 1 Sim. 45; *Pillaris v. Harkness*, Colles' P. C. 442; *Ex parte Broome*, 1 Rose, 69.

When a partnership is declared void upon that ground, the injured party, except as regards creditors of the firm, should not be regarded as a partner, or subjected to any of the loss sustained by the partners, and is entitled to redress against the perpetrator of the fraud to the extent of his injury, unless he has continued the partnership after discovering the fraud. *Hynes v. Stewart*, 10 B. Mon. (Ky.) 429.

2. *Williams v. Butler*, 35 Ill. 544.

But articles of partnership purporting to be between the complainant on one part and the defendant and a minor brother on the other, but which were executed only by the two, do not make the minor brother a partner. *McGunn v. Hamlin*, 29 Mich. 476.

3. *Lindley on Part.*, 70, *Bates' Law of Part.*, § 2. And see *Frothingham v. Seymour*, 118 Mass. 489; *Mitchell v. O'Neale*, 4 Nev. 504; *Kimmins v. Wilson*, 8 W. Va. 584; *The Herkimer*, *Stewart's Ad. Rep.* 23; *Coleman v. Eyre*, 45 N. Y. 38; *Breslin v. Brown*, 24 Ohio St. 565.

A partnership formed for the purpose of buying and selling slaves cannot be said to be based on a consideration of the purchase of slaves. The consideration of the contract of partnership consists of the mutual covenants and promises of the co-partners, and the acts they respectively engage

to perform. *Belcher v. Connor*, 1 S. Car. 88.

An agreement to become stockholders in specified shares in a partnership and to pay the amount subscribed, stating the number of shares and the aggregate amount of each, though no promise is stated in the agreement, is in effect a promise by each party to pay the stated amount to the others, and the promises of the others are a sufficient consideration for the promises of each. *Kimmins v. Wilson*, 8 W. Va. 584.

Adequacy.—"A *bona fide* contract of partnership is not invalidated by the unequal value of the contributions of its members, for they must be their own judges of the adequacy of the consideration of the agreement into which they enter." *Lindley on Part.* 70.

"If one man has skill and wants capital to make that skill available, and another has capital and wants skill, and the two agree that the one shall provide capital and the other skill, it is perfectly clear that there is a good consideration for the agreement on both sides, and it is impossible for the court to measure the quantum of value. The parties must decide that for themselves." *WIGRAM, V. C.*, in *Dale v. Hamilton*, 5 Hare 393.

4. *Mitchell v. O'Neale*, 4 Nev. 504; *Heyhoe v. Burge*, 9 C. B. 431.

An agreement between two persons by which one was to pay all the losses and have all the profits does not constitute them partners *inter se*; they are so only as to third persons who have dealt with them as a firm. *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497.

5. *Lindley on Part.* 71; *Bates' Law*

3. Effect of the Statute of Frauds—(See also FRAUDS, STATUTE OF, vol. 8, p. 657).—A contract of partnership, or for the transfer of a share in a partnership, need not be in writing under the Statute of Frauds.¹ Where, however, such a contract could not be, or is not to be performed within a year,² or if the partnership is to last more than a year³ it is within the Statute of Frauds; though a verbal contract of partnership which is to last more than a year, when it is acted upon and business is conducted under it, is valid and binding, at least during the time the parties were doing business under it.⁴ A partnership agreement which is not to begin within a year must be in writing.⁵

So, where the chief purpose of a partnership is the purchase of real property with the individual funds of the partners, or the contribution of the individual lands of the partners to be held

of Part., § 2; *Walker v. Harris*, 1 Anstr. 245.

If the premium is not paid according to agreement, the other party may, if he has held himself in readiness to perform the agreement on his part, maintain an action to recover it, and that without tendering a partnership deed. *Walker v. Harris*, 1 Anstr. 245.

A note given by one partner to his co-partner, as collateral security for the capital advanced by the latter, is without consideration to support it. *Stafford v. Fargo*, 35 Ill. 481.

1. *Barnett Line of Steamers v. Blackman*, 53 Ga. 98; *Jack v. Clemens*, 41 Iowa 95; *Holmes v. McCrary*, 51 Ind. 358; *Buffum v. Buffum*, 49 Me. 108; *Buckner v. Ries*, 34 N. Y. 344; *Coleman v. Eyre*, 45 N. Y. 38; *Smith v. Tailton*, 2 Barb. Ch. (N. Y.) 336; *Jordan v. Miller*, 75 Va. 442; *In re Great Western Tel. Co.*, 5 Biss. (U. S.) 363.

Where a partnership is formed in a State in which it must be written, but is to be executed in a State in which a writing is not required, an action for an account cannot be defeated in the latter State upon that ground. *Young v. Pearson*, 1 Cal. 448.

Evidence to prove a planting partnership need not be in writing. 1873, *Battle v. Jenkins*, 25 La Ann. 593.

A partnership may be shown to exist by parol evidence. It is not necessary that the agreement should be in writing. *Randel v. Yates*, 48 Miss. 685.

2. *Whipple v. Parker*, 29 Mich. 369; *Jones v. McMichael*, 12 Rich. (S. Car.) 176.

3. *Morris v. Peckham*, 51 Conn. 128; *Williams v. Jones*, 5 B. & C. 108. But

see *McKay v. Rutherford*, 13 Jur. 21.

A mere written assignment of a half of a patent right, where an oral contract to sell the half, and to go into partnership for more than one year, has been made between the parties, is not a memorandum of the partnership nor a performance. *Morris v. Peckham*, 51 Conn. 128.

4. See *Coward v. Clanton*, 79 Cal. 23; *Pio Pico v. Cuyas*, 47 Cal. 174; *Allison v. Perry*, 130 Ill. 9; *Southmayd v. Southmayd*, 4 Mont. 100; *Huntley v. Huntley*, 114 U. S. 394; *Williams v. Williams*, L. R., 2 Ch. App. 294; *Burdon v. Barkus*, 4 De G. F. & J. 42; *Baxter v. West*, 1 Dr. & Sm. 173.

Where a partnership has been entered into under a verbal agreement which has been acted upon for a period of years, and money had been received by one partner for which, independent of the Statute of Frauds, he ought to account, he will not be allowed to interpose the statute as a defense to a bill for an account by his co-partner. *Yates v. Fraser*, 6 Ill. App. 229.

Three persons entered into an oral agreement of partnership to work a mine. Two of them entered upon and worked it. The third purchased the mine without the knowledge of his co-partners. It was held that the purchase enured to the benefit of the firm, and that inasmuch as there had been a performance, the Statute of Frauds did not apply. *Burn v. Strong*, 14 Grant's Ch. (Up. Can.) 651.

5. *Williams v. Jones*, 5 B. & C. 108. And see *Coleman v. Eyre*, 45 N. Y. 38; *Huntley v. Huntley*, 114 U. S. 394.

by the firm, a parol contract of partnership is void;¹ but where such property is purchased or held as a mere incident of the business of the firm and the partnership exists outside of such ownership, the Statute of Frauds does not apply, and no writing is required to establish it.² And where the express purpose of the partnership is trade in lands, the prevailing rule is that the statute does not apply,³ though the contrary rule has sometimes been adopted.⁴

The Statute of Frauds applies only as between the parties to the partnership,⁵ and as to them, when the terms are reduced to

1. *Larkins v. Rhodes*, 5 Port. (Ala.) 195; *Benton v. Roberts*, 4 La. Ann. 216; *Dunbar v. Bullard*, 2 La. Ann. 810; *Clancy v. Craine*, 2 Dev. Eq. (N. Car.) 363. And see *infra*, this title, *Partnership Real Estate; Proof of Partnership Character*.

A partnership in growing crops may be formed and proved by parol; but not a partnership in the crops arising out of an alleged particular partnership in lands and negroes. It is not a partnership by contract, but by consequence of an alleged partnership in immovables. *Gantt v. Gantt*, 6 La. Ann. 677.

2. *Causlarr v. Wharton*, 62 Ala. 358; *Scruggs v. Russell*, *McCahon* (Kan.) 39; *Marsh v. Davis*, 33 Kan. 326; *Fall River Whaling Co. v. Borden*, 10 Cush. (Mass.) 458; *Sherwood v. St. Paul etc. R. Co.*, 21 Minn. 127; *Baldwin v. Johnson*, 11 N. J. Eq. 441; *Personette v. Pryme*, 34 N. J. Eq. 26; *Thompson v. Egbert*, 3 N. Y. Super. Ct. 474; *Fairchild v. Fairchild*, 64 N. Y. 471; *Smith v. Tarlton*, 2 Barb. Ch. (N. Y.) 336; *Falkner v. Hunt*, 73 N. Car. 571; *Knott v. Knott*, 6 Oregon 142; *Brooke v. Washington*, 8 Gratt. (Va.) 248; 56 Am. Dec. 142; *McCully v. McCully*, 78 Va. 159; *Lyman v. Lyman*, 2 Paine (U. S.) 11; *In re Farmer*, 18 Nat. Bankr. Reg. 207; *Newton v. Doran*, 3 Grants Ch. (Up. Can.) 353.

On the contrary it has been held that lands acquired in the name of one member of an oral partnership could not be shown to be partnership lands. *Rowland v. Boozer*, 10 Ala. 690; *Larkins v. Rhodes*, 5 Port. (Ala.) 195; *York v. Clemens*, 41 Iowa 95; *Everhart's Appeal*, 106 Pa. St. 349; *Bird v. Morrison*, 12 Wis. 153; *Smith v. Burnham*, 3 Sumn. (U. S.) 435. And where land is not purchased with partnership funds, but held as tenants in common, it cannot be converted into partnership property by oral agreement. *Parker v.*

Bowles, 57 N. H. 491. And see *Gray v. Palmer*, 9 Cal. 616; *Benton v. Roberts*, 4 La. Ann. 216; *Dunbar v. Bullard*, 2 La. Ann. 810; *Alexander v. Kimboo*, 49 Miss. 529; *Pratt v. Oliver*, 2 McLean (U. S.) 267.

After the conversion of land into personality an oral contract of partnership is permissible. *Everhart's Appeal*, 106 Pa. St. 349. And see *Mason v. Kaine*, 63 Pa. St. 335.

3. *Bunnell v. Taintor*, 4 Conn. 568; *Holmes v. McCray*, 51 Ind. 358; *Richards v. Grinnell*, 63 Iowa 44; 50 Am. Rep. 727; *Pennypacker v. Leary*, 65 Iowa 220; *Hunter v. Whitehead*, 42 Mo. 524; *Springer v. Cabell*, 10 Mo. 640; *Hirbour v. Reeding*, 3 Mont. 15; *Chester v. Dickerson*, 54 N. Y. 1; 13 Am. Rep. 550; *Williams v. Gillies*, 75 N. Y. 197; *Traphagen v. Burt*, 67 N. Y. 30; *Essex v. Essex*, 20 Beav. 442; *Dale v. Hamilton*, 5 Hare 369. And see *Carr v. Gravitt*, 54 Mich. 540; *Snyder v. Wolford*, 38 Minn. 175; *Smith v. Tarlton*, 2 Barb. Ch. (N. Y.) 336; *Wormser v. Meyer*, 54 How. Pr. (N. Y.) 189; *Bissell v. Harrington*, 18 Hun (N. Y.) 81; *Knott v. Knott*, 6 Oregon 142.

Where the parol contract of partnership is itself a transfer of real property, it was held void in *Henderson v. Hudson*, 1 Munf. (Va.) 510; *In re Warren*, 2 Dav. (U. S.) 322. And directly the contrary was held in *Holmes v. McCray*, 51 Md. 358; 19 Am. Rep. 735; *York v. Clemens*, 41 Iowa 95.

4. *Pecot v. Armelin*, 21 La. Ann. 667; *Gantt v. Gantt*, 6 La. Ann. 667; *Smith v. Burnham*, 3 Sumn. (U. S.) 435; *Dale v. Hamilton*, 5 Hare 369. See further as to the effect of the Statute of Frauds on partnerships holding real estate *infra*, this title, *Partnership Real Estate; Proof of Partnership Character*.

5. *In re Warren*, 2 Dav. (U. S.) 322. The recognition of the partnership

writing, the articles are presumed to contain all the conditions of the partnership.¹

4. Time of Commencement.—Where the contract does not determine the time of commencement of the partnership, it is usually presumed to begin at the time of the execution of the articles,² particularly where present and continuous action is contemplated,³ and the failure of one or more of the partners to perform does not alter the presumption;⁴ though if the agreement is executory and based upon the performance of conditions precedent, the partnership does not begin until they are fulfilled.⁵

It is competent to contract for a partnership to commence at a

in letters to third persons, books of account, written transactions, and schedules of property are sufficient memoranda in writing to satisfy the statute. *Rowland v. Boozer*, 10 Ala. 690; *Montague v. Hayes*, 10 Gray (Mass.) 609; *Fall River Whaling Co. v. Borden*, 10 Cush. (Mass.) 458.

1. *Boardman v. Close*, 44 Iowa 428. And see *Evans v. Hanson*, 42 Ill. 234; *Lowe v. Thompson*, 86 Ind. 503; *Reiter v. Morton*, 96 Pa. St. 229; *Hennessey v. Griggs* (N. Dak. 1890), 44 N. W. Rep. 1010; *Burgess v. Badger*, 124 Ill. 288.

2. *Ingraham v. Foster*, 31 Ala. 123; *Beaman v. Whitney*, 20 Me. 413; *Everet v. Watts*, 10 Paige (N. Y.) 82; *Aspinwall v. Williams*, 1 Ohio 84; *Austin v. Williams*, 2 Ohio 64; *Crary v. Williams*, 2 Ohio 65; *Howell v. Brodie*, 6 Bing. N. C. 44.

The day of delivery and not the date written in the instrument, is the day of execution. *Holmes v. Porter*, 39 Me. 157.

In a case where the partnership would be unlawful if entered upon the date of the articles, but lawful if it began three months afterward, it was held to be an absolute presumption of law that it began on the day of the date of the articles. *Williams v. Jones*, 5 B. & C. 108. But see *Dix v. Otis*, 5 Pick. (Mass.) 38; *Vassar v. Camp*, 14 Barb. (N. Y.) 356; *Bird v. Hamilton*, Walker Ch. (Mich.) 361.

3. *Kirrick v. Stevens*, 55 Mich. 167.

4. See *Southern White Lead Co. v. Haas* (Iowa), 33 N. W. 657; *Murray v. Johnson*, 1 Head (Tenn.) 353.

The existence of a partnership does not depend upon the fact that each partner has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business com-

menced, there is a partnership until legally dissolved. *Hartman v. Woehr*, 18 N. J. Eq. 383.

Where an existing partnership takes in a new partner, by a written instrument signed by the old members and the new, which written instrument recites the payment of a certain sum fixed by the incoming partner, and conveys to him one-third interest in the assets, and consents that he shall have one-third interest in the profits, the new partnership is complete on the execution of the instrument, notwithstanding it may be agreed that an account of the stock shall be taken, and if it exceeds a certain sum, the new partner shall pay one-half of that sum. *Phillips v. Nash*, 47 Ga. 218.

5. *Murray v. Richards*, 1 Wend. (N. Y.) 58; *Murray v. Johnson*, 1 Head (Tenn.) 353; *Fox v. Clifton*, 6 Bing. 776; *Dickinson v. Valpy*, 10 B. & C. 128. And see *Avery v. Lauve*, 1 La. Ann. 457; *Peel v. Thomas*, 29 Eng. L. & Eq. 276; *Story Part.*, § 150.

A having a stock of goods of the value of \$10,000, B agreed to give him his notes, with security, for \$5,000, and to become partner with him in trade. They entered into business, B being held out as a partner, A believing he could get the notes of B at any time; but B failed to execute the notes, and to advance any money to the concern. It was held that the giving of the notes was a condition precedent, and that no right of partnership could vest in B until he performed it. *McGraw v. Pulling*, 1 Freem. Ch. (Miss.) 357.

Where a party failed to perform the preliminary conditions upon compliance with which a partnership was to be formed, and the other party to the agreement, to enable him to perform, furnished his own capital, and, for a short time, carried on business in the

future date;¹ but where it is stipulated that the partnership shall be deemed to have commenced at a preceding date, the persons contracting thereby become partners as to third persons from the date of the instrument only,² though such stipulation would probably bind the parties as between themselves.³

Where there are no articles of co-partnership, but the partnership is implied by law from certain joint transactions, the partnership dates from the time such transactions took place or from the time the agreement to enter into them was formed.⁴

In order, however, to constitute a partnership as to third persons there must be, besides the co-partnership agreement, an actual entering upon some joint transaction or business, or some joint benefit derived from it.⁵

name of the proposed firm, it was held that this was no waiver, and could not entitle the defaulting party to the rights of a partner. *Bird v. Hamilton*, Walk. (Mich.) 361.

1. *Avery v. Lauve*, 1 La. Ann. 457. Where the articles contained a stipulation that the partnership shall go into effect at a future date, and the partners begin to act as such at once, such stipulation, like all other secret arrangements between the partners, is in operative as to creditors. *Battley v. Lewis*, 1 M. & G. 155.

Notes given in the name of a partnership to commence at a future day, and for goods to form the stock in trade for such partnership, and received upon the credit of an individual intending to become a member of such partnership, are collectible against such member, even though the partnership was never actually formed. *Stiles v. Meyer*, 64 Barb. (N. Y.) 77; 7 Lans. (N. Y.) 190. 2. See *Wilsford v. Wood*, 1 Esp. 182; *Dyke v. Brewer*, 2 Car. & K. 828.

Where A and B who were already partners agreed on the 24th of June to take C into the firm, the new partnership to be considered as commencing from the 18th of May preceding, it was held that C was not liable upon a bill of exchange indorsed by the firm of A and B upon the 19th of May. *Vere v. Ashby*, 10 B. & C. 288.

On the other hand, where A and B agree to enter into a partnership on the 1st of January, and from that time regard themselves as partners, the partnership will be deemed to have commenced on that day, though the articles of partnership were not executed until January 18th. *Battley v. Bailey*, 1 Scott N. R. 143.

3. A and B entered into partnership,

and agreed that the partnership should have relation back to a time specified, and that the firm should be responsible for debts contracted for goods by A in the intermediate time. *Held*, that the firm was liable for money appropriated to that purpose by A, during the time mentioned, which he held as treasurer of the county. *Hutchinson v. Smith*, 7 Paige (N. Y.) 26.

4. Pars. Part. (3rd ed.), p. 14. And see *Avery v. Lauve*, 1 La. Ann. 457; *Gardiner v. Childs*, 8 Car. & P. 345.

In *Gardiner v. Childs*, 8 Car. & P. 345, certain accounts between two firms were admitted in evidence determining their relative shares of the profits accruing from the alleged joint business to prove that they were partners at the time the goods in question in the suit were furnished.

5. *Goddard v. Pratt*, 16 Pick. (Mass.) 412; *Lucas v. Cole*, 57 Mo. 143; *Atkins v. Hunt*, 14 N. H. 205; *West Point etc. Assoc. v. Browne*, 3 Edw. Ch. (N. Y.) 284; *Elgie v. Webster*, 5 M. & W. 518; *Burnell v. Hunt*, 5 Jur. 650; *Metcalf v. Royal Ex. etc. Co.*, *Barnard* 343; *Heyhre v. Barge*, 9 C. B. 431. And see *Adams Bank v. Rice*, 2 Allen (Mass.) 480; *Moody v. Rathburn*, 7 Minn. 89; *Davis v. Key*, 8 N. Y. Super. Ct. 55; *Cook v. Carpenter*, 34 Vt. 121; *Rice v. Shuman*, 43 Pa. St. 37.

A mere promise to "go halves" in the purchase of land, if not carried into effect, does not make the promiser a partner, so as to bind him to pay a note executed by the grantee in both their names, for improvements thereon. *Huckabee v. Nelson*, 54 Ala. 12.

On evidence that A advanced money to B, taking notes therefor, it being agreed that A might if he choose become B's partner, and that the money

5. Duration or Continuance.—If no time is specified in the agreement for which the partnership shall continue, it is a partnership at will, and may be continued indefinitely upon the same terms, or brought to an end at any time at the election of any of the partners.¹ When its duration is fixed, if it is continued after that period, it will be converted into a partnership at will, but the terms of the original partnership agreement will continue to be operative and binding upon its members during such continuance after the original term,² and on the same principle the original articles may continue binding upon the firm through several successive changes caused by death or a change of membership.³

advanced should be A's contribution, and that B refused to recognize A as a partner, it was held in A's action against B on the notes, that a finding that no partnership ever was formed was justified. *Morrill v. Spurr*, 143 Mass. 257.

Where the agreement for the partnership is in writing, its terms must be considered in connection with the participation in the profits, in determining whether the partnership relation has been established or not. *Meehan v. Valentine*, 29 Fed. Rep. 276.

1. See *infra*, this title, *Dissolution*.

2. *Bradley v. Chamberlin*, 16 Vt. 613; *Stephens v. Orman*, 10 Fla. 9; *Robbins v. Laswell*, 27 Ill. 365; *Boardman v. Close*, 44 Iowa 428; *Frederick v. Cooper*, 3 Iowa 171; *Sangston v. Hack*, 52 Md. 173; *Blasdell v. Souther*, 6 Gray (Mass.) 149; *Gould v. Horner*, 12 Barb. (N. Y.) 601; *Miffin v. Smith*, 17 S. & R. (Pa.) 165; *U. S. Bank v. Binney*, 5 Mason (U. S.) 176; *Burn v. Strong*, 14 Grant's Ch. (Up. Can.) 651; *Essex v. Essex*, 20 Beav. 442; *Cox v. Willoughby*, 13 Ch. D. 863; *Gillett v. Thornton*, L. R., 19 Eq. 599; *Clark v. Leach*, 32 Beav. 24; *Booth v. Parks*, 1 Moll. 465.

If, on the expiration of the original term, partially new articles are adopted, the old articles are still binding so far as they are not superseded by the new ones. *Austen v. Boys*, 24 Beav. 598.

An extension or prorogation of a partnership made during the life thereof creates no new partnership. *Arnold v. Danziger*, 30 Fed. Rep. 898.

Where a firm consisted of one active and one silent partner and after the expiration of the term, the active partner continued the business with the assets of the firm and without accounting, a dissolution was not effected,

but the silent partner was entitled to continue to share the profits as under the original agreement. *Parsons v. Hayward*, 31 Beav. 199. But this rule will not be applied to a surviving partner continuing the business without a settlement. *Foster v. Hall*, 4 Humph. (Tenn.) 346.

While a provision that on the death of a partner, before the expiration of the term the survivor might take his interest at an agreed price or at a valuation to be fixed, will continue for a reasonable time if the partnership is continued beyond the original term. *Cox v. Willoughby*, 13 Ch. D. 863; *Essex v. Essex*, 20 Beav. 442. But see *Cookson v. Cookson*, 8 Sim. 529. The right cannot be exercised several years after the partner's death. *Gates v. Finn*, 13 Ch. D. 839.

Where articles of partnership expressly state that the partnership is to continue until dissolved, as the law provides, the partnership is one at will, dissoluble at the pleasure of either party, without the consent of the other. *Koenig v. Adams*, 37 Kan. 52.

3. See *Boardman v. Close*, 44 Iowa 428; *Sangston v. Hack*, 52 Md. 173; *Blasdell v. Souther*, 6 Gray (Mass.) 149; *Duffield v. Brainerd*, 45 Conn. 424.

Taking in a New Partner.—Where a partnership was formed of three persons, it being agreed that two of them should give their personal attention to the joint business, and receive \$1,000 each yearly for their services, and the other partner afterwards sold his interest to a third party, who permitted the business to continue without interruption or any new agreement, upon the final settlement of the partnership affairs, the two active partners were entitled to their yearly allowance as

There may be clauses, however, which the law will not continue, as, for instance, a provision in the nature of a penalty for the expulsion of a partner and the forfeiture of his interest,¹ and as it becomes a partnership at will upon the expiration of the original term, a provision requiring previous notice on the part of a partner of an intent to retire is no longer applicable.²

6. Specific Performance—(See also SPECIFIC PERFORMANCE).—A partnership contract not providing for any fixed period of duration, being dissolvable at the pleasure of the parties, its specific performance cannot be enforced,³ and when the duration of the term is fixed, if the contract is wholly executory, as the court cannot effectually enforce the contribution of time, services or skill, the parties will be left to their remedy at law.⁴ So, an agreement to purchase shares in a partnership at a valuation, being in effect an agreement to submit to arbitration, the same rule will be applied.⁵ But if the execution of the articles is necessary to confer rights upon a party to which he is entitled, or to determine his status, it will be decreed, though no steps will

upon the original agreement. *Wilson v. Lineberger*, 83 N. Car. 524.

Death of Partner.—Where articles of co-partnership contained the provision "that, in case of the death or bankruptcy of any of the parties, in order to prevent any alteration with the heirs, executors, administrators or assigns of the deceased or bankrupt, the shares of the profits, as well as capital, of the deceased or bankrupt, should be paid by the survivors or solvents, agreeably to the yearly statements of the company's affairs prior to his death or bankruptcy," it was held that this clause applied to real estate belonging to the firm, as well as to personal, and that, on the death of a partner in whom alone was the legal title to land, for the benefit of the firm, the whole beneficial estate therein survived to the surviving partners; and in such case it will make no difference that the term for which the partnership was originally formed had expired, and the partners had continued to do business as before without making a new agreement. *Robertson v. Miller*, Brock. (U. S.) 466.

1. *Clark v. Leach*, 32 Beav. 14.
2. See *Duffield v. Brainerd*, 45 Conn. 124; *Wilson v. Simpson*, 89 N. Y. 619; *Featherstonhaugh v. Fenwick*, 17 Ves. 198; *Neilson v. Mossend Iron Co., L. R.*, 11 App. Cas. 298.

3. *Morris v. Peckham*, 51 Conn. 128; *Buck v. Smith*, 29 Mich. 166; 18 Am. Rep. 84; *Somerby v. Buntin*, 118 Mass.

279; *Birchett v. Bolling*, 5 Munf. (Va.) 442; *Hercy v. Birch*, 9 Ves. Jr. 357; *Sayers v. Syers*, L. R., 1 App. Cas. 174. And see *Gow on Partnership*, 110, and cases cited.

4. See *Buck v. Smith*, 29 Mich. 166; 18 Am. Rep. 84; *Morris v. Peckham*, 51 Conn. 128; *Satterthwait v. Marshall*, 4 Del. Ch. 337; *Somerby v. Buntin*, 118 Mass. 279; *Meason v. Kaine*, 63 Pa. St. 335; *Reed v. Vidal*, 5 Rich. Eq. (S. Car.) 289; *Cross v. Hopkins*, 6 W. Va. 323; *Stocker v. Wedderburn*, 3 K. & J. 393; *Scott v. Raymond*, L. R., 7 Eq. 112; *England v. Curling*, 8 Beav. 129; *Sichel v. Mosenthal*, 30 Beav. 371; *Manning v. Wadsworth*, 4 Md. 59.

The court cannot assume to enforce the performance of daily prospective duties or supervise in advance, the course or conduct of one who is to control and manage in the interest of a firm in which he is to stand as a member. *Buck v. Smith*, 29 Mich. 166; 18 Am. Rep. 84.

5. *Vickers v. Vickers*, L. R., 4 Eq. 529.

In *Maxwell v. Port Tennant Co.*, 20 Beav. 495; and *Sheffield Gas etc. Co v. Harrison*, 17 Beav. 294, specific performance of a contract to purchase shares was denied apparently upon the ground that it would be in effect enforcing a contract to become a partner, and therefore covered by the principle of the cases above cited.

By articles of co-partnership defend-

be taken to compel the parties to act under the articles when thus executed.¹ And agreements collateral to the partnership contract, as a covenant to convey property rights with which the partnership is to deal which has been relied and acted upon, may be specifically enforced.² An assignee for the benefit of creditors is entitled to enforce the payment by a partner of the amount he has agreed to contribute,³ and when the partnership agreement consists of a contract for the contribution of capital only, if no business has been carried on under it, the remedy at law for damages is inadequate, and specific performance will sometimes be enforced.⁴

7. Construction of Partnership Articles.—When the question of partnership arises, as between the parties themselves, the agreement out of which the supposed partnership arises is to be construed as any other instrument between the same parties.⁵

Any part of the articles of a co-partnership may be waived, rescinded, changed or qualified by the conduct or established and uniform usage of the parties,⁶ and provisions not acted upon by

ants agreed to contribute their factory buildings and premises as part of their capital stock upon a certain valuation, and to receive the same back again, upon the dissolution of the firm, at the same valuation. They conveyed the premises to the members of the firm, and thereafter the buildings were destroyed by fire. *Held*, that upon dissolution of the co-partnership the agreement to receive back the premises for the agreed sum would not be enforced, as a reconveyance was no longer possible. *Goldman v. Rosenberg*, 116 N. Y. 78.

1. *Bates Law of Part.*, § 1013, *citing* Swanston's note *Crawshay v. Maule*, 1 Swanst. 495; *England v. Curling*, 8 Beav. 29; *Hibbert v. Hibbert*, *cited in* Collyer on Partnership, § 203. And see *Buxton v. Lister*, 3 Atk. 383.

2. See *Satterthwait v. Marshall*, 4 Del. Ch. 337; *Somerby v. Buntin*, 118 Mass. 279; *Whitworth v. Harris*, 40 Miss. 483; *Tilman v. Cannon*, 3 Humph. (Tenn.) 637; *Birchett v. Boiling*, 5 Munf. (Va.) 442; *Beckwith v. Mantou*, 12 R. I. 442.

An agreement to purchase shares of another contained in the original partnership agreement will be specifically enforced if business has been carried on under it, as it then becomes a case in which action has been taken and rights acquired and liabilities incurred on conditions which consequently ought to be performed. *Maddock v. Anthony*, 22 N. E. 187; *Dinkham v.*

Bradford, L. R., 5 Ch. App. 519. And see *Manning v. Wadsworth*, 4 Md. 59.

But if the specific performance of such an agreement can result in no benefit or only nominal benefit to the parties, as in a case of an agreement to convey half of the profits in payment for property, where the parties are insolvent and it is doubtful if there were any profits, the court will not generally direct it. *Sims v. McEwen*, 27 Ala. 184.

3. *Robinson v. McIntosh*, 3 E. D. Smith (N. Y.) 221.

4. See Anonymous, 2 Ves. Sr. 629.

5. *Bird v. Hamilton*, Walk. Ch. (Mich.) 361.

When articles provided that the profits should be divided into tenths, of which the first party was to receive six, the second three, and the third one, a provision in the articles that the first party guaranties profits to the second party equal to 20 per cent. on his investment is merely a personal agreement, and will not increase the second party's share beyond said three-tenths, as regards the firm. *McIntire's Appeal* (Pa. 1888), 11 Atl. Rep. 784; *Nellis' Appeal*, 118 Pa. St. 421.

6. *McGraw v. Pulling*, 1 Freem. Ch. (Miss.) 357; *Hall v. Sannover*, 44 Ark. 34; *Boisgerard v. Wall, Smed. & M. Ch.* (Miss.) 404; *Dow v. Moore*, 47 N. H. 419; *Thomas v. Lines*, 83 N. Car. 191; *Henry v. Jackson*, 37 Vt. 431; *Const. v. Harris, Turn. & R.* 496; *Geddes v. Wallace*, 2 Rich. 380; *Coventry v.*

the partners will be considered as omitted and expunged.¹ So, if the articles are not explicit or if ambiguous, the interpretation of the parties, as shown by their subsequent conduct, will be accepted as the true meaning of the articles and intent of the parties.² Such a change in the articles of co-partnership, however, whether by express agreement or by usage, in the absence of provision in the articles, can be accomplished only by the unanimous consent of all,³ and if it is provided that a change may be made by a majority, due notice and an opportunity to be heard must be given to all.⁴ A change, once effected, is binding upon the assignees or

Barclay, 3 D. J. S. 320; Pilling v. Pilling, 3 De G. J. & Sm. 162. And see Gammon v. Huse, 100 Ill. 234; England v. Curling, 8 Beav. 129.

Where the salary of a partner is fixed at a certain amount, and afterwards there are changes in the firm and a great increase in the business, if he changes his salary on the books at an increased rate with the knowledge of the firm and it is acquiesced in, a settlement on the basis of the increased rate will not be disturbed. Gage v. Parmelee, 87 Ill. 329.

Where the articles of partnership between two attorneys provide that one shall have no share in the pending business of the other who had previously been in business, if he permits him to prepare and argue the old cases and make charges with reference to them on the firm's account, he will be estopped from claiming that the fees are not a partnership matter. Thrall v. Seward, 37 Vt. 573.

Before the terms will be considered as waived, however, it must appear that new terms have been substituted. McGraw v. Pulling, 1 Freem. Ch. (Miss.) 357. And property rights are not to be injuriously affected by the rule, as in a case where it was provided that the share of a partner who dies may be purchased by the firm at the last semi-annual valuation, and the firm afterwards fails to take an account oftener than once a year, if a partner dies, his share must be valued at what it would have been upon the last semi-annual settlement. Lawes v. Lawes, 9 Ch. D. 98.

1. Boyd v. Mynatt, 4 Ala. 79; Jackson v. Sedgwick, 1 Swanst. 460. And see Simmonds v. Leonard, 3 Hare 581. But see to the contrary Smith v. Chandos, Barn. 419; 2 Atk. 458.

2. Bates' Law of Part., § 215. And see Beacham v. Eckford, 2 Sandf. Ch. (N. Y.) 116; Moore v. Trieber, 31 Ark. 113;

Geddes v. Wallace, 2 Bligh 270; Coventry v. Barclay, 3 D. J. S. 320; Stewart v. Forbes, 1 Hall & Tw. 461; 1 Mac. & G. 137.

Where the terms of a written agreement of partnership are ambiguous, and apparently limit the interest in one partner to a share in the profits, the construction put on it by the parties, giving to each partner a share in the capital stock, will control. Rathbun v. McConnell, 27 Neb. 239.

But where plaintiff's share of the profits of a firm in which he was partner was to be one-eighth, with a guaranty that it would be at least \$5,000 per year, for three years his share of the profits being credited to him on the books, but in each year it was less than the \$5,000, and the balance was not credited to him, it was held that these yearly accountings were merely to ascertain the net profits and did not alter the terms of the written partnership agreement. Broderick v. Beaupre, 40 Minn. 379.

3. Const. v. Harris, Turn. & R. 496; Abbot v. Johnson, 32 N. H. 9; Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573; Mangold v. Grange, 70 Wis. 575; England v. Curling, 8 Beav. 129.

A tacit understanding among a part of the partners, contravening the agreement (which then subsisted) on which the firm was formed, is not admissible to modify and impeach its terms. Thomas v. Lines, 83 N. Car. 191.

But when a partnership has been engaged for two years, under the management of the active partner, in buying and selling on their own account, it is too late for the other partner to allege that their legitimate business was confined to selling on commission, and that the purchases were made without his knowledge or consent. Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497.

4. Const. v. Harris, Turn. & R. 496.

representatives of a partner.¹

a. CONSTRUCTION OF PARTICULAR PROVISIONS.—In the absence of anything in the articles with reference to the period of division of the profits of a co-partnership, they are to be divided from time to time as a majority of the partners may decide.² The meaning of the term "profits" as used in articles of co-partnership, is the excess of the returns over the advances and necessary expenditures,³ but in estimating the profits of a partnership, such amounts as have been expended in permanent improvements upon the firm's real estate must be regarded as capital, and should not be included among the expenses.⁴ The term "net profits" is in effect the same thing as "profits," as above explained,⁵

1. *Const. v. Harris*, Turn. & R. 496.

2. *Kennedy v. Kennedy*, 3 Dana (Ky.) 239. And see *Carithers v. Jarrell*, 20 Ga. 842.

A provision that the firm may pay his share of the profits to one of the partners at a certain amount, within six months, raises a presumption that the period of settlement was designed to be at least once in six months. *Wood v. Beath*, 23 Wis. 254.

In the case of a partnership in a commission and warehouse business, where one partner engages to furnish the buildings and the other to superintend the business, if the latter partner dies, his estate will be entitled to share in the profits from the storage of cotton stored in his lifetime, though not realized by the disposal of the cotton till after his death, after deducting the actual expense of the delivery of the cotton to the bailors, or of its sale, including the keeping of the accounts. His representatives are likewise entitled to share in any proceeds realized by the sale of unclaimed cotton remaining in storage. *Parnell v. Robinson*, 58 Ga. 26.

3. See *Doane v. Adams*, 15 La. Ann. 350; *Shea v. Donahue*, 15 Lea (Tenn.) 160; 54 Am. Rep. 407; *Fletcher v. Hawkins*, 2 R. I. 330.

By a partnership agreement, A was to furnish \$20,000, and B was to manage the business, keep the stock up to the original value, and, on dissolution, to deliver up to A the remaining stock to the value of \$20,000, "losses by bad debts, decay of goods, and inevitable accidents, excepted." The partnership was to continue five years, unless dissolved by B's death. The profits, after paying rents, taxes, and necessary expenses, were to be equally shared. It was held that the losses by bad debts, etc., were

to be deducted from the profits, and not from the stock of \$20,000, so long as there was a surplus over that amount. *Leach v. Leach*, 18 Pick. (Mass.) 68.

Where an agreement was made by which one party agreed to pay another one-third of the profits of a business in which he worked and employed two hands, he was permitted to credit himself with his own labor and that of his two hands before reckoning profits. *Dunlap v. O'Dena*, 1 Rich. Eq. (S. Car.) 272.

4. *Braun's Appeal*, 105 Pa. St. 414. And see *Proudfoot v. Bush*, 7 Grant's Ch. (Up Can.) 518.

Where one partner is to furnish land and the necessary money for its cultivation and the other the labor, the land remaining the property of the former, he is to be charged with all permanent improvements made with partnership funds, but not with the increase in value of the vines upon the land due to their growth, during the terms. *Squires v. Anderson*, 54 Mo. 193.

5. See *Welsh v. Canfield*, 60 Md. 469; *Dumont v. Ruepprecht*, 38 Ala. 175; *Meserve v. Andrews*, 106 Mass. 419.

The salaries of the partners are to be deducted from the gross profits, in order to ascertain the net profits in which the partner furnishing his services but no capital is to share. *Fuller v. Miller*, 105 Mass. 105.

Where two partners so conducted their business and kept their accounts through a series of years as to show that they intended by their arrangement to divide the net profits of the business, it was held that losses by fire of furniture manufactured under the arrangement must be deducted from the profits before either party

and the term "gross profits" is a solecism.¹

Where one partner is to furnish the capital in substance and not the mere use of property, a loss by fire or otherwise must be shared by the other partners;² but where he furnishes the use only, it is his loss,³ though if the net profits are to be divided, such a loss must be deducted before estimating them.⁴

An agreement to advance partnership property means free of cost,⁵ and an agreement to keep in repair does not include permanent improvements.⁶

Absence on account of sickness is not a breach of a positive agreement to give one's time to the business,⁷ and the reservation of the right on the part of a partner to absent himself and carry on other business gives him the right to cease business altogether.⁸ So, a stipulation for the withdrawal of funds necessary for pri-

would be entitled to his share thereof. *Gill v. Gerfer*, 15 Ohio St. 399.

Where G. guaranteed his partner, B, \$10,000 profits the first year, notwithstanding losses of any extent, and at the end of the year the partnership was dissolved and no profits made, B was entitled to receive from G the \$10,000. *Grant v. Bryant*, 101 Mass. 567.

But where it is agreed that one partner is to have half of the crop, after all the supplies furnished by the other had been paid for, the payment is to be made before the division of the crop. *Nichol v. Stewart*, 36 Ark. 612.

1. Bates' Law of Part., § 230.

"Gross returns are returns without deduction for losses or capital." Bates' Law of Part. § 230.

2. *Carlisle v. Tenbrook*, 57 Ind. 529; *Taft v. Schwamb*, 80 Ill. 289; *Meserve v. Andrews*, 106 Mass. 419; *Gill v. Geyer*, 15 Ohio St. 399.

A partnership was formed between A and others, A to furnish the capital and credit himself on the firm books with the same. Certain articles, fixtures, and goods, purchased by the use of this capital were destroyed by fire. The other partners claimed that the firm was only liable for such loss as arose from, or was incident to, the business. It was held that the loss from fire was one which must fall upon, and be borne by, the firm. *Savey v. Thurston*, 4 Ill. App. 55.

If A and B enter into articles which provide that A shall contribute the whole capital, and that the profits, after payment of expenses, including rent of store, interest on capital, and an annual salary to B shall be divided equally, the capital becomes partner-

ship property, the expense of insuring which is a part of the expenses of the business, and, on dissolution, A is entitled to re-payment of the capital contributed by him before B is entitled to receive anything as profits. *Livingston v. Blanchard*, 130 Mass. 341.

3. *Whitcomb v. Converse*, 119 Mass. 38; 20 Am. Rep. 311.

4. See *Meserve v. Andrews*, 106 Mass. 419; *Gill v. Geyer*, 15 Ohio St. 399.

5. *Nichol v. Stewart*, 36 Ark. 612. And see *Hennessey v. Griggs* (N. Dak. 1890), 44 N. W. Rep. 1010.

6. *Dunnell v. Henderson*, 23 N. J. Eq. 174.

It was also held in *Dunnell v. Henderson*, 23 N. J. Eq. 174, that where one partner contributes the use of property to the partnership, the firm is not bound to leave it in good condition at the close of the enterprise.

7. *Boast v. Firth*, L. R., 4 C. P. 1; *Robinson v. Davison*, 6 Exch. 269.

8. *McFerran v. Filbert*, 102 Pa. St. 73.

Where articles of co-partnership provided that each partner should give to the business of the firm his whole time and attention, "except such time as may be proper for the fulfilling of the duties of any office or agency held individually by either partner; . . . and neither partner shall accept or continue to hold any office or agency unless by the consent of his co-partner;" held that the exception applied not only to offices and agencies held by individual partners at the time of the formation of the partnership, but also to offices and agencies held by a partner at any time during the continuance of the partnership, and the

vate expenses includes the proper maintenance of family and education of children, but not the purchase of plate, furniture, carriages, etc.,¹ and provisions that the partners are to bear their own expenses do not cover expenses incurred in the prosecution of the business of the firm.² A provision in the partnership agreement giving annuities or other rights to the deceased partner's widow, in case of death can be enforced by the beneficiary as a trust,³ and a provision in partnership articles that in case of the death of a partner, the partnership shall not be dissolved, but shall be continued by the survivors and the representative of the deceased, makes it compulsory on the survivors to admit such representative,⁴ but such representative is not bound to come in and render himself liable as a partner;⁵ he is entitled to a reasonable time and opportunity to investigate before deciding as to his course,⁶ and if terms upon which he can come in are imposed, they must be strictly complied with.⁷

The ordinary rule that an agreement to submit disputes to arbitration will not be specifically enforced when it in effect ousts the court of jurisdiction, applies to such stipulations in partnership

partner so holding any such office or agency was alone entitled to the profits thereof. *Starr v. Case*, 59 Iowa, 491.

A provision in a co-partnership agreement assigning to one of the partners the duty of conducting the financial settlements, may not be construed as abrogating or dividing the general partnership authority, and giving to the one absolute and exclusive control over the finances of the firm. Such an intention must be clearly and distinctly expressed. *Sweet v. Morrison*, 103 N. Y. 235.

1. *Stoughton v. Lynch*, 1 Johns. Ch. (N. Y.) 467.

Where a father-in-law entered into a co-partnership with his son-in-law, and it was agreed that the father-in-law should furnish a house for a shop, tools, etc., and a house for the son-in-law to live in, and that he "should be at no expense," it was held that these words must be understood to mean expense for things connected with the business, and not family expenses. *Brown v. Haynes*, 6 Jones' Eq. (N. Car.) 49.

2. *Burleigh v. White*, 70 Me. 130; in which one partner furnished all the capital. And see *Levi v. Karrick*, 13 Iowa 344.

A provision in a partnership contract, that each partner shall pay his own individual expenses, must be understood as intended to apply when the parties were at home, and not

when traveling on the business of the concern; he should be allowed for the whole of his personal expenses while abroad, and not merely the excess of such expenses above what they would have been at home. *Withers v. Withers, Pet.* (U. S.) 355.

3. *Page v. Cox*, 10 Hare 163.

A partner who has stipulated to pay an annuity out of the profits of the firm is liable in damages if he willfully refuses to continue the business to prevent the profits from accruing. *McIntyre v. Belcher*, 14 C. B., N. S. 654.

But where partnership articles stipulate for the payment of a certain sum to a stranger when the business reaches a certain stage of profitability, such stranger cannot maintain an action to enforce any of the other stipulations of the partnership. *Greenwood v. Sheldon*, 31 Minn. 254.

4. *Page v. Cox*, 10 Hare 163; *Wainwright v. Waterman*, 1 Ves. Sr. 311.

5. See *Downs v. Collins*, 6 Hare 418; *Kershaw v. Mathews*, 2 Russ. 62; *Madgwick v. Wimble*, 6 Beav. 495.

6. *Pigott v. Bagley, McCl. & G.* 569.

Doing any partnership act or exercising any partnership function will be considered as an election to come in. *Edwards v. Thomas*, 66 Mo. 468.

7. *Holland v. King*, 6 C. B. 727. And see *Milliken v. Milliken*, 8 Irish Eq. 16; *Brooke v. Garrod*, 2 De G. & J. 62.

articles.¹ And the pendency of arbitration proceedings is no defense to an action in equity for a discovery or an accounting.² But where such an agreement exists the courts will sometimes withhold relief until the parties have made an effort to settle their disputes by that means.³ And where the provisions of the contract have been carried out, and the arbitration is in progress, the submission can be revoked only by rescinding the entire contract.⁴ On a submission for a general settlement and accounting the arbitrators need not direct with reference to a dissolution, unless a finding upon all points is specifically required,⁵ though such a finding is within their jurisdiction,⁶ and if a dissolution is directed they may wind up the affairs of the concern, either by directing a division of the property, or that a part shall take the property, paying the others a specified amount, together with directions for the payment or assumption of indebtedness, or in such other manner as to the arbitrators shall seem most economical, equitable and just.⁷

1. *Pearl v. Harris*, 121 Mass. 390; *Page v. Marshall*, 6 Phila. (Pa.) 264; *Street v. Rigby*, 6 Ves. 615; *Halphide v. Fenning*, 2 Bro. C. C. 336; *Lee v. Page*, 7 Jur., N. S. 768; 30 L. J., N. S., Ch. 857.

Although partnership articles contain a clause requiring six months' notice of an intention to dissolve, and a clause providing for arbitration, a court of equity has jurisdiction in a proper case to entertain a bill for an injunction and a receiver. *Page v. Vankirk*, 1 Brewst. (Pa.) 282; 6 Phila. (Pa.) 264.

2. *Meagher v. Cox*, 37 Ala. 201; Ala. Sel. Cas. 156; *Page v. Vankirk*, 1 Brewst. (Pa.) 282; 6 Phila. (Pa.) 264; *Coope v. Coope*, L. R., 4 Eq. 77; *Street v. Rigby*, 6 Ves. 615. And see *DePusey v. Dupont*, 1 Del. Ch. 82. *Russell v. Russell*, 14 Ch. D. 471, appears to hold the contrary.

No action for damages will lie for breach of an agreement to arbitrate. *Tattersall v. Groote*, 2 B. & P. 131. *Contra* *Livingston v. Ralli*, 5 E. & B. 132.

3. See *Waters v. Taylor*, 15 Ves. 10. 4. *Haley v. Bellamy*, 137 Mass. 357.

In *England*, where the parties have agreed in writing to submit disputes to arbitration, the court may, under a statutory provision, stay suit on application of the defendant, unless good cause is shown to the contrary, in order to permit the arbitration to take place. See *Plews v. Baker*, L. R., 16 Eq. 564; *Russell v. Russell*, L. R., 14 Ch. D. 471; *Randegger v. Holmes*, L. R., 1 C. P. 679; *Gillett v. Thornton*, L. R., 19 Eq.

599; *Hirsch v. M'Thurn*, 4 C. B., N. S. 569.

5. See *Page v. Vankirk*, 1 Brewst. (Pa.) 282; 6 Phila. (Pa.) 264; *Simmonds v. Swain*, 1 Taunt. 549.

Both individual and partnership matters may be submitted, and in order to attack the award on the ground that it covers only partnership matters, it must be established that an individual controversy in fact existed. *Leavitt v. Comer*, 5 Cush. (Mass.) 129.

Where in an arbitration between two persons who had formerly been partners, a third person who had transacted a part of their business submits to the same arbitrators all unsettled matters between them, and an award was made on the second submission that a certain sum was due such third person, it is competent for the arbitrators to take such award into consideration in determining the controversy between the original parties, and decide which shall pay it. *Wallis v. Carpenter*, 13 Allen (Mass.) 19.

6. *Green v. Waring*, 1 W. Bl. 475; *Routh v. Peach*, 3 Anstr. 637; *Hutchinson v. Whitfield*, Hayes 78.

In *Hutchinson v. Whitfield*, Hayes 78, it was held that where articles provide for a dissolution by deed, an award under seal directing a dissolution is a sufficient compliance.

But a submission to ascertain the share of a deceased partner, does not include real estate unless it is alleged to be partnership property. *Ebert v. Ebert*, 5 Md. 353.

7. See *Runyon v. Brokaw*, 5 N. J.

Where the articles attach a penalty to a breach of the provisions contained in them, if the amount of the damages for such breach would be uncertain, the penalty will be enforced as liquidated damages,¹ but no effect will be given to a stipulation providing for one penalty for any breach of the articles, including unimportant as well as important provisions.² In the absence of agreement to the contrary such liquidated damages will be regarded as covering all damages flowing from the breach of the contract.³ So a provision for the expulsion of a partner for misconduct or otherwise must be strictly construed,⁴ and no such right exists unless expressly provided for.⁵ The power, when it exists, can be exercised only by the concurrence of all in whom it is vested,⁶ and opportunity to explain,⁷ and to assist in the accounting and determination of his share,⁸ must be given to the accused partner, its exercise being required to be *bona fide*, for the

Eq. 340; *Leavitt v. Comer*, 5 Cush. (Mass.) 159; *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268; *Lamphire v. Cowan*, 39 Vt. 420; *Wood v. Wilson*, 2 Cr. M. & R. 241; *Simmonds v. Swaine*, 1 Taunt. 549; *Lingood v. Eade*, 2 Atk. 501.

The arbitrators may require one partner to give a bond of indemnity for the protection of another, and if they have not done so the court will require it and interpose by injunction until it is done. *Cook v. Jenkins*, 35 Ga. 113; *Burton v. Wigley*, 1 Bing. N. C. 665.

The arbitrators cannot, however, deviate from their instructions, or make any disposition of the property not in accordance with them. *McCormick v. Gray*, 13 How. (U. S.) 26. And they have no right to collect debts or personally interfere with the management or custody of the property. See *Lingood v. Eade*, 2 Atk. 501; *Green v. Waring*, 1 W. Bl. 475; *Burton v. Wigley*, 1 Bing. N. C. 665; *Morley v. Newman*, 5 D. & R. 317; *Re Mackey*, 2 A. & E. 356.

See also on this subject ARBITRATION AND AWARD, vol. 1, p. 646.

1. See *Maxwell v. Allen*, 78 Me. 32.

2. *Kemble v. Farren*, 6 Bing. 141; *Astley v. Wilden*, 2 B. & P. 346; *Charleston Fruit Co. v. Bond*, 26 Fed. Rep. 18.

3. *Perzell v. Shook*, 53 N. Y. Super. Ct. 501; *Clark v. Abington*, 17 Ves. 106.

The general rules applicable to penalties apply to this subject. See PENALTIES AND PENAL ACTIONS.

4. See *Clarke v. Hart*, 6 H. L. Cas. 633.

5. *Hubbard v. Guild*, 1 Duer (N. Y.)

662. And see *Piatt v. Oliver*, 3 McLean (U. S.) 27; *Patterson v. Silliman*, 28 Pa. St. 304; *Freeland v. Stansfield*, 2 Sm. & G. 479.

The mere failure of one partner to pay his share of the debts or expenses does not forfeit his right to the common property. *Kimball v. Gearhart*, 12 Cal. 27.

An association or partnership cannot exclude or expel a partner for refusing to do an act not required by the constitution or laws when he joined, and entirely foreign to the purposes of the association. *Gorman v. Russel*, 14 Cal. 531.

The burden of proof to establish the right to compel a forfeiture rests upon the persons exercising it. *Patterson v. Silliman*, 29 Pa. St. 304.

6. *Smith v. Mules*, 9 Hare 556.

A partner illegally expelled may be reinstated, and if this does not afford adequate relief for the injury, he can procure a dissolution and an accounting. *Patterson v. Silliman*, 28 Pa. St. 304. But his illegal expulsion gives him no right of action at law, as he is still a partner. *Wood v. Wood*, L. R., 9 Ex. 190.

7. *Wood v. Wood*, L. R., 9 Ex. 190; *Stewart v. Gladstone*, 10 Ch. D. 626; *Russell v. Russell*, 14 Ch. D. 471. And see *Blisset v. Daniel*, 10 Hare 493.

8. *Stewart v. Gladstone*, 10 Ch. D. 626; *Blisset v. Daniel*, 10 Hare 493.

The expelled partner will not be bound by an account afterwards taken by the other partners, and where it was provided that in case of expulsion the last annual valuation should govern, and no valuation had ever been taken,

benefit of the firm, and not to advance the individual interests of the partners.¹

A mere inability to pay debts is sufficient under a provision that the other partners may dissolve the firm if one becomes insolvent; an adjudicated insolvency is not necessary to the exercise of the right,² and a sale of one's share may be made to an irresponsible person, under a reservation of a right to sell out and retire in articles of co-partnership for a fixed period.³ But where such a reservation is based upon certain conditions, such conditions will be inoperative after a change in the firm,⁴ and a restriction that neither party shall sell out without the consent of the other, being in restraint of alienation, will not apply after dissolution.⁵ A provision in articles of co-partnership that upon the death, retirement or bankruptcy of a partner, his share may be taken by the continuing partner or partners, and paid for at the rate of the last valuation or inventory is valid,⁶ and may be specifically enforced.⁷ And, if such inventory should not be made at the agreed time, or if it be not properly made, the retiring partner or

the right of expulsion cannot be exercised. *Blisset v. Daniel*, 10 Hare 493.

1. See *Blisset v. Daniel*, 10 Hare 493; *Patterson v. Sillemann*, 28 Pa. St. 304.

2. See *Biddlecombe v. Bond*, 4 Ad. & E. 332; *Parker v. Gosage*, 7 Cr. M. & R. 617.

Insolvency may exist where there is no insufficiency of assets, if they are unavailable. See *Benj. on Sales*, § 837.

3. *Jeffreys v. Smith*, 3 Russ. 158.

4. *Frank v. Beswick*, 44 Up. Can., Q. B. 1. And see *Homfray v. Fothergill*, L. R., 1 Eq. 567.

5. *Noonan v. McNab*, 30 Wis. 277. And see *Noonan v. Orton*, 31 Wis. 265.

Under provisions that in case of death the buyer might purchase the deceased partner's share, or in case he should refuse, that it might be sold, if he refuses either to buy or to admit a buyer into the firm, he becomes responsible for the value of the share. *Featherstonhaugh v. Turner*, 25 Beav. 382.

6. *Gant v. Reed*, 24 Tex. 46; *Leach v. Leach*, 18 Pick. (Mass.) 68. And see *Knapp v. Levanway*, 27 Vt. 298; *O'Lone v. O'Lone*, 2 Grant's Ch. (Up. Can.) 125; *Ewing v. Ewing*, L. R., 8 App. Cas. 822.

A statutory regulation to that effect has been adopted in some States. See *Rammelsberg v. Mitchell*, 29 Ohio St. 22.

A mere stipulation for a division of the assets gives no right to purchase at a valuation. *Rigden v. Pierce*, 6 Madd. 353; *Cook v. Collingridge*, Jac. 607.

An agreement for a sale upon a valuation made in contemplation of bankruptcy is fraudulent and void, and if the provision is that the valuation is to be made by persons chosen by the partners respectively, as the bankrupt retains no capacity to act, the valuation cannot be made. *Wilson v. Greenwood*, 1 Swanst. 471. And see *Whitmore v. Mason*, 2 Johns. & H. 204.

Continuing Partner.—One is said to be a continuing partner when the business which he carries on is substantially though not necessarily precisely the same, the continuation of one of a firm of insurance agents with five out of the seven companies originally represented by the firm being sufficient to constitute him the continuing partner. *Reed v. Nevitt*, 41 Wis. 348.

Option.—In articles of co-partnership it was agreed, that in case of the death of one partner, the other should have the right to recover the fourth part of a certain chattel, and against that he was to pay to the deceased the sum of one thousand dollars, after the deceased shall have paid all debts which he owed to the partnership. It was held that this clause gave the surviving partner an option of purchase, and did not import an absolute covenant or engagement. *Scharringhausen v. Luefsenn*, 52 Mo. 337.

7. See *Maddock v. Astbury*, 32 N. J. Eq. 181; *Dinham v. Bradford*, L. R., 5 Ch. App. 519; *Jackson v. Jackson*, 1 Sm. & G. 184.

The court will not exercise its powers

his representatives will be entitled to the amount of its proper valuation at the proper time.¹

IX. THE FIRM NAME.—It is usual and very expedient for partners to adopt a partnership name or style,² both for the purpose of identification and to indicate that the acts performed under it are partnership acts.³ It is not, however, an indispensable requisite to the existence of a partnership;⁴ and when used, or when the words "& Co." are added to the name of a partner or of partners, it merely raises a presumption,⁵ which is disputable, how-

to effect specific performance, however, when the object of its exercise is the appointment of appraisers. See *Vickers v. Vickers*, L. R., 4 Eq. 529; *Collins v. Collins*, 26 Beav. 306.

1. *Pettyt v. Jansen*, 6 Madd. 146; *Coventy v. Barclay*, 33 Beav. 1, Laws v. Laws, 9 Ch. D. 98.

Where it was provided that an annual account should be taken, and that in case of the death of a partner, his representative should receive the amount due him at the last annual accounting, with interest in lieu of subsequent profits, and one partner died, no account having been taken in several years, the court held that the intention of the provision was to prevent the necessity of winding up and a sale, and permitted an account to be then taken allowing the representatives of the deceased partner to share in the profits up to the time of his death. *Simmons v. Leonard*, 3 Hare 581. And where the articles further provided that stock contributed by a partner after the annual inventory and before his death, should be added to his share, it was held to follow that capital withdrawn by him during that time was to be deducted. *Browning v. Browning*, 31 Beav. 316.

2. The word firm signifies "the name," from the Italian *firma*—to sign or subscribe. See *Churton v. Douglas*, H. V. Johns. 174. With reference to the body it is synonymous with partnership. See *Bolchow v. Foster*, 25 Grant's Ch. (Up. Can.) 476.

The existence of a firm name implies the existence of a firm. *Fulton v. Maccrocken*, 18 Md. 528.

3. See *Haskins v. D'Este*, 133 Mass. 356; *Baring v. Crafts*, 9 Met. (Mass.) 380; *Ferris v. Thaw*, 5 Mo. App. 279; *Wright v. Hooker*, 10 N. Y. 51.

4. *Pursley v. Ramsey*, 31 Ga. 403; *Kitner v. Whitlock*, 83 Ill. 513; *Haskins v. D'Este*, 133 Mass. 35; *Getchell*

v. Foster, 106 Mass. 42; *Ontario Bank v. Hennessey*, 48 N. Y. 545.

It is not necessary to prove that a partnership has a name; the name in which the promise in question was made, only needs to be proved. *Tessing v. Sulzbacher*, 35 Mo. 445; *Lea v. Guice*, 13 Smed. & M. (Miss.) 656; *Drake v. Elwyn*, 1 Cal. (N. Y.) 184, and an allegation that partners did business under a stated name is immaterial and need not be proved. *Stickney v. Smith*, 5 Minn. 486.

When a note is made payable to a firm, but no such firm exists, such firm name may be assumed by the person to whom the note is given, for the purpose of the indorsement or other disposition of the note. *Blodgett v. Jackson*, 40 N. H. 21.

The *California* statute prohibits an action by partners who have not filed a certificate showing their names and residences. *Held*, not to prohibit an action by assignees of such partners. *Wing v. Baldwin*, 70 Cal. 194.

It is only where it appears that the transaction was had with the plaintiffs in their partnership name that it is material whether they have complied with the law requiring the filing and publication of a notice of the partnership, the suit being brought by them as partners under their fictitious name. *Lee v. Orr*, 70 Cal. 398.

5. *Fergusson v. King*, 5 La. Ann. 642; *Armstrong v. Robinson*, 5 Gill & J. (Md.) 412; *Whitlock v. McKechnie*, 1 Bosw. (N. Y.) 427, *The San José Indiano*, 2 Gall. (U. S.) 268; *The Francis*, 1 Gall. (U. S.) 618. But see *Robinson v. Magarity*, 28 Ill. 423.

In *Michigan* it was held that in a State where there is no statute prohibiting the carrying on of business under a name or an abbreviation other than that of the individual, which is the case in that State, there is no necessary presumption that where "& Co." is made

ever,¹ that it is a partnership, and that there are others besides those named.

The parties to a partnership may give it such name as they see fit;² though in *Massachusetts* the use of the name of a former partner without his written consent or that of his representatives,³ and in *New York* and *Louisiana* the use in the firm style of the name of a person who is not a partner, or the use of "& Co.," unless an actual partner is represented by it,⁴ are forbidden by statute. These statutes, however, being penal, are strictly construed, and are not extended to cover cases where the "& Co." rep-

use of after the dealer's name, he has a partner or partners, or that such title includes more than one person. *Brennan v. Partridge*, 37 Mich. 449.

1. *Fergusson v. King*, 5 La. Ann. 642; *Charman v. Henshaw*, 15 Gray (Mass.) 293; *Whitlock v. McKechnie*, 1 Bosw. (N. Y.) 427.

2. *Crawford v. Collins*, 45 Barb. (N. Y.) 269; 30 How. Pr. (N. Y.) 398. And see *Manhattan Brass Co. v. Sears*, 45 N. Y. 797.

The name may contain the names of one or more or all the partners, or the names of one or more with a collective designation, or may be purely fanciful, and in this country may be a corporate name. *Bates' Law of Part.*, § 191.

Two were sued as partners. *Held*, that it might be shown that the name used was a mere trademark used by different persons succeeding to the business, and that plaintiff knew this. *Nichols v. White*, 41 Hun (N. Y.) 152.

3. See *Sohier v. Johnson*, 111 Mass. 238; *Morse v. Hall*, 109 Mass. 409; *Rogers v. Taintor*, 97 Mass. 291.

In *New York*, *Georgia* and *Louisiana*, no partner is permitted to transact business in the name of a person not interested in the firm. *Stimpson's Stat. L. S.* 5305.

Under *New York Laws*, 1880, ch. 561, the successors of one dead who, for five years, carried on business in his sole name, may use his name as theirs in continuing his business, with the addition of "& Co." and with the permission of his legal representatives. *Arnstaedt v. Blumenfeld*, 13 Daly (N. Y.) 354.

In several of the states among which are *Arizona*, *California*, *Dakota* and *Indiana*, a partnership transacting business under a fictitious name or a designation not showing the names of the partners, must file with the county recorder, a certificate stating the names and residence of all the partners, and

publish such notice for a designated number of weeks. *Stimpson's Stat. Law*, § 5305.

In *New York*, when any partnership has used a firm name, and his business is continued by any of the partners, they may continue to use the firm name upon filing a new certificate stating such change. *Laws of New York*, 1854, ch. 400.

4. See *Stinson's Stat. Law*, § 5306.

Fictitious Firm Name.—A firm name showing the surnames only of the partners is not "a fictitious name," nor "a designation not showing the names of the partners," within *Civil Code California*, § 2466, requiring every firm doing business under such name or designation to file and publish a certificate showing the full names and residences of its members. *Pendleton v. Cline* (Cal. 1890), 24 Pac. Rep. 659.

In *France*, the firm name must contain no other names than those of actual partners. *Code de Commerce*, 21. And the rule is the same in *Germany*, except that the old name may be retained after a change in the firm.

The *Mississippi Code* of 1880, § 1300, provides that "If any person shall transact business as a trader or otherwise . . . and fail to disclose the name of his principal or partner, by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, . . . all the property, stock, money, and choses in action, used or acquired in such business, shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property." This statute does not apply to a person conducting the business of milling and ginning for the public, but applies only where the business transacted is that of a trader or one *ejusdem generis*. *Yale v. Taylor Mfg. Co.*, 63 Miss. 598. And see *Quin v. Myles*, 59 Miss. 375.

resents an actual person, though disqualified to act,¹ or transactions which are not an ordinary incident of the business.² Nor do they interfere with the use of a name that is merely fanciful,³ and they are designed to be applied as a means of protection to those giving credit to the firm and not to those obtaining credit from it.⁴

The name of one of the partners may be used as the firm name,⁵ though in such case a contract made in that name is presump-

The effect of this statute is to make "all the property, stock, money, and choses in action used or acquired in such business" the property of him who transacts such business, and liable for his debts, without regard to the sign under which the business is conducted, unless by a proper sign the name of the owner of, or partner in, the business be disclosed. *Loeb v. Morton*, 63 Miss. 286.

The statute making property embarked in a trade liable for the debts of the person who conducts the business without disclosing the owner by a conspicuous sign, applies regardless of whether the creditors were misled or their claims antedated the business. *Quin v. Myles*, 59 Miss. 375.

1. *Zimmerman v. Erhard*, 83 N. Y. 74; 60 How. Pr. (N. Y.) 163; 38 Am. Rep. 396.

One who continues business in the old name, after a change, is not liable for fraud if no fraud was intended. *Thompson v. Gray*, 11 Daly (N. Y.) 183.

Where property is shipped in the name of the firm which has been dissolved, the shipper can recover against the carrier for negligence. *Wood v. Erie R. Co.*, 72 N. Y. 196, 28 Am. Rep. 125.

Under Laws *New York*, 1849, ch. 347, plaintiffs, a foreign firm, consisting of C and B only, may use their firm name and style of "C, B & Co." in transacting their business through agents in *New York* without violating Pen. Code *New York*, § 363, making it a misdemeanor to use the designation "& Co." when no actual partners are represented thereby. *Lunt* *Lunt*, 8 Abb. N. Cas. (N. Y.) 76.

Where a person adds "& Co." to his name and does business thereunder in another State, employing an agent to canvass for him in that State, he cannot be defeated in an action against the agent on that ground. Where the contract was made in the latter State, see

Succession of Bofenschen, 29 La. Ann. 711, *Stoddart v. Key*, 62 How. Pr. (N. Y.) 137.

An act authorizing the continued use of a partnership name, after a change on filing a certificate and advertising the change, does not enlarge or create rights of property, and the use of the old trade mark by a part of the former partners is equivalent to a materially false statement. *Hazard v. Caswell*, 93 N. Y. 259.

2. *Pollard v. Brady*, 48 N. Y. Super. Ct. 486.

The *New York* act of 1833, forbidding the transaction of the business in the name of a partner not interested in the firm, under the penalty of a fine not exceeding \$1,000, being highly penal in its nature, will be strictly construed by the courts of *Pennsylvania*, and will not include a lease by a millinery firm of a part of its building. *Sparrow v. Kohn*, 109 Pa. St. 359, 58 Am. Rep. 726.

3. *Gay v. Seibold*, 97 N. Y. 472, 49 Am. Rep. 533; *Lamperty v. Wheeler*, 11 Daly (N. Y.) 194.

4. These laws cannot be set up as a defense to an action on a bond given to a firm, reciting the names of the partners and stating the firm name with the words "& Co." added to it. *Kent v. Mojoiner*, 36 La. Ann. 259; *Gay v. Seibold*, 97 N. Y. 472, 49 Am. Rep. 533.

On the other hand, it was held in *Lane v. Arnold*, 13 Abb. N. Cas. (N. Y.) 73, that surviving partners, continuing the business in the old firm name, cannot recover for goods sold by them even where such continuance was directed by the deceased partner.

5. See *Manufacturers' etc. Bank v. Winship*, 5 Pick. (Mass.) 11; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529; *Kirk v. Blurton*, 9 M. & W. 284.

By a partnership agreement between two, no firm name was expressly adopted, but one partner was to give his personal attention to and have en-

tively the personal contract of the person whose name is used,¹ but it may be shown to have been made for the purposes and by the authority of the firm, and upon its credit;² and if no separate business is carried on by the person whose name is used, such contracts will be presumed to be those of the firm.³

So, a firm may have several names,⁴ which is often the case where a firm has a place of business in two or more different cities,⁵ in which case all of the members are equally liable on its contracts at whichever place or under whatever name they may have been made.⁶ And where two independent firms, having common partners, adopt the same name, the question as to which is bound by a contract in the firm name made by a common partner is one

of tire control and management of the business, with authority to arrange and negotiate the acceptance of drafts, the other to incur no risks and assume no responsibility. *Held*, that it might be inferred that the co-partnership business was to be done in the name of the first partner, and the other would be held liable on a draft drawn by him in his individual name, procured to be discounted by him for the benefit of the firm, and avails applied to its use; although at the time the draft was discounted the second partner was not known to the payee as such. *Ontario Bank v. Hennessey*, 48 N. Y. 545.

In *Mississippi*, where there is a statute providing that if a person transact business as a trader in partnership without the words "& Co." or a like designation failing to disclose the partnership, the property should be treated as his, it was held that cotton bought by such person in his own name was liable to seizure under execution on a judgment rendered before the enactment of the statute, although owned by an undisclosed partner. *Gumbel v. Koon*, 59 Miss. 264.

1. See *Macklin v. Crutcher*, 6 Bush (Ky.) 401; *Bates' Law of Part.*, § 192, *Pars. Part.* (3rd ed.) p. 128.

2. *Straus v. Waldo*, 25 Ga. 641; *Buckner v. Lee*, 8 Ga. 285; *Thielen v. Hann*, 27 Kan. 778; *Mercantile Bank v. Cox*, 38 Me. 500; *Etheridge v. Binney*, 9 Pick. (Mass.) 272; *Manufacturers etc. Bank v. Winship*, 5 Pick. (Mass.) 11; *Bank of Rochester v. Monteath*, 1 Den. (N. Y.) 402; 43 Am. Dec. 681; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529; *Yorkshire Banking Co. v. Beatson*, L. R., 4 C. P. Div. 204.

3. See *Etheridge v. Binney*, 9 Pick. (Mass.) 275, *Olipphant v. Matthews*,

16 Barb. (N. Y.) 608; *Bank of Rochester v. Monteath*, 1 Den. (N. Y.) 402; 43 Am. Dec. 681; *Mifflin v. Smith*, 17 S. & R. (Pa.) 165.

In cases in which the name of an individual partner is used as a firm name, the one whose name is so used, has, by law, full authority to represent and act for the rest, and use his name as the name of the firm; and his representations in a matter of business which might be theirs, binds them all, however fraudulent on his part. *Pars. Part.* (3rd ed.), p. 130.

4. *Michael v. Workman*, 5 W. Va. 391, *Moffat v. McKissick*, 8 Baxt. (Tenn.) 517.

An action may be maintained and a valid judgment recovered on two notes, one of which was signed "A. Hunt & Bro." and the other "Hunt & Bro." where both names represent the same individuals. *Hunt v. Semonin*, 79 Ky. 270.

A promise under one name may be shown and a recovery had where the defendants were described as partners under a different name. See *Brown v. Jewett*, 18 N. H. 230; *West v. Valley Bank*, 6 Ohio St. 168; *Miner v. Downer*, 20 Vt. 461.

5. See *Lathrop v. Snell*, 6 Fla. 750; *Ballin v. First*, 55 Ga. 546; *Campbell v. Colorado Coal etc. Co.*, 9 Colo. 60; *Sneed v. Kelly*, 3 Dana (Ky.) 538; *Buckner v. Calcote*, 28 Miss. 432; *Wright v. Hooker*, 10 N. Y. 51; *Anderson v. Norton*, 15 Lea (Tenn.) 14; *Messner v. Lewis*, 20 Tex. 221; *In re Williams*, 3 Woods (U. S.) 493; *Mat- ter of Vetterlien*, 5 Ben. (U. S.) 311; *Sparhawk v. Drexel*, 12 Nat. Bankr. Reg. 450.

6. See *Campbell v. Colorado Coal etc. Co.*, 9 Colo. 60; *Buckner v. Calcote*, 28 Miss. 432; *In re Williams*, 3 Woods,

of identity, to be determined from all the circumstances of the case.¹

1. Use of the Firm Name by the Partners.—Ordinarily, where there is an adopted and recognized firm name or style, the partnership cannot be bound by contracts made in any other name.² Where, however, the individual names of all of the partners are used in the contract, a joint liability is created the same as though the firm name had been used,³ and a receipt given by one partner in his own name in matters relating to the business of the firm is binding upon it.⁴ So, where the deviation from the true name of the

(U. S.) 493; *Matter of Vetterlien*, 5 Ben. (U. S.) 311.

1. *Elkin v. Green*, 13 Bush (Ky.) 612. And see *Mechanics' etc. Bank v. Dakin*, 24 Wend. (N. Y.) 411; *Miner v. Downer*, 19 Vt. 14; *In re Munn*, 3 Biss. (U. S.) 442; *Swan v. Steele*, 7 East 210.

Where a note is made in the name of the Avery Factory Co. by C, its agent, and there was a partnership and also a corporation by that name, of both of which C was agent, the fact that the corporation had ceased business and the partnership, is still doing business is competent and sufficient to fasten the liability on the latter as maker of the note. *Jones v. Parker*, 20 N. H. 31.

It may be shown by the contemporaneous declarations of the ostensible partners, or by the circumstances, or the avowed purposes for which the indebtedness was incurred, which firm is to be held liable therefor. *Elkin v. Green*, 13 Bush (Ky.) 612. And see *Fosdick v. Van Horn*, 40 Ohio St. 459.

Where there were two firms, each doing business under the name of H & G operating two different mills, there being one partner in one firm who had no interest in the other, both firms using the same letter-heads giving the names of all the partners, including the one interested in the one firm only, and one of the common partners made a note in the firm name and procured the plaintiff to discount it, and the jury found that the loan was made upon the credit of the firm composed of the common partners, the plaintiff cannot elect which firm to sue and cannot hold the additional partner in the other firm. *Hastings Nat. Bank v. Hibbard*, 48 Mich. 452.

2. See *Markham v. Hazen*, 48 Ga. 570; *Gordon v. Bankard*, 37 Ill. 147; *Ostrom v. Jacobs*, 9 Met. (Mass.) 454; *Clark v. Houghton*, 12 Gray, (Mass.) 38; *Butterfield v. Hemsley*, 12 Gray

(Mass.) 226; *Cummings v. Parish*, 39 Miss. 412; *Norton v. Thatcher*, 8 Neb. 186; *Tilford v. Ramsey*, 37 Mo. 563; *Kirby v. Hewitt*, 26 Barb. (N. Y.) 607; *Palmer v. Stephens*, 1 Den. (N. Y.) 471; *Moffat v. McKissick*, 8 Baxt. (Tenn.) 517; *Royal Canadian Bank v. Wilson*, 24 Up. Can. C. P. 362; *McLinden v. Wentworth*, 51 Wis. 170; *Kirk v. Blurton*, 9 Mees. & W. 284; *Coote v. Bank of U. S.*, 3 Cranch (U. S.) 95.

Where B. F. C. Champion, a member of the firm of Champion & Co., signed a note in his own name, and after having procured indorsers on it, added & Co. to his signature, the indorsers were held to be released. But the court said that had the note been for a debt of Champion & Co. it does not follow that they would not have been liable, for a partner will not be permitted to gain any advantage by misnaming his firm. *Haskell v. Champion*, 30 Mo. 136.

3. See *Kitner v. Whitlock*, 88 Ill. 413; *Iddings v. Pierson*, 100 Ind. 418; *Nelson v. Neely*, 63 Ind. 194; *Maiden v. Webster*, 30 Ind. 317; *Getchel v. Foster*, 106 Mass. 42; *Patch v. Wheatland*, 8 Allen (Mass.) 102; *Holden v. Bloxum*, 35 Miss. 381; *Richardson v. Huggins*, 23 N. H. 106; *McGregor v. Cleveland*, 5 Wend. (N. Y.) 475; *Austin v. Williams*, 2 Ohio 61; *Crouch v. Bowman*, 3 Humph. (Tenn.) 209; *Crozier v. Kirker*, 4 Tex. 252; 51 Am. Dec. 724; *In re Warren*, 2 Ware (U. S.) 322; *In re Thomas*, 17 Nat. Bankr. Reg. 54; 8 Biss. (U. S.) 139; *Ex parte Buckley*, 14 M. & W. 469; *Ex parte Clark*, De Gex. 153; *Norton v. Seymour*, 3 C. B. 792.

4. *Brown v. Lawrence*, 5 Conn. 397; *Bisel v. Hobbs*, 6 Blackf. (Ind.) 479; *Willett v. Chambers*, Cowp. 814. And see *Byington v. Gaff*, 44 Ill. 510; *Tomlin v. Lawrence*, 3 M. & P. 555.

Where a bill is drawn on a firm designating them by a wrong name,

firm is so slight as to appear to be unintentional, the question as to whether there is a substantial difference is one for the jury.¹ And where there is a regular habit on the part of the partners of using a name, or the use with the assent of each of a name other than the agreed one, such use binds the firm.² So where a wrong name is used in a valid and proper transaction, the partners will be held if the firm received the benefit of it, and credit was given to the partnership in good faith.³ But the rule is different where the promise is an individual one, and does not purport to be a partnership act,⁴ or where the promise is an individual note under seal.⁵

Where no firm name has been adopted, either by agreement or usage, in making a partnership contract, the firm will be bound by the use of any name when such intention appears,⁶ and if such

but the firm accepted it in their right name, it is binding. *Carney v. Hotchkiss*, 48 Mich. 276; *Lloyd v. Ashby*, 2 B. & A. d. 23.

A bill drawn by a firm but issued after a change in the firm by its successors under a changed name binds the new firm. *Usher v. Dauncey*, 4 Camp. 97.

But it was held in *Royal Canadian Bank v. Wilson*, 24 Up. Can. C. P. 362, that a draft drawn on Wilson, Moulson & Co. and accepted by one partner in that name, when the firm name was J. S. Wilson & Co., did not bind the firm. And in *Kirk v. Blurton*, 9 M. & W. 284, a bill signed "John Blurton & Co." was held not to bind the firm, the real name of which was John Blurton.

1. *Tilford v. Ramsey*, 37 Mo. 563; *Kinsman v. Dallam*, 5 Mon. (Ky.) 382; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529. And see *Moffat v. McKissick*, 3 Baxt. (Tenn.) 517; *Faith v. Richmond*, 11 A. & E. 339.

Where the firm name was Nathan Smith and the business was done in the name of N. Smith, and the contract in question was made in that name, it was held to be immaterial. *Mifflin v. Smith*, 1 S. & R. (Pa.) 165.

2. See *Folk v. Wilson*, 21 Md. 538; *Palmer v. Stephens*, 1 Den. (N. Y.) 471; *Mifflin v. Smith*, 17 S. & R. (Pa.) 165; *Mellandy v. New England etc. Union*, 36 Vt. 31; *Williamson v. Johnson*, 1 B. & C. 146.

3. See *Bacon v. Hutchings*, 5 Bush (Ky.) 595; *Bancroft v. Haworth*, 29 Iowa 462; *Gage v. Rollins*, 10 Met. (Mass.) 348; *Farmers' Bank v. Bayliss*, 41 Mo. 274; *Miner v. Downer*, 19 Vt. 14; *Weaver v. Tapscott*, 9 Leigh (Va.) 424.

This doctrine seems to be put on the

ground that the firm is in such case liable on the original consideration, and not on the contract. *Macklin v. Crutcher*, 6 Bush (Ky.) 401.

A partner holding the title to the firm real estate, was authorized to borrow money, and did so, signing his own name "as trustee." It was held that the firm was bound. *Morse v. Richmond*, 97 Ill. 303.

Where a partner was authorized to draw on a particular house, and did so, but signed his own name, directing the bill to be charged to the account of the firm, equity will enforce the bill against the firm in favor of a payee who had trusted to their joint credit. *Reimsdyk v. Kane*, 1 Gall. (U. S.) 630.

4. *Strauss v. Waldo*, 25 Ga. 641; *Butterfield v. Humsley*, 12 Gray (Mass.) 226; *Uhler v. Browning*, 28 N. J. L. 79; *Re Herrick*, 13 Nat. Bankr. Reg. 312; *Goldie v. Maxwell*, 1 Up. Can., Q. B. 424.

Where a partner orders goods in the name of S & Co., this is no evidence to show a contract with the firm of H & S. *Hancock v. Hintrager*, 60 Iowa 374.

Where it is provided in the articles that A is to furnish the funds by the use of his individual note, he alone is liable on the note signed by him, even though he declares that he binds the firm. *Dreyer v. Sander*, 48 Mo. 400.

5. *Williams v. Gillies*, 75 N. Y. 197; *Patterson v. Brewster*, 4 Edw. Ch. (N. Y.) 352; *Harris v. Miller*, Meigs (Tenn.) 158; 33 Am. Dec. 138; *United States v. Astley*, 3 Wash. (U. S.) 508.

6. *Holland v. Long*, 57 Ga. 36; *Kinsman v. Castleman*, 1 Mon. (Ky.) 210; *Drake v. Elwyn*, 1 Cal. (N. Y.) 184; *Austin v. Williams*, 2 Ohio 61; *Aspinwall v. Williams*, 1 Ohio 84; *Brown v. Pickard*, 4 Utah 292.

intention is not plain, the creditor may show by oral evidence that he intended to give credit to the firm.¹

X. THE FIRM AS AN ENTITY.—While the common law conception of a partnership was that it was not a thing in any way distinct or separate from the members composing it,² the law of *Scotland*,³ the Roman law, and the systems of Continental *Europe*, as well as that of *Louisiana*,⁴ regarded a firm as a separate person, having distinct rights and interests and capable of suing and being sued by its own members. Equity has treated partnerships as distinct from their members in some respects,⁵ and now judicial determinations that a firm is a distinct entity are frequently found.⁶

A partner may use his own name alone and bind the firm. *Sage v. Sherman*, 2 N. Y. 417.

If goods designed for the firm are sold, charged and invoiced to one partner "& Co.," it is a partnership debt, even though no note was given. See *Baring v. Crafts*, 9 Met. (Mass.) 380; *Crary v. Williams*, 2 Ohio 65.

1. *Getchell v. Foster*, 106 Mass. 42. And see *Drake v. Elwyn*, 1 Cai. (N. Y.) 184; *Bancroft v. Haworth*, 29 Iowa 462.

2. See *Bank of Toronto v. Nixon*, 4 Ont. App. 346; *Jacand v. French*, 12 East 317.

3. Bell's Law of Scotland, § 357.

4. Succession of *Pilcher*, 39 La. Ann. 362; *Liverpool etc. Co. v. Agar*, 14 Fed. Rep. 615.

Where the firm of T and C had a business house in Cincinnati where C resided, and another in New Orleans where T resided, each keeping independent accounts, and a bill was drawn on T and C, New Orleans, and accepted by C in *Connecticut* for the New Orleans house, it was held to have been drawn, not upon the individuals but upon the partnership as domiciled in New Orleans. *West v. Valley Bank*, 6 Ohio St. 168. And see *Chenoweth v. Chamberlin*, 6 B. Mon. (Ky.) 60; 43 Am. Dec. 145; *Bank of New Orleans v. Stagg*, 1 Handy (Ohio) 382.

5. *Hosmer v. Burke*, 26 Iowa 353; *Chaffee v. Jones*, 19 Pick. (Mass.) 260; *Warner v. Smith*, 1 De. G. J. & S. 337.

6. See *Bracken v. Ellsworth*, 64 Ga. 243; *Henry v. Anderson*, 77 Ind. 361; *Fitzgerald v. Grimmell*, 64 Iowa 261; *Cross v. Nat. Bank*, 17 Kan. 336; *Succession of Dolhoude*, 21 La. Ann. 3; *Robertson v. Carsett*, 39 Mich. 777; *Roop v. Herron*, 15 Neb. 73; *Faulkner v. Whitaker*, 15 N. J. L. 438; *Curtis v. Hollingshead*, 14 N. J. L. 402; *Meily*

v. Word, 71 Pa. St. 488; 10 Am. Rep. 719; *Pecks v. Barnum*, 24 Vt. 75; *Cameron v. Canieo*, 9 Nat. Bankr. Reg. 527.

Many of the Code States recognize the entity of a partnership by permitting one firm to sue another where the two firms have a common partner. See *Newlon v. Heaton*, 42 Iowa 593; *Leach v. Milburn Wagon Co.*, 14 Neb. 106; *Whitman v. Keith*, 18 Ohio St. 134.

Where partners make a promise with respect to a matter not within the scope of the firm's business, it is not a promise of the firm, and should not be declared upon as such. *Forsyth v. Woods*, 11 Wall. (U. S.) 484.

The notion of agency cannot be grasped unless the notion of the existence of the firm as a separate entity from the existence of the partners is also grasped. *Pooley v. Driver*, L. R., 5 Ch. D. 458.

A partnership or joint stock company is just as distinct and palpable an entity in the eye of the law, as distinguished from the individuals composing it as is a corporation, and can contract as an individualized and unified party with one of its members as effectually as a corporation with one of its stockholders. *Walker v. Wait*, 50 Vt. 668.

While the chattel mortgages of partnerships must usually be filed at the place of residence of each of the partners, (*Briggs v. Leitelt*, 41 Mich. 79; *Rich v. Roberts*, 48 Me. 548; *Stewart v. Platt*, 101 U. S. 731), even though the chattels are in possession of one partner, (*Morrill v. Sanford*, 49 Me. 566), it was nevertheless held in *Michigan* that a firm chattel mortgage, filed at the place where the firm transacts its business, is sufficient if executed by all the partners, all of whom live in

On the other hand, actions must be brought, where there are no statutes on the subject, against the individual partners; and conveyances of real estate taken in the name of a firm are highly defective,¹ and every change in a firm, though the business be continued in the old name, ends the old and creates a new firm, and actions by or against the one cannot be joined with actions by or against the other.²

So, property is usually listed and taxed where the partners live, if they reside in the same taxing district,³ though if all the partners live in the same town it may be assessed either against the partners individually or against the firm.⁴

The statutes of many of the States, however, tax a firm as an independent owner, and not the partners, without regard to their residence.⁵ In such case the assessment should be made to the

the State, but not at the place where the firm is located. *Hubbardston Lumber Co. v. Covert*, 35 Mich. 254.

1. Bates' Law of Part., § 174. And see *infra*, this title, *Actions With Third Persons*.

2. *Abat v. Penny*, 19 La. Ann. 289; *Dyas v. Dinkgrave*, 15 La. Ann. 502. And see *Haskins v. D'Este*, 133 Mass. 356.

A power granted to trustees to loan money to a firm, is not a power to lend to continuing partners after the death or retirement of one of them. *Fowler v. Reynal*, 2 DeG. & Sm. 749; 3 M. & G. 500; *Jones v. Shears*, 4 Ad. & El. 832.

3. *Cook v. Port Fulton*, 106 Ind. 170; *Griffith v. Carter*, 8 Kan. 565; *Peabody v. Essex Co.*, 10 Gray (Mass.) 97; *In re Hatt*, 7 Up. Can. L. J. 103.

A tax on all persons exercising a profession can be levied upon each partner separately, even though he has no practice except that of the firm. *Wilder v. Savannah*, 70 Ga. 760; 48 Am. Rep. 598; *Lanier v. Macon*, 59 Ga. 187.

Where a firm's business and property were in Jersey City, and one partner lived in Elizabeth and the other three partners out of the State, the three non-residents should be taxed where the property was situated and the other at Elizabeth where he resided. *Taylor v. Love*, 43 N. J. L. 142.

In *Kansas*, the rule stated in the text has been changed by statute. See *Swallow v. Thomas*, 15 Kan. 66.

4. See *Swallow v. Thomas*, 15 Kan. 66; *Taylor v. Love*, 43 N. J. L. 142; *State v. Parker*, 33 N. J. L. 71.

A firm should pay but one tax, and it would be unjust and unequal to tax each

partner separately in addition. *Savannah v. Hines*, 53 Ga. 616.

Levying a tax is not giving a credit, but an arbitrary imposition, and therefore a retiring partner, who has given no notice of dissolution, is not, for that reason, liable to the State. *Washburn v. Walworth*, 133 Mass. 499.

5. *Thilodaux v. Keller*, 29 La. Ann. 508; *Stockwell v. Brewer*, 59 Me. 286; *Williams v. Saginaw*, 51 Mich. 120; *McCoy v. Anderson*, 47 Mich. 502; *Putman v. Fife Lake* 45 Mich. 125; *Hubbard v. Winsor*, 15 Mich. 146; *Robinson v. Ward*, 13 Ohio St. 293; *In re Hatt*, 7 Up. Can. L. J. 103.

The managing officer or partner who lives where the business is carried on, may properly list the entire assets there under a statute requiring it to be listed by him, and another partner living in another country need not list his interest at all. *Swallow v. Thomas*, 15 Kan. 66; *Little v. Cambridge*, 9 Cush. (Mass.) 298.

An unincorporated joint stock company is a partnership, and taxable as such where the business is carried on, and the shareholder is not taxed. See *Hoadley v. Co. Com.*, 105 Mass. 519.

In *England*, a joint stock company is so far converted into an artificial body as to be taxable as a company. *Oliver v. Liverpool etc. Ins. Co.*, 100 Mass. 531.

After dissolution, and while the partnership is being wound up, it still continues for the purpose of closing up, and it is proper to continue to tax the firm, and not the share of each partner, as before. *Oliver v. Lynn*, 130 Mass. 143. But see to the contrary, *Von Phul v. New Orleans*, 24 La. Ann. 261.

partnership,¹ though the use of a wrong name is immaterial.² Usually all taxes are levied in the district of the home establishment, even though a branch business is carried on elsewhere.³ And such has been held to be the rule where a part of their transactions were carried on at the branch in entire independence of the home establishment.⁴ But where the owners reside elsewhere the tax can be assessed to the person in charge.⁵

On the same principle, a license issued to, or a special tax levied upon a particular kind of business will inure to or fall upon the continuing partner, after a purchase by him of the interest of his copartner,⁶ though a license being a personal privilege, when issued to one, will not justify acts performed under it by his copartners.⁷

XI. PERSONS COMPOSING THE FIRM.—Any person who has capacity to enter into contracts and transact business on his own account may become a partner;⁸ and there is nothing in this country to prevent any number of persons, who choose, from going into partnership.⁹

1. Who May be a Partner—*a. ALIENS.*—An alien friend may be a partner in any commercial or other business involving ownership or transactions in personal property only.¹⁰ With reference

In case of death of a partner the survivors, until the affairs of the firm are wound up, should be assessed as a firm in the firm name, and the taxes are to be paid out of the partnership funds. *Blodgett v. Muskegon*, 60 Mich. 580.

1. *Hubbard v. Winsor*, 15 Mich. 146.

2. *Lyle v. Jacques*, 101 Ill. 644.

3. *Little v. Cambridge*, 9 Cush. (Mass.) 398; *Barker v. Watertown*, 137 Mass. 227; *McCoy v. Anderson*, 47 Mich. 502; *Fairbanks v. Kittridge*, 24 Vt. 9.

The reason for this rule probably lies in the fact that the books and papers from which the value of the property is ascertainable, are generally kept at the principal place of business, so that elsewhere the right of review and correction would be less available. See *McCoy v. Anderson*, 47 Mich. 502.

4. *McCoy v. Anderson*, 47 Mich. 502; *Putman v. Fife Lake*, 45 Mich. 125.

5. *Danville Co. v. Parks*, 88 Ill. 170; *Hittinger v. Westford*, 135 Mass. 258; *Putman v. Fife Lake*, 45 Mich. 125.

If the principal place of business is out of the State, the interest of a resident partner is taxable in the his residence. *Bemis v. Boston*, 14 Allen (Mass.) 366.

Stock in trade in a factory hired by the firm, in a different town from the one in which the principal place of business is located, may be taxed in the

town where it is, even though one of the partners lives there. *Lee v. Templeton*, 6 Gray (Mass.) 579.

6. *State v. Gerhardt*, 3 Jones (N. Car.) 178; *U. S. v. Glab*, 99 U. S. 225. But see, to the contrary, *Harding v. Hagar*, 63 Me. 515.

7. *Webber v. Williams*, 36 Me. 512; *U. S. v. Glab*, 99 U. S. 225.

It was held in *Lemons v. State*, 50 Ala. 130, that a license to sell liquors could legally issue to a firm.

8. *Bates Law of Part.*, § 130; *Pars. Part.* (3rd ed.), p. 16.

There is nothing in the *status* of partnership which, on the one hand, confers a power to transact business on one who would otherwise have no power, or, on the other, restrains or diminishes the power in him who possesses it before or without partnership. *Pars. Part.* (3rd ed.), p. 16.

9. *Pars. Part.* (3rd ed.), p. 16.

In *England*, the Companies act, 25 and 26 Victoria, 1862, provides that no partnership consisting of more than twenty persons which has for its object the acquisition of gain, is allowed to carry on business, without forming a company by registration, and any seven or more persons may so associate, with or without limited liability, as they may elect and declare.

10. *Co. Litt.* 129 b.

The capacity of an alien to be a part-

to partnerships in real estate, while aliens cannot in some countries hold land, a court of equity would probably hold the partners possessing the legal title to be trustees for the partnership.¹ But a partnership with an alien enemy is impossible,² and if there be a partnership with an alien friend, and war breaks out between the countries, it annuls, or, at least, entirely suspends it.³

b. PERSONS INSANE AND UNDER GUARDIANSHIP.—A partnership contract entered into by a lunatic, or one under guardianship as a spendthrift, drunkard or otherwise, is valid and binding upon him, where the others were unaware of his infirmity, if executed; and if executory and disaffirmed, to the extent of compelling him to restore to the other parties an equivalent for what they have parted with.⁴

c. INFANTS.—An infant may become a partner.⁵ Such contracts are not void but merely voidable;⁶ and where the contract is induced by the actual fraud or misrepresentation of the infant, it is not even voidable, so far as his liability to the person misled is concerned.⁷ The infant alone can avail himself of his inca-

ner is the same as his capacity to form any other contract. *Bates' Law of Part.*, § 131.

Where an accredited and recognized minister of a foreign government is entitled to immunity from liability to be sued, he will still be entitled to it if he engages in trade. *Magdalena Steam Nav. Co. v. Martin*, 2 E. & E. 94.

1. See *Pars. Part.* (3rd ed.), p. 27.

2. *McAdams v. Hawes*, 9 Bush (Ky.) 15; *Evans v. Richardson*, 3 Mer. 469; *Brandon v. Nesbitt*, 6 T. R. 23. And see *Griswold v. Waddington*, 15 Johns. (N. Y.) 57; *The Rapid*, 8 Cranch (U. S.) 155; *Scholefield v. Eichelberger*, 7 Pet. (U. S.) 586; *The San Jose Indians*, 2 Gall (U. S.) 268; *The Hoop*, 1 Rob. Adm. 196; *Clemonston v. Blessing*, 11 Exch. 135; *Briston v. Towers*, 6 T. R. 35; *Willison v. Patterson*, 7 Taunt. 439.

No alien enemy can bring an action in any court of the hostile country. *Hoare v. Allen*, 2 Dall. (U. S.) 102. And see cases above cited. And the same rule has been applied to a citizen residing in the country of the enemy, on the ground that a recovery might tend to strengthen the hostile power. *Griswold v. Waddington*, 16 Johns. (N. Y.) 438; *O'Mealey v. Wilson*, 1 Camp. 482; *McConnell v. Hector*, 3 B. & P. 113; *Roberts v. Hardy*, 3 M. & S. 533.

The disability to maintain an action attaches to an alien carrying on business in the enemy's country, though he resides there as consul of a neutral

country. *Albrecht v. Sussman*, 2 Ves. & B. 323.

The wife of an alien enemy cannot sue in the hostile country in her own name on a contract made either before or during coverture. *De Wahl v. Braune*, 1 Hurl. & Nor. 178.

3. See *Kershaw v. Kelsey*, 100 Mass. 561; *Mutual Benefit etc. Co. v. Hildyard*, 37 N. J. L. 444; *Cohen v. New York L. Ins. Co.*, 50 N. Y. 610; *Woods v. Wilder*, 43 N. Y. 164; *Griswold v. Waddington*, 15 Johns. (N. Y.) 57; *New York L. Ins. Co. v. Statham*, 93 U. S. 24.

4. As to lunatics see *Bates' Law of Part.* § 132; *Pars. Part.* (3rd ed.), p. 30. As to persons under guardianship see *Menkins v. Lightner*, 18 Ill. 282; *Mansfield v. Watson*, 2 Clarke (Iowa) 111.

An agreement to form a partnership will be avoided on proof that at the time it was made, one of the parties "had not an agreeing mind" through temporary intoxication. *Pitt v. Smith*, 3 Camp. 33; *Fenton v. Holloway*, 1 Stark 126. And see *Lightfoot v. Heron*, 3 Young & C. Exch. 586.

5. *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229; *Dunton v. Brown*, 31 Mich. 182; *Penn v. Whitehead*, 17 Gratt. (Va.) 503; *Goode v. Harrison*, 5 B. & Ald. 147.

The consent of the father to his son's becoming a partner, is a release of his services. *Penn v. Whitehead*, 17 Gratt. (Va.) 503.

6. *Bates' Law of Part.*, § 142.

7. See *Bates' Law of Part.*, § 142.

capacity,¹ though where the contract was induced by the fraud of the infant, the adult partner may rescind or dissolve it.² The infant can rescind on account of his infancy, subject to the payment of the debts of the firm only, and he can compel his adult partner to bear the burden of such debts only after the exhaustion of the entire assets of the firm,³ though while in the firm he has the rights and powers of a partner,⁴ and either he or his partner is entitled to call upon the other for an accounting and settlement at any time.⁵ If, after coming of age, he ratifies the contracts of the partnership, he subjects himself to all the liabilities of the firm contracted during his minority.⁶ A ratification may be express or implied,⁷ and what amounts to one is a question of intention, to be determined from all the facts and circumstances of

Where an infant who was a secret partner, falsely represented his ostensible partner as worthy of credit in order to obtain credit for both, his infancy is a defense to an action for the price of the goods, but the seller could have rescinded the sale on account of the fraud and reclaimed the goods. *Vinsen v. Lockard*, 7 Bush (Ky.) 458.

In *Kemp v. Cook*, 18 Md. 130, it is implied that an infant holds himself out as an adult and practices a fraud by the mere act of forming a partnership. But Bates in his *Law of Partnership* (§ 142) says that this is not law.

1. *Stein v. Robertson*, 30 Ala. 286.

Where a firm, in which there was an infant partner, having claim against an insurance company, was induced by fraud to settle it and the firm received and divided the money, but afterwards sought to rescind the settlement, it was held that they must pay back the whole amount, even though the infant was unable to restore his share. *Brown v. Hartford F. Ins. Co.*, 117 Mass. 479.

Where one being a widow and the natural tutrix of her minor children, and having the possession and administration of the property of her deceased husband's succession during her life, entered into a partnership with the heirs, who were of full age, and slaves and other property of the succession were employed and used by the partnership, the minor heirs were not, and could not be made members of the partnership by her; and they, consequently, after her death, had the right to sue for and recover from the surviving partners a debt due them by the partnership, before a final settlement and liquidation of partnership affairs. *Cuiele v. Gassen*, 14 La. Ann. 5.

2. *Bush v. Linthicum*, 29 Md. 344.

3. *Page v. Morse*, 128 Mass. 99; *Moley v. Brine*, 120 Mass. 324; *Dunton v. Brown*, 31 Mich. 182.

In *Sparman v. Keim*, 83 N. Y. 245, an infant was permitted to avoid the partnership contract and recover back his capital.

Where an infant paid a premium for admittance into a partnership and afterwards disaffirms it, he cannot recover it back. *Ex parte Taylor*, 8 De G. M. & G. 254; 2 Jur., N. S. 220.

A minor who has sold out his interest to his partner, and thus dissolved the partnership, is entitled to an injunction to prevent a levy of execution on his property under a judgment got against the firm without his knowledge. *Vansyckle v. Rorback*, 6 N. J. Eq. 234.

A partnership of which a minor is a member, and to the capital of which he has contributed, may, after its dissolution, upon the petition of the adult member, be declared insolvent, and a warrant may be issued against the firm's property. *Pelletier v. Couture*, 148 Mass. 269.

4. See *Bush v. Linthicum*, 59 Md. 344.

5. *Breed v. Judd*, 1 Gray (Mass.) 455; *Gay v. Johnson*, 32 N. H. 167; *Kitchen v. Lee*, 11 Paige (N. Y.) 107.

The court has the same power to decree a dissolution and compel an accounting on account of the misconduct of the infant as in other cases, but the infant cannot be made personally liable for the costs. *Bush v. Linthicum*, 59 Md. 344.

6. *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229; *Miller v. Sims*, 2 Hill (S. Car.) 479.

7. *Miller v. Sims*, 2 Hill (S. Car.) 479.

the case.¹ Upon arriving at majority the infant should disaffirm and retire from the partnership at once; otherwise he will be held on contracts made by his partners, even though he takes no part in them, with former dealers with the firm who knew of his connection with it.²

Creditors are entitled to have all the assets of the firm applied to the payment of its indebtedness, notwithstanding the infancy of one of the partners,³ but individual creditors of the adult member cannot claim equality of distribution with firm creditors on account of the infancy of the other partner.⁴

d. MARRIED WOMEN.—At common law a married woman's contract of partnership was wholly void where she had no separate estate; but where she had such an estate she was permitted to embark it in a partnership;⁵ as well as in cases of the abandonment by or separation from the husband.⁶ Under the statutes of the different States, if no power or only a limited power to contract is conferred, the rule of the common law prevails, and she cannot become a partner;⁷ but where she is given power to sell,

1. A mere continuance in the firm after majority was held not to indicate an intent to ratify in *Crabtree v. May*, 1 B. Mon. (Ky.) 289. And see *Dana v. Stearns*, 3 Cush. (Mass.) 372. But exactly the contrary ruling was made in *Miller v. Sims*, 2 Hill (S. Car.) 479.

While a promise by an infant after coming of age to pay his share of notes is not a ratification, but rather a refusal to ratify, dealing with the goods on hand which remained unpaid for is a ratification as to such goods, for they might have been returned. *Minock v. Shortridge*, 21 Mich. 304.

Where judgment is rendered against two partners, one of whom is an infant, the omission of the latter to attack the judgment for six years after majority is a ratification. *Kemp v. Cook*, 18 Md. 130.

Where partners, who are minors, gave a mortgage to secure payment for goods to be supplied them from time to time, and a part of the goods was furnished and accepted after one of them became of age, it was a ratification of the mortgage as to him. *Keegan v. Cox*, 116 Mass. 289.

A sale of his interest by an infant partner to an adult, taking a chattel mortgage to secure the purchase money and proving the mortgage as a claim against his partner's estate in insolvency after becoming of age, is not a ratification of the partnership. *Dana v. Stearns*, 3 Cush. (Mass.) 372.

Where the partnership effects were bought in on a sale by the grandfather of an infant partner, and afterwards sold to the infant, there was no ratification. *Todd v. Clapp*, 118 Mass. 495.

2. *Goode v. Harrison*, 5 B. & Ald. 147. See *King v. Barbour*, 70 Ind. 35.

3. *Bush v. Linthicum*, 59 Md. 344; *Furlong v. Bartlett*, 21 Pick. (Mass.) 401; *Whittemore v. Elliott*, 7 Hun (N. Y.) 518.

A partnership of which a minor is a member, and the capital of which he has contributed, may, after its dissolution, upon the petition of the adult members, be declared insolvent, and a warrant may be issued against the firm's property. *Pelletier v. Couture*, 148 Mass. 269.

4. See *Yates v. Lyon*, 61 N. Y. 344; *David v. Birchard*, 53 Wis. 492.

5. *Bates' Law of Part.*, § 135; *Pars. Part.* (3rd ed.), p. 23.

6. See *Co. Litt.* 132 b, 133 a; *Lean v. Schutz*, 2 W. Bl. 1195; *Carbett v. Poelnitz*, 1 T. R. 5; *Marshall v. Rutton*, 8 T. R. 545; *Carrol v. Blencow*, 4 Esp. 27; *Cornwall v. Hoyt*, 7 Conn. 420; *Gregory v. Paul*, 15 Mass. 31; *McArthur v. Bloom*, 2 Duer (N. Y.) 151; *Wright v. Wright*, 2 Desau. (S. Car.) 244; *Robinson v. Reynolds*, 1 Aik. (Vt.) 174. See *Brown v. Jewett*, 18 N. H. 230, in which the husband had been absent and unheard of for seven years.

7. *Haas v. Shaw*, 91 Ind. 384; 46 Am. Rep. 607; *De Graum v. Jones*

contract and carry on business, as partnerships are one of the usual ways of doing business, she may do so,¹ and her separate property is still hers and does not become liable for her husband's debts.² And so, where she has no right to become a partner, if she attempts to do so, she still retains title to the property and he cannot assign it,³ nor can his creditors reach it.⁴ The firm property, however, including her contribution, is liable for its debts.⁵

(Fla. 1887), 6 So. Rep. 925; *Bradstreet v. Baer*, 41 Md. 19; *Todd v. Clapp*, 118 Mass. 495; *Howard v. Stephens*, 52 Miss. 239; *Gwynn v. Gwynn*, 27 S. Car. 525; *Brown v. Chancellor*, 61 Tex. 437; *Miller v. Marx*, 65 Tex. 131; *Frank v. Anderson*, 13 Lea (Tenn.) 695; *Carey v. Burruss*, 20 W. Va. 571; 43 Am. Rep. 790.

The question as to whether a married woman could become liable as a partner by holding out, was raised but not decided in *Rittenhouse v. Leigh*, 57 Miss. 697.

Where the statute permits a married woman to carry on trade separate from her husband, the employment of their husbands by a firm of married women is carrying on business separately, as the husbands are merely agents and not owners. *Kutcher v. Williams*, 40 N. J. Eq. 436.

Where defendants were sued as partners, although their wives constituted the firm, defendants were liable for partnership debts if they permitted themselves to be held out as partners, and their wives were not necessary parties under Code Alabama, 1886, 260, providing that one partner may be sued for the obligation of all. *Rabitt v. Orr*, 83 Ala. 185. And see *Parshall v. Fisher*, 43 Mich. 529.

There are other cases in which a married woman was a member of a partnership, though it appears that it was with the consent of her husband. See *Craig v. Chandler*, 6 Colo. 543; *Atwood v. Meredith*, 37 Miss. 635; *Bitter v. Rathman*, 61 N. Y. 512; *Penn v. Whitehead*, 17 Gratt. (Va.) 503; *Merchants' Nat. Bank v. Raymond*, 27 Wis. 569.

1. See *Abbott v. Jackson*, 43 Ark. 212; *Dupuy v. Sheak*, 57 Iowa 361; *Swasey v. Antram*, 24 Ohio St. 87; *Silvenus v. Porter*, 74 Pa. St. 448; *Edwards v. Thomas*, 66 Mo. 468; *Newman v. Morris*, 52 Miss. 402; *Penn v. Whitehead*, 17 Gratt. (Va.) 503; *In re Kinkead*, 3 Biss. (U. S.) 405.

But under the statutes of the follow-

ing states it has been held that no power is conferred upon a married woman to become a partner: *Maryland*—See *Bradstreet v. Baer*, 41 Md. 19. *Massachusetts*—See *Todd v. Clapp*, 118 Mass. 495. *New Hampshire*—See *Brown v. Jewett*, 18 N. H. 230. *South Carolina*—See *Gwynn v. Gwynn*, 27 S. Car. 525.

In an action against a married woman for goods sold and delivered, it appeared that she owned a plantation in her own right; that by reason of her representations as to her property, and on her request, plaintiff was induced to give her credit for goods. *Held*, that under the provisions of General St. *South Carolina*, § 2087, giving a married woman the power to contract and be contracted with as to her separate property, the defendant and her estate were bound for all supplies furnished for her plantation. *Brown v. Thompson*, 27 S. Car. 500.

2. *Abbott v. Jackson*, 43 Ark. 212; *Plumer v. Lord*, 5 Allen (Mass.) 460; *Silvenus v. Porter*, 74 Pa. St. 448. And see *Newman v. Morris*, 52 Miss. 402; *Edwards v. Thomas*, 66 Mo. 468; *Dupuy v. Sheak*, 57 Iowa 361.

3. *Howard v. Stephens*, 52 Miss. 239.

That the earnings or profits become the husband's property, is held in *Cranor v. Winters*, 75 Ind. 301; *Miller v. Marx*, 65 Tex. 131.

4. *Maghee v. Baker*, 15 Ind. 254; *Duress v. Horneffer*, 15 Wis. 195; *Horneffer v. Duress*, 13 Wis. 603.

The co-partners of a married woman who has become a partner, cannot deny her capacity to sue alone for an accounting and dissolution. *Bitter v. Rathman*, 61 N. Y. 512. Nor can a trespasser on her property who has levied an execution against the husband on partnership property when sued by the firm. *Horneffer v. Duress*, 13 Wis. 603.

A married woman may claim as a creditor for a loan to it in case of the insolvency of the firm. *Frank v. Anderson*, 13 Lea (Tenn.) 695.

5. *Newman v. Morris*, 52 Miss. 402;

The doctrine has been entertained in some courts that where the husband consents to his wife's going into a general mercantile partnership not connected with her separate property, he will be regarded as the partner and she as his agent only.¹

Under the broadest statutes, and even in those States where a married woman may embark in other partnerships, it is almost universally held that she cannot contract that relation with her husband or become a member of a firm in which he is a partner.² In case she does so, however, as in most others, the partnership assets are liable for the partnership debts;³ and, while the decisions

Miller v. Marx, 65 Tex. 131. And see *Garbrough v. Bush*, 69 Ala. 170; *Clay v. Van Winkle*, 75 Ind. 239; *Bradstreet v. Baer*, 41 Md. 19; *Edwards v. Thomas*, 66 Mo. 468.

1. *Swasey v. Antram*, 24 Ohio St. 87; 13 Am. Law Reg. (U. S.) 577. See *Weil v. Simmons*, 66 Mo. 617; *Hamilton v. Douglas*, 46 N. Y. 218; *Bradford v. Johnson*, 44 Tex. 381.

Where the labor and skill of the husband and wife are inseparably mixed up in a business carried on by both, it is deemed his business and subject to his debts. *National Bank v. Sprague*, 20 N. J. Eq. 13.

The business which belonged to the wife was allowed to appear to be solely owned by the husband. It was held that the wife could not claim the property to be partnership assets, after judgment had been obtained against him in favor of a creditor of the firm. *Parshall v. Fisher*, 43 Mich. 529; *Norris v. McCanna*, 29 Fed. Rep. 757.

Where a man marries a woman who is a member of a firm, he becomes liable for the existing partnership debts, but such debts incurred after coverture, in a firm in which her separate estate only is involved stands on a different basis, he having no interest and no control. *Alexander v. Morgan*, 31 Ohio St. 546.

2. *Haas v. Shaw*, 91 Ind. 384; 46 Am. Rep. 607; *Montgomery v. Sprankle*, 31 Ind. 113; *Mayer v. Soyster*, 30 Md. 402; *Bowker v. Bradford*, 140 Mass. 521; *Lord v. Parker*, 3 Allen (Mass.) 127; *Kaufman v. Schoeffel*, 37 Hun (N. Y.) 140; *Graff v. Kinney*, 15 Abb. N. Cas. (N. Y.) 397; *Fairlee v. Bloomingdale*, 14 Abb. N. Cas. (N. Y.) 341; 67 How. (N. Y.) Pr. 292; *Boyle's Estate, Tucker* (N. Y.) 4; *Payne v. Thompson*, 44 Ohio St. 192; *Miller v. Marx*, 65 Tex. 131; *Brown v. Chancellor*, 61 Tex. 437; *Cox v. Miller*, 54 Tex. 16; *Wallace v. Finberg*, 46 Tex. 35;

Casio v. DeBernales, Ryan & Moody, 102. And see *Fuller v. Ferguson*, 26 Cal. 546; *Wise v. Williams*, 72 Cal. 544; *Francis v. Dickel*, 68 Ga. 255; *Wilson v. Loomis*, 55 Ill. 352; *Huffman v. Copeland*, 86 Ind. 224; *Chambovet v. Cagney*, 35 N. Y. Super. Ct. 474; *Sherman v. Elder*, 1 Hilt. (N. Y.) 178; *Knott v. Knott*, 6 Oregon 142.

Under articles of agreement signed by a married woman, her husband, and several other persons, reciting that she and one of the others have taken a lease of certain manufacturing works, and providing that she shall furnish a certain amount of capital at eight per cent., and that her husband shall devote his whole time to the business of manufacturing and selling the articles, and making a special provision as to the duties and rights of the others, and further providing that "she or her husband, as they two may decide or agree, shall receive one-half of the net profits of the concern," her husband is a partner in the firm; and she, therefore, is not a partner, and is not liable upon a promissory note given in the name of the firm. *Plumer v. Lord*, 7 Allen (Mass.) 481.

Where there is nothing in the testimony that would warrant the jury in finding that a husband and wife were partners, more than a vague recognition by the husband of an interest in the wife (not amounting to a legal one), and a sort of a moral lien for the amount of the money of the wife which she has permitted the husband to invest in the business, the question of partnership between them should not be submitted to the jury. *Norris v. McCanna*, 29 Fed. Rep. 757.

3. *Knott v. Knott*, 6 Oregon 142; *In re Boyle's Estate*, 1 Tuck. (N. Y.) 4. And see *Huffman v. Copeland*, 86 Ind. 224; *Lord v. Davison*, 3 Allen (Mass.) 131; *Glidden v. Taylor*, 16 Ohio St. 509.

are conflicting, it would seem to be a general rule that she is entitled to her share of the profits.¹

In States where the statute preserves the choses in action of a married woman as her separate property, the wife of a partner who has loaned money to or performed services for the firm, or a woman who, being a creditor of a firm, marries one of the partners, may enforce the claim in equity against the firm;² but if the statute does not preserve them they are terminated and discharged as to the whole firm,³ and if the statute allows her to contract as if *sole*, except with her husband, she cannot contract with a firm of which he is a member.⁴

e. PARTNERSHIPS.—Where several firms hold themselves out to persons with whom they deal as partners and assume to constitute but one firm, they are held jointly liable as such.⁵ This, however, is unimportant with reference to third parties, as all the partners are liable *in solido* to third persons, but it is important with reference to questions of distribution, contribution, and their liability to each other, the intention of the parties being the sole gauge as to their rights and liabilities where ascertained.⁶

f. CORPORATIONS.—(See also CORPORATIONS, vol. 4, p. 184).—A corporation being only a legal person, and having such powers only as are conferred upon it by its charter and the statutes under which it was formed, cannot as a general rule become a partner,

1. That the property still remained hers as against the creditors of the husband was held in *Plass v. Thomas*, 6 Mo. App. 157. But in *Plummer v. Frost*, 81 Mo. 425, it was held that the earnings belonged to the husband, there being no capital invested.

On the other hand, it was held in *Lord v. Parker*, 3 Allen (Mass.) 127, that her contribution ceases to be her separate property and becomes his. See also *Sherman v. Elder*, 1 Hilt. (N. Y.) 178. And in *Wilson v. Loomis*, 55 Ill. 352, it was held that while the property was perhaps hers as between the parties, it is liable for the debts of the husband.

Where a husband and wife were jointly engaged in carrying on a farm which was the separate property of the wife, and they executed a joint note, both were held liable on it, on the principle that it was a debt incurred, so far as she was concerned on the credit of her separate property. *Kronskop v. Shontz*, 51 Wis. 202.

2. *Benson v. Morgan*, 50 Mich. 78, *Gould v. Gould*, 35 N. J. Eq. 37-562; 36 N. J. Eq. 380; *Devin v. Devin*, 17 How. Pr. (N. Y.) 514; *Adams v. Curtis*, 4 Lans. (N. Y.) 164; *Bennett v. Winfield*, 4 Heisk. (Tenn.) 440.

3. *Fox v. Johnson*, 4 Del. Ch. 580.

4. *Kenworthy v. Sawyer*, 125 Mass. 28; *Edwards v. Stevens*, 3 Allen (Mass.) 315.

Where a wife invests her separate property in her husband's firm, and afterwards assigns the claim; and the firm promises to pay the assignee, he can maintain an action on the promise. *Lord v. Davison*, 3 Allen (Mass.) 131.

The wife of a member of a firm is bound if she indorses a note for the accommodation of the firm, and she can hold a prior indorser, for he is estopped to deny the maker's capacity. *Kenworthy v. Sawyer*, 125 Mass. 28.

Where the wife of D owed a claim against the firm of A B and C, and C sold out to D and D became a partner in C's place, payments made by D to his wife upon the debt were held to be evidence of the assent of all parties to a substitution of the new firm for the old one as creditors. *Osborn v. Osborn*, 36 Mich. 48.

5. *Beall v. Lowndes*, 4 S. Car. 258.

6. See *Rich v. Davis*, 6 Cal. 163; *Bullock v. Hubbard*, 23 Cal. 495; *Raymond v. Putnam*, 44 N. H. 160; *Gulick v. Gulick*, 14 N. J. L. 578; *Re Hamilton*, 1 Fed. Rep. 800; *In re Warner*, 7 Nat. Bankr. Reg. 47.

either with other corporations or with individuals,¹ but contracts may sometimes be entered into in furtherance of the objects of their creation, the effect of which would be to impose the liabilities of partners upon them.² And where the laws under which a corporation is formed have given it capacity to do so it may be a partner.³ Where, however, a corporation has attempted to become a member of a firm, and obligations have been incurred, it will be held to the same liability as an individual becoming a member of a firm with full power to do so.⁴ Carriers having

1. *Cleveland Paper Co. v. Courier Co.*, 67 Mich. 152; *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 471; *Sharon Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412; *Mallory v. Hanauer Oil Works*, 86 Tenn. 598; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Burke v. Concord R. Co.*, 8 Am. & Eng. R. Cas. 552.

Where the statute limits the amount of indebtedness a corporation may incur, or requires it to make periodical statements of its condition and debts, it cannot be carried out if other principals have the power of creating them. See *Gunn v. Central R. Co.*, 74 Ga. 509; *Marine Bank v. Ogden*, 29 Ill. 248; *Whittenton Mills v. Upton*, 10 Gray (Mass.) 582; *State v. Concord R. Co* (N. H.), 13 Am. & Eng. R. Cas. 94; *Pearce v. Madison etc. R.*, 21 How. Pr. (N. Y.) 441; *New York etc. Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412; *Hackett v. Multnomah R. Co.*, 12 Oregon 124.

2. See *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 471; *Jones v. Parker*, 20 N. H. 31; *Mallory v. Hanauer Oil Works*, 86 Tenn. 598.

Several railroad corporations were spoken of as having formed a partnership in *Railroad Co. v. Bixby*, 55 Vt. 235; and an individual and a corporation were regarded as partners in *Catskill Bank v. Hooper*, 5 Gray (Mass.) 574.

Where a corporation, formed for the manufacture of iron, leased its mills for a term of years by a contract whereby it was to receive a share of the profits in such a manner as to make the contract one of partnership, it was held that as the corporation was formed to manufacture iron, it could carry out this purpose by any legal means, including the formation of a partnership, and that the firm so formed is liable on mercantile paper made by it. *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 471.

If two corporations consolidate or

form a co-partnership, and afterwards enter into a contract as a consolidated company or jointly as partners, they cannot set up the fact that they had no legal right to effect a consolidation, or to enter into a co-partnership, as a defense to an action brought upon such contract, after it had been performed by the plaintiff. *Racine etc. R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331; *Bissell v. Michigan Southern etc. R. Co.*, 22 N. Y. 258, 263; *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 471; *Pearce v. Madison*, 21 How. (N. Y.) 441; *Allen v. Woonsocket*, 11 R. I. 288.

3. See *Butler v. American Toy Co.*, 46 Conn. 136; *Allen v. Woonsocket Co.*, 11 R. I. 288.

Several corporations formed for the purpose of manufacturing salt may associate themselves together to develop their business and sell the product, provided the association does not amount to a monopoly. *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant's Ch. (Up. Can.) 540.

4. *Cleveland Paper Co. v. Courier Co.*, 67 Mich. 152; *French v. Donohue*, 29 Minn. 111. And see *Marine Bank v. Ogden*, 29 Ill. 248.

Where a corporation and individual acted as partners for two years, when the corporation excluded the individual from the business and took the property, it was held that the want of power to enter into the partnership was no defense to a suit for an accounting and injunction, and that the individual partner could not thus be deprived of his services and property. *Van Keuren v. Trenton etc. Co.*, 13 N. J. Eq. 302.

Ultra vires is no defense to an action by an injured passenger against two railroad corporations which have attempted to form a partnership. *Bissell v. Michigan Southern etc. R. Co.*, 22 N. Y. 258. To the contrary, see *Gunn v. Central R. Co.*, 74 Ga. 509.

connecting lines frequently associate together for the purpose of through transportation. These are legal, but do not constitute partnerships, it being a mere running arrangement, and there being no community of interest in the business, profits or loss.¹

2. Kinds of Partners—*a.* ACTUAL AND OSTENSIBLE PARTNERS.—An ostensible partner is one who is held forth to the world as one.² If he is not an actual member of the firm, if so held forth, he is still an ostensible one, though he is sometimes called a nominal partner.³ Where such holding forth is done with his knowledge and consent, whether he be an actual, ostensible or nominal partner, all the liability of a general partner attaches to him.⁴ So, where a person unknown in the firm is made known or held out as such in any way to any person, with his consent, he is, as to that person, an ostensible partner, though unknown or unconnected with the firm as to others.⁵

***b.* DORMANT PARTNERS.**—A dormant partner is one who takes no active part in the business, and whose name does not appear in the title of the partnership, and who is unknown to those who give credit to the firm.⁶ Where the name of a partner appears, but he takes no part whatever in the business, he is perhaps more

1. See *Hot Springs R. Co., v. Trippe*, 42 Ark. 465; 48 Am. Rep. 65; *Ellsworth v. Tartt*, 26 Ala. 733; 62 Am. Dec. 749; *Irvin v. Nashville etc. R. Co.*, 92 Ill. 103; 34 Am. Rep. 116; *Pratt v. Ogdensburg etc. R.*, 103 Mass. 557; *Briggs v. Vanderbilt*, 19 Barb. (N. Y.) 222.

2. See *Pars. Part.* (3rd ed.), p. 30; *Harris v. Sessler* (Tex. 1887), 3 S. W. Rep. 316.

3. See *Lindsey v. Edmiston*, 25 Ill. 359; *Currier v. Silloway*, 1 Allen (Mass.) 19; *Hicks v. Crane*, 17 Vt. 449; *Ex parte Chuck*, 8 Bing. 469; *Fox v. Clifton*, 6 Bing. 795; *Jacobson v. Hennekenins*, 5 Bro. P. C. 482.

One who is merely a nominal partner with another may be called by the latter as a witness. He is not incompetent on account of interest. *Parsons v. Crosby*, 5 Esp. 199; *Maivman v. Gillett*, 2 Taunt. 327.

4. See *Hicks v. Cram*, 17 Vt. 449; *Waugh v. Carver*, 2 H. Bl. 235; *Ex parte Watson*, 19 Ves. 461.

Partners whose names are not expressed in the firm name, but who are indicated by the words "& Co." are not dormant, but ostensible partners. *Goddard v. Pratt*, 16 Pick. (Mass.) 412.

An agreement between A and B that A should use B's name in the firm of A & Co., bankers, and that B should not participate in the profits and losses, but to have for his share of the profits

ten per cent. *per annum* on all deposits that he might make with the firm, A to indemnify B against all losses, is not void for want of consideration moving from B, as A's undertaking to save him harmless from losses is a contract of indemnity, and not a covenant preventing B's liability to creditors of the firm. *Clift v. Barrow*, 108 N. Y. 187.

The fact that a person who makes advances of money to pay the employees of a firm takes the charge and superintendence of the partnership business, and exercises the right of a proprietor, does not constitute him the owner of the establishment and property, as between himself and the partners. *Greend v. Kummel*, 41 La. Ann. 65.

5. *Pars. Part.* (3rd ed.), pp. 30, 32.

6. *Bates Law of Part.*, § 151.

Watson on Part., p. 46, says: "Sometimes all the partners in trade do not appear ostensibly to the world, though they share in the profits and loss; and it is not unusual for gentlemen of large and independent fortunes to embark very considerable sums of money in trade, they being oftentimes ignorant of the science of commerce, and meaning to depend entirely upon the skill of merchants or traders with whom they engage in a general partnership of all their stock and effects, yet not suffering their names to appear in the co-partnership firm, but at the same time re-

properly a silent or sleeping partner.¹ And one who participates in the business but keeps his relations with the firm a secret is sometimes called a secret partner.²

ceiving a proportionate share of the profits arising out of their joint trade, bearing equally their risk of loss; and such are usually styled dormant partners." See also *North v. Bloss*, 30 N. Y. 374; *Waite v. Dodge*, 34 Vt. 181; *Jones v. Fegeley*, 4 Phila. (Pa.) 1.

Where there is an existing partnership under a firm name, and a new partner is taken in, and there is no change in the firm name, the new partner is to be considered a dormant partner, unless it appears that his connection with the firm is by publication or other acts, made known to the public. *Phillips v. Nash*, 47 Ga. 218.

B and C, partners under the firm name of C and B, ostensibly in carrying on a retail store in Baltimore, bought goods of M on credit, shipped them thither, deposited them in warehouses, and under various fictitious names, secretly shipped them in the original packages to G, who used the same name in reshipping and selling them. It was held that G was a dormant partner, and as such was liable to M, notwithstanding the fact that M sold the goods in ignorance of G's interest. *Gilmore v. Merritt*, 62 Ind. 525.

An action for contribution was brought by two plaintiffs for themselves and for the use of a third, who was not a party to the partnership agreement, and whose name did not appear in the firm, but who was, the declaration averred, by agreement between the three, entitled to an interest in the profits of the firm. It was held that the use plaintiff was a dormant partner, and the action was properly brought. *Smith v. Ayrault*, 71 Mich. 475.

Persons who jointly participate in the profits of trade or business, ostensibly carried on by another for his sole use and benefit, are equally liable when discovered, with the ostensible and actual owner, to all creditors of the firm whose debts were contracted during the time of such participation, without knowledge of the same, or of the actual relation between the parties at the time the credit was given, and that liability exists notwithstanding the parties may have privately stipulated that they shall not be partners, and in contem-

plation of law really are not such as between themselves. *Bigelow v. Eliott*, 1 Cliff. (U. S.) 28.

Where several persons purchased whisky on joint account, and left it in the warehouse of one of the joint owners, to be sold for their joint profit, they do not thereby become dormant partners with him, where there is no fraud or concealment of ownership, and he cannot pledge the property for his individual debt, so as to bind the other owners. *Cochran v. Anderson Co. Nat. Bank*, 83 Ky. 36.

1. Pars. Part. (3rd ed.), p. 32.

One who took an entire transfer of the entire stock, fixtures, debts, goodwill, etc., of a firm, employing them as his agents to close the business and deliver to him the proceeds, was held not liable for articles afterwards purchased by them in their own name to complete unfinished work. His frequent presence at the store, seeing the work go on, raised no presumption of silent partnership, or of an implied contract to pay for the articles. *Noblitt v. Bonaffon*, 81 Pa. St. 15.

Sale by Ostensible Partner.—If A be a silent partner with B, he is the only person who can object to the validity of a sale by B alone, of goods owned in common by them as partners. *Derby v. Gallup*, 5 Minn. 119.

2. Pars. Part. (3rd ed.), p. 32. *Harris v. Sessler* (Tex. 1887), 3 S. W. Rep. 16.

A secret partnership is one in which the existence of certain persons as partners is not avowed to the public by any of the partners. *Deering v. Flanders*, 49 N. H. 225.

Where W, a father, made a parol contract of partnership, but the son was permitted to sign the articles when drawn, in order to conceal from the public W's association with the firm, and W fulfilled the contract, held, that W was liable as a partner. *Watson v. Lovelace*, 49 Iowa 558.

A partnership article between A and B, that B should be a secret partner and employ C "as his agent to act for him and in his place and stead" in all matters pertaining to the partnership, is not void as within the inhibition of *New York Laws* 1833, ch. 281, the intent being to prevent obtaining from the public a false credit, A being liable

Absolute secrecy is not necessary; and if the connection of the dormant partner becomes known to some, he is no longer dormant as to them, but remains so as to the rest of the public.¹ But where the connection becomes generally known, in any way, the dormancy ceases, even though the firm style be the name of another partner only.² He may, however, act as a clerk or agent,³ or otherwise participate in the business, provided it does not become known that he is a partner,⁴ but he could not be the active manager or business man of the firm.⁵

If the firm consists of but two, and its name has a collective word or general designation, as & Co., etc., both partners are ostensible;⁶ but where such general designation might apply to more than one person there may be a dormant partner,⁷ the intent that he shall be unknown, and the fact that he was not generally known,⁸ being the test of dormancy rather than the firm name.

to third persons as a partner. *Ryan v. Hardy*, 26 Hun (N. Y.) 176.

1. *Cregler v. Durham*, 9 Ind. 375; *North v. Bloss*, 30 N. Y. 374; *Davis v. Allen*, 3 N. Y. 168; *Kelley v. Hulburt*, 5 Cow. (N. Y.) 534; *Fosdick v. Van Horn*, 40 Ohio St. 459; *Metcalf v. Officer*, 1 McCrary (U. S.) 325; 2 Fed. Rep. 640; *In re Ess*, 3 Biss. (U. S.) 301.

2. *Boyd v. Ricketts*, 60 Miss. 62; *Deering v. Flanders*, 49 N. H. 225; *Clark v. Fletcher*, 96 Pa. St. 416; *Benjamin v. Covert*, 47 Wis. 375; *U. S. Bank v. Binney*, 5 Mason (U. S.) 176; *Evans v. Drummond*, 4 Esp. 89. To the contrary, see *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529.

The question of dormancy is one of fact for the jury. *Cregler v. Durham*, 9 Ind. 375; *Goddard v. Pratt*, 16 Pick. (Mass.) 412; *North v. Bloss*, 30 N. Y. 374; *Hunter v. Hubbard*, 26 Tex. 537; *Metcalf v. Officer*, 1 McCrary (U. S.) 320, 2 Fed. Rep. 640.

It has been held that the law of dormant partners applies to commercial partnerships only, and that in matters relating to real estate a partnership cannot be in the name of one person, on account of the statute of frauds. See *Pitts v. Waugh*, 4 Mass. 424; *Patterson v. Brewster*, 4 Edw. Ch. (N. Y.) 352; *Speake v. Prewitt*, 6 Tex. 252; *Smith v. Burnham*, 3 Sumn. (U. S.) 435. But the prevailing rule seems to be to the contrary. *Gray v. Palmer*, 9 Cal. 616; *Chester v. Dickerson*, 54 N. Y. 1; *Benners v. Harrison*, 19 Barb. (N. Y.) 53; *Brooke v. Washington*, 8 Gratt. (Va.) 248; 56 Am. Dec. 142.

3. *Waite v. Dodge*, 34 Vt. 181; *How*

v. Kane, 2 Pin. (Wis.) 531, 2 Chand. (Wis.) 222, 54 Am. Dec. 152.

4. *Bank of St. Mary's v. St. John*, 25 Ala. 566; *Mitchell v. Dall*, 2 Har. & G. (Md.) 159; *North v. Bloss*, 30 N. Y. 374; *Fosdick v. Van Horn*, 40 Ohio St. 459.

5. *Choteau v. Raitt*, 20 Ohio 132. On the contrary, see *Bank of St. Mary's v. St. Johns*, 25 Ala. 566.

6. *Shamburg v. Ruggles*, 83 Pa. St. 148; *Metcalf v. Officer*, 1 McCrary (U. S.) 325; 2 Fed. Rep. 640. But see *Grosvenor v. Lloyd*, 1 Met. (Mass.) 19; *Podrasnik v. Martin*, 25 Ill. App. 300.

One who is a member of a partnership, trading under the firm name of R, M & Co., does not become a dormant partner, by reason of the creditor being ignorant of the name of the co-partner of R. M. *Deford v. Reynolds*, 36 Pa. St. 325.

7. *Warren v. Ball*, 37 Ill. 76; *Kennedy v. Bohannon*, 11 B. Mon. (Ky.) 118; *Goddard v. Pratt*, 16 Pick. (Mass.) 412; *Grosvenor v. Lloyd*, 1 Met. (Mass.) 19; *Waite v. Dodge*, 34 Vt. 181; *Benton v. Chamberlain*, 23 Vt. 711; *Hagar v. Stone*, 20 Vt. 106; *Metcalf v. Officer*, 1 McCrary (U. S.) 325; 2 Fed. Rep. 640.

8. *Phillips v. Nash*, 47 Ga. 218; *Howell v. Adams*, 68 N. Y. 314.

It was formerly thought that every person whose name was not included in the firm name or some general designation, as & Co., was to be considered as a dormant partner. See *Bank of St. Mary's v. St. John*, 25 Ala. 566; *Mitchell v. Dall*, 2 Har. & G. (Md.) 159; *Cammack v. Johnson*, 2 N. J. Eq. 163;

Where claims have been acquired against the partnership property on the faith of the apparent ownership of the ostensible partner, a dormant partner cannot be permitted to assert his lien in violation of the appearances he has held out, nor can the partnership creditors assert such lien through him.¹

The fact that a partner is a dormant one, where there are no restrictions in the articles, does not of itself place any restriction upon his general power as a partner,² and on the death of the active partner he may take all the steps necessary to wind up the

Mason v. Connell, 1 Whart. (Pa.) 381; Jones v. Fegely, 4 Phila. (Pa.) 1; Shamburg v. Ruggles, 83 Pa. St. 148; Speake v. Prewitt, 6 Tex. 252; Leveck v. Shaftoe, 2 Esp. 468. But this rule was obviously too sweeping. Under it a firm having a name purely artificial or fanciful would consist of all dormant partners, which is preposterous. Bates' Law of Part., § 152.

1. Lord v. Baldwin, 6 Pick. (Mass.) 348; French v. Chase, 6 Me. 166; Cammack v. Johnson, 2 N. J. Eq. 163; VanValen v. Russell, 13 Barb. (N. Y.) 590; Callender v. Robinson, 96 Pa. St. 454; Brown's Appeal, 17 Pa. St. 480; Hillman v. Moore, 3 Tenn. Ch. 454; Whitworth v. Patterson, 6 Lea (Tenn.) 119; How v. Kane, 2 Pin. (Wis.) 531, 2 Chand. (Wis.) 222, 54 Am. Dec. 152; *Ex parte* Law, 3 Deac. 541. And see Talcott v. Dudley, 5 Ill. 427. But see Wittor v. Richards, 10 Conn. 37; Talcott v. Dudley, 5 Ill. 427, Baro v. Harris, 13 Lea (Tenn.) 36; Taylor v. Jarvis, 14 Up. Can., Q. B. 128.

In *Mississippi*, it is provided by statute that if a person trade in his own name without "& Co." or other partnership designation or sign, all the property is treated as his. See Gumbel v. Koon, 59 Miss. 264.

But where a partnership has existed for three years without any effort at concealment, it is immaterial in a suit by the firm to recover for goods sold by one of the partners to defendant in payment of his individual debt, that defendant had no knowledge of the existence of the partnership. Janney v. Springer, 78 Iowa 617.

Where one has an account in a bank and makes an overdraft, if he afterwards takes in a secret partner who supplies money with which subsequent deposits are made, they may be applied by the bank to the prior overdrafts. Allen v. Brown, 39 Iowa, 330.

If an ostensible partner goes into bankruptcy, the creditors of the busi-

ness can regard him as their sole debtor, and elect to prove against his estate, with his separate creditors, who would then be subrogated to the claims against the joint estate. See *Ex parte* Norfolk, 19 Ves. 455; *Ex parte* Hodgkinson, 19 Ves. 294; *Ex parte* Watson, 19 Ves. 458; *Ex parte* Chuck, 8 Bing. 469.

But if the ostensible partner becomes bankrupt his assignees cannot take possession of the partnership stock as if he were sole owner, regardless of the rights of the dormant partners. *Ex parte* Hayman, 8 Ch. D. 11; Reynolds v. Bowley, L. R., 2 Q. B. 474. The assignee cannot take rights in the property against the creditors which the assignor could not. Talcott v. Dudley, 5 Ill. 427.

Under Code *Mississippi*, § 1300, providing that if any person shall merchandise with the addition of the words "Agent," "and Co.," or like words, and shall fail to have the name of his principal or partner conspicuously placed on a sign at his place of business, or shall carry on business in his own name without such addition, all goods, etc., used in or accruing in such business, shall, as to his creditors, be deemed his property, the stock used in merchandising under the firm names of "H. & C.," the surnames only of two partners, of whom the junior is a married woman, the business being conducted by her husband and the senior partner under partnership articles constituting the husband the wife's agent to manage her interest therein, is liable to the husband's creditors. Evans v. Henley, 66 Miss. 148.

2. Cammack v. Johnson, 2 N. J. Eq. 163; Holme v. Hammond, L. R., 7 Ex. 218.

The admissions of a dormant partner are evidence against the firm. Kaskaskia Bridge Co. v. Shannon, 6 Ill. 15.

If, however, in fact, the dormant partner has no actual power, and is not known to be a partner, his attempt to

business.¹ The power of the ostensible partners to bind the dormant ones is the same as they have to bind each other,² the liabilities of the dormant partners being the same as those of other partners, being founded upon the general principles of commercial law applicable to undisclosed principals,³ the liability attaching when credit is given, even though the party giving it knew nothing of the dormant partner, and though no benefit was ever derived to the firm or to the dormant partner therefrom.⁴

contract on behalf of the firm would probably not bind it. *Lindl. Part.* 238, d. And see *Nicholson v. Rickets*, 2 E. & E. 497; *Holme v. Hammond*, L. R., 7 Ex. 218. But see *Rich v. Davis*, 6 Cal. 163.

1. *Beach v. Hayward*, 10 Ohio 455.

This, however, was said to be uncertain in *Johnson v. Ames*, 6 Pick. (Mass.) 330.

2. *Snead v. Barringer*, 1 Stew. (Ala.) 134; *Parker v. Canfield*, 37 Conn. 250; 9 Am. Rep. 317; *Phillips v. Nash*, 47 Ga. 218; *Holland v. Long*, 57 Ga. 36; *Lindsey v. Edmiston*, 25 Ill. 359; *Bisel v. Hobbs*, 6 Blackf. (Ind.) 479; *Gilmore v. Merritt*, 62 Ind. 525; *Scott v. Colmesnil*, 7 J. J. Marsh. (Ky.) 416; *Kennedy v. Bohannon*, 11 B. Mon. (Ky.) 118. *Bernard v. Torrance*, 5 Gill & J. (Md.) 383; *Moale v. Hollins*, 11 Gill & J. (Md.) 11; *Lea v. Guice*, 13 Smed. & M. (Miss.) 656; *Richardson v. Farmer*, 36 Mo. 35; *Tucker v. Peaslee*, 36 N. H. 167; *Bromley v. Elliott*, 38 N. H. 287; *Johnson v. Warden*, 3 Watts (Pa.) 101; *Reab v. Pool*, 30 S. Car. 140; *Gavin v. Walker*, 14 Lea (Tenn.) 643; *Bradshaw v. Apperson*, 36 Tex. 133; *Griffith v. Buffum*, 22 Vt. 181; 54 Am. Dec. 64; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529; *U. S. Bank v. Binney*, 5 Mason (U. S.) 176.

Where goods were sold before the dormant partner was taken in, but delivered afterwards, if credit was given at time of delivery, it will be presumed to have been given to the firm including the dormant partner. *Johnson v. Warden*, 3 Watts (Pa.) 101.

3. *Parker v. Canfield*, 37 Conn. 250; 9 Am. Rep. 317; *McDonald v. Clough*, 10 Colo. 49; *Lindsey v. Edmiston*, 25 Ill. 359; *Wiley v. Thompson*, 23 Ill. App. 199; *Grosvenor v. Lloyd*, 1 Met. (Mass.) 19; *St. Armand v. Long*, 25 La Ann. 167; *Tucker v. Peaslee*, 36 N. H. 167; *Reab v. Pool*, 30 S. Car. 140; *Bradshaw v. Apperson*, 36 Tex. 133; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529.

The liability of a dormant partner formerly was, and sometimes now is, put on the ground that he receives a part of the profits, or gets the benefit of the contracts of the ostensible partner. See *Phillips v. Nash*, 47 Ga. 218; *Lea v. Guice*, 13 Smed. & M. (Miss.) 656; *Fosdick v. Van Horn*, 40 Ohio St. 459; *Waugh v. Carver*, 2 H. Bl. 235.

A dormant partner is liable for goods sold the firm subsequent to his withdrawal from it, if the seller has no notice of his withdrawal, and believed him to be still a member; and an instruction that he is not liable unless the seller extended credit to the firm because of such belief is erroneous. *Leib v. Craddock*, 87 Ky. 525.

Where a fraud was perpetrated on a dormant partner in the formation of the partnership, and on its discovery he rescinded the contract without having received any part of the funds, he did not become liable to creditors. *Mason v. Connell*, 1 Whart. (Pa.) 381; *Wood v. Connell*, 2 Whart. (Pa.) 542.

A bill against dormant partners, after judgment recovered against ostensible partners, cannot be sustained, without showing special cause for relief; as that the plaintiff was kept in ignorance of the partnership by undue means; that he used due diligence to inform himself, etc. *Penny v. Martin*, 4 Johns. Ch. (N. Y.) 566.

4. *Gilmore v. Merritt* 62 Ind. 325; *Galway v. Nordlinger*, 4 N. Y. Sup. 649; *Gavin v. Walker*, 14 Lea (Tenn.) 643; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529. But see to the contrary, *Bank of Alexandria v. Mandeville*, 1 Cranch (U. S.) 575.

A loan made to a person who has a secret partner, on his individual credit and for his individual benefit, is a personal matter, and the secret partner is not affected by it. *In re Munn*, 3 Biss. (U. S.) 442.

To charge a dormant partner on a note made by the firm, it must be shown that the loan was on the credit of the

3. Sub-Partners.—A contract between a partner and a stranger, whereby the latter agrees to participate in the partner's share of the profits and bear a part of his losses, constitutes a sub-partnership, and the stranger so participating is called a sub-partner,¹ as between the original partners the sub-partner is not a member of the firm,² but he is a partner with the one with whom he contracted.³ The mere knowledge or consent of the other partners to the arrangement does not make him a member of the firm unless it amounted to a new agreement between all, admitting him as a partner;⁴ nor can he compel an accounting of either by the firm or any member of it except his partner;⁵ nor is he liable as a

firm, or that it was used in the business or for the benefit of the firm. *Fosdick v. Van Horn*, 40 Ohio St. 459.

Where a note is made for the benefit of a firm having dormant partners, the name of the signing partner will be regarded as the firm name. See *Snead v. Barringer*, 1 Stew. (Ala.) 134; *Parker v. Canfield*, 37 Conn. 250; 9 Am. Rep. 317; *Scott v. Colmesnil*, 7 J. J. Marsh. (Ky.) 416; *Moale v. Hallins*, 11 Gill & J. (Md.) 11; *Richardson v. Farmer*, 36 Mo. 35; *Griffith v. Buffum*, 22 Vt. 181; 54 Am. Dec. 64.

1. *Bates' Law of Part.*, § 164.

2. *Reynolds v. Hicks*, 19 Ind. 113; *Fitch v. Harrington*, 13 Gray (Mass.) 46; *Shearer v. Paine*, 12 Allen (Mass.) 289; *Burnett v. Snyder*, 81 N. Y. 550; 37 Am. Rep. 527; *Fay v. Waldron* (Supreme Ct.), 3 N. Y. Supp. 894; *Rockapillow v. Miller*, 107 N. Y. 507; *Wright v. Taylor*, 9 Wend. (U. S.) 538; *Newland v. Tate*, 3 Ired. Eq. (N. Car.) 226; *Setzer v. Beale*, 19 W. Va. 274.

If A lets B have money to use in a partnership between B and C, B promising to pay A one-half his profits, A cannot sue the firm, even though B is insolvent, or through the firm against A's wish is doing an illegal business. *Zeisler v. Steinmann*, 53 N. Y. Super. Ct. 184.

3. *Fry v. Hawley*, 4 Fla. 258; *Meyer v. Krohn*, 114 Ill. 574; *Reynolds v. Hicks*, 19 Ind. 113; *Fitch v. Harrington*, 13 Gray (Mass.) 468; 8 Am. Law Reg., N. S. 688; *Shearer v. Paine*, 12 Allen (Mass.) 289; *McHale v. Oertel*, 15 Mo. App. 582; *Burnett v. Snyder*, 76 N. Y. 344; 81 N. Y. 550; 37 Am. Rep. 527; *Murray v. Bogart*, 14 Johns. (N. Y.) 318; 7 Am. Dec. 466; *Newland v. Tate*, 3 Ired. Eq. (N. Car.) 226; *Channel v. Fassitt*, 16 Ohio 166; *Setzer v. Beale*, 19 W. Va. 274; *Mathewson v. Clarke*, 6 How. (U. S.) 122; *Bybee v. Hawckett*, 12 Fed. Rep. 649; 8 Sawy.

(U. S.) 176; *Ex parte Barrow*, 2 Rose 252; *Brown v. DeTastet*, Jac. 284; *Bray v. Fromont*, 6 Madd. 5; *Ex parte Dodgson*, Mont. & McAr. 445; *Frost v. Moulton*, 21 Beav. 596; *Fairholm v. Majorbanks*, 3 Ross L. C. 697; *Mair v. Bacon*, 5 Grant's Ch. (Up. Can.) 338.

4. *Shearer v. Paine*, 12 Allen (Mass.) 289; *Newland v. Tate*, 3 Ired. Eq. (N. Car.) 226; *Channel v. Fassitt*, 16 Ohio 166; *Setzer v. Beale*, 19 W. Va. 274. See to the contrary, *Fitch v. Harrington*, 13 Gray (Mass.) 468.

A and B formed a partnership, each to have an equal share in the profits. B agreed with C that the latter should receive his share of the profits, leaving it to C's discretion as to what part, not less than one-fifth, should be retained by B. A consented to the arrangement on condition that the terms should in no way conflict with the terms of the partnership, nor invalidate the rights secured thereby. *Held*, that C did not become a member of the firm. *Rockafellow v. Miller*, 107 N. Y. 507.

5. *Reilly v. Reilly*, 14 Mo. App. 62; *Mathewson v. Clarke*, 6 How. (U. S.) 122; *Bray v. Fromont*, 6 Madd. 5; *Brown v. DeTastet*, Jacob 284; *Sir Charles Raymon's Case*, cited in *Ex parte Barrow*, 2 Rose 252, 255. And see *Settembre v. Putnam*, 30 Cal. 490; *Johnstone v. Robinson*, 3 McCrary, (U. S.) 42; 16 Fed. Rep. 903.

Where a partner has been compelled to pay a debt, he cannot enforce contribution against the sub-partners. *Murray v. Bogert*, 14 Johns. (N. Y.) 318; 7 Am. Dec. 466; *Setzer v. Beale*, 19 W. Va. 274; *Mair v. Bacon*, 5 Grant's Ch. (Up. Can.) 338. Nor can a sub-partner compel an original partner to contribute. *Freeman v. Bloomfield*, 43 Mo. 391.

In *Chandler v. Chandler*, 4 Pick. (Mass.) 78, it was held in an action for an accounting between a sub-partner

partner to creditors of the firm.¹

A sub-partnership does not necessarily last as long as the principal one,² and a sub-partner can enforce his contract with his co-partner without waiting for the settlement of the original firm.³

XII. PARTNERSHIP PROPERTY.—The capital of the firm is the sum of the amounts agreed to be contributed by each partner as the basis for beginning or continuing the partnership business.⁴

1. In General.—The contributions need not be in money, but may be in property of any kind in which a joint ownership may be had and which can be reached by creditors,⁵ and in whatever shape contributed it becomes at once the property of the firm,⁶ each partner having a joint interest in the whole, but no separate interest in any particular part.⁷ It is incumbent upon the part-

and his partner that the other principal partners could be made parties so that the right to know the state of the accounts and discovery to which the sub-partner is entitled may be enforced through the latter.

After a dissolution a sub-partner can maintain a suit in chancery for his proportionate share of the adventure. *Matthewson v. Clark*, 6 How. Pr. (N. Y.) 122. And in winding up the principal firm it is proper to decree to a sub-partner whose connection has been assented to the amount due him, as against the other partner who is a debtor of the firm. *Rosenshil v. Gray*, 12 Ill. 282.

1. *Meyer v. Krohn*, 114 Ill. 574; *Reynolds v. Hicks*, 19 Ind. 113; *Burnett v. Snyder*, 81 N. Y. 550; 37 Am. Rep. 527; *Drake v. Ramey*, 3 Rich. (S. Car.) 37; *Bybee v. Hawckett*, 12 Fed. Rep. 649; 8 Sawy. (U. S.) 176; *Fairholin v. Marjoribanks*, 3 Ross Lead. Cas. 697. See to the contrary *Baring v. Crafts*, 9 Met. (Mass.) 380; *Fitch v. Harrington*, 13 Gray (Mass.) 468; 8 Am. Law Reg., N. S. 688; *Newland v. Tate*, 3 Ired. Eq. (N. Car.) 226.

2. *Frost v. Moulton*, 21 Beav. 596.

Where R paid to D, a member of a newly formed partnership, one-half the amount of his contribution, on the understanding that upon final distribution they were to divide the profits of the enterprise, and before any profits were realized, R sold out his share to the other members at an advance, it was held that as to them this was a final distribution, and that R was entitled to a share in the purchase money as profits. *Richardson v. Dickinson*, 26 N. H. 217.

Where a partnership in which S was a sub-partner with C, a member, was dissolved before the completion of the

enterprise, and C continued and made money on his own account, it was held that S was entitled only to one-half of C's share in the original enterprise. *Scott v. Clark*, 1 Ohio St. 382.

3. *Reilly v. Reilly*, 14 Mo. App. 62.

4. *Bates' Law of Part.*, § 251.

5. *Bates' Law of Part.*, § 253.

Bates says, however, that where one partner contributes only his time, skill and experience, it is improper to call this his capital, for it has none of the attributes of capital, and in case of loss counts for nothing against the amount due the other partner for contributions of capital proper. *Law of Part.*, § 253.

6. *Clements v. Jessup*, 36 N. J. Eq. 569; *Taft v. Schwamb*, 80 Ill. 289; *Ex parte Morley*, L. R., 8 Ch. App. 1026; *Robinson v. Ashton*, L. R., 20 Eq. 25.

This is the rule, even in cases in which the whole capital stock was contributed by one, while services only were contributed by the other. See *Malley v. Atlantic Ins. Co.*, 51 Conn. 222; *Bradbury v. Smith*, 21 Me. 117; *Nutting v. Ashcroft*, 101 Mass. 300.

The lien of a chattel mortgage executed by partners upon partnership property is prior to that of an attachment for the debt of one partner, made before the mortgage was given, because the attachment only applies to the interest of the individual partner upon an adjustment of partnership affairs. *Clements v. Jessup*, 36 N. J. Eq. 569.

7. *Taft v. Schwamb*, 80 Ill. 289; *Williams v. Roberts*, 6 Coldw. (Tenn.) 493.

Each partner has a moiety, or the same species of interest, in the stock in trade, whether each contributes exactly in the same proportion or not; but their several degrees of interest must be regulated according to the stipulated

ners to make these contributions free and clear from any liens or incumbrances whatsoever,¹ and where profits are to be divided in proportion to capital, neither partner can increase or diminish his share without the consent of the other.²

a. WHAT IS PARTNERSHIP PROPERTY?—The question as to what is and what is not partnership property, is, in general, one of the intention of the partners to be deduced from their acts and all the circumstances of each particular case,³ and if the pur-

portions and the different conditions of the partnership. Neither partner has any exclusive right to any of the joint effects, for any sum due him, until a balance of account is struck. Taft v. Schwamb, 80 Ill. 289.

If partners, by arrangement between themselves, own each a separate part of the stock in trade, on which the partnership business is transacted, the stock will nevertheless be regarded as partnership property for the payment of partnership debts, at least as to creditors who have no notice that the stock is owned in that way. Elliot v. Stevens, 38 N. H. 311.

1. See Nichol v. Stewart, 36 Ark. 612; Sexton v. Lamb, 27 Kan. 426; Dunnell v. Henderson, 23 N. J. Eq. 174.

But where one partner contributes borrowed money to the capital of the firm, and the other partner only puts in property that afterwards proves worthless, a partnership note, given in payment of such borrowed capital, is a valid firm debt. Nordlinger v. Anderson (Supreme Ct.), 5 N. Y. Supp. 609.

2. Fulmer's Appeal, 90 Pa. St. 143; Crawshay v. Collins, 15 Ves. 218; 2 Russ. 325; Cock v. Evans, 9 Yerg. (Tenn.) 287. And see Dumont v. Ruepprecht, 38 Ala. 175.

Where partners purchase land, the fact of equal partnership gives an equity to one partner, and on a bill against the vendee of the other to recover his share of the land, the fact of equal payment need not be alleged in the bill. Farmer v. Samuel, 4 Litt. (Ky.) 187; 14 Am. Dec. 106.

When articles of co-partnership provided that one partner should furnish the stock of goods then on hand, and the other should give his skill, services, etc., and that the first should have three-fourths of the "net profits," the other the remaining fourth, the partner so furnishing the capital was not entitled, in the division of the profits, to receive interest on the capital stock. Interest on the capital invested is not to

be deducted in ascertaining the "net profits," but only losses and expenses of business. Tutt v. Land, 50 Ga. 339.

In Raymond v. Putnam, 44 N. H. 160; however, undrawn profits were allowed to be added to the original capital.

3. See Smith v. Hood, 4 Ill. App. 360; Topping v. Paddock, 92 Ill. 92; Rust v. Chisolm, 57 Md. 376; Chappell v. Cox, 18 Md. 513; First Nat. Bank v. Brenneien (Mo.), 10 S. W. Rep. 884; Thomas v. Lines, 83 N. Car. 191; Stidger v. Reynolds, 10 Ohio 351; Brown v. Beecher (Pa.), 15 Atl. Rep. 608; Brown v. Beecher, (Pa.) 12 Atl. Rep. 68; Fulmer's Appeal, 90 Pa. St. 143; Holden v. McMakin, 1 Pars. Sel. Cas. (Pa.) 270; Calder v. Crowley (Wis.), 42 N. W. Rep. 266; Dean v. Dean, 54 Wis. 23; Foster v. Chapline, 19 Grant's Ch. (Up. Can.) 251; Wood v. Scoles, L. R., 1 Ch. App. 369; Mathers v. Patterson, 33 Pa. St. 485. But see Hatch v. Foster, 27 Vt. 515.

A note in favor of a partner, but entered many months before his death on the partnership books to the credit of the maker, a debtor and customer of the firm, will not be treated as a partnership asset. Gillisse v. Gibson, 6 La. Ann. 125.

Where all the members of a partnership join in a deed of land, the presumption is, in the absence of proof, that the consideration money goes to the use of the firm. Lincoln v. White, 30 Me. 291.

Where, by an agreement between co-partners, the firm is to acquire a joint right in any inventions, the partner to whom a patent for such an invention is issued may not claim the exclusive benefits thereof. Burr v. De La Vergne, 102 N. Y. 415.

The premium on bills of exchange, drawn for part of the capital furnished by a partner, belongs to the partnership, and not to the individual partners. But where such a premium had been credited to a partner as a part of his capital, and it appeared that this appli-

pose for which it is to be used is a partnership one, it is usually conclusive as to the intention to impress it with the character of partnership property.¹ So property purchased and paid for with partnership funds, even though bought by one partner in his

cation had long been acquiesced in, it was held to be too late to question it. *Stoughton v. Lynch*, 2 Johns. Ch. (N. Y.) 209.

Money belonging to a firm, placed in bank in the name of the firm by a partner who is an executor of the deceased partner, and by him checked out in payment of debts of the firm, with his co-partner's consent, will, as to the payees, be considered as firm assets, notwithstanding a private agreement between the executors that it belonged to the estate. *Kreis v. Gorton*, 23 Ohio St. 468.

A and B as co-partners, gave a note to C, and afterwards the co-partnership was dissolved, B agreeing to pay all the debts, and B and C formed a co-partnership. *Held*, that this did not operate as an extinguishment of the note, unless it was so expressly agreed between B and C at the time their co-partnership was formed, although it was alleged that this note was to form a part of C's stock in the firm. *Mitchell v. Dobson*, 7 Ired. Eq. (N. Car.) 34.

Infants.—Where an infant partner goes into a court of equity and asks for the appointment of a receiver, he thereby consents that the rights of all parties shall be settled by the court, and where he asks the court to take charge of goods purchased by the firm, as part of its assets, he cannot disaffirm the contract of purchase, so as to escape liability therefor, and, at the same time retain them; and the court will, in such case, treat them as partnership assets, and apply them first to the payment of the firm debts. *Shirk v. Shultz* (Ind.), 15 N. E. 12.

1. See *Quinn v. Quinn* (Cal.), 12 Pac. Rep. 264; *Smith v. Hood*, 4 Ill. App. 360; *Scott v. Robertson*, 127 Ill. 135; *Scott v. McKinney*, 98 Mass. 344; *Ritchie v. Kinney*, 46 Mo. 298; *Patterson v. Silliman*, 28 Pa. St. 304; *Baily v. Brownfield*, 20 Pa. St. 41. But see *Shafer's Appeal*, 106 Pa. St. 49.

At the formation of a partnership for carrying on the milling business the property in controversy was purchased, a small part of the price being paid in cash, and possession

taken, and the balance of the price was paid out of the earnings of the mill, a large part of the profits were expended in improvements. There was no agreement between the parties by which the property was to become partnership property, and the title stood in the individual names of the partners, but in exact proportion to their prospective interests in the partnership; and upon the several re-adjustments and conveyances of interest in the partnership, deeds were given for proportionate interests in the property. *Held*, that the property was, as to creditors, partnership property, especially as under the laws of the State where the property was situated and proper mode of transferring title was to the individual partners. *Ames v. Ames*, 37 Fed. Rep. 30.

M, a member of the firm of M and B, leased certain premises in his own name, but in fact for the benefit of his firm, for the term of fifteen years, "with the sole and exclusive right and privilege during said period of digging and boring for oil and other materials, and of gathering and collecting the same therefrom." Soon after he assigned the lease to his firm. Subsequently he transferred his interest in the premises to plaintiff, his brother, who knew of the existence of the partnership, and of the purposes for which the lease was obtained. *Held*, in ejectment by plaintiff against purchasers of the leasehold under executions against the firm of M and B, that the leasehold was the chattel property of the firm, and defendant's title to it was good. *Brown v. Beecher* (Pa. 1888), 12 Atl. Rep. 68.

Under a contract with A and B, co-partners, a lease was taken by them, in which the partnership relation was not mentioned. *Held*, nevertheless, that the lease was partnership property, especially when considered in connection with the declaration of both that it was so taken and held. *Rust v. Chisolm*, 57 Md. 376. But see *Otis v. Sill*, 8 Barb. (N. Y.) 102.

But if a member of a co-partnership, the articles of which provide that each partner is to give his time to the business of the firm, and is not to engage in any other speculation or business in

own name, is partnership property,¹ though such a purchase may have been made by agreement for the benefit of one partner only, in which case the fund with which the purchase is made is converted into separate property and the article purchased is an individual asset.² Property purchased with partnership profits is partnership property, whether the original contributions are held

his own name, and on his own account, to the detriment of the firm, uses his time and labor and materials belonging to the firm in making improvements in machines manufactured and sold by the firm, with the knowledge and without the objection of the other partners, they can claim no interest in letters patent procured by him, at his expense and in his name for such improvements. *Belcher v. Whittemore*, 134 Mass. 330.

1. *Kayser v. Maugham*, 8 Colo. 339; *Smith v. Ramsey*, 6 Ill. 373; *Indiana etc. Co. v. Bates*, 14 Ind. 8; *Scott v. McKinney*, 98 Mass. 344; *Way v. Stebbins*, 47 Mich. 296; *Evans v. Gibson*, 29 Mo. 223; *Wilde v. Jenkins*, 4 Paige (N. Y.) 481; *Partridge v. Wells*, 30 N. J. Eq. 176; *Coder v. Huling*, 27 Pa. St. 84; *Hunt v. Benson*, 2 Humph. (Tenn.) 459; *Smith v. Smith*, 5 Ves. 189; *Robley v. Brooke*, 7 Bligh 90; *Morris v. Barrett*, 3 Y. & J. 384. And see *German Bank v. Schloth*, 59 Iowa 316; *Vetter v. Lentzinger*, 31 Iowa 182; *Collins v. Charlestown Mut. F. Ins. Co.*, 10 Gray (Mass.) 155; *Thursby v. Lidgerwood*, 69 N. Y. 198; *Chapin v. Clementson*, 1 Barb. (N. Y.) 311.

Plaintiff and defendant formed a partnership for the purchase and sale of mineral and mining lands, and defendant was appointed agent of the firm, on a salary. He visited the West, and inspected several mines, including the G. C. mine, his expenses being paid by the firm. After his return he consulted with plaintiff as to the purchase of shares in the G. C. mine, which required more money than the partnership had and, it was agreed between them that the money therefor should be obtained by defendant from a friend of defendant if possible. The loan was so obtained, but it was agreed that, in case it should not be obtained, plaintiff was to raise a sum nearly equal to one-half of that required for the purchase. The shares were purchased by defendant in his own name which was customary—no property being purchased in the name of the firm. *Held*, that the purchase was made of the partnership, and that plaintiff was entitled to

half the profits, after payment of the loan. *Kimberly v. Arms*, 129 U. S. 512.

The firm may sue on a warranty made in a sale to one of the partners in his own name, where payment was made with partnership funds. *Hersom v. Henderson*, 23 N. H. 498.

Where articles are manufactured by a firm under a patent belonging to one of the partners, they may be sold after dissolution as the property of the firm. *Monstross v. Mabie*, 30 Fed. Rep. 234.

But property, purchased with partnership funds, does not, in cases free from fraud and breach of trust, become, of necessity, partnership property, if that is not the intention of the parties. *Hoxie v. Carr*, 1 Sumn. (U. S.) 173.

2. *Reno v. Crane*, 2 Blackf. (Ind.) 217; *Keller v. Stolenbach*, 20 Fed. Rep. 47; *McWilliams Mfg. Co. v. Blundell*, 11 Fed. Rep. 419; *Watten v. Butler*, 29 Beav. 428; *Ex parte Emly*, 1 Rose 64.

A firm may make a loan to one of the partners with which to make a purchase, in which case he is a creditor of, not a trustee to the firm. *Smith v. Smith*, 5 Ves. 189.

Inventions in machinery to facilitate the firm's business are the property of the inventor. *Belcher v. Whittemore*, 134 Mass. 330; *Burr v. De La Vergne*, 102 N. Y. 415. But where he affixes his invention to and it becomes a part of the firm's machines, it becomes firm property. *Wade v. Metcalf*, 16 Fed. Rep. 130. And where, by an agreement between the copartners, the firm is to acquire a joint right in any inventions, the partner to whom a patent for such an invention is issued may not claim the exclusive benefits thereof. *Burr v. De La Vergne*, 102 N. Y. 415.

If firm property has been *bona fide* conveyed to one, it cannot be subjected to a judgment against the firm to which he was not made a party, upon a mere suggestion, or an attempt to levy on the property, that he was a co-partner, as that would be to bind him as partner without notice or suit, and without any regular proceeding against him as such. *Strong v. Hines*, 35 Miss. 201.

jointly or as the several property of the partners.¹ Partnerships may exist in all kinds of business which extend to the profits only, the property being owned either in severalty² or in com-

Evidence of Conversion.—An entry in the partnership book by one of the partners in the business of a saw mill, charging himself with a boat which he had built at the mill, may be introduced by him as evidence *inter alia* to prove the boat to be his individual property. *Reno v. Crane*, 2 Blackf. (Ind.) 217.

1. *Clark's Appeal*, 72 Pa. St. 142; *Northrup v. Phillips*, 99 Ill. 449; *Priest v. Choteau*, 85 Mo. 398; 12 Mo. App. 252; *Morton v. Ostrom*, 33 Barb. (N. Y.) 256; *Wilde v. Jenkins*, 4 Paige (N. Y.) 481; *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; *Kenton Furnace etc. Co. v. McAlpin*, 5 Fed. Rep. 737; *Ex parte Hurd*, 3 De G. & S. 613; *Ex parte Connell*, 3 Deac. 201.

Where articles of partnership between R, M, and G provided that the capital contributed by R and M should belong to them exclusively, and R and M bought machinery and put it in the shop in custody of G, and M credited it to R and M upon the books of the firm, it thereby became the property of the firm, and R and M could not maintain trover against G for its removal. *Robinson v. Gilfillan*, 15 Hun (N. Y.) 267.

In case of a partnership to build a railroad, however, the firm does not become the owner of the stock formerly held by each partner. *Alspaugh v. Mathews*, 4 Sneed (Tenn) 216.

So, the mere fact that advertising had been paid for by the firm, and of which it had had the benefits, does not, after its expiration, give to each partner the advantage of the publicity. *Morrison v. Moat*, 9 Hare 241.

In *Kelly v. Clancey*, 16 Mo. App. 550, it was held that as between the partners, property purchased by one with his own funds, for partnership use, is presumed to remain his individual property, and if destroyed in such use and replaced by the firm the new property belongs to the same partner individually.

2. See *Conklin v. Barton*, 43 Barb. (N. Y.) 435; *Flagg v. Stowe*, 85 Ill. 164; *Pearce v. Pearce*, 77 Ill. 284; *Robbins v. Laswell*, 27 Ill. 365; *Fawcett v. Osborn*, 32 Ill. 411; *Stevens v. Faucet*, 24 Ill. 483; *Graves v. Kellenberger*, 51 Md. 66; *Root v. Gay*, 64 Iowa 399;

Dupuy v. Sheak, 57 Iowa 361; *City F. Ins. Co. v. Doll*, 35 Md. 89; *Howe v. Howe*, 99 Mass. 71; *Blanchard v. Coolidge*, 22 Pick. (Mass.) 151; *Cutler v. Hake*, 47 Mich. 80; *Moody v. Rathbun*, 7 Minn. 89; *Hankey v. Becht*, 25 Minn. 212; *Gillham v. Kerone*, 45 Mo. 487; *State v. Finn*, 11 Mo. App. 546; *Champion v. Bostwick*, 18 Wend. (N. Y.) 175; 31 Am. Dec. 376; *Moore v. Huntington*, 7 Hun (N. Y.) 425; *Bartlett v. Jones*, Strobb. (S. Car.) 471; 47 Am. Dec. 606; *Bisbee v. Taft*, 11 R. I., 307; *London Assur. Co. v. Drennen*, 116 U. S. 461; *Berthold v. Goldsmith*, 24 How. (U. S.) 536; *French v. Styring*, 2 C. B., N. S. 357; *Barton v. Hanson*, 3 Taunt. 49; *Peacock v. Peacock*, 1 Camp. 45; *Steward v. Blakeney*, L. R., 4 Ch. 603; *Fremont v. Coupland*, 2 Bing. 170; *Ex parte Smith*, 3 Madd. 63; *Ex parte Hamper*, 17 Ves. 403; *Ex parte Owen*, 4 De G. & Sm. 351. To the contrary see *Dwinel v. Stone*, 30 Me. 384; *Newberger v. Friede*, 23 Mo. App. 631; *Chase v. Barrett*, 4 Paige (N. Y.) 148; *Sayers v. Sayers*, L. R., 1 App. Cas. 174.

Where S furnished the capital and owned all the stock of a co-partnership, and R contributed his labor and experience and had a "working interest" only, receiving a share of the net profits for his services, the property did not become partnership property, but was liable to be seized and sold to satisfy the individual debts of S. *Stumph v. Bauer*, 76 Ind. 157.

Where B and G entered into a mercantile partnership, the agreement reciting that G had purchased the stock, good will, and fixtures of the store, and had admitted B into partnership with him in consideration of his knowledge of the business, and that G had agreed to pay B one-half the net profits of the business, B was entitled to one-half the net profits only, and the stock, good will, and fixtures belonged solely to G, as between him and B. *Bowker v. Gleason* (N. J. 1887), 7 Atl. Rep. 885.

Where it is agreed between A and B that if A will pay one-half the value of a shop and tools, that the two shall be partners; and A goes and works for a time, receiving a share of the profits, but does not pay his share of the value

mon,¹ the use of it only being contributed; but where the goods are to be purchased on joint account, even though the money is advanced by one, they will be partnership property² as well as where the partners have permitted property owned in severalty to become so commingled as not to be capable of identification.³ Where one partner furnishes all the capital and the other is a partner in the profits only, the stock is not partnership property and is subject to levy by the individual creditors of the former partner,⁴ and he is at liberty to prove that there were no profits,

of the shop and tools, nor any part of it, the mere reception of a share of the profits does not create a partnership as to the shop, stock, and tools, as between the parties, whatever might be the obligations of each to third parties. *McCauley v. Cleveland*, 21 Mo. 438.

1. See *Rushing v. Peoples*, 42 Ark. 390; *French v. Styring*, 2 C. B., N. S. 357. And see *infra*, this title, *Partnership Real Estate*.

Where two persons were engaged in the livery business, each individually owning a portion of the property used therein, the only community of interest being in the profits, the property was not partnership property in such sense as to prevent the owners from claiming it as exempt from execution. *Root v. Gay*, 64 Iowa 399.

2. *Soule v. Hayward*, 1 Cal. 345; *Scutt v. Robertson*, 26 Ill. App. 803; *Paul v. Cullums*, 132 U. S. 237; *Reed v. Hollinshead*, 4 B. & C. 867; *Re Gellar*, 1 Rose 297; *Raba v. Ryland*, Gow N. P. 133. And see *Julio v. Ingalls*, 1 Allen (Mass.) 41; *Miller v. Sullivan*, 1 Cinct. Sup. Ct. Rep. 271; *Tupper v. Haythorne*, Gow N. P. 35.

Where money is advanced by one partner for the purpose of investment in goods, the goods, when purchased are presumed to be partnership property. *Bradbury v. Smith*, 21 Me. 117; *Knight v. Ogden*, 2 Tenn. Ch. 473; *Newbran v. Snider*, 1 W. Va. 153. But see *Rice v. Austin*, 17 Mass. 197; *Bartlett v. Jones*, 2 Strobb. (S. Car.) 471; *Meyer v. Sharp*, 5 Taunt. 74; *Smith v. Watson*, 2 B. & C. 401.

Where the business of the firm is to manufacture by a secret process, the process becomes the property of the firm and can be used by any of the partners after dissolution, unless restricted by contract. *Kenny's etc. Co. v. Somerville*, 38 L. T., N. S. 878; *Morison v. Moat*, 9 Hare 241.

Lumber purchased by one partner with his own means and sent to the

other to be used in the erection of a mill for the firm, a part of it having been so used is partnership property. *Person v. Wilson*, 25 Minn. 189.

When one entering a partnership puts in an invention as a part of the capital stock, a patent obtained thereon during the existence of the partnership becomes partnership property without a written assignment of an interest from the patentee to his partner. *Hill v. Miller*, 78 Cal. 149.

3. *Laswell v. Robbins*, 39 Ill. 209; *King v. Hamilton*, 16 Ill. 190; *White Mountain Bank v. West*, 46 Me. 15; *Chappell v. Cox*, 18 Md. 513; *Sims v. Willing*, 8 S. & R. (Pa.) 103. And see *Bowker v. Gleason* (N. J. 1887), Atl. Rep. 885; *Newbran v. Snider*, 1 W. Va. 153.

Where articles of co-partnership provided that the entire stock should be furnished by one and that the other should have no interest or ownership in it, it was held that stock manufactured by the partnership, or purchased by it in the course of the business, was not the sole property of the partner furnishing the capital but was joint property. *Snyder v. Lunsford*, 9 W. Va. 223.

Where partners in the profits alone invest them in additional stock, the partner owning the original stock consenting, the other acquires an interest in the new purchase subject to execution. *Hankey v. Becht*, 25 Minn. 212.

4. *Stumph v. Bauer*, 76 Ind. 157; *Appeal of York Co. Bank*, 32 Pa. St. 446.

On agreement simply to share the profits, A put into the business of B, who had a stock worth \$3,000, \$125 worth of drugs \$250 in cash, and his practice as physician. The goods were seized by creditors of B, A being allowed to withdraw his drugs, and by an arrangement, of which A knew, the goods were sold to C and D. Held, that A had no interest in the goods,

thus establishing an entire absence of interest in his partner.¹

A claim or a judgment for damages for trespass or other injury to the firm is partnership property,² but a claim which is a personal benefit to, or a matter of trust and confidence in one partner, is his individual asset,³ though it may become partnership property by specific agreement or by a course of dealing among the partners indicating that intent,⁴ and claims originally outside of the partnership scope may have become partnership property by an extension of its business.⁵

6. EFFECT OF CHANGE IN PARTNERSHIP.—The consideration paid by a person who buys an interest in an existing business under an agreement for a partnership does not become partnership property, but belongs to the former proprietor;⁶ but where a

and was only entitled to an account from *B. Rushing v. Peoples*, 42 Ark. 390.

Where by articles of agreement between A and B, A "was to have no interest in 'the shoes' until they were sold, and then at the expiration of each year he was to have half the profits," whether the agreement constituted a co-partnership or not, the "shoes" could not be levied on as the property of A, but his creditors' remedy was by garnishment of B. *Barnett v. Totly, Dudley (Ga.)* 175.

1. See *Dupuy v. Sheak*, 57 Iowa 361; *Blanchard v. Coolidge*, 22 Pick. (Mass.) 151; *Gillham v. Kerone*, 45 Mo. 487; *State v. Finn*, 11 Mo. App. 546; *Bartlett v. Jones*, 2 Strobb. (S. Car.) 471; 47 Am. Dec. 606.

2. *Collins v. Butler*, 14 Cal. 223; *Bread v. Lynn*, 126 Mass. 367; *Blakely v. Le Duc*, 22 Minn. 476.

A and B, partners, held a lease of a colliery. A bought B's interest and all property connected therewith, real and personal, and the partnership was dissolved. At this time a suit was pending against a railroad company for damages caused by the location of its road through the colliery. After the sale and dissolution A received \$10,000 from the railroad company in settlement of the suit. *Held*, that B, as a partner, was entitled to share in this sum. *Blakiston's Appeal*, 81½ Pa. St. 339.

Where, however, a claim is given for a penalty to the first person complaining, it being a matter of punishment and not redress, it cannot be sued for by a partnership. *Fowler v. Tuttle*, 24 N. H. 10.

3. See *Starr v. Case*, 59 Iowa 491; *Alston v. Simms*, 24 L. J. Ch. 553; 1 Jur., N. S. 458; *Moffat v. Farquharson*,

2 Bro. C. C. 338; *Campbell v. Mullett*, 2 Swanst. 551.

A license to sell liquors issued to one partner will not justify sales made by the other partner after a transfer to him of all the assets of the firm. *Shaw v. State*, 56 Ind. 188; *Webber v. Williams*, 36 Me. 512. Though a license to a firm will authorize sales by the continuing partner after dissolution. *U. S. v. Glab*, 99 U. S. 225; *State v. Girhardt*, 3 Jones (N. Car.) 178. But see to the contrary, *Harding v. Hagar*, 63 Me. 515, though this was a case of license as a broker.

Where, however, property has been taken, and that particular property is returned, it retains its joint character. *Thomson v. Ryan*, 2 Swanst. 565.

4. *Caldwell v. Leiber*, 7 Paige (N. Y.) 483; *Collins v. Jackson*, 31 Beav. 645. And see *Smith v. Mules*, 9 Hare 556; *Ambler v. Bolton*, L. R., 14 Eq. 427.

One of two partners entered into an agreement with a neighboring postmaster, by which the office was to be kept at the store of the firm, and the contracting partner was appointed deputy; but the business was transacted by the clerks of the store indiscriminately; no separate books were kept; the money went into the partnership fund, and all payments on account of the post-office were made out of the fund of the firm. It was held that the profits of the postoffice belonged to the firm, especially as the partners had made two settlements between themselves, without any separate claim to those profits having been set up by the partner who contracted for the business. *Caldwell v. Leiber*, 7 Paige (N. Y.) 483.

5. *Tiernan v. Doran*, 19 Neb. 492.

6. *Ball v. Farley*, 81 Ala. 288; *Evans*

new partner is taken in unconditionally, who contributes or agrees to contribute to the capital stock or pays or agrees to pay for a share of the capital stock, he becomes a joint owner with the rest.¹

Where, however, the transfer is conditioned upon payment, or the performance of some other act, the stock does not become partnership property until the condition is complied with.² In case of a sale of his interest by a retiring partner to the other members of the firm, the stock remains partnership property, and as the interests of each extends to the whole, there can be said to have been no change, either in title or in possession.³

c. RIGHT TO POSSESSION.—Partners are trustees of the partnership property as to each other, and all acts in relation to it

v. Hanson, 42 Ill. 234. And see *Jones' Appeal*, 70 Pa. St. 169.

1. *Malley v. Atlantic Insurance Co.*, 51 Conn. 222; *Rogers v. Nichols*, 20 Tex. 719; *Sims v. Willing*, 8 S. & R. (Pa.) 103.

Whether or not the stock becomes partnership property is a question of intention to be decided from a consideration of conduct, circumstances and the value of the property. See *Parker v. Hills*, 5 Jur. U. S. 809; *Pilling v. Pilling*, 3 DeG. J. & S. 162; *Ex parte Owen*, 4 DeG. & Sm. 351.

If the new partner assign a lease to the firm, after dissolution, it belongs to the firm and does not revert to him alone. *Morton v. Ostrom*, 33 Barb. (N. Y.) 256. But if its use only was contributed, the lease remaining individual property, it would belong to the contributing partner. *Burdon v. Barkus* 4 Giff. 112.

Where a partnership engaged in the manufacture of barbed wire, under a license from the holder of the patent, dissolved, the license being partnership property, but had been originally issued to S, one of the members, providing that he might associate with himself others who would agree to be bound on the conditions of the license, and the other members had agreed to be so bound, but only so long as they were associated with S, after the dissolution the sole interest in the license vested in S. *Scutt v. Robinson*, 127 Ill. 185.

2. *Fish v. Lightner*, 44 Mo. 268; *Manning v. Wadsworth*, 4 Md. 59; *Penny v. Black*, 9 Bosw. (N. Y.) 310.

3. As applied to insurance cases, see *Pierce v. Nashua Ins. Co.*, 50 N. H. 297; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *West v. Citizens' Ins. Co.*, 27 Ohio St. 1; 22 Am. Rep. 294; *Powers v. Guardian Ins. Co.*, 136 Mass. 108; 49

Am. Rep. 20. But see to the contrary, *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Hartford F. Ins. Co. v. Ross*, 23 Ind. 179; *Baltimore Ins. Co. v. McGowan*, 16 Md. 45; *Tate v. Citizens' Mut. Ins. Co.*, 13 Gray (Mass.) 79; *Tillon v. Kingston Mut. Ins. Co.*, 5 N. Y. 405.

This rule extends to cases in which there was originally but two partners, so that the transfer converted the assets from joint into separate property. *Burnett v. Eufaula Home Ins. Co.*, 47 Ala. 11; 7 Am. Rep. 581; *Dermani v. Home Mut. Ins. Co.*, 26 La. Ann. 69; *Powers v. Guardian Ins. Co.*, 136 Mass. 108; 49 Am. Rep. 20. But see to the contrary, *Dreher v. Aetna Ins. Co.*, 18 Mo. 128; *Finley v. Lycoming Mut. Ins. Co.*, 30 Pa. St. 311; *Buckley v. Garrett*, 47 Pa. St. 204; *Keeler v. Niagara F. Ins. Co.*, 16 Wis. 523.

Insurance policies containing clauses of restriction against alienation have in some cases been held good notwithstanding a change in membership, upon the theory that the firm contracted as an entity not affected by internal changes. See *Pierce v. Nashua F. Ins. Co.*, 50 N. H. 297; 9 Am. Rep. 235; *Combs v. Shrewsbury Ins. Co.*, 34 N. J. Eq. 403; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *Wilson v. Genesee Mut. Ins. Co.*, 16 Barb. (N. Y.) 511; *Hobbs v. Memphis Ins. Co.*, 1 Sneed (Tenn.) 444.

Two members of a firm executed to a third person a bill of sale of their interest in certain enumerated articles of personal property belonging to the firm, and a clause was added, expressing the intention to be, to sell all the interest of the two "in the articles of personal property" of the firm. It was held that the latter clause had reference to the articles before enumerated, and was limited to them. *Hickok v. Stevens*, 18 Vt. 111.

and advantages derived from it inure to the benefit of the firm;¹ the right of possession, therefore, is as much in one as in another, and no action can be maintained by one against another to recover possession² or damages for its detention,³ unless there has been a destruction of his interest.⁴ But a sale of the whole or of his

1. *Betts v. Letcher* (S. Dak. 1890), 46 N. W. Rep. 193; *Chapin v. Clemiston*, 1 Barb. (N. Y.) 311.

In an action on notes executed by defendant to plaintiff's intestate, it appeared that he and defendant were partners in the sale of mules, and defendant's share of the profits, which he pleaded as an offset, exceeded the amount due on the notes. Plaintiff's intestate sold the mules, and took the sale notes and securities in his own name. It was held, that this was a conversion of the partnership effects, and plaintiff's intestate was liable to the defendant for his share of the profits. *Edelen v. Hagan* (Ky. 1888), 7 S. W. Rep. 251.

Each partner is liable to account to every other for himself, and not for his co-partner; and no two partners are jointly responsible to another. *Portsmouth v. Donaldson*, 32 Pa. St. 202.

2. *Buckley v. Carlisle*, 2 Cal. 420; *Conklin v. Leeds*, 58 Ill. 178; *Cooley v. Sears*, 25 Ill. 613; *Kuhn v. Newman*, 49 Iowa 424; *Whitesides v. Collier*, 7 Dana (Ky.) 283; *Crabtree v. Clapham*, 67 Me. 326; *Azel v. Betz*, 2 E. D. Smith (N. Y.) 188; *Portsmouth v. Donaldson*, 32 Pa. St. 202; *Course v. Prince*, 1 Mill Const. (S. Car.) 413; 12 Am. Dec. 649. And see *Mason v. Tipton*, 4 Cal. 276; *Dana v. Gill*, 5 J. J. Marsh. (Ky.) 242; 20 Am. Dec. 255; *Kugan v. Cox*, 116 Mass. 289.

Where A, one partner of a firm, sold all the goods in the store against the will of his co-partner, B, and A and the purchaser broke open the store and the goods were delivered to the purchaser, B can not maintain trespass against A and the purchaser jointly, nor against A, except for goods actually destroyed. *Montjoy v. Holden*, Litt. Sel. Cas. (Ky.) 447; 12 Am. Dec. 331.

As one partner cannot replevin from another, so he cannot replevin from the bailee of another partner. *Tell v. Beyrer*, 38 N. Y. 161.

That a partnership may happen to be in debt, does not give one partner the right to prevent the other from taking possession of the partnership property. *Carithers v. Jarrell*, 20 Ga. 842.

Where one partner has taken partnership property by replevin writ, and, when sued upon the replevin bond, claims an equitable reduction of damages, he must show that, as between the obligee and himself, the former will have had more of the property of the firm than himself, if full damages are given; or that the obligee is indebted to the firm, and his equitable interest in its property does not equal the value of that replevied and not returned. *Clapham v. Crabtree*, 72 Me. 473.

3. *Morganstern v. Thrift*, 66 Cal. 577; *Robinson v. Gillfillan*, 15 Hun (N. Y.) 267; *Kellogg v. Fox*, 45 Vt. 348; *Smith v. Book*, 5 Up. Can., Q. B. (O. S.) 356; *Fox v. Hanbury*, Cowp. 445; *Harper v. Goodsell*, L. R., 5 Q. B. 422. And see *Gribbin v. Thompson*, 28 Ill. 61; *Martyn v. Knowles*, 8 T. R. 146.

A defense in assumpsit good to one of several co-partners is good to all. *Cooler v. Sears*, 25 Ill. 613.

Plaintiff and defendant, being partners in business, agreed that the plaintiff should assign to the defendant an undivided third of a patent, of which he and a third partner were owners, and that the defendant should pay to the plaintiff a sum of money, furnish the means necessary to develop the invention and carry on the business thereunder as long as they should agree, the defendant to have one-third of the profits. At the beginning of the partnership, plaintiff brought to the shop of the firm machinery and materials which before belonged to him, and were needed and used for the development of the invention. After some months, the defendant put an end to the business, and took possession of all the property on hand, including what remained of the machinery and materials. It was admitted that this property belonged to the partners in equal shares. The court held that the plaintiff could not maintain an action against the defendant for its value. *Remington v. Allen*, 109 Mass. 47.

4. See *Mountjoy v. Holden*, Litt. Sel. Cas. (Ky.) 447; 12 Am. Dec. 331; *Edelen v. Hagan* (Ky. 1888), 7 S. W. Rep. 251; *Stedman v. Smith*, 8 E.

entire interest by one partner effects a dissolution of the firm, and the remaining partners are therefore entitled to the possession of the whole for the purpose of winding up the affairs of the concern,¹ and an action for its possession or an injunction against its disposition will lie against the buyer and the selling partner.²

On the same principle one partner cannot be guilty of larceny or embezzlement of partnership funds, nor of false pretense or burglary with reference to the partnership property.³ But an attempt, in conjunction with a third person, to swindle the firm is a conspiracy,⁴ and where partnership property has been converted into individual assets, it may then be the subject of a crime by a co-partner.⁵ Where, however, by the terms of the partnership, or other agreement, one partner is entitled to the exclusive possession and control of certain partnership property for the

& B. 1; *Cubitt v. Porter*, 8 B. & C. 257.

A sale of all the partnership stock on an execution against one partner personally is such a destruction of the interest of the rest as to enable them to maintain an action against the sheriff. *Jacobs v. Seward*, L. R. 5 H. L. 464; *Mayhew v. Herrick*, 7 C. B. 229.

1. *Reece v. Hoyt*, 4 Ind. 169; *Meaher v. Cox*, 37 Ala. 201; 1 Sel. Cas. 201; *Nichol v. Stewart*, 36 Ark. 612; *Miller v. Brigham*, 50 Cal. 615; *Montjoy v. Holden*, Litt. Sel. Cas. (Ky.) 447; 12 Am. Dec. 331; *Blaker v. Sands*, 29 Kan. 551; *Edelen v. Hagan* (Ky. 1888), 7 S. W. Rep. 251; *Flynn v. Fish*, 7 Lans. (N. Y.) 117; *Horton's Appeal*, 13 Pa. St. 67. And see *Crosby v. McDermitt*, 7 Cal. 146; *South Fork Canal Co. v. Gordon*, 6 Wall. (U. S.) 561; *Fox v. Rose*, 10 Up. Can. Q. B. 16.

Ordinarily, during the existence of the partnership, one partner, acting within the scope of the partnership's business, may sell and dispose of the entire interest in the partnership's effects; but when the firm, though not formally dissolved, has closed its business and reduced all its assets in the shape of two notes payable to the firm, if one partner fraudulently transfers these, the purchaser takes them subject to the other partner's equity. *Halstead v. Shephard*, 23 Ala. 558.

The purchaser cannot maintain an action to recover his interest in the goods, but must sue for an accounting, and will recover whatever his assignor would have been entitled to upon a settlement of the partnership accounts; and, until the affairs of the partnership are thus wound up, the partner who

did not sell is entitled to the possession of the property. *Miller v. Brigham*, 50 Cal. 615. Nor has he any right to participate in the management of the partnership property. *Chase v. Scott*, 33 Iowa 309.

2. See *Halstead v. Shepard*, 23 Ala. 558, *High v. Lack*, Phil. Eq. (N. Car.) 175.

The jurisdiction and powers of a court of chancery are ample to warrant the appointment of a receiver of partnership property and the issue of an injunction against one partner to prevent his interfering with it. In *Pennsylvania* these powers are now vested in the several courts of common pleas, by the acts of assembly of June 16, 1836, and October 13, 1840. *Sloan v. Moore*, 37 Pa. St. 217.

3. See *Soule v. Hayward*, 1 Cal. 345; *Becket v. Sterrett*, 4 Blackf. (Md.) 499; *State v. Butman*, 61 N. H. 511; *Alfele v. Wright*, 17 Ohio St. 238; *Napoleon v. State*, 3 Tex. App. 522; *Reg. v. Evans*, 9 Jur., N. S. 184. But see *Lieghortner v. Weissenborn*, 20 N. J. Eq. 172.

A partner cannot arrest his co-partner upon affidavit of fraudulent removal of the partnership property. *Cary v. Williams*, 1 Duer (N. Y.) 667. And see *Smith v. Small*, 54 Barb. (N. Y.) 223.

Where one partner was caught by the other in the act of taking the money of the firm from a drawer in the firm's establishment and killed by him, the crime was held to be murder and not manslaughter. *Jones v. State*, 76 Ala. 8.

4. *Reg. v. Warburton*, L. R., 1 Cr. Cas. 274; 11 Cox (C. C.) 584.

5. *Sharpe v. Johnston*, 59 Mo. 557.

purpose of carrying out the objects of the firm or otherwise, if such right of possession is violated he may proceed against the partner violating it,¹ or against a third person acting in his behalf,² to recover possession; and a notice of dissolution stating that one of the members would thereafter conduct the business is competent and sufficient evidence as to who is entitled to possession.³ After dissolution and division the assets remain partnership property for the purpose of winding up the affairs of the firm.⁴

2. Partnership Real Estate—*a. WHAT IS.*—Real estate originally contributed as stock, even though purchased with the separate means of the partners, becomes partnership property and a part of the capital stock of the firm,⁵ and, where land is the commodity or stock for the purpose of dealing in which the partnership was formed, it is of course partnership property.⁶ That real estate is

1. *Ivey v. Hammock*, 68 Ga. 428; *Belcher v. VanDuzen*, 37 Ill. 281. And see *Bostwick v. Brittain*, 25 Ark. 482.

Two persons who have formed a commercial partnership in a single transaction, and who have by mutual consent made a partition, may enforce their respective claims against each other, without bringing suit for a settlement of the partnership. *Jenkins v. Howard*, 21 La. Ann. 597.

Right of action between partners at law, when on the winding up of a partnership business, the partnership effects are divided between the several partners by an actual separation thereof, so that certain specific articles are assigned to each as his individual share, either partner may maintain an action at law against the other in respect to such articles. But a mere agreement to divide affords no foundation for such an action. Until the effects are actually separated they remain joint assets, and, as neither partner has in such case a remedy at law to specifically enforce the agreement, equity has jurisdiction to grant relief. 1870, *Hunt v. Morris*, 44 Miss. 314.

Where the right to exclusive possession was given by instrument under seal, an action in covenant, but not on the case, will lie. *Clay Co. v. Grubbs*, 1 Litt. (Ky.) 222.

2. *Harkey v. Tillman*, 40 Ark. 551; *Jenkins v. Howard*, 21 La. Ann. 597; *Hunt v. Morris*, 44 Miss. 314; *Bartley v. Williams*, 66 Pa. St. 329; *Kahle v. Sneed*, 59 Pa. St. 388; *Williams v. Barton*, 3 Bing. 139.

3. *Kelly v. Murphy*, 70 Cal. 560.

4. *Boone v. Sirrine*, 38 Ga. 121.

5. *Weigand v. Copeland*, 14 Fed. Rep.

118; 7 Sawy. (U. S.) 442; *Southern Cotton Oil Co. v. Henshaw*, 89 Ala. 448; *Sigourney v. Munn*, 7 Conn. 11; *Arnold v. Wainwright*, 6 Minn. 358; *Way v. Stebbins*, 47 Mich. 296; *Hogle v. Lowe*, 12 Nev. 286; *Ames v. Ames*, 37 Fed. Rep. 30. And see *Singer v. Carpenter*, 26 Ill. App. 28.

Lands owned by partners individually, of which each deeds an undivided one-half to the other under an agreement that it shall go into the firm, become firm property. *Killefer v. McLain*, 70 Mich. 508.

Where one joint owner of real estate contributes it, as his portion, to the capital stock of a partnership, and the other joint owner subsequently agrees to and ratifies his acts, and afterwards the firm pays the taxes and insurance on the property as its own, and it is entered on the firm's books as so much capital invested, it is partnership property as between the other joint owner and the firm creditors. *Riedeburg v. Schmitt*, 71 Wis. 644.

A chattel real, the demise of a leasehold interest in the land with the privilege of boring and mining, for instance, may become partnership assets by the partnership association of the owners, under separate deeds of the undivided interests therein. *Brown v. Beecher*, 120 Pa. St. 590.

6. See *Simpson v. Tenney*, 41 Kan. 561; *Morrill v. Colehour*, 82 Ill. 618; *Horne v. Ingraham*, 125 Ill. 189; *Gray v. Palmer*, 9 Cal. 616; *Dudley v. Littlefield*, 21 Me. 418; *King v. Remington*, 36 Minn. 15; *Chester v. Dickerson*, 54 N. Y. 1; 13 Am. Rep. 550; 52 Barb. (N. Y.) 349; 45 How. Pr. (N. Y.) 326; *Sage v. Sherman*, 2 N. Y. 417; *Thompson v.*

held in the names of several persons and that such persons are partners, however, is not alone sufficient to establish its partnership character.¹

Whether it is partnership or individual property is purely a question of the intention of the partners, to be inferred from their actions and surrounding circumstances, the most usual and most controlling considerations being, when the articles are silent on the subject, the ownership of the fund with which the property was purchased, the uses to which it was put, and how it was entered and carried in the accounts of the firm.²

The mere fact that partnership funds have been used in the purchase of real estate, while it is evidence of the intention of the partners to make it partnership property,³ is in itself indecisive; it is to be considered in connection with the use of the property, its management, and the way in which the question is treated by the partners, none of which, considered alone, are con-

Bowman, 6 Wall. (U. S.) 316; Clagett v. Kilbourne, 1 Black (U. S.) 346; Darby v. Darby, 3 Drew 495; *In re Warren*, 1 Dar. (U. S.) 322.

Where a contract of partnership provides that the partners shall participate equally in the profits to arise from the purchase and sale of land, and one of them afterwards acquires land, an express trust is raised for the benefit of the other, and the statute does not commence to run against an action of account until a disavowal of the trust has been made and communicated to the *cestui que trust*. *Horn v. Ingraham*, 125 Ill. 198.

1. *Thompson v. Bowman*, 6 Wall. (U. S.) 316.

Real estate owned by commercial partners does not enter into their commercial assets. As regards that species of property they are joint owners. *Guilbean v. Melancon*, 28 La. Ann. 627.

Land conveyed to partners in the firm name is not "the joint property of the associates" within Code Alabama 1886, § 2605, providing that a judgment against partners sued in the common firm name binds the joint property of all the associates, but vests in them individually as tenants in common, and the judgment creditor cannot redeem from a mortgage sale land thus conveyed to the firm. *Powers v. Robinson* (Ala. 1890), 8 So. Rep. 10.

The fact that tenants in common enter into a partnership with a third person to deal in cattle, they agreeing to furnish the capital, is not sufficient of itself to constitute their land partnership assets, in which no homestead can

be had, as to a creditor of such third person holding a note on which the cotenants are sureties. *Fordyce v. Hicks*, 79 Iowa 272.

2. *Bates' Law of Part.*, § 280; *Blatchley v. Coles*, 6 Col. 349. And see *Paige v. Paige*, 71 Iowa 318; *Collumb v. Read*, 24 N. Y. 505; *Allen v. Logan*, 96 Mo. 591.

Where land is purchased with partnership funds and conveyed to the partners by name, although in law they are considered as tenants in common and no notice is taken of the equitable relations arising out of the partnership, yet in equity the partnership property is devoted to partnership purposes, and a trust is created for the security of the partnership debts. If the partnership becomes insolvent, the property is primarily liable for the payment of the partnership debts, to the postponement of the creditors of the several partners. *Ross v. Henderson*, 77 N. Car. 170; *Pepper v. Thomas*, 85 Ky. 539; *Marvin v. Trumbull*, *Wright* (Ohio) 386.

Taking insurance in the firm name is evidence that the property is firm property, though it is not conclusive. *Hogle v. Lowe*, 12 Nev. 286.

Real estate purchased by partners and deeded to them in their individual names, and paid for out of the firm's moneys, assessed for taxation in the firm's name, and used in the prosecution of the firm's business, is firm property. *Roberts v. Eldred*, 73 Cal. 394.

3. *Holmes v. Self*, 79 Ky. 297; *Hatchett v. Blanton*, 72 Ala. 421; *Fall River Whaling Co. v. Borden*, 10 Cush. (Mass.) 458; *Sumner v. Hampson*, 8

clusive;¹ but where such purchase is within the usual scope of the partnership business, a presumption obtains, which may be rebutted, however, that they intended it to be partnership property.² So, the mere fact that a partner devotes his individual property to the use of the firm,³ or that partners carry on their business upon property owned by them as tenants in common,⁴ does not give it the character of partnership property, though if

Ohio 328; 32 Am. Dec. 722; Goodwin v. Richardson, 11 Mass. 469.

More weight is given to the method of charging real property on the books than to its use. *Ex parte McKenna*, 3 De G. F. & J. 645.

1. See *Smith v. Jackson*, 2 Edw. Ch. (N. Y.) 28; *Hatchett v. Blanton*, 72 Ala. 428; *Brewer v. Browne*, 68 Ala. 210; *Wood v. Montgomery*, 60 Ala. 500; *Hanks v. Hinson*, 4 Port. (Ala.) 509; *McGuire v. Ramsey*, 9 Ark. 518; *Tillotson v. Tillotson*, 34 Conn. 335; *Price v. Hicks*, 14 Fla. 565; *Baker v. Middlebrooks*, 80 Ga. 491; *Morgan v. Olvey*, 53 Ind. 6; *Indiana Pottery Co. v. Bates*, 14 Ind. 8; *Matlock v. Matlock*, 5 Ind. 403; *Buck v. Winn*, 11 B. Mon. (Ky.) 320; *Richards v. Manson*, 101 Mass. 482; *Dyer v. Clark*, 5 Met. (Mass.) 562; 39 Am. Dec. 697; *Allen v. Logan*, 96 Mo. 591; *Collumb v. Read*, 24 N. Y. 505; *Tarbel v. Bradley*, 7 Abb. N. Cas. (N. Y.) 273; *Ross v. Hinderson*, 77 N. Car. 170; *King v. Weeks*, 70 N. Car. 372; *Baird v. Baird*, 1 Dev. & B. Eq. (N. Car.) 524; *Lefevre's Appeal*, 69 Pa. St. 122; 8 Am. Rep. 129; *Ebbert's Appeal*, 70 Pa. St. 79; *Providence v. Bullock*, 14 R. I. 353; *Gaines v. Catron*, 1 Humph. (Tenn.) 514; *Hanson v. Eustace*, 2 How. (U. S.) 653; *Phillips v. Phillips*, 1 Myl. & K. 649.

2. See *Pugh v. Currie*, 5 Ala. 446; *Johnson v. Clark*, 18 Kan. 157; *Converse v. Citizen's Mut. Ins. Co.*, 10 Cush. (Mass.) 37; *Sumner v. Hampson*, 8 Ohio 328; 32 Am. Dec. 722; *Wooldrige v. Wilkins*, 3 How. (Miss.) 360; *Allen v. Withron*, 110 U. S. 119.

Where the proof shows that a part of real estate, bought with partnership funds, but conveyed to one of the partners, had been divided, and the division evidenced by deed between the parties, and no evidence, written or parol, was offered to show a division of the residue, the presumption was, that no such division was made. *McGuire v. Ramsey*, 9 Ark. 518.

Payment of a mortgage on real estate with partnership funds is evidence that it was intended to be partnership prop-

erty. *Fairchild v. Fairchild*, 64 N. Y. 471.

Declarations made by the partners that certain real estate is partnership property, are admissible in evidence to establish that fact. *Rust v. Chisholm*, 57 Md. 376.

One partner is liable for the acts of another partner, whereby deceptive appearances are created in land, which is the subject of the partnership, and whereby the partnership realizes the proceeds of the fraud. *Chester v. Dickerson*, 52 Barb. (N. Y.) 349.

3. *Rapier v. Gulf City Paper Co.*, 64 Ala. 330; *Union Pacific R. Co. v. Kennedy* (Colo. 1889), 20 Pac. Rep. 696; *Goepfer v. Kinsinger*, 39 Ohio St. 429; *Warthman v. Miles*, 1 Stark. 181; *Burdon v. Barkus*, 4 De G. F. & J. 42; *Colnaghi v. Bluck*, 8 C. & P. 464.

There is no presumption that a leasehold, standing in the name of one of several partners, constitutes partnership assets, notwithstanding that the partnership business is carried on upon the leased premises. The presumption is otherwise. *Chamberlain v. Chamberlain*, 44 N. Y. Super. Ct. 116.

Certain lands belonging to an individual partner were included as assets in the partnership articles, and the firm gave a mortgage on them. The owner drew up a deed conveying an undivided half of them to his partner, but it was not recorded, and he afterwards destroyed it and took up the mortgage with partnership notes. When he went out of the firm he took a bond from his partner binding the latter to pay all partnership debts, and gave him a clear title to the lands, which the partner bought with the other assets. It was held that by destroying the former deed he would have been estopped from enforcing payment of the notes but for the subsequent conveyance of clear title, after which the notes constituted a liability enforceable by suit on the bond. *Mette v. Feldman*, 45 Mich. 25.

4. *Buck v. Winn*, 11 B. Mon. (Ky.) 320; *Willite v. Boulware* (Ky.), 10 S. W. Rep. 629; *Pecot v. Armelin*, 21 La.

the land is a part of the stock in trade, or if it is substantially involved or inseparably connected with it, the rule is different.¹

The manner in which the property is treated on the books of the firm is usually cogent evidence as to its partnership character. thus if purchased in the name of one partner, though with partnership funds, if it is charged against him, it indicates a conversion into individual property;² but, on the other hand, if it was owned or purchased by one partner, and credited to him or half its value charged to the other partner, a contribution to the capital of the firm is indicated.³ A deed to the members of the firm, describing

Ann. 667; *Ware v. Owens*, 42 Ala. 212; *Theriot v. Michel*, 28 La. Ann. 107; *Sikes v. Work*, 6 Gray (Mass.) 433; *Reynolds v. Ruckman*, 35 Mich. 80; *Moody v. Rathbun*, 7 Minn. 89; *Price v. Hicks*, 14 Fla. 565; *Russell v. Miller*, 26 Mich. 1; *Gordon v. Gordon*, 49 Mich. 501; *Alexander v. Kimbro*, 49 Miss. 529; *Hogle v. Lowe*, 12 Nev. 286; *Coles v. Coles*, 15 Johns. (N. Y.) 159; *Deloney v. Hutchison*, 2 Rand. (Va.) 183; *Wheatly v. Calhoun*, 12 Leigh (Va.) 264; 37 Am. Dec. 654; *Griffie v. Maxey*, 58 Tex. 210; *Crawshay v. Maule*, 1 Swanst. 495.

A tract of farming land purchased and cultivated by a firm transacting a general merchandise business at a town some distance from such lands, the purchase deed describing the purchasers as co-partners, but there being no evidence that the land was purchased with partnership funds or for partnership purposes, is not such partnership property as to give one partner who has paid debts of the firm, after its dissolution, an equitable lien thereon, as against creditors of the other partner. *Alkire v. Kahla* (Ill., 1888), 17 N. E., Rep. 693.

A deed to partners, although the consideration is partnership funds, creates a tenancy in common, unless otherwise expressed in the deed. So held in a contest between individual and partnership creditors. *Black v. Seipt*, 12 Phila. (Pa.) 360.

If land devoted to the uses of a partnership business is owned by the partners, each holding the legal title to an undivided share, a mortgage by one of his interest is valid, and takes precedence over the title of a purchaser at a sale on an execution on behalf of the partnership creditors, unless the purchaser can show that the land had, in fact, been made partnership property, and that the mortgagee had notice of

this before lending. *Johnson v. Clark*, 18 Kan. 157. And see *Hogle v. Lowe*, 12 Nev. 286.

1. *Waterer v. Waterer*, L. R., 15 Eq. 402. And see *Gray v. Palmer*, 9 Cal. 616; *Dudley v. Littlefield*, 21 Me. 418; *Chester v. Dickerson*, 54 N. Y. 1; 13 Am. Rep. 550; 52 Barb. (N. Y.) 349; *Thomson v. Bowman*, 6 Wall. (U. S.) 316; *Darby v. Darby*, 3 Drew 495.

2. *Fairchild v. Fairchild*, 64 N. Y. 471; *Harvey v. Pennypacker*, 4 Del. Ch. 445; *Homer v. Homer*, 107 Mass. 82; *Collumb v. Read*, 24 N. Y. 505; *Bergeron v. Richardott*, 55 Wis. 129. And see *Leissinring v. Black*, 5 Watts (Pa.) 303; *Smith v. Smith*, 5 Ves. 189.

The appearance of real estate on partnership books, to the extent necessary to carry on the business of the firm, is not inconsistent with the partners' title to the real estate as tenants in common. *Grubb's Appeal*, 66 Pa. St. 117.

Where the property was purchased with partnership funds and the books throw no light on the subject, the presumption would be in the contrary direction. *King v. Weeks*, 70 N. Car. 372.

One of two partners purchased real estate and paid for the same with a note of the firm, with the intention of using it in the firm's business, but the expenses of the purchase, the discount on the original note, the renewals thereof, and the taxes on the lot, were charged to his individual account by the direction of the other partner. It was held, that the property was purchased on individual account, and the profits arising from a sale of the real estate went to the partner and not to the firm. *Hay's Appeal*, 91 Pa. St. 265.

3. See *Collins v. Charleston Mut. F. Ins. Co.*, 10 Gray (Mass.) 155; *Robinson v. Ashton*, L. R., 20 Eq. 25.

Where property is purchased with partnership funds and remains undi-

them as partners, is sufficient to raise an inference that it was purchased for the firm.¹

Real estate, however, which was leased or purchased for, and devoted to, partnership purposes, and paid for out of partnership funds, is partnership property, although the legal title may have been taken in the name of one partner, he being held in equity as a trustee for the firm, and the Statute of Frauds having no application in such cases.²

vided, but is used for the residences of the partners, and upon which they have erected dwellings at their individual expense, if treated as partnership property on the books, it will be so regarded. *Ex parte McKenna*, 3 De G. F. & J. 645.

Where taxes upon land the legal title to which is in one member of a partnership, are paid by the firm with firm funds and charged on the books to the partner in whose name the title stands, it is evidence that the land was considered as partnership property. *Gorpper v. Kinsinger*, 39 Ohio St. 429. And see *Hay's Appeal*, 91 Pa. St. 265.

1. *Offutt v. Scott*, 47 Ala. 104. But see *Alkire v. Kahla* (Ill. 1888), 17 N. E. Rep. 693.

The presentation by a surviving partner of his claim for advances in the purchase of property bought with partnership funds, against the estate of the decedent, does not estop him from claiming the property to be joint and withdrawing his former claim, if it was not intended as an abandonment. *Way v. Stebbins*, 47 Mich. 596.

2. *Fairchild v. Fairchild*, 64 N. Y. 471; *Espey v. Comer*, 76 Ala. 501; *Hatchett v. Blanton*, 72 Ala. 423; *Little v. Snedecor*, 52 Ala. 167; *Offutt v. Scott*, 47 Ala. 104; *Owens v. Collins*, 23 Ala. 837; *Pugh v. Currie*, 5 Ala. 446; *Drewry v. Montgomery*, 28 Ark. 256; *Roberts v. Eldred*, 73 Cal. 394; *Hardenbergh v. Bacon*, 33 Cal. 356; *McCauley v. Fulton*, 44 Cal. 355; *Sigourney v. Munn*, 7 Conn. 11; *Rice v. Pennypacker*, 5 Del. 279; *King v. Hamilton*, 16 Ill. 190; *Smith v. Ramsey*, 6 Ill. 373; *Morgan v. Olvey*, 53 Ind. 6; *Matlock v. Matlock*, 5 Ind. 403; *Price v. Hicks*, 14 Fla. 565; *Loubat v. Nours*, 5 Fla. 350; *Paige v. Paige*, 71 Iowa 318; *Hewitt v. Rankin*, 41 Iowa 35; *Tenny v. Simpson*, 37 Kan. 353; *Scruggs v. Russell*, *McCahoon* (Kan.) 39; *Johnson v. Clark*, 18 Kan. 157; *Pepper v. Thomas*, 85 Ky. 539; *Buck v. Winn*, 11 B. Mon. (Ky.) 320;

Divine v. Mitchum, 4 B. Mon. (Ky.) 488; 41 Am. Dec. 241; *Bryant v. Hunter*, 6 Bush (Ky.) 75; *Burnam v. Burnam*, 6 Bush (Ky.) 589; *Spalding v. Wilson*, 80 Ky. 589; *Dyer v. Clark*, 5 Met. (Mass.) 562; 39 Am. Dec. 697; *Howard v. Priest*, 5 Met. (Mass.) 582; *Burnside v. Merrick*, 4 Met. (Mass.) 537; *Thayer v. Lane*, Walk. Ch. (Mich.) 200; *Whitney v. Cotten*, 53 Miss. 689; *Scruggs v. Blair*, 44 Miss. 406; *Willet v. Brown*, 65 Mo. 138; 27 Am. Rep. 265; *Crow v. Drace*, 61 Mo. 225; *Hogle v. Lowe*, 12 Nev. 286; *Messer v. Messer*, 59 N. H. 375; *Ciley v. Huse*, 40 N. H. 358; *Jarvis v. Brooks*, 27 N. H. 37; 37 Am. Dec. 359; *Campbell v. Campbell*, 30 N. J. Eq. 415; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Matlach v. James*, 13 N. J. Eq. 126; *Rank v. Grote*, 50 N. Y. Super. Ct. 275; *Denning v. Colt*, 3 Sandf. (N. Y.) 284; *Cox v. McBurney*, 2 Sandf. (N. Y.) 561; *Delmonico v. Guillaume*, 2 Sandf. Ch. (N. Y.) 366; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165; *Smith v. Tarlton*, 2 Barb. Ch. (N. Y.) 336; *Summey v. Patton*, 1 Winst. Eq. (N. Car.) 52; *Norwalk Nat. Bank v. Sawyer*, 38 Ohio St. 339; *Greene v. Greene*, 1 Ohio 535; 13 Am. Dec. 642; *Page v. Thomas*, 43 Ohio St. 38; *Tillinghast v. Champlin*, 4 R. I. 173; *Jones v. Smith*, 31 S. Car. 527; *Bowman v. Bailey*, 20 S. Car. 550; *Winslow v. Chiffelle*, 1 Harp. Eq. (S. Car.) 25; *Hunter v. Martin*, 2 Rich. (S. Car.) 541; *Hunt v. Benson*, 2 Humph. (Tenn.) 459; *Dewey v. Dewey*, 35 Vt. 555; *Willis v. Freeman*, 35 Vt. 44; *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404; *Diggs v. Brown*, 78 Va. 292; *Pierce v. Tregg*, 10 Leigh (Va.) 406; *Martin v. Smith*, 25 W. Va. 579; *Martin v. Morris*, 62 Wis. 418; *Bergeron v. Richardott*, 55 Wis. 129; *Fowler v. Bailley*, 14 Wis. 125; *Bird v. Morrison*, 12 Wis. 138; *Weigand v. Copeland*, 14 Fed. Rep. 118; 7 Sawy. (U. S.) 442; *Hoxie v. Carr*, 1 Sumn. (U. S.) 173; *Kimberly v. Arms*, 129 U. S. 512; *Conger v. Platt*, 25 Up. Can., Q.

But a *bona fide* purchaser of such property of the partner holding the legal title without notice of its partnership character, will hold it free from partnership claims.¹ So, land or other property

B. 277; *Crawshay v. Maule*, 1 Swanst. 495. And see *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Foster v. Barnes*, 81 Pa. St. 377; *West Hickory Min. Assoc. v. Reed*, 80 Pa. St. 38; *Blatchley v. Coles*, 6 Colo. 349.

Where real property was bought for the purpose of being used by a company formed for the purpose of carrying on a mechanical trade, and was so used, and had been so used by several companies before this, and was necessary to the carrying on of such business, and was mentioned in several deeds to the several partners, as a part of the effects of the partnership, a trust was created, by operation of law, for the partnership, as tenants in common, though it had not been declared in writing. *Haufl v. Howard*, 3 Jones' Eq. (N. Car.) 440.

Where land is purchased by one partner with partnership funds, and, at his instance, conveyed to a third person, an action by the co-partner to set aside the conveyance is not barred by the pendency of an action for a partnership accounting, but the accounting cannot be had until it is determined whether or not the land is partnership assets. *Maloy v. Associated Lace Makers' Co.* (Supreme Ct.), 8 N. Y. Supp. 815.

A partnership for the manufacture of iron was composed of four persons, the names of two of whom who lived at a distance did not appear. The two acting partners bought land in their own names, for the purpose of obtaining from it wood to be used in the manufacture of iron, and so far as it was paid for, it was out of the partnership effects. It was held that the land was partnership property, and the partnership having failed, the two dormant partners were liable to the vendor for the balance of the purchase-money. *Brooke v. Washington*, 8 Gratt. (Va.) 248; 56 Am. Dec. 142.

Real estate sold at a judicial sale was knocked down to A and B, partners, A having bid it in, in pursuance of an understanding between him and his partner for the firm. In order, however, to avoid the necessity of getting outsiders to go on the bonds for their purchase-money, they had the sale entered in B's name, and he signed the bonds as principal and A as surety. It was

held that the real estate was partnership property. *Seiler v. Brenner* (Ky. 1881), 3 S. W. Rep. 796.

Leasehold Property.—Where partners purchased a leasehold estate with partnership property, gave a deed of trust upon it, and the trustee, after the death of one of the partners, sold the estate under the power in the deed, a surplus remaining, is to be considered as partnership property, upon which the surviving partner was entitled to administer. *Carlisle v. Mulhern*, 19 Mo. 56.

Partners as Tenants in Common.—When real estate is purchased by partners, with partnership funds, for partnership use, although it is so conveyed as to make them tenants in common, in the absence of an express agreement, or of circumstances showing an intent that such estate shall be held for their separate use, it will be treated in equity as partnership property, subject to an implied trust in favor of the firm. *Robertson v. Baker*, 11 Fla. 192; *Cottle v. Harrold*, 72 Ga. 830; *Paige v. Paige*, 71 Iowa 318; *Hart v. Hawkins*, 3 Bibb (Ky.) 502; *Buffum v. Buffum*, 49 Me. 108; *Abbott's Appeal*, 50 Pa. St. 234; *Hoxie v. Carr*, 1 Sumn. (U. S.) 173. And should be applied to the payment of partnership debts in preference to individual debts of one of the partners, which were contracted on the faith and credit of the real estate. *Paige v. Paige*, 71 Iowa 318; *Robertson v. Baker*, 11 Fla. 192; *Buffum v. Buffum*, 49 Me. 108.

Under the laws of Louisiana prohibiting a commercial partnership from owning immovable property, if such property is purchased with partnership funds by one of the partners in his own name, and without the consent of his co-partners, the property itself belongs to the partner purchasing, but its value at the time of the purchase belongs to the partnership. No decree of court can be rendered to vest the title of the property so purchased in the partnership, for the partnership is incapable of acquiring title. *McKee v. Griffin*, 23 La. Ann. 417.

1. *Priest v. Chouteau*, 85 Mo. 398; 55 Am. Rep. 373; *McNeil v. Congregational Soc.*, 66 Cal. 105; *Duryea v. Burt*, 28 Cal. 569; *Brush v. Maydwell*, 14 Cal. 208; *Dupuy v. Leavenworth*, 17 Cal. 263; *Frink v. Branch*, 16 Conn.

purchased with the earnings of the firm is partnership property,¹ and where improvements made for partnership purposes are placed upon lands held by the partners as tenants in common and it is thereupon used by the firm, it becomes partnership property.²

260; *Sigourney v. Munn*, 7 Conn. 324; *Reeves v. Ayers*, 38 Ill. 418; *Johnson v. Clark*, 18 Kan. 157; *Flanagan v. Shuck*, 82 Ky. 617; *Buck v. Winn*, 11 B. Mon. (Ky.) 320; *Divine v. Mitchum*, 4 B. Mon. (Ky.) 488; 41 Am. Dec. 241; *Churchill v. Proctor*, 31 Minn. 129; *Arnold v. Wainwright*, 6 Minn. 358; *Whitney v. Cotten*, 53 Miss. 689; *Crow v. Drace*, 61 Mo. 225; *Cowden v. Cairns*, 28 Mo. 471; *Hogle v. Lowe*, 12 Nev. 286; *Messer v. Messer*, 59 N. H. 375; *Matlack v. James*, 13 N. J. Eq. 126; *Hiscock v. Phelps*, 49 N. Y. 97; *Tarbel v. Bradley*, 7 Abb., N. Cas. (N. Y.) 273; *Ross v. Henderson*, 77 N. Car. 170; *Norwalk Nat. Bank v. Sawyer*, 38 Ohio St. 339; *Miller v. Proctor*, 20 Ohio St. 442; *Tillinghast v. Champlin*, 4 R. I. 173; *Boyers v. Elliott*, 7 Humph. (Tenn.) 204; *Bergeron v. Richardott*, 55 Wis. 129; *Fowler v. Bailey*, 14 Wis. 125; *Hoxie v. Carr*, 1 Sumn. (U. S.) 173; *Mason v. Parker*, 16 Grant's Ch. (Up. Can.) 230. See *Staats v. Bristow*, 73 N. Y. 264.

Where one partner holds the legal title to the undivided half of certain real estate, the whole of which is, in equity, partnership property, the conveyance by him of his undivided half to a creditor of the firm, in payment of a partnership debt, vests in the grantee a good title thereto, notwithstanding the firm is insolvent, and the other partner is ignorant of the conveyance. *Van Brunt v. Applegate*, 44 N. Y. 544. And see *Jones v. Neale*, 2 Patt. & H. (Va.) 339.

And a mortgage by one partner of partnership real estate, standing in his name as owner, to raise money to pay firm debts, is within such partner's implied authority, and binding on the firm. *Chittenden v. German-American Bank*, 27 Minn. 143.

Individual interests in real estate conveyed to a firm are subjected by attachment to the payment of individual liabilities, although such real estate be conveyed to and held in the firm name, if it is not made to appear that it was purchased for partnership purposes, and appropriated to those purposes, and paid for by partnership funds. *Bank of Louisville v. Hall*, 8 Bush (Ky.) 672.

Real estate conveyed to all the members of a partnership, though purchased with the funds of the partnership, and used for partnership purposes, vests, at law, in the partners as tenants in common, and a failure to dissolve an attachment of such estate, made in an action on a note given by the two partners individually, after the dissolution of the partnership, will not render the partnership liable to proceedings in insolvency. *Ensign v. Briggs*, 6 Gray (Mass.) 329.

In *Georgia*, if land is bought for a firm with firm money, and conveyed for the firm to two of the partners, the firm are the equitable owners, and a mortgage executed by four out of five members conveys the interest of all who join. *Cottle v. Harrold*, 72 Ga. 830.

1. *Ex parte McKenna*, 3 De G. F. & J. 645; *Merot v. Burnand*, 4 Russ. 247; 2 Bli., N. S. 215; *Ex parte Hinds*, 3 De G. & Sm. 613. But see *Steward v. Blakeway*, L. R., 4 Ch. App. 603.

2. *Smith v. Danvers*, 5 Sandf. (N. Y.) 669; *Roberts v. McCarty*, 9 Ind. 16; *Lane v. Tyler*, 49 Me. 252; *Bopp v. Fox*, 63 Ill. 540; *Deveney v. Mahoney*, 23 N. J. Eq. 247; *Goepper v. Kinsinger*, 39 Ohio St. 429; *Winslow v. Chiffelle*, Harp. Eq. (S. Car.) 25. And see *Newton v. Doran*, 3 Grant's Ch. (Up. Can.) 353.

A had the possession and a bond for the deed of a mill. He made an oral contract to sell it to B, who paid down some money and ran the mill for a short time. A and B then made an oral contract of partnership to run the mill and agreed that the former contract should be abandoned, and the purchase of the mill, which had not been wholly paid for by A, be completed on partnership account. There was evidence to show that this was acted upon. A, after two years, notified B of his intention to dissolve and took a deed of the mill to himself. It was held that the mill should stand charged with partnership equities in a suit to settle up the partnership. *Colins v. Decker*, 70 Me. 23.

Partition is not an incident to a suit for a partnership accounting, in which

The same rule applies to property owned by one partner upon which the firm has placed valuable improvements for partnership purposes,¹ at least to the extent of the value of the improvements,² though the mere use of the land of one partner without compensation, or placing temporary improvements, either upon their joint property or upon the property of one of them, would not stamp it with the character of partnership property.³ Real estate taken by partners, whether as tenants in common or in the name of one, in payment of a debt due the firm, is partnership property, the equitable title vesting in each in proportion to their respective interests.⁴

the partners usually have a right to have the assets disposed of. If land belonging to the firm is not disposed of it must be left as a distinct tenancy in common, so that the tenants may have it partitioned in a separate suit. *Godfrey v. White*, 43 Mich. 171.

1. *Lane v. Tyler*, 49 Me. 252; *Balantyne v. Frelinghuysen*, 38 N. J. Eq. 266. And see *Union Pacific R. Co. v. Kennedy* (Colo. 1889). 20 Pac. 696.

Where one of two partners, acting as the financial member of the firm, purchases lands to promote the partnership business, on which the firm afterward expend money, and make valuable improvements, the purchase will be deemed that of the firm and will inure to its benefit. *Lacy v. Hall*, 37 Pa. St. 360.

2. *Kendall v. Rider*, 35 Barb. (N. Y.) 100; *King v. Wilcomb*, 7 Barb. (N. Y.) 263; *Averill v. Loucks*, 6 Barb. (N. Y.) 470; *Kerr v. Kingsbury*, 39 Mich. 150.

3. See *Frink v. Branch*, 16 Conn. 260; *Robertson v. Corsett*, 39 Mich. 777; *Ballantine v. Frelinghuysen*, 38 N. J. Eq. 266; *Chamberlin v. Chamberlin*, 44 N. Y. Super. Ct. 116; *De-loney v. Hutcheson*, 2 Rand. (Va.) 183.

In order to raise an implied trust in favor of the partnership by a joint purchase of real property, the purchase must have been made at the time with partnership funds or on partnership responsibility. The payment, incidentally, out of those funds, of an installment due upon an antecedent contract of individual responsibility, does not raise such a trust, or give title to anything but reimbursement. *Wheatley v. Calhoun*, 12 Leigh (Va.) 264.

A and B were tenants in common of a sawmill, with the land and appurtenances conveyed to them by separate deeds, each owning an undivided half, and each furnishing the

purchase-money for the share conveyed to him. They subsequently formed a co-partnership, and entered into a parol agreement to consider the real estate as partnership property, using it in their partnership business. It was held that it was not liable in equity to the payment of the partnership debts, as against the separate creditors of the copartners, who had given them credit and taken security thereon upon the strength of their owning the property as tenants in common. *Parker v. Bowles*, 57 N. H. 491.

4. *Paton v. Baker*, 62 Iowa 704; *Morgan v. Olvey*, 53 Ind. 6; *Flanagan v. Shuck*, 82 Ky. 617; *Moran v. Palmer*, 13 Mich. 368; *Williams v. Sheldon*, 61 Mich. 311; *Morrison v. Mendenhall*, 18 Minn. 232; *Whitney v. Cotten*, 53 Miss. 689; *Berchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165; *Columb v. Read*, 24 N. Y. 505; *Leisenring v. Black*, 5 Watts. (Pa.) 303. And see *Smith v. Ramsey*, 6 Ill. 373; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *West Hickory Min. Assoc. v. Reed*, 80 Pa. St. 38; *Foster v. Barnes*, 81 Pa. St. 377.

Two parties holding unequal interests, having foreclosed a mortgage upon real estate taken to indemnify the partnership against a certain securityship, bid in the property, and the land was conveyed to them jointly, without designating their respective interests. Held, that each took a moiety of the legal title, but that in equity they would hold according to their respective interests; and that a conveyance by the executor of the partner holding the greater interest "of all the right, title and interest which the testator had at the time of his decease," would pass to the grantee the legal title to one-half the land, and the equitable title to the additional interest held by the testator. *Putnam v. Dobbins*, 38 Ill. 394.

Taking in a new partner is a dissolution of the old firm, and consequently if the real estate of the old firm is contributed as capital stock it becomes the partnership property of the new firm,¹ but where the new firm simply uses the property, the opposite rule prevails.² Where, upon dissolution, the partners in whose names the title stands, convey to the others a share equal to their interest in the firm, the partnership character of the whole property is destroyed.³

b. DOCTRINE OF EQUITABLE CONVERSION—(See also *EQUITABLE CONVERSION AND RECONVERSION*, vol. 6, p. 664).—In England partnership real estate is considered as personal estate for all purposes, and after the settlement of the firm affairs it is not subject to dower, and is distributable as personal property;⁴ but the almost universal American doctrine is that it is to be regarded

The proceeds of a sale to satisfy a vendor's lien of land purchased with partnership funds, and for partnership purposes, is assets for the payment of the obligations of the partnership, after the satisfaction of the lien, and such sale is not subject to a right of dower in the wife of one of the partners. *Sherley v. Thomasson* (Ky. 1886), 1 S. W. Rep. 530.

But land purchased by a surviving partner at sheriff's sale, under an attachment in a suit by such partner on a debt due the partnership, does not become partnership real estate, which will descend to the heirs of the deceased partner, so as to prevent the surviving partner from converting it into money by a sale. *Bright v. Land & River Imp. Co.*, 42 Fed. Rep. 479.

1. *Hatchett v. Blanton*, 72 Ala. 423; *Andrews v. Brown*, 21 Ala. 437; 56 Am. Dec. 252; *Marsh v. Davis*, 33 Kan. 326; *Bergeron v. Richardott*, 55 Wis. 129.

If the title remains in the old partners they will be deemed to hold it in trust for the partnership. *Marsh v. Davis*, 33 Kan. 326.

In case of the sale of such property a presumption arises that the consideration or any securities taken for its payment, are the property of and have been appropriated to the use of the firm. *Lincoln v. White*, 30 Me. 291.

A deed from the partners to the firm consisting of themselves and a new partner just taken in is valid and binding. *Henry v. Anderson*, 77 Ind. 361. And operates as a transfer of an undivided fourth part to the new partner. *McFarland v. Chase*, 7 Gray (Mass.) 462.

2. *Hatchett v. Blanton*, 72 Ala. 423.

Where the new firm pays rent to the partners composing the old firm, the partnership character of the property is lost, and it becomes the real estate of the old firm. *Rowley v. Adams*, 8 Jur. 994.

3. *Smith v. Ramsey*, 6 Ill. 373; *Brush v. Maydwell*, 14 Cal. 208.

In such a case the purchaser need not proceed in equity to have the firm affairs settled before asserting his title to his half of the land. *Brush v. Maydwell*, 14 Cal. 208.

Partners desiring to form a corporation agreed to subscribe for stock to be paid for by the transfer of the firm property and assets. E, one of the partners, contracted with F for the purchase of certain realty, to be paid for out of the proceeds of the sale of his interest in the firm property, in stock of the corporation. The corporation was formed, and E was credited with a certain sum as consideration for his conveyance of the firm realty standing in his name. E, having died, his executors obtained leave of court to carry out the contract with F, and transferred to him stock in the corporation, and an order to do it, receiving the balance of E's credit in stock. E's widow, having renounced the will, the realty and stock were sold. It was held that whether or not the legal title to the property was in the firm at the time of E's death, there had been such a disposition of it under agreements between the partners, with F, and with the corporation, as to defeat any right of firm creditors to the fund in the hands of E's executor. *Singer v. Carpenter*, 26 Ill. App. 28.

4. *Darby v. Darby*, 3 Drew. 495; *At-*

in equity as personal property so far only as may be necessary for the payment of debts and the adjustment of partnership accounts, the balance retaining all the incidents of real property.¹ The partners may, however, effect a complete conversion of the

torney General *v.* Hubback, 10 Q. B. D. 473; Murtagh *v.* Costello, 7 Irish L. R. 428.

Canada seems to have adopted the English rule. Sanborn *v.* Sanborn, 11 Grant's Ch. (Up. Can.) 359; Wylie *v.* Wylie, 4 Grant's Ch. (Up. Can.) 278.

1. Davis *v.* Smith, 82 Ala. 198; Espey *v.* Comer, 76 Ala. 501; Brewer *v.* Browne, 68 Ala. 210; Offutt *v.* Scott, 47 Ala. 104; Lenow *v.* Fones, 48 Ark. 557; Strong *v.* Lord, 107 Ill. 25; Grison *v.* Moore, 106 Ind. 296; Hale *v.* Plummer, 6 Ind. 121; Matlock *v.* Matlock, 5 Ind. 403; Pepper *v.* Thomas, 85 Ky. 539; Lowe *v.* Lowe, 13 Bush (Ky.) 688; Galbraith *v.* Gedge, 16 B. Mon. (Ky.) 630; Buffum *v.* Buffum, 49 Me. 108; Goodburn *v.* Stevens, 5 Gill (Md.) 1; 1 Md. Ch. 420; Wilcox *v.* Wilcox, 13 Allen (Mass.) 252; Scruggs *v.* Blair, 44 Miss. 406; Holmes *v.* McGee, 27 Mo. 597; Smith *v.* Jones, 18 Neb. 481; Campbell *v.* Campbell, 30 N. J. Eq. 415; Fairchild *v.* Fairchild, 64 N. Y. 471; Rank *v.* Grote, 50 N. Y. Super. Ct. 275; Buchan *v.* Sumner, 2 Barb. Ch. (N. Y.) 165; Buckley *v.* Buckley, 11 Barb. (N. Y.) 43; Sumney *v.* Patton, 1 Winst. Eq. (N. Car.) 52; Stroud *v.* Stroud, Phil. (N. Car.) 525; Ferguson *v.* Hass, Phil. Eq. (N. Car.) 113; Rammelsberg *v.* Mitchell, 29 Ohio St. 22; Marvin *v.* Trumbull, Wright (Ohio) 386; Greene *v.* Graham, 5 Ohio 264; Bowman *v.* Bailey, 20 S. Car. 559; Piper *v.* Smith, 1 Head (Tenn.) 93; Gaines *v.* Catron, 1 Humph. (Tenn.) 514; Williamson *v.* Fontain, 7 Baxt. (Tenn.) 212; Griffey *v.* Northcutt, 5 Heisk. (Tenn.) 746; Diggs *v.* Brown, 78 Va. 291; Martin *v.* Morris, 62 Wis. 418; Clay *v.* Field, 34 Fed. Rep. 375; Logan *v.* Greenlaw, 25 Fed. Rep. 299; Murrett *v.* Murphy, 11 Nat. Bankr. Reg. 231. But see McAlister *v.* Montgomery, 3 Hayw. (Tenn.) 94; Bank of Louisville *v.* Hall, 8 Bush (Ky.) 672; Buck *v.* Winn, 11 B. Mon. (Ky.) 320.

In a court of equity, real estate, owned by a partnership, may be treated as a part of the partnership funds, and consequently, as personal estate. But this rule grows out of the peculiar nature of the partnership relation, and is

adopted for the purpose of doing justice between partners, or between them and others having dealings with them, and for the purpose of properly adjusting the relations between them, or between them and others having dealings with or relations to the partnership. It is not an arbitrary rule, by which a court of equity transmutes real estate into personal property when it is once owned and possessed by a partnership, and causes it to take that character outside of and independent of the exigencies of the partnership. Black *v.* Black, 15 Ga. 445.

Land purchased by several for the purpose of sale for profits only, and not for permanent use, will be regarded in equity as personal property among the partners in the speculation, and one of them may release his interest in the same orally. Morrill *v.* Colehour, 82 Ill. 618; Necoll *v.* Ogden, 29 Ill. 323.

The legal title to partnership realty is held by the partners as tenants in common, subject in equity to be used in settling the liabilities of the co-partnership; but when the debts of the firm are paid all the incidents and qualities of real estate revive, and it will become subject to dower, and descend to the heir as in any other tenancy in common. Pepper *v.* Pepper, 24 Ill. App. 316.

Leasehold estate belonging to a partnership is subject, in equity, to the incidents of personal property. Day *v.* Perkins, 2 Sandf. Ch. (N. Y.) 359.

In Tennessee real estate held by partners for partnership purposes descends and vests, upon the death of one of the partners, in his heirs at law, as real estate. Yeatman *v.* Hoods, 6 Yerg. (Tenn.) 20.

In Pennsylvania the doctrine of equitable conversion is applied as between the parties, but as to strangers such conversion must be evidenced by writing and recorded in order to establish a priority in the partnership over third persons who have obtained liens upon the property. See Shafer's Appeal, 106 Pa. St. 49; Kepler *v.* Erie etc. Co., 101 Pa. St. 602; Du Bree *v.* Albert, 100 Pa. St. 483; Holt's Appeal, 98 Pa. St. 257; Black's Appeal, 89 Pa. St.

property into personalty by agreement,¹ but an agreement to have that effect must be clear and explicit.²

So far as the partnership real estate is converted into personalty, all the incidents of personal property consistent with technical rules of conveyancing attach to it, the partner's lien, prior to claims of separate creditors, for advances, payment of creditors and his share of the surplus attaching to it,³ and there being no descent by inheritance as real property, and no inchoate or other dower right existing in it, whether the legal title be in the name

201; Geddes' Appeal, 84 Pa. St. 482; Foster v. Barnes, 81 Pa. St. 377; Foster's Appeal, 74 Pa. St. 391; 15 Am. Rep. 553; Meily v. Wood, 71 Pa. St. 488; 10 Am. Rep. 719; Jones' Appeal, 70 Pa. St. 169; Ebbert's Appeal, 70 Pa. St. 791; Leferies' Appeal, 69 Pa. St. 122; 8 Am. Rep. 229; Moderwell v. Mullison, 21 Pa. St. 257; McDoernatt v. Lawrence, 7 S. & R. (Pa.) 438; 10 Am. Dec. 468; Hale v. Henrie, 2 Watts (Pa.) 143; 27 Am. Dec. 289.

Before the liquidation of a partnership its effects are personalty, not realty, although invested in land; and, a partner dying, his personal representative, not his heir, succeeds to his interest therein. Leaf's Appeal, 105 Pa. St. 505. And see Moderwell v. Mullison, 21 Pa. St. 257.

1. Davis v. Christian, 15 Gratt. (Va.) 11; Maddock v. Astbury, 32 N. J. Eq. 181; Leap's Appeal, 105 Pa. St. 505; West Hickory Min. Assoc. v. Reed, 80 Pa. St. 38.

A purchase of real property as a part of the stock in trade of the firm was held to constitute such an agreement in Galbraith v. Gedge, 16 B. Mon. (Ky.) 630, and Ludlow v. Cooper, 4 Ohio St. 1. But the contrary was held in Strong v. Lord, 107 Ill. 25, and Hewitt v. Rankin, 41 Iowa 35.

An agreement that the real property shall be held solely for partnership purposes is an out and out conversion. Rammelsburg v. Mitchell, 29 Ohio St. 22; Collumb v. Read, 24 N. Y. 505.

In Pennsylvania an agreement of partners to make real estate part of the common stock must be in writing, and ought to appear of record. Harding v. Devitt, 10 Phila. (Pa.) 95; Jones' Appeal, 70 Pa. St. 169; Ebbert's Appeal, 70 Pa. St. 79; Lefevre's Appeal, 69 Pa. St. 122. And see *supra* Pennsylvania rule.

2. See Lenow v. Fones, 48 Ark. 557; Flanagan v. Shuck, 82 Ky. 617; Berry v. Folkes, 60 Miss. 576.

Real estate owned and used by a partnership may be deemed personalty, not only for purposes of the partnership but for distribution also, when the intention of the partners that it should be so treated appears. In the absence of their agreement, express or implied, to this effect, it should only be so regarded for the purposes of the partnership, and after these are answered, the surplus should be held to be real estate for all other purposes. Lowe v. Lowe, 13 Bush (Ky.) 688.

3. See Duryea v. Burt, 28 Cal. 569; Taylor v. Farmer, (Ill. 1889), 4 N. E. Rep. 370; Roberts v. McCarty, 9 Ind. 16; Evans v. Hawley, 35 Iowa 83; Pennypacker v. Leary, 65 Iowa 220; Spalding v. Wilson, 80 Ky. 589; Bryant v. Hunter, 6 Bush (Ky.) 75; Hewett v. Sturdevant, 4 B. Mon. (Ky.) 453; Divine v. Metchum, 4 B. Mon. (Ky.) 488; 41 Am. Dec. 241; Burleigh v. White, 70 Me. 130; Goodburn v. Stevens, 5 Gill (Md.) 1; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Howard v. Priest, 5 Met. (Mass.) 582; Dyer v. Clark, 5 Met. (Mass.) 562; 39 Am. Dec. 697; Arnold v. Wainright, 6 Minn. 358; Whitney v. Cotten, 53 Miss. 689; Dilworth v. Mayfield, 36 Miss. 40; Priest v. Choteau, 85 Mo. 398; Uhler v. Semple, 20 N. J. Eq. 288; Hiscock v. Phelps, 49 N. Y. 97; Tarbell v. Bradley, 7 Abb. N. Cas. (N. Y.) 273; Coles v. Coles, 15 Johns. (N. Y.) 159; Mendenhall v. Ben Bow, 84 N. Car. 646; Winslow v. Cheffelle, 1 Harp. Eq. (S. Car.) 25; Hunter v. Martin, 2 Rich. (S. Car.) 541; Lane v. Jones, 9 Lea (Tenn.) 627; Boyers v. Elliott, 7 Humph. (Tenn.) 204; Williams v. Love, 2 Head (Tenn.) 80; Diggs v. Brown, 78 Va. 292; Thrall v. Crampton, 9 Ben. (U. S.) 218; 16 Nat. Bankr. Reg. 261. And see *infra*, this title, *Effect of Partner's Lien*.

Real estate purchased with co-partnership funds and used exclusively for copartnership purposes, although conveyed to the individual members of the

of one or another or all of the partners,¹ while the purposes of the equitable conversion remain unaccomplished. If in any case a right of dower descends to a widow as a legal title, she would hold it in trust for the purposes of the partnership.² A sale or incumbrance, therefore, by one partner of his share or the whole to one chargeable with knowledge of its partnership character, creates no lien or claim against it as against the firm or a subsequent purchaser from the firm for partnership purposes,³ though

firm, and by them retained as tenants in common, is in equity co-partnership property, liable to be applied in liquidation of the debts of the firm, in derogation of all claims against and under the individual members. *Lime Rock Bank v. Phetteplace*, 8 R. I. 56.

1. *Andrews v. Brown*, 21 Ala. 437; 56 Am. Dec. 252; *Price v. Hicks*, 14 Fla. 565; *Loubat v. Nourse*, 5 Fla. 350; *Trowbridge v. Cross*, 117 Ill. 109; *Simpson v. Leech*, 86 Ill. 286; *Bopp v. Fox*, 63 Ill. 540; *Grissom v. Moore*, 106 Ind. 296; *Hale v. Plummer*, 6 Ind. 121; *Matlock v. Matlock*, 5 Ind. 403; *Paige v. Paige*, 71 Iowa 318; *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 630; *Goodburne v. Stevens*, 1 Md. Ch. 420; *Dyer v. Clark*, 5 Met. (Mass.) 562; 39 Am. Dec. 697; *Burnside v. Merrick*, 4 Met. (Mass.) 537; *Robertshaw v. Hanway*, 52 Miss. 713; *Wooldridge v. Witkins*, 3 How. (Miss.) 360; *Willett v. Brown*, 65 Mo. 138; 27 Am. Rep. 265; *Collins v. Warren*, 29 Mo. 236; *Uhler v. Semple*, 20 N. J. Eq. 288; *Stroud v. Stroud*, Phil. (N. Car.) 525; *Sumner v. Hampson*, 8 Ohio 328; 32 Am. Dec. 722; *Greene v. Greene*, 1 Ohio 535; 13 Am. Dec. 642; *Foster's Appeal*, 74 Pa. St. 391; 15 Am. Rep. 553; *Richardson v. Wyatt*, 2 Desaus. (S. Car.) 471; *Williamson v. Fontain*, 7 Baxt. (Tenn.) 712; *Martin v. Smith*, 25 W. Va. 579; *In re Ransom*, 17 Fed. Rep. 331; *Sanborn v. Sanborn*, 11 Grant's Ch. (Up. Can.) 350; *Conger v. Platt*, 15 Up. Can. Q. B. 277.

An out and out conversion of partnership real estate into personalty may be accomplished without the consent of the wife of a partner. *West Hickory Min. Assoc. v. Reed*, 80 Pa. St. 38.

Neither the partner nor the heirs can acquire any interest in the partnership property, real or personal, adverse to the trust imposed upon it by law for the payment of the partnership debts. The widow of a deceased partner is only entitled to dower in the partnership realty, after the payment of the firm debts, and the right to a homestead

exemption stands on no higher ground. *Robertshaw v. Hanway*, 52 Miss. 713; *Howard v. Priest*, 5 Met. (Mass.) 582.

But when a suit to dissolve partnership involves the question whether certain property is the homestead of partner or partnership property, because bought with firm funds, the wife of such partner is a necessary party. *Rhodes v. Williams*, 12 Nev. 20, though the wife of a partner need not join in a mortgage made by the firm and is not a necessary party defendant in an action for its foreclosure. *Huston v. Neil*, 41 Ind. 505.

Where two agree to engage in the milling business as partners, the one to erect a building on a lot which he owns, and convey a half interest to the other and the other to furnish the machinery, in all of which they are to be equal owners, and the former subsequently conveys an undivided half interest to a third, but dies without conveying to his partner as agreed, his widow has dower in the half of the lot not conveyed, but no interest in the building or other improvements, and the heirs take no interest in either the lot or improvements. *Grissom v. Moore*, 106 Ind. 296; 55 Am. Rep. 742.

When It Again Becomes Realty.—The time of its reversion to its former character is the moment the partnership is wound up, either by decree, judgment, or agreement, when it is determined to be no longer partnership stock nor required for partnership purposes. *Foster's Appeal*, 74 Pa. St. 391.

2. *Bates' Law of Part.*, § 290. And see *infra*, this title, cases cited holding that conveyance of legal title will be compelled in aid of surviving partner.

Where two partners purchase joint estate with joint funds, taking the title in the name of the wife of one of them, her title is subject to a resulting trust in favor of the individual partners and the rights of their creditors. *Price v. Hicks*, 14 Fla. 565.

3. See *Tarbel v. Bradley*, 7 Abb. N. Cas. (N. Y.) 273; *Norwalk Nat. Bank*

it would be enforceable against his surplus, if any, after settlement.¹

This conversion of real estate into personality, however, is an equitable and not a legal conversion, and in case of death the legal title descends to the heirs of the partner or partners holding it, but subject to the equitable trust for the settlement of the partnership.² The surviving partner, therefore, while he can transfer his interest in the legal title only, can in a proper case dispose of the whole beneficial interest, and a court of equity will compel

v. Sawyer, 38 Ohio St. 338. But *Treachwell v. Williams*, 9 Bosw. (N. Y.) 649, seems to have been decided differently.

A purchased real estate for himself and B, with funds furnished by them jointly, the purchase being made for use of a partnership to be formed, but, for convenience, took the title in his own name, the vendor having knowledge of the purpose of the purchase, and of the contemplated partnership. In an action for damages for false representations as to the quantity of land contained in the tract sold, it was held that they could be joined as plaintiffs as A and B, co-partners, etc. *Peaks v. Graves*, 25 Neb. 235.

A conveyance by one partner of an undivided moiety of partnership real estate held by the partners as joint tenants or tenants in common, to a trustee, to secure his individual creditors, passes the legal title subject to the prior implied trust in favor of the partnership creditors, or the balance due another partner on a settlement of the partnership accounts; and neither the other partner nor the partnership creditors can enjoin the sale by the trustee under such deed of trust, as the purchaser would hold the land subject to their prior equities, appearing of the face of the deeds under which such purchaser would take the land. *Cunningham v. Ward*, 30 W. Va. 572.

1. *Henritt v. Rankin*, 41 Iowa 35; *Johnson v. Rogers*, 15 Nat. Bankr. Reg. 1. And see *Caldwell v. Farmer*, 56 Ala. 405; *Lang v. Waring*, 17 Ala. 145; *McCauley v. Fulton*, 44 Cal. 355; *Stadler v. Allen*, 44 Iowa 198; *Bryant v. Hunter*, 6 Bush (Ky.) 75; *Bank of Louisville v. Hall*, 8 Bush (Ky.) 672; *Blake v. Mitter*, 19 Me. 16; *Ensign v. Briggs*, 6 Gray (Mass.) 329; *Collins v. Warren*, 29 Mo. 236; *Cowden v. Cairns*, 28 Mo. 471; *Page v. Thomas*, 43 Ohio St. 38; *Lauffer v. Cavett*, 87 Pa. St. 479; *Foster v. Barnes*, 81 Pa. St. 377.

Where a partner gives a mortgage upon his separate property, to secure a partnership debt, he thereby becomes a surety for the firm, and is entitled to the rights and privileges of that character, and his separate creditors succeed to his rights and privileges as such surety, and have a right to insist that the partnership property be first applied toward payment of the debt, secured by such partner, before resort is had for that purpose to the separate estate of the surety; and if the separate estate of the surety is first applied in payment of such debt, his separate creditors will be entitled to be subrogated to the rights of the creditor as against the partnership fund. *Averill v. Louck*, 6 Barb. (N. Y.) 470.

2. *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165; *Abernathy v. Moses*, 73 Ala. 381; *Caldwell v. Farmer*, 56 Ala. 405; *Andrews v. Brown*, 21 Ala. 437; 56 Am. Dec. 252; *Pugh v. Curie*, 5 Ala. 446; *Percifull v. Platt*, 36 Ark. 456; *McNeil v. Congregational Soc.* 66 Cal. 105; *Loubat v. Nourse*, 5 Fla. 350; *Cobble v. Tomlinson*, 50 Ind. 550; *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 630; *Buffum v. Buffum*, 49 Me. 108; *Dyer v. Clark*, 5 Met. (Mass.) 562; 39 Am. Dec. 697; *Merritt v. Dickey*, 38 Mich. 41; *Dilworth v. Mayfield*, 36 Miss. 40; *King v. Weeks*, 70 N. Car. 372; *Pierce v. Trigg*, 10 Leigh (Va.) 406.

In such a case real estate is subject to a resulting trust in favor of the firm, even twenty-four years after the purchase, and after the death of the partner. *Rice v. Pennypacker*, 5 Del. 279.

The widows of the partners are not entitled to dower, nor are the heirs of the partners entitled to the rents and profits, which accrue after the death of their ancestor, if the estate and such rents are required for payment of partnership debts. *Howard v. Pries*, 5 Met. (Mass.) 582.

If land is purchased by partners with partnership funds, for partnership purposes, and is not needed for the pay-

the heirs to convey the legal title in accordance with such disposition,¹ though if there were collusion² or if the sale were not made as surviving partner for the purpose of winding up,³ or if there were no debts and consequently no necessity for a sale,⁴ such relief will be withheld.

The use and occupation of the property by the firm for the purposes of its business, if not sufficient notice of its partnership

ment of debts, the title vests in the members of the firm as tenants in common; and, after the death of one of them, a petition for damages sustained by reason of the location of a railroad upon it, is properly brought in the joint names of his heirs and the surviving partner. *Whitman v. Boston etc. R. Co.*, 3 Allen (Mass.) 133.

1. *Murphy v. Abrams*, 50 Ala. 293; *Andrews v. Brown*, 21 Ala. 437; 56 Am. Dec. 292; *Pugh v. Currie*, 5 Ala. 446; *Dupmy v. Leavenworth*, 17 Cal. 263; *Gay v. Palmer*, 9 Cal. 626; *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 630; *Keith v. Keith*, 143 Mass. 262; *Howard v. Priest*, 5 Met. (Mass.) 582; *Dyer v. Clark*, 5 Met. (Mass.) 562; 39 Am. Dec. 697; *Burnside v. Merrick*, 4 Met. (Mass.) 537; *Whitney v. Cotten*, 53 Miss. 689; *Hanway v. Robertshaw*, 49 Miss. 758; *Dilworth v. Mayfield*, 36 Miss. 40; *Easton v. Courtwright*, 84 Mo. 27; *Matthews v. Hunter*, 67 Mo. 293; *Tillinghast v. Champlin*, 4 R. I. 173; *Griffey v. Northcutt*, 5 Heisk (Tenn.) 746; *Pierce v. Trigg*, 10 Leigh (Va.) 406; *Shanks v. Klein*, 104 U. S. 18; *Francklyn v. Sprague*, 121 U. S. 215; *Sprague Mfg. Co. v. Hoyt*, 29 Fed. Rep. 421; *Conger v. Platt*, 24 Up. Can., Q. B. 277. And see *Scruggs v. Blair*, 44 Miss. 406.

An administrator who settles an estate under decree of court, is protected against the claims of creditors and relieved from personal liability, if no *mala fides* be shown in his conduct of the proceedings. *Mendenhall v. Ben Bow*, 84 N. Car. 646. But if he sells partnership real estate under such decree, the surviving partner, if he consented to such sale, may compel him to account for the purchase money. *Dyer v. Clark*, 5 Met. (Mass.) 562; 39 Am. Dec. 697; *Merritt v. Dickey*, 38 Mich. 41. And see *Burnside v. Merrick*, 4 Met. (Mass.) 537; *Greene v. Graham*, 5 Ohio, 264.

The heirs of deceased partners are not necessary parties to an action to subject the real property of the firm to the claims of its creditors if they

have only an equitable title. *McCaskill v. Lancashire*, 83 N. Car. 393.

Where different tracts of land were purchased in the names of the different partners, separate suits must be brought for their recovery, the heirs of each being interested only in the lands descending to him. *Keith v. Keith*, 143 Mass. 262.

If a trustee under the will of a partner who has the legal title to the partnership lands joins with the surviving partner in a conveyance of them a valid title is given. *West of England Bank v. Murch*, L. R., 23 Ch. D. 138; *Corser v. Cartwright*, L. R. T. H. L. 731.

The decree need not give minor heirs a day in court after coming of age to show cause against it. *Creath v. Smith*, 20 Mo. 113.

2. See *Lang v. Waring*, 25 Ala. 625; 60 Am. Dec. 533.

3. *McNeil v. Congregational Soc.*, 66 Cal. 105; *Martin v. Morris*, 62 Wis. 418.

4. *Lang v. Waring*, 25 Ala. 625; 60 Am. Dec. 533; *Way v. Stebbins*, 47 Mich. 296; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165. And see *Strong v. Lord*, 107 Ill. 25; *Godfrey v. White*, 43 Mich. 171.

It has been held in some cases that the personal property must first be resorted to and exhausted, and that a surviving partner can resort to the real property for the purpose of paying debts only when necessary so to do after the exhaustion of the personality. See *Easton v. Courtwright*, 84 Mo. 27; *Stroud v. Stroud*, Phil. (N. Car.) 525; *Foster's Appeal*, 74 Pa. St. 391; 15 Am. Rep. 553. But, on the other hand, see *infra*, this title, *Actions in Equity Between Partners*.

Tennessee has adopted a different rule by statute; real estate of a partnership, after its dissolution, is to be converted into personality by a court of equity only when such conversion is required for the payment of claims against the partnership which are in the nature of debt. *Shearer v. Shearer*, 98 Mass. 107.

character, is at least enough to put the purchaser or incumbrancer upon inquiry,¹ but as such use and occupation is not inconsistent with a tenancy in common, the question as to its sufficiency is probably one of mixed law and fact.² A purchaser from one partner, when the legal title is in another has sufficient notice,³ and a deed describing the grantees as co-partners is enough to put a mortgagee, of one of them upon inquiry.⁴ Declarations on the part of the other partners, that the property was not purchased for their benefit, will be a sufficient justification to a purchaser,⁵ but a mortgagee for an antecedent separate debt is not a *bona fide* purchaser.⁶

c. THE LEGAL TITLE.—Although partnership real estate is converted into personality to the extent required for the adjustment of partnership indebtedness and the equities of the partners, it is an equitable conversion only, and transfers and incumbrances by mortgage are governed by the rules applicable to the conveyance of real estate,⁷ but a proper conveyance by one partner

1. *Duryea v. Burt*, 28 Cal. 569; *Reeves v. Ayres*, 38 Ill. 418; *Buck v. Winn*, 11 B. Mon. (Ky.) 320; *Divine v. Mitchum*, 4 B. Mon. (Ky.) 488; 41 Am. Dec. 241; *Kerr v. Kingsbury*, 39 Mich. 150; *Churchill v. Proctor*, 31 Minn. 129; *Mechanics' Bank v. Godwin*, 5 N. J. Eq. 334; *Bergeron v. Richardott*, 55 Wis. 129; *Hoxie v. Carr*, 1 Sumn. (U. S.) 173; *Cavander v. Bulteel*, L. R., 9 Ch. App. 79.

The court, on application of the firm's assignee, set aside a deed to the father of one of the partners, upon the ground that he must have had notice of the character of the property. *Matlack v. James*, 13 N. J. Eq. 126.

If by inquiry of the tenant in possession, the mortgagee would have learned of the partnership character of the property, the notice is sufficient. *Baldwin v. Johnson*, 1 N. J. Eq. 441.

In *North Carolina* the purchaser of the interest of a partner takes subject to partnership debts whether he had notice of its partnership character or not. *Ross v. Henderson*, 77 N. Car. 170.

2. See *Parker v. Bowles*, 57 N. H. 491; *Fruik v. Branch*, 16 Conn. 260; *Hammond v. Paxton*, 58 Mich. 393; *Reynolds v. Buckman*, 35 Mich. 80; *Cowden v. Cairns*, 28 Mo. 71; *Norwalk Nat. Bank v. Sawyer*, 38 Ohio St. 339; *Forde v. Herron*, 4 Munf. (Va.) 316. And see cases cited under rule of equitable conversion in *Pennsylvania* heretofore cited.

3. *Williams v. Love*, 2 Head (Tenn.) 30.

A sale by a surviving partner of an undivided half to which he had legal title, when he might have sold it all as surviving partner, was held to indicate to the buyer, the intent of the surviving partner to convert the proceeds to his own use. *Tillinghast v. Champin*, 4 R. I. 173. And see *Martin v. Morris*, 62 Wis. 418. But see to the contrary *Offutt v. Scott*, 47 Ala. 104.

4. *Sigourney v. Munn*, 7 Conn. 324; *Brewer v. Browne*, 68 Ala. 210; *Boyce v. Coster*, 4 Strobh Eq. (S. Car.) 25; *Martin v. Morris*, 62 Wis. 418.

Though real property, purchased with the effects and used for the purposes of a mercantile firm, may in equity be liable to discharge the balance due from the company to any partner, in preference to the private creditor of any other partner, it is nevertheless competent for the members of such co-partnership to acquire such property jointly as individuals, or to lose the lien by acts tending to mislead or deceive creditors or purchasers in this particular; as, where the deed neither describes the parties purchasing as merchants and partners, nor states that the purchase was made for the use of the firm, but merely purports a conveyance to them as individuals. *Forde v. Herron*, 4 Munf. (Va.) 316.

5. *Phillips v. Crammond*, 2 Wash. (U. S.) 441. And see *Baldwin v. Johnson*, 1 N. J. Eq. 441.

6. *Lewis v. Anderson*, 20 Ohio St. 281.

7. *Davis v. Christian*, 15 Gratt. (Va.) 11; *Lawrence v. Taylor*, 5 Hill (N.

in the names of all is sufficient, whether his authority was by instrument under seal, by parol or by ratification.¹ So, a judgment against a firm is a lien upon real estate, the title to which is in the names of its members.²

1. *Conveyance to Firm in Firm Name.*—While a conveyance to a partnership in the partnership name is insufficient to convey the legal title, a partnership not being a legal person, either natural or artificial,³ it is valid as a contract to convey, and vests such an equitable title in the partnership as will defeat an after-acquired

Y.) 107; *Miller v. Proctor*, 20 Ohio St. 442; *Moreau v. Saffarans*, 3 Sneed (Tenn.) 595; *Piatt v. Oliver*, 3 McLean (U. S.) 27.

1. *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Herbert v. Hanrick*, 16 Ala. 581; *Gunter v. Williams*, 40 Ala. 561; *Grady v. Robinson*, 28 Ala. 289; *Peine v. Weber*, 47 Ill. 41; *Haynes v. Seachrest*, 13 Iowa 455; *Holbrook v. Chamberlain*, 116 Mass. 155; *Smith v. Kerr*, 3 N. Y. 144. And see *Morrison v. Mendenhall*, 18 Minn. 232; *Moran v. Palmer*, 13 Mich. 368; *Lemmon v. Hutchins*, 1 Ohio Cir. Ct. 388; *Hott's Appeal*, 98 Pa. St. 257; *Stroman v. Varn*, 19 S. Car. 307; *Weigand v. Copsland*, 14 Fed. Rep. 118; *Darst v. Roth*, 4 Wash. (U. S.) 471; *Anthony v. Butler*, 13 Pet. (U. S.) 423; *Cady v. Shepherd*, 11 Pick. (Mass.) 400; *Swan v. Stedman*, 4 Met. (Mass.) 548; *McIntyre v. Park*, 11 Gray (Mass.) 102; *Baldwin v. Richardson*, 33 Tex. 16; *Wilson v. Hunter*, 14 Wis. 683.

A deed of partnership land executed by one partner only will be deemed to have been authorized after the lapse of thirty years. *Frost v. Wolf* (Tex. 1890), 14 S. W. Rep. 440.

"I see no reason why a valid general power for each to execute deeds as attorney for the others might not be inserted in the articles of partnership. The trust would not be greater, nor more liable to abuse than that which now exists in relation to the disposition of personal property." *STRONG, J.*, in *Sage v. Sherman*, 2 N. Y. 417.

A, B, C and D, as partners, wanted money to build a saw mill on land belonging to A and B. C, the active member of the firm, mortgaged the land in the name of all. The validity of the mortgage was always recognized by all. *Held*, that it was a valid lien on the land. *Stroman v. Varn*, 19 S. Car. 307.

A conveyance of partnership land in fee by two of three partners to the third, with a conditional limitation over

upon the death of the grantee without issue, gives the remainder-men no estate in the undivided one-third of which the grantee was already seised. *Fry v. Scott* (Ky. 1889), 11 S. W. Rep. 426.

A partner who shares the profits of the firm business with knowledge that realty, held in the partnership name, has been mortgaged to secure advances which were used in the partnership business, and shares the proceeds, will not be heard, in an action to foreclose, to assert for the first time that his partner executed the mortgage without his authority, knowledge, or consent. *Salinas v. Bennett* (S. Car. 1890), 11 S. E. Rep. 968.

A lease to a firm executed in its firm name by one partner was deemed ratified by all the partners taking possession. *Holbrook v. Chamberlain*, 116 Mass. 155; *Kyle v. Roberts*, 6 Leigh (Va.) 495.

In *Holdeman v. Knight*, Dall. (Tex.) 556, it was held that a conveyance of real estate belonging to two partners by one of them, was ratified and validated by the acknowledgment before a notary by the other partner that his partner was duly authorized.

2. See *Erwin's Appeal*, 39 Pa. St. 535; *Overholt's Appeal*, 12 Pa. St. 222; *In re Coddington*, 9 Fed. Rep. 849.

Where real estate is conveyed by articles of agreement to partners as tenants in common, judgments entered against the individual partner will take effect as a lien on their interest in the land. In *Pennsylvania* no parol testimony to the effect that it was bought by the firm, with firm assets, and actually used by the firm, will alter this result. *Holt's Appeal*, 98 Pa. St. 257.

3. *Kelly v. Bourne*, 15 Oregon 476; *Percifull v. Platt*, 36 Ark. 456; *Tidd v. Rines*, 26 Minn. 201; *Rammelsberg v. Mitchell*, 29 Ohio St. 22. And see *McMurry v. Fletcher*, 24 Kan. 574.

title;¹ and where the firm name consists of the name of one partner with the addition of & Co., or some other partnership designation, the title is vested in the partner whose name is used, clothed with a trust for the benefit of the partnership.² So, all conveyances to or by partners in the partnership name, will generally be enforced in equity, where the question of the priority of other liens is not involved.³

2. *Power of One Partner to Convey.*—A partner in a firm not engaged in the purchase and sale of real estate as a business, has no power, unless expressly conferred, to bind the firm by contracts to incumber or convey its lands, and such contracts will not be enforced, specifically or otherwise;⁴ but where the real estate is the

1. *Kelly v. Bourne*, 15 Oregon 476; 16 Pac. Rep. 40. And see *Fairchild v. Fairchild*, 64 N. Y. 471; *Rammelsberg v. Mitchell*, 29 Ohio St. 22.

A lease under seal, executed by one partner in the name of the firm as lessees, the firm occupying thereunder for two years, paying rent directly to the lessor, is evidence of an agreement for a lease, which, as they have had the benefit of it, will be enforced against the surviving partners after the death of him who executed it. *Kyle v. Roberts*, 6 Leigh (Va.) 495.

Where a deed was made to two partners in their firm name which consisted of their surnames connected by "and" the conveyance was valid and vested the legal title in them as partnership property. *Jones v. Neale*, 2 Pat. & H. (Va.) 339.

Where a deed was made to Peter Hoffman and son reciting the fact of partnership, it was held that this was a sufficient designation of the son intended, and that John Hoffman, the junior member of the firm, could take under the deed, and maintain an action as surviving partner for breach of a covenant for quiet enjoyment contained in the deed. *Hoffman v. Porter*, 2 Brock. (U. S.) 158.

A deed to an indefinite grantee, or to an unincorporated society in its society name, while it is invalid at law, will create an equity in the members of the firm or society. *Byam v. Bickford*, 140 Mass. 31; *Tidd v. Rines*, 26 Minn. 201; *Douthill v. Stinson*, 73 Mo. 199.

A separate partnership may take a mortgage in the firm name to secure a debt due to it. *Kellogg v. Olson*, 34 Minn. 103.

2. *Gille v. Hunt*, 35 Minn. 357; *Moreau v. Saffarans*, 3 Sneed (Tenn.) 595; *Percifull v. Platt*, 36 Ark. 456;

Arthur v. Weston, 32 Mo. 378; *Chavener v. Wood*, 2 Oregon 182; *Lindsay v. Jaffray*, 55 Tex. 626. And see *Brunson v. Morgan*, 76 Ala. 593.

A partnership, as such, cannot hold the legal title to real estate. But where a deed was made to Jarrett, Moon & Co., it not appearing whether the firm was composed of Jarrett & Moon and others, or Jarrett Moon (one person) and others, it was held, that in the former case the legal title vested in Jarrett & Moon, and in the latter in Jarrett Moon, in trust for the partnership; and that the uncertainty arising from the omission of the Christian names of grantees might be removed by parol proof. *Holmes v. Moon*, 7 Heisk. (Tenn.) 506.

3. See *Beaman v. Whitney*, 20 Me. 413; *Brunson v. Morgan*, 76 Ala. 593; *Slaughter v. Swift*, 67 Ala. 494; *Lindsay v. Hoke*, 21 Ala. 542; *Elliott v. Dycke*, 78 Ala. 150; *Chicago Lumber Co. v. Ashworth*, 26 Kan. 212; *Printup v. Turner*, 65 Ga. 71; *Orr v. How*, 55 Mo. 328; *Batly v. Adams Co.*, 16 Neb. 44; *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. (N. Car.) 103; 18 Am. Dec. 577; *Hunter v. Martin*, 2 Rich. (S. Car. 541; *Baldwin v. Richardson*, 33 Tex. 16; *Morse v. Carpenter*, 19 Vt. 613; *Wilson v. Hunter*, 14 Wis. 683; *Sherry v. Gilmore*, 58 Wis. 324.

4. *Ruffner v. McConnel*, 17 Ill. 212; *Sutlive v. Jones*, 61 Ga. 676; *Willey v. Carter*, 4 La. Ann. 56; *Dillon v. Brown*, 11 Gray (Mass.) 179; *Keck v. Fisher*, 58 Mo. 532; *Arnold v. Stevenson*, 2 Nev. 234; *McWhorter v. McMahan*, Clark's Ch. (N. Y.) 400; 10 Paige (N. Y.) 386; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107. And see *Elliott v. Dycke*, 78 Ala. 150; *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. (N. Car.) 103; 18 Am. Dec. 577; *Anthony v. Butler*, 13

stock in trade in which the partnership is dealing and is a commodity of the firm, each partner has the same power of disposition as that of a partner in an ordinary commercial partnership to dispose of the goods of the firm in the usual scope of its business;¹ but in any event, whether converted into personality or not, it must be conveyed as real estate.²

A surviving partner, however, has the right to control partnership real estate, and treat it as personality for the payment of partnership debts until the affairs of the firm are finally settled,³ and he can sell the entire interest of the whole firm without aid

Pet. (U. S.) 423; *Napier v. Catron*, 2 Humph. (Tenn.) 534. But see *Peine v. Weber*, 47 Ill. 41; *Smith v. Kerr*, 3 N. Y. 144.

A mortgage under seal, executed by one member of a firm binds him, but not the firm. *Weeks v. Mascoma Rake Co.*, 58 N. H. 101.

A sealed lease executed by one partner only, in the name of the partnership, though for a term which required no seal, does not pass the estate of the other partners, without evidence of previous authority or subsequent ratification by them. *Dillon v. Brown*, 11 Gray (Mass.) 179.

If one partner makes an assignment of the real estate belonging to the firm, the legal title will be held in trust by the firm for the assignee. *Baldwin v. Richardson*, 33 Tex. 16.

A deed by one partner in the firm name conveys only his interest, though subsequently the other partners orally assent. *Brunson v. Morgan*, 76 Ala. 593.

A partner's mortgage of partnership land, though in the firm name and to secure a firm debt, contracted within scope of the partnership business, if not authorized or ratified by his co-partners, conveys only his own interest, and may be foreclosed as to his interest. *Printup v. Turner*, 65 Ga. 71.

Conveyances by one partner have been upheld, however, where the character of the partnership and its course of business necessarily implied an authority to execute them. *Shaw v. Farnsworth*, 108 Mass. 357; *Mussey v. Holt*, 24 N. H. 248; 55 Am. Dec. 234.

In *Michigan*, it has been held that a deed of partnership real estate held in the names of all the partners, made by one partner in his own name the firm receiving the avails, and knowing of and acquiescing in it, is valid and effectual as against the heirs of one of the

partners who subsequently died. *Moran v. Palmer*, 13 Mich. 367.

1. *Thompson v. Bowman*, 6 Wall. (U. S.) 316; *Batty v. Adams Co.*, 16 Neb. 44; *Sage v. Sherman*, 2 N. Y. 417; *Robinson v. Crowder*, 4 McCord (S. Car.) 519; 17 Am. Dec. 762; *Baldwin v. Richardson*, 33 Tex. 16; *Young v. Wheeler*, 34 Fed. Rep. 98. But see *Lawrence v. Taylor*, 5 Hill (N. Y.) 107.

All the members of a partnership engaged in real estate transactions are liable for the frauds committed by either, in the course of the transactions and business of the partnership, although the others had no connection with, knowledge of, or participation in the fraud. *Chester v. Dickerson*, 54 N. Y. 1.

A and B were jointly interested in acquiring land, laying it out, and then selling it. A held the legal title to all the land as trustee, and held the entire control under a deed of trust to which B was a party. The trust deed gave him the power to make loans and secure the loans by mortgage. A borrowed money, and gave a note signed "A, trustee," secured by a mortgage on part of the land, it was held that B was personally liable on the note, because of the express power given to A by the deed of trust. *Morse v. Richmond*, 6 Ill. App. 166.

In *Pennsylvania*, it has been held that owing to the Statute of Frauds, where land is partnership stock, it never becomes personality, even during the continuance of the firm, so as to give one partner power to dispose of the firm interest in it. *Foster's Appeal*, 74 Pa. St. 391; 15 Am. Rep. 553; 3 Am. Law Rep. 230.

2. *Davis v. Christian*, 15 Gratt. (Va.) 11.

3. *Cobble v. Tomlinson*, 50 Ind. 550; *Merritt v. Dickey*, 38 Mich. 41. And

from the court¹ or convey or incumber it to compromise or secure partnership debts,² and where rents and profits are derived from the property between the time of the death of the partner and its final disposition, they go to the surviving partner.³

d. PROOF OF PARTNERSHIP CHARACTER.—The Statute of Frauds can only be invoked, when at all, in contests between partners with relation to their real estate; third persons may prove that it is partnership property and affected with partnership equities by parol evidence.⁴ As between the partners, where the land is a mere incident to its business, and not its stock in trade, the same rule applies,⁵ and where it is a partnership formed

see *infra*, this title, *Doctrine of Equitable Conversion*.

1. *Easton v. Courtwright*, 84 Mo. 27; *Dupuy v. Leavenworth*, 17 Cal. 262; *Walling v. Burgess*, 122 Ind. 299; *Tillinghast v. Champlin*, 4 R. I. 173; *Griffey v. Northcutt*, 5 Heisk. (Tenn.) 746; *Shanks v. Klein*, 104 U. S. 18. But see *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 631.

Where, on the death of one of the partners, the firm being insolvent, the surviving partner conveys the lands, with all the other partnership property, to an assignee, in compromise and settlement of the claims of creditors, who assent to it, the assignee may maintain a bill in equity against the heirs of the deceased partner to compel a divestiture of the legal title, and have the lands applied to the payment of the partnership debts. *Murphy v. Abrams*, 50 Ala. 293.

While the deed of a surviving partner, conveying partnership real estate for the purpose of paying debts, does not pass the legal title as against the heirs of the deceased, it conveys an equity through which the purchaser may compel a conveyance of the legal title to them. *Davis v. Smith*, 82 Ala. 198.

2. *Breen v. Richardson*, 6 Colo. 605; *Murphy v. Abrams*, 50 Ala. 293. And see *infra*, this title, *Powers of Surviving Partners*.

Where a firm borrowed money, purchased real estate for firm purposes, mortgaged it to secure the loan, and on the dissolution of the firm, by death, a surviving partner, together with his wife, to secure an extension of the loan, executed new notes and mortgage, no new debt was created, but the property still continued liable for the original debt, and a decree of foreclosure against the personal representatives of the deceased partner was proper. *Van Staden v. Kline*, 64 Iowa, 180.

3. *Dyer v. Clark*, 5 Met. (Mass.) 562; 39 Am. Dec. 697; *Hartnett v. Fegan*, 3 App. 1; *Cilley v. Huse*, 40 N. H. 358.

If rents and profits accrue from the real partnership assets while in the hands of the surviving member of a firm, such rents and profits are personal property, and any surplus after the winding up of the partnership would go to the personal representative of the deceased partner. The heir would only be entitled to the realty or its surplus, if sold, as it stood at the death of his ancestor. *Griffey v. Northcutt*, 5 Heisk. (Tenn.) 746.

4. *In re Warren*, 2 Dav. (U. S.) 322; *Brown v. Beecher* (Pa. 1888), 15 Atl. Rep. 608.

5. *Fairchild v. Fairchild*, 64 N. Y. 471; *Causler v. Wharton*, 62 Ala. 358; *York v. Clemens*, 41 Iowa 95; *Marsh v. Davis*, 33 Kan. 326; *Tenny v. Simpson*, 37 Kan. 353; *Scruggs v. Russell*, McCahon (Kan.) 39; *Fall River Whaling Co. v. Borden*, 10 Cush. (Mass.) 458; *Sherwood v. St. Paul etc R. Co.*, 21 Minn. 127; *Personette v. Pryme*, 34 N.J. Eq. 26; *Baldwin v. Johnson*, 1 N. J. Eq. 441; *Smith v. Tarlton*, 2 Barb. Ch. (N. Y.) 336; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Knott v. Knott*, 6 Oregon 142; *McCully v. McCully*, 78 Va. 159; *Brooke v. Washington*, 8 Gratt. (Va.) 248; 56 Am. Dec. 142; *Hoxie v. Carr*, 1 Sumn. (U. S.) 173; *Lyman v. Lyman*, 2 Paine (U. S.) 11; *In re Farmer*, 18 Nat. Bankr. Reg. 207; *Newton v. Doran*, 3 Grant's Ch. (Up. Can.) 353.

Where the evidence is clear and certain, relief is granted on the grounds of a resulting trust. *Pratt v. Oliver*, 2 McLean (U. S.) 267; *Larkins v. Rhodes*, 5 Port. (Ala.) 195.

Plaintiff to whom a testator devised all his real estate, brought an action to dispossess E of lands, the title to which was in testator's name. E, in his an-

for the purpose of dealing in lands the preponderance of authority where the land is purchased with the joint fund, is against the applicability of the statute.¹ But the doctrine of resulting trusts does not apply to a conversion into partnership property of real estate purchased with individual funds and held as tenants in common, and such conversion must therefore be evidenced by writing.² So, an agreement by an owner of lands to make them partnership property, or to take in a partner and to confer upon

answer, set up that the testator and himself were partners, and that the real estate was partnership property. *Held*, that E was entitled to set up this defense to plaintiff's claim, and that parol evidence of the facts set forth was admissible on the part of the defense. *Thompson v. Egbert*, 3 *Thomp. & C.* (N. Y.) 474; 1 *Hun* (N. Y.) 484.

Where written articles of a mercantile co-partnership entered into in March, stipulated for the purchase of a lot for the firm for the erection of a store, parol evidence is admissible to show that a lot absolutely conveyed later in the year to one of the partners, on which a store was erected and used for partnership purposes, and was purchased with partnership funds, was in fact, partnership property. *Bird v. Morrison*, 12 *Wis.* 138.

Where a partnership, formed under an oral agreement, purchases land, and takes title, by consent, in the name of one partner, the other partner cannot invoke the statute of frauds to defeat a recovery on notes given by him to his co-partner for his interest in the land. *Allison v. Perry*, 130 *Ill.* 9.

In *Meason v. Kaine*, 63 *Pa. St.* 335, damages were allowed for the breach of an oral agreement to contribute a certain amount of capital in a partnership formed for the purpose of purchasing a certain tract of land.

1. *Bunnel v. Taintor*, 4 *Conn.* 568; *Holmes v. McCray*, 51 *Ind.* 358; 19 *Am. Rep.* 753; *Pennybacker v. Leary*, 65 *Iowa* 220; *Richards v. Grinnell*, 63 *Iowa* 44; 50 *Am. Rep.* 727; *Hunter v. Whitehead*, 42 *Mo.* 524; *Springer v. Cahell*, 10 *Mo.* 640; *Hirbour v. Reed*, 3 *Mont.* 15; *Chester v. Dickerson*, 54 *N. Y.* 1; 13 *Am. Rep.* 550; *Traphagen v. Burt*, 67 *N. Y.* 30; *Clagett v. Kilbourne*, 1 *Black* (U. S.) 346. See *Carr v. Leavitt*, 54 *Mich.* 540; *Snyder v. Wolford*, 33 *Minn.* 175; *Wormser v. Meyer*, 54 *How. Pr.* (N. Y.) 189; *Smith v. Tarlton*, 2 *Barb. Ch.* (N. Y.) 336; *Knott v. Knott*, 6 *Oregon* 142; *Platt v.*

Oliver, 2 *McLean* (U. S.) 267; 3 *How.* 401; *Essex v. Essex*, 20 *Beav.* 442; *Dale v. Hamilton*, 5 *Hare* 369.

A, B and C verbally agreed to purchase, taking title in the name of A, a farm for their joint benefit, each to pay one-third of the price, the farm to be sold in parcels, the proceeds to be applied on the purchase price, and each to be entitled to one-third of the surplus, if any, or of the unsold residue. After the agreement went into effect, they purchased another lot, taking title in the name of A, and put a building on it with a part of the proceeds of the sales. A did not expressly agree to convey any part of the farm or lot to his partners or either of them. The agreement was held to be valid, and after the partnership was dissolved, and A and B had made a general assignment, C could compel the assignee to convey to him an equal, undivided third of the land. *Bissell v. Harrington*, 18 *Hun* (N. Y.) 81.

The Contrary Doctrine is squarely maintained in *Smith v. Burnham*, 3 *Sumn.* (U. S.) 435; *Gray v. Palmer*, 9 *Cal.* 616; *Pecot v. Armelin*, 21 *La. Ann.* 667.

D verbally agreed with two other persons to purchase certain premises on the joint account of the three for speculation, each to contribute a certain proportion of the purchase money, and share the profits *pro rata*, D to take title and give bond and mortgage in his own name for the portion not paid down, and it was done accordingly. In an action to foreclose the mortgage it was held that the name of D could not be regarded as the agreed firm name, or as representing any one but himself on his bond. And that payments made by another of the three did not change the character of the bond from an individual to a joint obligation. (Reversing 13 *Hun* (N. Y.) 422.) *Williams v. Gillies*, 75 *N. Y.* 197.

2. *Parker v. Bowles*, 57 *N. H.* 491; *Alexander v. Kimbro*, 49 *Miss.* 529.

him the rights of a partner in the property, is void under the Statute of Frauds if not in writing, as it is in effect a sale of an interest in lands.¹ Books of account and other written transactions of the parties, or the recognition of the partnership in letters to third persons, however, are sufficient to satisfy the statute.²

XIII. THE INTERESTS OF THE PARTNERS.—A partner has no specific interest in any particular part of the property of the firm: his interest consists of his portion of the residue left after payment of all the debts and liabilities of the firm and the adjustment of their partnership claims against each other.³

1. Presumption of Equality.—In the absence of any agreement to the contrary, a presumption exists that it was the intention of the partners to share the profits and bear the losses equally, even though the capital may have been contributed in unequal proportions, or though capital may have been contributed by one and labor by another.⁴ So where the proportion in which the profits

But *Personette v. Pryne*, 34 N. J. Eq. 26, seems to have been decided upon a contrary principle.

1. *Henderson v. Hudson*, 1 Munf. (Va.) 510; *In re Warren*, 2 Dav. (U. S.) 322. And see *Rowland v. Boozer*, 10 Ala. 690; *York v. Clemens*, 41 Iowa 95; *Larkins v. Rhodes*, 5 Port. (Ala.) 195; *Everhart's Appeal*, 106 Pa. St. 349; *Smith v. Burnham*, 3 Sumn. (U. S.) 435; *Dunbar v. Bullard*, 2 La. Ann. 810; *Gray v. Palmer*, 9 Cal. 616; *Benton v. Roberts*, 4 La. Ann. 216.

After the sale of lands, the proceeds being personalty, oral evidence will be admissible to establish an interest in them on the part of the copartners. *Everhart's Appeal*, 106 Pa. St. 349.

2. *Fall River Whaling Co. v. Borden*, 10 Cush. (Mass.) 458. And see *Rowland v. Boozer*, 10 Ala. 690; *Montague v. Hayes*, 10 Gray (Mass.) 609.

3. *Douglass v. Winslow*, 20 Me. 89; *Noonau v. Nunan*, 76 Cal. 44; *Filley v. Phelps*, 18 Conn. 294; *Trowbridge v. Cross*, 117 Ill. 109; *Bopp v. Fox*, 63 Ill. 540; *Perry v. Holloway*, 6 La. Ann. 265; *Tobey v. McFarlin*, 115 Mass. 98; *Fern v. Cushing*, 4 Cush. (Mass.) 357; *Schalck v. Harmon*, 6 Minn. 265; *Bowman v. O'Reilly*, 31 Miss. 261; *Bufium v. Seaver*, 16 N. H. 160; *Staats v. Bristow*, 73 N. Y. 264; *Mabbett v. White*, 12 N. Y. 442; *McCutchon v. Davis* (Tex. 1888), 8 S. W. Rep. 123; *Williams v. Roberts*, 6 Coldw. (Tenn.) 493. And see *Elliot v. Stevens*, 38 N. H. 311.

In winding up a partnership, in order to determine the rights of each partner, and what one should pay the other, an

account should be taken of the firm's liabilities, and the assets first applied to their satisfaction; what remains constitutes the fund to be apportioned between the several partners. *Gaines v. Coney*, 51 Miss. 323.

A decree giving to an alleged partner a share in the avails of property purchased with partnership funds, cannot be sustained, when there is no account taken between the partners, nor any proof of the state of accounts between them. *Bowman v. O'Reilly*, 31 Miss. 261.

It is error to instruct the jury that any particular articles, or any aliquot part of the property of a partnership is liable in execution against one of two partners. *Fait v. Murphy*, 80 Ala. 440.

The equitable title, in a member of a partnership, to an undivided half of a piece of land, purchased with partnership funds, is liable to sale for the payment of the firm debts. *Reeves v. Stevens*, 38 Ill. 418.

4. *State v. Brower*, 93 N. Car. 344; *Brewer v. Browne*, 68 Ala. 210; *Stein v. Robertson*, 30 Ala. 286; *Donelson v. Posey*, 13 Ala. 752; *Turnipseed v. Goodwin*, 9 Ala. 372; *Griggs v. Clark*, 23 Cal. 427; *Ligare v. Peacock*, 109 Ill. 94; *Flagg v. Stowe*, 85 Ill. 164; *Remick v. Emig*, 42 Ill. 342; *Farr v. Johnson*, 25 Ill. 522; *Roach v. Perry*, 16 Ill. 37; *Moore v. Bare*, 11 Iowa 198; *Lee v. Lashbrooke*, 8 Dana (Ky.) 214; *Conwell v. Sandidge*, 5 Dana (Ky.) 210; *Pirtle v. Penn*, 3 Dana (Ky.) 247; 28 Am. Dec. 70; *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 506; *Wolfe v. Gilmer*, 7 La. Ann. 583; *Harris v. Carter*, 147

are to be shared is provided for, it will be presumed that the losses are to be borne in the same ratio,¹ though there is no pos-

Mass. 313; *Northrup v. McGill*, 27 Mich. 234; *Randle v. Richardson*, 53 Miss. 176; *Henry v. Bassett*, 75 Mo. 89; *Buckingham v. Ludlum*, 29 N. J. Eq. 345; *Ratzer v. Ratzer*, 28 N. J. Eq. 136; *Ryder v. Gilbert*, 16 Hun (N. Y.) 163; *Taylor v. Taylor*, 2 Murph. (N. Car.) 70; *Jones v. Jones*, 1 Ired. Eq. (N. Car.) 332; *Knott v. Knott*, 6 Oregon 142; *Christman v. Baurichter*, 10 Phila. (Pa.) 115; *Whitis v. Polk*, 36 Tex. 602; *Logan v. Dixon*, 73 Wis. 533; *Wilester v. Bray*, 7 Hare 159; *Farrar v. Beswick*, 1 Mov. & R. 527; *Robinson v. Anderson*, 20 Beav. 98; 7 De G. M. & G. 239; *Brown v. Dale*, 9 Ch. D. 78; *Copeland v. Toulmin*, 7 Ch. & F. 349; *Collins v. Jackson*, 31 Beav. 645. And see *Frederick v. Cooper*, 3 Iowa 171. And *quare* in *Towner v. Lane*, 9 Leigh (Va.) 262.

Where two partners were subjected to the payment of a debt of a third person, the one as surety, and the other as the heir of a co-surety, which debt was paid from the partnership funds, a separate action might be maintained by each against the principal for a moiety of the money paid. *Gould v. Gould*, 6 Wend. (N. Y.) 263.

Partnership Articles.—Articles of partnership, providing that one partner should put into the capital stock a building and machinery valued at \$9,615, and the other two should put in \$2,500, and pay the first interest on the excess put in by him, gives each partner a joint ownership of the building and machinery; and a provision that "losses in all business transactions during said partnership shall be borne," one-half by the first, and one-fourth by each of the others, does not change the rule. *Taft v. Schwamb*, 80 Ill. 289.

A provision in partnership articles that each is to use due diligence in procuring logs for their mill and share the expense, refers to the expense only, and does not mean that each is to furnish half of the logs. *Pence v. McPherson*, 30 Ind. 66.

It is held in Scotland, and in some of the earlier English cases that the question as to what should be the share of each in the profit or loss, is one for the jury, to be decided upon consideration of all the circumstances, equality not being necessarily presumed. *Thompson v. Williamson*, 7 Bligh N. R. 432;

Sharpe v. Cummings, 2 Dow. & L. 504; *Peacock v. Peacock*, 2 Camp. 45.

Taxes levied on the business of a partnership, form part of its expenses, and, when returned by the government, are to be distributed among the partners according to the terms by which the expenses were shared. Succession of *Harris*, 39 La. Ann. 443.

1. *Moley v. Brine*, 120 Mass. 324; *Flagg v. Stowe*, 85 Ill. 164. And see *Bullock v. Ashley*, 90 Ill. 102.

Where C, one of four partners, was to contribute to the business \$25,000; and "such time as he may be able to give," receiving interest on the \$25,000; W another partner, \$50,000, and all his time, receiving interest on the 50,000 and B and S, the two others, to contribute all their time, and each partner was to receive one-fourth of the net profits, and the business resulted in a loss, and B became insolvent, it was held, that the capital constituted a debt of the partnership, to which all were bound to contribute equally, and that the loss was to be born equally by C, W, and S. *Whitcomb v. Converse*, 119 Mass. 38.

Willful Default in Contributing.—H and W entered into a partnership for the purpose of building a furnace and manufacturing pig iron. It was stipulated that the money necessary to build the furnace and carry on the business should be advanced by said parties in equal proportions, in installments, whenever it should be required. It appeared that F had contributed an amount a few thousand dollars in excess of W, and that F had assumed exclusive control of the business and denied all access to the books to W; that the latter demanded to see the books and the vouchers of F in order to equalize his contribution, and was denied; that he tendered an amount sufficient to make their contributions equal, and was refused; that at the time the furnace commenced operations the difference in the contributions was small, and that the disproportion arose thereafter; that by reason of the profits arising from the business, all necessity for contribution had ceased long prior to the time fixed as the limitation of the partnership. It was held that the provision in the articles of partnership was intended to provide for the willful default of a part-

itive rule to that effect.¹ And where partners engage in speculations outside of the scope of their partnership business, they will be presumed to have intended to share the profits or losses in the same proportions as those of their regular business.² A firm which is a partner in another firm, is, in the absence of agreement to the contrary, presumed to be entitled to but one-half of the profits, the other half going to the other partner.³

2. Sale or Incumbrance of a Partner's Interest.—The sale or incumbrance by a partner of his interest in the partnership assets passes to the purchaser only his share of what would remain after the payment of the partnership debts and the adjustment of the equities of the partners.⁴ The same rule applies to a mort-

ner, in not making his full contribution of capital; that there was no such willful default in this case, and that if the contributions were equalized before the profits were accurately ascertained, that was time enough and saved any default. *Fulmer's Appeal*, 90 Pa. St. 143.

1. *In re Albion L. Assur. Soc.*, 16 Ch. D. 83.

2. *Storm v. Cumberland*, 18 Grant's Ch. (Up Can.) 245. And see *Bullock v. Ashley*, 90 Ill 102.

If one partner applies funds to the acquisition of property foreign to the objects of the partnership, without the consent of the other, on discovery, he may be compelled to take such property and account for half of the purchase money. *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 506.

3. See *Turnipseed v. Goodwin*, 9 Ala. 372; *Conwell v. Sandridge*, 5 Dana (Ky.) 210; *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 506; *Warner v. Smith*, 1 De G. J. & S. 337.

Continuance by Partners.—Where one partner sells out to another, and the remaining ones continue the business, it will be presumed, in the absence of proof to the contrary, that, as between themselves, the partnership continues with only a change in the proportions of their interests. *Frederick v. Cooper*, 3 Iowa 171.

4. *Tarbell v. West*, 86 N. Y. 280; *Sheeey v. Graves*, 58 Cal. 449; *Burpee v. Bunn*, 22 Cal. 194; *Chase v. Steel*, 9 Cal. 64; *Beecher v. Stevens*, 43 Conn. 587; *Filley v. Phelps*, 18 Conn. 294; *Sutlive v. Jones*, 61 Ga. 676; *Shaw v. McDonald*, 21 Ga. 395; *Deeter v. Sellers*, 102 Ind. 458; *Henry v. Anderson*, 77 Ind. 361; *Conant v. Frary*, 49 Ind. 530; *Kistner v. Sindlinger*, 33 Ind. 114; *Fargo v. Ames*, 45 Iowa 491; *Hodges v. Holeman*, 1 Dana (Ky.) 50; *Whit-*

more v. Shiverick, 3 Nev. 288; *Matlack v. James*, 13 N. J. Eq. 126; *Mechanics' Bank v. Godwin*, 5 N. J. Eq. 334; *Hiscock v. Phelps*, 49 N. Y. 97; *Williams v. Lawrence*, 53 Barb. (N. Y.) 320; *Tarbel v. Bradley*, 7 Abb. N. Cas. (N. Y.) 273; *Burbank v. Wiley*, 79 N. Car. 501; *Ross v. Henderson*, 77 N. Car. 170; *Bank v. Fowle*, 4 Jones' Eq. (N. Car.) 8; *Norwalk Nat. Bank v. Sawyer*, 38 Ohio St. 339; *Knox v. Summers*, 4 Yeates (Pa.) 477; *McCarty v. Emlen*, 2 Yeates (Pa.) 190; *Hunt v. Smith*, 3 Rich. Eq. (S. Car.) 465; *Knox v. Schepler*, 2 Hill (S. Car.) 595; *White v. Dougherty*, Mart. & Y. (Tenn.) 309; *Williams v. Love*, 2 Head (Tenn.) 80; *Still v. Focke*, 66 Tex. 715; *Jones v. Neale*, 2 Patt. & H. (Va.) 339; *Merrill v. Rinker*, 1 Baldw. (U. S.) 528; *Lyndon v. Gorham*, 1 Gall. (U. S.) 367; *Fox v. Hanbury*, Cowp. 445; *Bentley v. Bates*, 4 Young & C. 182; *Smith v. Parkes*, 16 Beav. 150; *Young v. Keighly*, 15 Ves. 557. And see *Deveney v. Mahoney*, 23 N. J. Eq. 247; *Tappan v. Blaisdell*, 5 N. H. 189; *Fisk v. Herrick*, 6 Mass. 271; *Pierce v. Jackson*, 6 Mass. 242.

The interest of a partner consists of his proportion of whatever balance may ultimately be left after the payment of the partnership debts and settlement of accounts between the partners, and either partner may mortgage such interest in the partnership property, and the mortgagee may sell the same on foreclosure, and the other partners cannot resist such sale on the ground that the partnership debts exceed the partnership property. The mortgagee is entitled to have the ultimate interest of the mortgagor in the property sold, and the purchaser takes that interest. The sale does not affect the right of the other partners to insist

gage,¹ or an absolute sale² by a partner of the real estate of the firm. So, a chattel mortgage made by one partner in his own name passes no title to the firm property,³ and the lien of a judgment against one partner attaches to partnership real estate subject to partnership indebtedness and the rights of the partners.⁴ All a

upon the application of the joint property to payment of firm debts, and to the payment of any balance due them. *Smith v. Evans*, 37 Ind. 526.

Although a mortgage by a partner of firm property without his copartner's consent, to secure his individual debt, will not be permitted to operate as a mortgage, yet if, on a payment of the firm debts, and a division of the assets of the firm, such mortgaged property falls to the mortgagor, it becomes operative and can be enforced. *Smith v. Andrews*, 49 Ill. 28.

An assignment by one member of a firm of all the interest he has in the stock of goods, notes, and accounts due to the firm, vests the assignee with the interest of the assignor in a mortgage held by the firm to secure a note due to it. *Keith v. Ham*, 89 Ala. 590.

A mortgage on the real estate of an insolvent partnership, executed by one of the partners to secure his individual indebtedness, is subject to the payment of the partnership debts that existed when it was given, although the greater part of the consideration may have been such partner's contribution to the capital of the firm. *Stebbins v. Willard*, 53 Vt. 665.

Partner's Lien.—When the partnership name is used, with the consent of both partners, in borrowing money for the individual accommodation of one who executes to the other a mortgage on his interest in the partnership property as security, and the latter pays the debt, his lien as a partner on the partnership property for the sum so paid, is not dependent on the mortgage or its registration, and is superior to the lien of a prior unrecorded mortgage, of which he had no notice, but which was recorded before his, and was given for the individual debt of his co-partner. *Warren v. Taylor*, 60 Ala. 218.

Encumbrance of Specific Part.—One partner cannot sell or mortgage his undivided interest in a specific part of the property belonging to the partnership. *Lovejoy v. Bowers*, 11 N. H. 404.

1. *Tarbel v. Bradley*, 7 Abb. N. Cas. (N. Y.) 273; *Jones v. Parsons*, 25 Cal.

100; *Collins v. Butler*, 14 Cal. 223; *Beecher v. Stevens*, 43 Conn. 587; *Whitmore v. Shiverick*, 3 Nev. 288; *Tarbell v. West*, 86 N. Y. 280; *Norwalk Nat. Bank v. Sawyer*, 38 Ohio St. 339; *Miller v. Proctor*, 20 Ohio St. 442.

2. *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. (N. Car.) 103; *Marks v. Sayward*, 50 Cal. 57; *Burpee v. Bunn*, 22 Cal. 194; *Gale v. Gale*, 13 Conn. 185; 33 Am. Dec. 393; *Holland v. Fuller*, 13 Ind. 195; *Matlack v. James*, 13 N. J. Eq. 126; *Rodriguez v. Hefferman*, 5 Johns. Ch. (N. Y.) 417; *Ross v. Henderson*, 77 N. Car. 170; *Boyce v. Coster*, 4 Strobb. Eq. (S. Car.) 25; *Williams v. Love*, 2 Head (Tenn.) 80; *Maxwell v. Wheeling*, 9 W. Va. 206; *Fourth Nat. Bank v. New Orleans etc. R. Co.*, 11 Wall. (U. S.) 624.

Where the title was in the partners as tenants in common the purchaser gets the legal title to an undivided share of the land, and in an action by him to recover it, the partners can set up the equitable defense that it was the property of an unsettled partnership, or that the partner making the sale was indebted to the firm. *McCauley v. Fulton*, 44 Cal. 355.

Where a person acquired an interest in a partnership and its property prior to the dissolution of the firm, and was recognized as a partner, it was held that he was a proper party to a bill for an adjustment of the partnership and for the statement of an account, and there was no error in decreeing that the defendant partner pay him a sum found to be due him, even though the defendant had not consented to his becoming a partner. *Rosenstiel v. Gray*, 112 Ill. 282.

3. *Deeter v. Sellers*, 102 Ind. 458; *Gale v. Gale*, 13 Conn. 185; 33 Am. Dec. 393; *Smith v. Andrews*, 49 Ill. 28; *Clark v. Houghton*, 12 Gray (Mass.) 38.

4. *Johnson v. Rogers*, 15 Nat. Bankr. Reg. 1; 5 Am. Law Rec. 536. And see *Evans v. Hawley*, 35 Iowa 83; *Lancaster Bank v. Myley*, 13 Pa. St. 544; *Miley v. Wood*, 71 Pa. St. 488; *Coster v. Bank of Georgia*, 24 Ala. 37; *Willis*

purchaser or mortgagee could acquire would be a right to receive, upon winding up, the share of the surplus that would otherwise have gone to the partner from whom he received the conveyance,¹ in preference to other and unsecured individual creditors.²

A subsequent *bona fide* sale of the whole property by the firm, therefore, takes precedence over such sale or incumbrance by a partner of his share, and passes a title unincumbered by it.³ So, a judgment against a partner in whose name title to partnership real estate stands may be superseded or nullified by subsequent mortgages or sales by the firm.⁴ And a sale under execution or attachment against the firm will pass to the buyer a title unincum-

v. Freeman, 35 Vt. 44; *Richards v. Allen*, 117 Pa. St. 198.

1. See *Thompson v. Spittle*, 102 Mass. 207; *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. (N. Car.) 103; 18 Am. Dec. 577; *Fourth Nat. Bank v. New Orleans etc. R. Co.*, 11 Wall. (U. S.) 624.

The members of a co-partnership are in law tenants in common of land owned by the firm; and a deed by all the firm, but executed by only one partner, is effectual to convey that partner's undivided interest only. *Jackson v. Stanford*, 19 Ga. 14; *Layton v. Hastings*, 2 Harr. (Del.) 147; *Jones v. Neale*, 2 Patt. & H. (Va.) 339. But the assignee does not become a tenant in common. *Fourth Nat. Bank v. New Orleans etc. R. Co.*, 11 Wall. (U. S.) 624; *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. (N. Car.) 103; 18 Am. Dec. 577.

One who has advanced money to enable one partner to purchase an interest of another, has no equity superior to that of the partnership creditors, though the advancement was made on the promise of the partner to secure him by mortgage, and at a time when there were no partnership debts. *Ames v. Ames*, 37 Fed. Rep. 30.

A conveyance by one partner, of real estate owned by the partnership, in trust to secure a creditor of the partnership, passes a good title, both at law and in equity, to an undivided moiety of such estate, and such creditor is entitled to priority over all other creditors of the firm. But when such property is conveyed by one partner in trust to secure his individual creditors, the property remains subject to the payment of the partnership debts. *Jones v. Neale*, 2 Patt. & H. (Va.) 339.

In *Moseley v. Garrett*, 1 J. J. Marsh. (Ky.) 212, it was held that where

a partner mortgages his interest in the partnership property to procure funds for the firm, the other partners cannot divert the interest mortgaged from the purposes contemplated by him and use it for the payment of other partnership debts.

2. *Thompson v. Spittle*, 102 Mass. 207. And see the other cases cited in this section with reference to the interest of a partner.

3. *Tarbel v. Bradley*, 7 Abb. N. Cas. (N. Y.) 273; *Jones v. Parsons*, 25 Cal. 100; *Gale v. Gale*, 13 Conn. 185; 33 Am. Dec. 393; *Shaw v. McDonald*, 21 Ga. 395; *Tarbell v. West*, 86 N. Y. 280; *Norwalk Nat. Bank v. Sawyer*, 38 Ohio St. 339; *Bentley v. Bates*, 4 Young & Co. 182; *Cavender v. Balleel*, L. R., 9 Ch. App. 79.

But in *Treadwell v. Williams*, 9 Bosw. (N. Y.) 649, it was held that a conveyance by one member of a solvent firm of his undivided interest in the real estate of the partnership, to a stranger, whether made upon a sale, or by way of payment of his individual debt, is valid as against the co-partners; and they cannot maintain an action to have it set aside on the ground that it was made without their consent, and impairs the credit of the firm.

4. *Meily v. Wood*, 71 Pa. St. 488; *Coster v. Bank of Georgia*, 24 Ala. 37; *Evans v. Hawley*, 35 Iowa 83; *Lancaster Bank v. Myley*, 13 Pa. St. 544; *Kramers v. Arthur*, 7 Pa. St. 165; *Willis v. Freeman*, 35 Vt. 44; *Johnson v. Rogers*, 15 Nat. Bankr. Reg. 1; 5 Am. Law Rec. 536; *Lake v. Craddock*, 3 P. Wms. 158.

If a judgment against one partner for a separate debt operates as a cloud upon the title of a *bona fide* purchaser from the firm of partnership property, its removal will be decreed. *Evans v. Hawley*, 35 Iowa 83.

bered by any lien placed by a partner upon his interest.¹ This rule applies as well to debts incurred and transfers made after the sale or incumbrance by one partner, as before, the balance at the time of the winding up and accounting, or the foreclosure, being all that the lien against, or the transfer by, the partner can act upon;² and where the partnership was formed for a fixed period, the remaining partners cannot be prevented from continuing to the end of the term at the risk of diminishing the share thus incumbered or disposed of.³

The same rule applies where the incumbrance is given by one partner to another, and a mortgage to secure capital or advances affords no better security than the partner's equitable lien, as it is not available against creditors.⁴ The purchaser or mortgagee,

In *Blake v. Nutter*, 19 Me. 16, however, it was held that real estate purchased with partnership funds, for partnership purposes, and so used and enjoyed, is held by the members of the firm as tenants in common, and the superior right of partnership creditors over the creditors of the individual partners does not apply at common law, to real estate thus purchased.

1. *Smith v. Andrews*, 49 Ill. 28; *Robinson v. Tevis*, 38 Cal. 611; *Hill v. Wiggin*, 31 N. H. 292; *Whitmore v. Shiverick*, 3 Nev. 288. See *Tarbell v. West*, 86 N. Y. 280; *Kistner v. Sindlinger*, 33 Ind. 114.

A purchaser at a sheriff's sale of the interest of a partner takes nothing, if the partnership is insolvent. *Staats v. Bristow*, 73 N. Y. 264.

Where an officer had attached the partnership effects, in a suit against one of the partners, and afterwards, with the consent of the firm, suffered the effects to be applied to pay a partnership debt due to a stranger, he is not responsible to the first attaching creditor, in an action for not having seized the goods in execution. *Commercial Bank v. Wilkins*, 9 Me. 28.

2. *Conant v. Frary*, 49 Ind. 530; *Beecher v. Stevens*, 43 Conn. 587; *Churchill v. Proctor*, 31 Minn. 129; *Lovejoy v. Bowers*, 11 N. H. 404; *Merchants' Bank v. Godwin*, 5 N. J. Eq. 334; *Burbank v. Wiley*, 79 N. Car. 501; *Page v. Thomas*, 43 Ohio St. 38; *Norwalk Nat. Bank v. Sawyer*, 38 Ohio St. 339; *Cavender v. Bulteel*, L. R., 9 Ch. App. 79; *Wheatham v. Davey*, 30 Ch. D. 574; *Kelly v. Hutton*, L. R., 3 Ch. App. 690; *Lindsay v. Gibbs*, 3 De G. & J. 690.

The same rule applies where partnership funds have been expended in

improving the land so deeded—to the enhanced value of the land so improved, the partnership creditors take priority over the individual creditors. *Hiscock v. Phelps*, 49 N. Y. 97.

Where the interest of one of the partners, in the property of a partnership, is assigned by him as security for his individual debts, and such assignee permits the business to go on in its ordinary course, such security becomes subject to the fluctuations of the business, and upon the subsequent dissolution is only entitled to what remains to such partner after the payment of the debts of the firm. *Bank v. Fowle*, 4 Jones' Eq. (N. Car.) 8.

3. *Whetham v. Davey*, 30 Ch. D. 574; *Redmayne v. Forster*, L. R., 2 Q. Eq. 467; *Cavender v. Bulteel*, L. R., 9 Ch. App. 78; *Kelly v. Hutton*, L. R., 3 Ch. App. 703. And see *Lovejoy v. Bowers*, 11 N. H. 404.

4. *Irwin v. Bidwell*, 72 Pa. St. 244; *Conwell v. Sandidge*, 8 Dana (Ky.) 273; *Low v. Allen*, 41 Me. 248. And see *Seaman v. Huffaker*, 21 Kan. 254.

One of three partners, purchasing the share of one of the others, is directly liable at law, or in equity, to any partnership claim of the third partner against the vendor. *Kendrick v. Tarbell*, 27 Vt. 512.

A mortgage given by one partner to another to secure a balance, however, is not a partnership asset. *Niagara Co. Nat. Bank v. Lord*, 33 Hun (N. Y.) 557, and such a mortgage has been held good in the hands of a *bona fide* purchaser as against creditors. *Scudder v. Delashmut*, 7 Iowa 39. And see *Reid v. Godwin*, 48 Ga. 527.

Where one of the members of a partnership put in, as part of his share of the capital, the land on which mills

however, would, as a general rule, be entitled to an accounting where there was no fixed term of partnership, to ascertain his rights,¹ and a *bona fide* purchaser or mortgagee of the partner who held the legal title would be protected.²

3. Separate Sale of Each Partner's Share.—The doctrine has been adopted in a number of well considered cases that either a sale under execution on judgments against separate partners for individual debts, or a voluntary sale by the partners, of their shares separately, will pass the full title to the purchasers, leaving no rights either legal or equitable in said property to the firm creditors, upon the ground that such creditors can work out their equities only through the partner's lien upon the partnership assets for the payment of debts and the adjustment of balances, and that by suffering such a disposition of them, this lien is lost;³ while, upon the other hand, a larger number of perhaps equally well considered cases have gone upon the theory that each sale, the last as well as the first, passed only the seller's interest remaining after the payment of debts and the adjustment of balances, and that, therefore, the corpus of the property still remained subject to levy by the firm creditors and liable for partnership debts.⁴ Where the sales are made simultaneously to one person with the intent to pass

(the partnership property) were built, but did not make any conveyance to the others, and sold out, reserving a lien on the land for the price, and, on a settlement, was found indebted to another partner, it was held, that it was erroneous, after decreeing against him personally the amount of his deficiency, to decree him to convey the land to the firm for benefit of purchasers, and thereby defeat his own lien. *Savage v. Carter*, 9 Dana (Ky.) 408.

1. *Smith v. Evans*, 37 Ind. 526. And see *infra*, this title, *Dissolution; Alienation of One's Interest*.

2. See *Dupuy v. Leavenworth*, 17 Cal. 262; *Reeves v. Ayers*, 38 Ill. 418; *Hiscock v. Phelps*, 49 N. Y. 97; *Lewis v. Anderson*, 20 Ohio St. 281; *Miller v. Proctor*, 20 Ohio St. 442; *Mason v. Proctor*, 16 Grant's Ch. (Up. Can.) 230. See also *infra*, this title, *What Is Partnership Real Estate*.

3. *Saunders v. Reilly*, 105 N. Y. 12; *Norris v. Vernon*, 8 Rich. (S. Car.) 13; *Coover's Appeal*, 29 Pa. St. 1; *Couchman v. Maupin*, 78 Ky. 33; *Doner v. Stauffer*, 1 P. & W. Pa. 198.

S and T, trading as partners, made several assignments each, of his private property and interest in the firm, on successive days, to the same assignees, who accepted both trusts. Afterwards a firm creditor issued execution and

levied upon the partnership property. It was held, that in the absence of proof to the contrary, the assignment of the firm to assignees, by one of the firm was assented to by the other, and that the partnership property vested in the assignees, and could not be levied upon by the sheriff, after the assignments had been made and accepted. *McNutt v. Strayhorn*, 39 Pa. St. 269.

4. *Caldwell v. Bloomington Mfg. Co.*, 17 Neb. 489; *Glenn v. Arnold*, 56 Cal. 631; *Freeman v. Campbell*, 56 Cal. 639; *Tappan v. Blaisdell*, 5 N. H. 190; *Jarvis v. Brooks*, 7 Fost. (N. H.) 37; 59 Am. Dec. 359; *Maxwell v. Wheeling*, 9 W. Va. 206; *Osborn v. McBride*, 3 Sawy. (U. S.) 590; 16 Nat. Bankr. Reg. 22.

In an action against the members of a partnership upon a joint and several promissory note, signed by them individually, but not with the firm name, an attachment was issued and levied upon the interests of defendants in the partnership property, upon which one attachment previously had been, and others were subsequently, levied in actions against the firm. Judgments having been entered in all the cases, the property was sold under execution in one of the cases against the firm, and the proceeds applied in satisfaction of that execution and another in a similar

the whole property, however, it is in effect a conversion of partnership into individual assets, and the rights of the creditors are gone.¹

XIV. CONVERSION OF JOINT INTO SEPARATE PROPERTY.—Partners may agree, that the whole or any part of the joint property of the firm shall become the separate property of one or more or all of the partners, and such an agreement based upon a sufficient consideration, and in the absence of fraud or mistake, will effect its conversion into individual assets.² Such a conversion, however, either by a division among themselves or by sales to third parties, can be effected only by the unanimous consent of all the partners,³

case. It was *held*, that the money was properly applied on the executions against the firm in preference to those of the plaintiff. *Commercial Bank v. Mitchell*, 58 Cal. 42.

Partnership effects, cannot be taken by attachment or sold on execution to satisfy a creditor of one of the partners, except to the extent of the interest of such separate partner in the effects, subject to the payment of firm debts and settlement of all accounts. No more property can be carried out of the firm by the assignee of one partner than the partner himself could extract after all the accounts are taken, and no person deriving under a partner can be in a better condition than the partner himself. *Menagh v. Whitwell*, 52 N. Y. 146.

1. *Brinkerhoff v. Marvin*, 5 Johns. Ch. (N. Y.) 320.

Where one of two partners, with the consent of the other, sells and conveys one-half of the effects of the firm to a third person, and the other partner afterwards sells and conveys the other half to the same person, such sales and conveyances are not *prima facie* void, as against the creditors of the firm, but are *prima facie* valid, against all the world, and can be set aside only by the creditors of the firm, upon their proving the transactions to be fraudulent as against them. *Kimball v. Thompson*, 13 Met. (Mass.) 283.

2. *Hickerson v. McFaddin*, 1 Swan. (Tenn.) 258; *Sage v. Chollar*, 21 Barb. (N. Y.) 596; *Kendall v. Hackworth*, 66 Tex. 499.

Where the fund has passed into the control of a court of equity, however, for the purpose of winding up the affairs of the concern, if such an agreement is made, the court may, if it deems it advisable, in view of the state of the ac-

counts and the circumstances of the case, refuse to enforce it. *Buckingham v. Ludlum*, 29 N. J. Eq. 345.

A creditor of a partnership cannot, unless he has recovered judgment for his debt, file a bill to restrain the partners from applying the partnership property to their separate debts, and for the appointment of a receiver. *Clement v. Foster*, 3 Ired. Eq. (N. Car.) 213.

3. *Hunt v. Benson*, 2 Humph. (Tenn.) 459; *Croswell v. Lehman*, 54 Ala. 363; 25 Am. Dec. 684; *Cannon v. Lindsay*, 85 Ala. 198; *Barkley v. Tapp*, 87 Ind. 25; *Gray v. Church*, 84 Ga. 125; *King v. Hamilton*, 16 Ill. 190; *Janney v. Springer*, 78 Iowa 617; *Cooper v. Fredrick*, 4 Greene (Iowa) 403; *Wilson v. Davis*, 1 Mont. 183; *Croughton v. Forrest*, 17 Mo. 131; *People v. Till*, 3 Neb. 261; *Partridge v. Wells*, 30 N. J. Eq. 176; *Shaler v. Trowbridge*, 28 N. J. Eq. 595; *Uhler v. Semple*, 20 N. J. Eq. 288; *Bunn v. Morris*, 1 Cai. (N. Y.) 54; *Rhodes v. Williams*, 12 Nev. 20; *Thomas v. Lines*, 83 N. Car. 191; *Chiple v. Keaton*, 65 N. Car. 534; *Eason v. Cherry*, 6 Jones' Eq. (N. Car. 261; *Clement v. Foster*, 3 Ired. Eq. (N. Car.) 213; *Buford v. Neely*, 2 Dev. Eq. (N. Car.) 481; *Moore v. Knott*, 12 Oregon 260; *McNaughton's Appeal*, 101 Pa. St. 550; *Graham v. Taggart* (Pa. 1889), 11 Atl. Rep. 652; *Horback v. Huey*, 4 Watts (Pa.) 455; *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea (Tenn.) 358; *Wood v. Shepherd*, 2 Patt. & H. (Va.) 442; *Bird v. Fake*, 1 Pin. (Wis.) 290; *Phillips v. Crammond*, 2 Wash. (U. S.) 441; *West v. Skip*, 1 Ves. Sr. 239; *Ex parte Ruffin*, 6 Ves. 119. And see *Owens v. Miller*, 29 Md. 144; *Campbell v. Mullett*, 2 Swanst. 551.

A partner cannot, in the absence of his co-partners, subject specific articles

either express or implied from their acts.¹

But a mere unexecuted agreement is not enough to effect a conversion; there must be an actual division or delivery,² and the execution of the agreement must definitely and certainly appear

of partnership property to the individual debts of one of them by declarations or admissions that they are such persons' individual property, nor will his knowledge, presence or acquiescence, at a levy and execution sale for such individual debts, estop his co-partners, who are absent and without notice, from asserting their rights. *Williams v. Lewis*, 115 Ind. 45.

One partner cannot, without the express concurrence of his co-partner, make a note of the firm payable to himself and charge the firm with it. *Brown v. Haynes*, 6 Jones' Eq. (N. Car.) 49.

A partner cannot appropriate partner assets on the ground of indebtedness of the partnership to himself, without assent of the co-partners. *Saylor v. v. Mockfie*, 9 Iowa 209.

Money deposited in a bank by a firm to the credit of the intestate (their principal) previous to his death, becomes at his decease an asset of the succession, and cannot be withdrawn by the administrator, one of the firm, and treated as belonging to said firm. *Rhoten's Succession*, 34 La. Ann. 893.

An assignment for the benefit of creditors, of the entire firm assets, except property exempt from execution, operates as a dissolution of the partnership, and the subsequent delivery by the assignees to the assignors of such portions of the exempt property as was respectively owned by them and used in the business of the firm, does not revive or continue the partnership. *Wells v. Ellis*, 68 Cal. 243.

In an action by partners against a vendor for the proceeds of a bank check made by a partner as manager of a firm of grain dealers on their bank deposit, for house furniture for his separate use, it may be presumed, without allegations to the contrary, that the check was given on account of the partner's interest from profits in the business of the firm. *Warren v. Martin*, 24 Neb. 273.

1. *Cabaniss v. Clark*, 31 Miss. 423. And see *McGhee v. McCutcheon*, 82 Ga. 788.

Co-partners cannot claim an equitable lien in property purchased by one partner with money which he has

drawn, by their consent, from the firm, though in excess of his share. *McCormick v. McCormick*, 7 Neb. 440.

A joint conveyance by partners of the partnership property in trust to secure their individual debts, entitles the individual creditors to priority over the partnership creditors. *Carver Gin & Mach. Co. v. Bannon*, 85 Tenn. 712.

When a partner signs the firm name to a settlement which extinguishes the individual indebtedness of another partner at the cost of the firm, it is as effective evidence of his consent as if he expressly consented in his individual name. *Campbell v. District of Columbia*, 19 Ct. of Cl. 160.

2. *Jones v. Neale*, 2 Patt. & H. (Va.) 339; *Fitzgerald v. Christl*, 20 N. J. Eq. 90; *Solomon v. Solomon*, 2 Ga. 18; *Allison v. Davidson*, 2 Dev. Eq. (N. Car.) 79, *Ex parte Cooper*, 1 M. D. & DeG. 358; *Ex parte Sprague*, DeG. M. & J. 866; *Ex parte Wood*, 10 Ch. D. 554; *Ex parte Wheeler*, Buch. 25.

But where the retiring partner sells and transfers all his interest in the partnership to his co-partner, who thereupon assumes exclusive control over it, and disposes of it to bona fide purchasers, the former should not be permitted to follow such property into the hands of third persons, but should be remitted to his action at law for a breach of the agreement. *Tracy v. Walker*, 1 Flip. (U. S.) 41.

Where two partners agreed to divide their stock and that their machinery should be given to the party who would give the most for it, and they accordingly separated the stock into "two piles," but no delivery was made, and before the arrangement was completed the parties quarreled and the settlement was interrupted. And one of the parties caused a demand to be made for half of the property. It was held, that enough had not been done to vest in the plaintiff a separate, exclusive property in the subject of the suit. *Koningsburg v. Launitz*, 1 E. D. Smith (N. Y.) 215; *Hunt v. Morris*, 44 Miss. 314.

But where there is no intention to end the joint ownership the rule is different. *Usry v. Rainwater*, 40 Ga. 328.

in order to defeat the priority of the partnership creditors.¹ As between the partners, while such a conversion is held to be void as against partnership creditors, without notice, for want of an actual delivery,² the possession of each being that of all, the mere relinquishment of possession by the seller would be enough as to individual creditors and between themselves.³ The effect of an otherwise valid transfer is not weakened by a stipulation to equalize any excesses or deficiencies that may exist on final settlement.⁴

Land received by one member of a firm in payment of a debt due to the firm, a share of which he conveys to his partner, is thereby all converted into separate property. The transfer works a conversion of the part transferred, and the conversion of that part converts the whole. *Smith v. Ramsey*, 6 Ill. 373.

A notice stating that the retiring partner has sold his interest converts an executory sale into an executed one, though no delivery has been made. *Armstrong v. Fahnestock*, 19 Md. 58.

1. *Kreis v. Gorton*, 23 Ohio St. 468. And see *National Bank v. Mapes*, 85 Ill. 67.

Where, upon the death of one partner in whose name is the legal title to partnership land, the other presents a claim against his estate for money advanced in its purchase, he is not estopped from insisting on its partnership character, and is at liberty to withdraw his claim. *Way v. Stebbins*, 47 Mich. 296.

2. *Page v. Carpenter*, 10 N. H. 77; *Newell v. Desmond*, 63 Cal. 242; *Criley v. Vassel*, 52 Mo. 445; *Birks v. French*, 21 Kan. 238; *Fisher v. Minot*, 10 Gray (Mass.) 260.

Where a partnership is dissolved, and the property of the firm has been divided, and is held separately by each partner as individual property and not as property of the firm, each partner may convey, mortgage or deliver possession of his individual share; but, if no legal dissolution has taken place, such property remains partnership property as to creditors of the firm who knew nothing of the division and who extended credit to the firm. *Moline Wagon Co. v. Rummell*, 14 Fed. Rep. 155.

But where, upon dissolution, one of two partners takes the property and the right to use the firm name in continuing the business, and agrees to pay the debts, the fact of his continuing in the business under the same style and in the same manner as before, and employing the

retiring partner as a salesman at a rate agreed upon, will not, of itself, warrant the inference that the transfer from the retiring partner was fraudulent as against his creditors, or subject the property to liability by levy by his individual creditor, who became such after the dissolution. *Hamill v. Willett*, 6 Bosw. (N. Y.) 533; *Criley v. Vassel*, 52 Mo. 445.

So, where one of two partners sold out his interest and the buyer took his place in the firm and they employed the outgoing partner to take charge of his interest, his continued possession being that of an agent only, has no effect upon the validity of his sale to the incoming partner. *Pier v. Duff*, 63 Pa. St. 59.

3. See *Hunt v. Morris*, 44 Miss. 314; *Koningsburg v. Launitz*, 1 E. D. Smith (N. Y.) 215; *Tracy v. Walker*, 1 Flip. (U. S.) 41.

Where one partner is away and the other is in possession of the property, attending to the business, and the absent partner sells his interest to the one in charge, the buyer acquires a good title under the Statute of Frauds. *Boynton v. Page*, 13 Wend. (N. Y.) 425.

A symbolic delivery or a delivery of part for all is sufficient, where the articles are scattered in a number of different places. *Shurtleff v. Willard*, 19 Pick. (Mass.) 202.

So, no formal delivery is necessary as between themselves where a third person purchases an interest in a partnership. *Riechie v. Kinney*, 46 Mo. 298.

4. *Mafflyn v. Hathaway*, 106 Mass. 414; *Sharpe v. Johnston*, 59 Mo. 557; *Murchison v. Warren*, 50 Tex. 27.

Where the legal title to partnership real estate is in the names of two partners, and they agree to convey to the third his share of it, taking from him a receipt for a sum of money estimated as his share of the profits, the receipt takes the place of the land as joint property, and the third partner is entitled to a conveyance without refer-

Any act which will serve to transfer a chose in action from one person to another is sufficient as between the partners to effect its conversion into separate property.¹ Where one partner sells his whole interest to a third person, as it amounts to a transfer of an interest in the nature of a chose in action only, no manual delivery is necessary or possible.² But in case of an abstraction of funds

ence to the state of the accounts. *Beckwith v. Manton*, 12 R. I. 442.

1. See *Belknap v. Cram*, 11 Ohio 411; *McDougal v. Banks*, 13 Ga. 451; *Myers v. Winn*, 16 Ill. 135; *Mechanics' Bank v. Heldreth*, 9 Cush. (Mass.) 356; *Glynn v. Phetteplace*, 26 Mich. 383; *Morse v. Green*, 13 N. H. 32; 38 Am. Dec. 471; *Smith v. Lusher*, 5 Cow. (N. Y.) 688; *Kirby v. Cogswell*, 1 Cai. (N. Y.) 505; *Shafer's Appeal*, 106 Pa. St. 49; *Robinson v. Moriarty*, 2 Greene (Iowa) 497; *Harlan v. Moriarty*, 2 Greene (Iowa) 486; *Rowland v. Frazer*, 1 Rich. (S. Car.) 325; *Sneed v. Mitchell*, 1 Hayw. (N. Car.) 289; *Manegold v. Dulan*, 30 Wis. 541; *Lawrence v. Vilas*, 20 Wis. 381; *Merrill v. Guthrie*, 1 Pin. (Wis.) 435; *Jackman v. Partridge*, 21 Vt. 558; *Stevenson v. Woodhull*, 19 Fed. Rep. 575; *Baring v. Lyman*, 1 Story (U. S.) 396; *McLanahan v. Ellery*, 3 Mason (U. S.) 267.

Debts due to a firm may be assigned to either of the partners, and a note given to the assignee for the amount due by a debtor to the firm extinguishes the debt to the partnership. *Lamkin v. Phillips*, 9 Port. (Ala.) 98.

The application of partnership property to the payment of partnership debts is the equity of the partners, and not of the creditors, and therefore the partnership, while it is solvent, may sell its property or give its note, secured by mortgage, to one of the partners, and if the sale be made, and the note or mortgage be given in good faith and for valuable consideration, they will be valid against the claims of the partnership creditors; and although, if such note and mortgage be retained by the partner until the bankruptcy of the firm, he will not be allowed to enforce them against the company assets to the exclusion of the partnership creditors, because he is himself liable to these creditors, yet the assignee of such note and mortgage, who has received them in good faith and for valuable consideration during the solvency of the firm, holds them unaffected by the claims of the partnership creditors. *Waterman v. Hunt*, 2 R. I. 298.

If a claim is placed in the hands of two attorneys, practicing in partnership, and, before any steps are taken in the collection of the claim, the firm dissolves, and one of the members takes charge of the claim, and renders all the services of its collection, and sues individually, the owner of the claim for his fees in doing so, the jury will be satisfied in inferring that it was part of the contract of dissolution between the partners, that the one who had rendered the services should attend to the claim and receive the compensation, and their verdict to that effect will be upheld. *Anderson v. Tarpley*, 6 Smed. & M. (Miss.) 507.

But where, for the convenience, and by the consent of the firm, one partner deposits the funds of the firm in his own name and to his own account, and they are charged on the firm books to such partner, in order to indicate in whose hands they are, the firm, and not the partner holding the funds, must bear the loss resulting from the insolvency of the bank in which they were deposited. *Campbell v. Stewart*, 34 Ill. 151.

2. *Wallace's Appeal*, 104 Pa. St. 559; *Collins' Appeal*, 107 Pa. St. 590; *Raigell's Appeal*, 104 Pa. St. 234. And see *Caswell v. Howard*, 16 Pick. (Mass.) 562; *Eggleston v. Wagner*, 46 Mich. 610; *Stewart v. Stebbins*, 30 Miss. 66; *Phillips v. Jones*, 20 Mo. 67; *Collender v. Phelan*, 79 N. Y. 366.

Notice to one partner in possession of the partnership property, of the purchase of another partner's interests, is a sufficient delivery to constitute a valid sale. *Whigham's Appeal*, 63 Pa. St. 194.

The following notice of the dissolution of a co-partnership was published: "B, having disposed of his interest in the firm of A & Son to A, the firm is this day dissolved. A assumes all the liabilities of the old firm, and, for such purpose, will use its name, and to whom all debts due the firm will be paid." This paper was signed by A and B, and was in itself, if made *bona fide*, a written dissolution of the partnership, and a transfer in writing by B of all his in-

or a disposition of property in fraud of the rights of a co-partner and without his consent, he can follow the fund and subject it to a resulting trust for the satisfaction of partnership equities.¹ But in order to accomplish this, there must have been some element of fraud or bad faith in the transaction.²

If a partner has retired and transferred his interest either to his co-partners or to third persons the equity of the creditors to have the partnership property applied to partnership debts, which can be enforced only through the like equity of the partners, is gone, for the partners have no such equity left to which they can be subrogated,³ and an assumption of all debts by the purchaser and an agreement to indemnify the seller in such case creates no lien upon the goods or interests sold; it is a personal contract only, leaving the buyer at liberty to dispose of the goods as he may see

terest in its effects to A. *Armstrong v. Fahnestock*, 19 Md. 58.

In *Whittle v. Skinner*, 23 Vt. 531, however, it was held that an assignment by a partner of all his interest in the firm was void, even though made with the consent of his copartner, upon the ground that the assignment of an unascertained balance or an unliquidated claim was a virtual sale of suits, which was void for maintenance.

1. *Ross v. Henderson*, 77 N. Car. 170; *Shinn v. Macpherson*, 58 Cal. 596; *Kayser v. Maughan*, 8 Colo., 339; *Renfrow v. Pearce*, 68 Ill. 125; *Janney v. Springer*, 78 Iowa, 617; *Croughton v. Forrest*, 17 Mo. 131; *Holdrege v. Gwynne*, 18 N. J. Eq. 26; *Bergeron v. Richardott*, 55 Wis. 129; *Miller v. Price*, 20 Wis. 117; *Howell v. Howell*, 15 Wis. 55; *Kelley v. Greenleaf*, 3 Story (U. S.) 93; *Prentiss v. Brennan*, 1 Grant's Ch. (Up. Can.) 484.

A wife who has taken property in payment of an individual debt due from her husband, knowing it to belong to the firm of which her husband is a member, without its consent, is within Code Ga., § 1913, providing that any person, receiving firm property in payment of a partner's individual debt, with notice that such partner is misapplying the firm assets, cannot be an innocent purchaser. *Clarke v. Farrell*, 80 Ga. 622.

Plaintiff, trustee of a savings bank, took from one of the defendants, in payment of his individual note, a check of the firm of which he was a partner, knowing that the signature and writing in the check were in the handwriting of the maker of the note. *Held*, that these facts were notice to plaintiff that de-

fendant was applying the firm assets to his private use, and that he took the risk of the assent of the other partner. *Graham v. Taggart* (Pa. 1887), 11 Atl. Rep. 652.

But a partner cannot maintain an action to set aside a mortgage executed by his co-partner on the latter's interest in the partnership real estate, and subject that interest to the payment of the partnership debts, unless he alleges and proves that the mortgagees had notice that the real estate was partnership property. *Seely v. Mitchell*, 85 Ky. 508.

Such equity of creditors continues only so long as the right of the partners against each other subsists; but if the partners have put an end to their own rights, with intent to hinder, delay, or defraud partnership creditors in pursuit of such equity, the equity of creditors still remains. *Arnold v. Hagerman*, 45 N. J. Eq. 186.

2. *Sharp v. Hibbins*, 42 N. J. Eq. 543; *U. S. v. Duncan*, 4 McLean (U. S.) 607; *Williams v. Barnett*, 10 Kan. 455; *Crozier v. Shants*, 43 Vt. 478. And see *Russell v. Miller*, 26 Mich. 1; *Howell v. Howell*, 15 Wis. 55; *Halls v. Coe*, 4 McCord (S. Car.) 136.

A salaried partner, whose salary was overdue, drew money, charged it to himself on the books, and bought stock with it in his own name. The firm became insolvent, and its creditors sought to reach the stock. *Held*, that the title to the stock was in him, not in the firm. *Maybin v. Moorman*, 21 S. Car. 346.

3. *Jones v. Fletcher*, 42 Ark. 523; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411; 56 Am. Dec. 573; *Seaman v. Hufaker*, 21 Kan. 254; *Fox's Appeal* (Pa. 1887), 11 Atl. Rep. 228; *Lingen v. Simp-*

fit, the retiring partner being a mere unsecured creditor.¹ But it is competent for the retiring partner to retain a lien upon the in-

son, 1 Sim. & S. 600; *Ex parte* Ruffin, 6 Ves. 119. And see *Commercial Bank v. Mitchell*, 58 Cal. 42; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb. 489; *Alpaugh v. Savage* (N. J. 1890) 19 Atl. Rep. 380; *Arnold v. Hagerman*, 45 N. J. Eq. 186; *Menagh v. Whitwell*, 52 N. Y. 146; 11 Am. Rep. 683; *Osborne v. McBride*, 3 Sawy. (U. S.) 590; 16 Nat. Bankr. Reg. 22.

A partner to whom a balance is owing on account of partnership business, is, in cases where there has been a dissolution by sale of his interest, a general creditor, and as such he may maintain an action to set aside a fraudulent conveyance, but he has no specific lien on land purchased by the former partner with the goods of the former partnership which passed to him by the sale. *Barkley v. Tapp*, 87 Ind. 25.

Where one partner sold out to another, taking the notes of the buyer in payment, secured by a mortgage on partnership property, and the property having been sold by mutual consent, and proceeds coming into the seller's hands, he is at liberty to apply them to partnership indebtedness before satisfying his notes. *Low v. Allen*, 41 Me. 248.

Where there are no partnership creditors, a partner who sells his interest in firm real estate to his co-partner is entitled to a vendor's lien for the purchase price. *Reese v. Kinkead*, 18 Nev. 126; though it would be subject to the claims of firm creditors. *Seaman v. Huffaker*, 21 Kan. 254; *Savage v. Carter*, 9 Dana (Ky.) 408. And a mortgage for such a claim in the hands of an assignee for value has been held good against firm creditors. *Scudder v. Delashmut*, 7 Iowa 39.

The transfer by a partner of his share of the partnership property does not transfer any equity he might have against his partner. *Moore v. Steele*, 67 Tex. 435.

A mortgage executed by the members of a firm, upon the real estate of the firm to secure an individual debt of a partner, free from fraud or collusion, creates a lien prior to partnership debts. *Anderson v. Norton*, 15 Lea (Tenn.) 14.

Where the assignee never took possession or asserted any control over the assigned property, it was held that the lessee did not by his assignment lose his status as a partner, so as to deprive

his creditors of the right to have the entire partnership interest sold for the payment of partnership debts. *Brown v. Beecher* (Pa. 1888), 15 Atl. Rep. 608.

A partnership lien is waived by a partner's purchase of his deceased partner's interest at administrator's sale. *Hart v. Clark*, 54 Ala. 490.

Where a firm forms a corporation, and transfers to it real and personal property belonging to the firm, and each partner receives corporate stock in payment, the stock is individual property, and a firm creditor is not entitled to have his debt satisfied out of the proceeds of such stock received by one of the partners in preference to individual creditors. *Singer v. Carpenter*, 125 Ill. 117.

1. *Goembel v. Arnett*, 100 Ill. 35; *Reese v. Bradford*, 13 Ala. 837; *West v. Chasten*, 12 Fla. 315; *Williamson v. Adams*, 16 Ill. App. 564; *Hapgood v. Comwell*, 48 Ill. 64; *Ladd v. Griswold*, 9 Ill. 25; 46 Am. Dec. 443; *Trentman v. Swartzell*, 85 Ind. 443; *Magnoketa v. Willey*, 35 Iowa, 323; *Armstrong v. Fahnestock*, 19 Md. 58; *Griffith v. Buck*, 13 Md. 102; *Giddings v. Palmer*, 107 Mass. 269; *Howe v. Lawrence*, 9 Cush. (Mass.) 553; 57 Am. Dec. 68; *Robb v. Mudge*, 14 Gray (Mass.) 534; *Fulton v. Hughes*, 63 Miss. 61; *Andrews v. Mann*, 31 Miss. 322; *Vosper v. Kramer*, 31 N. J. Eq. 420; *Stanton v. Westover*, 101 N. Y. 265; *Emerson v. Parsons*, 46 N. Y. 560; *Dimon v. Hazard*, 32 N. Y. 65; *Weber v. Defor*, 8 How. Pr. (N. Y.) 502; *Parks v. Comstock*, 59 Barb. (N. Y.) 16; *Cory v. Long*, 2 Sweeny (N. Y.) 491; *Allen v. Grissom*, 90 N. Car. 90; *Rankin v. Jones*, 2 Jones' Eq. (N. Car.) 169; *Lathan v. Skinner*, Phil. Eq. (N. Car.) 292; *Clarke's Appeal*, 107 Pat. St. 436; *Baker's Appeal*, 21 Pa. St. 76; *Miller v. Estell*, 5 Ohio St. 508; *Hollis v. Staley*, 3 Baxt. (Tenn.) 167; *Croone v. Bivens*, 2 Head (Tenn.) 339; *Smith v. Edwards*, 7 Humph. (Tenn.) 106; *White v. Parish*, 20 Tex. 688; *Crane v. Morrison*, 17 Nat. Bank. Reg. 393; *Ex parte* Ruffin, 6 Ves. 119; *Langmead's Trusts*, 7 De G. M. & G. 353; *Ex parte* Williams, 11 Ves. 3.

Two parties agreed that the partnership should be dissolved and the business closed, and that the partnership accounts should be considered and taken

terest sold by agreement at the time of the transfer,¹ and where, by the terms of the assumption of indebtedness by the remaining partner, he is to apply the assets or the profits to their payment, such an application will be enforced at the instance of the retiring partner.² When a lien is thus reserved it extends to the entire

as if the partnership had never existed, and that the amount already received by one partner from the partnership should be his compensation paid by the other partner to him as an employee, and that the other partner should collect the debts due the firm, and pay the debts due by the firm; and the agreement was acted on. *Held*, that the partner who received the compensation as an employee had no further interest in the partnership accounts, and could not maintain a suit for an accounting. *Wagner v. Wagner*, 50 Cal. 76.

A and W being partners, A with the consent of W, transferred his interest to D, and D and W agreed to collect assets and pay the debts of the old firm. Afterwards D brought a suit against W for a dissolution and an account. It was held that A could not, upon petition, become a party to the proceedings for the purpose of securing his rights in the firm property. *Dayton v. Wilkes*, 5 Bosw. (N. Y.) 655.

If a partner has sold out to his co-partner, and has taken a bond of indemnity as security that the latter will pay the debts of the firm, according to agreement, he cannot be substituted, in the place of the creditors of the old firm, to enforce their claims against such co-partner. Or enforce against his co-partner, executions obtained against himself by the creditor, or subject the partnership property, sold to the latter, to the payment of the debts. *Griffin v. Orman*, 9 Fla. 22.

A division, voluntarily made between partners, of the assets of the firm, in the belief that the credits will produce sufficient funds to pay its debts, vests, as between the partners, title to the goods divided; and one partner cannot afterwards maintain an action against the other, or the assignee of the other, to secure the application of the proceeds of his share of the goods to the partnership debts, unless he can establish that fraud was committed in procuring the division. *Whitworth v. Benbow*, 56 Ind. 194. And see *Lingen v. Simpson*, 1 Sim. & S. 603.

But in *Olson v. Morrison*, 29 Mich. 395, and *Devean v. Fowler*, 2 Paige

(N. Y.) 400, it was held that a covenant to pay the debts recognizes and preserves the retiring partner's lien.

1. *White v. Parish*, 20 Tex. 688; *Rogers v. Nichols*, 20 Tex. 719; *Savage v. Carter*, 9 Dana (Ky.) 408. *Griffith v. Buck*, 13 Md. 102; *Croone v. Bivens*, 2 Head (Tenn.) 339.

In *Langmead's Trusts*, 7 De G. M. & G. 353, the court expressed a doubt as to whether a sale with an agreement of indemnity made subject to the payment of debts, showed an intention to retain the seller's lien. So, if such a sale is made to third persons, no title passes. *Stevenson v. Sexsmith*, 21 Grant's Ch. (Up. Can.) 355.

Where it is agreed that the retiring partner shall receive a bond for the purchase price, until that is made and delivered, the contract is executory and his lien continues. *Fitzgerald v. Christl*, 20 N. J. Eq. 90; *Ex parte Wood*, 10 Ch. D. 554.

2. *Wildes v. Chapman*, 4 Edw. (N. Y.) 669; *Talbot v. Pierce*, 14 B. Mon. (Ky.) 158; *Bowman v. Spalding* (Ky. 1887), 2 S. W. Rep. 911; *Harman v. Clark*, 13 Gray (Mass.) 114; *Robb v. Stevens*, Clark Ch. (N. Y.) 195; *Cory v. Long*, 2 Sweeny (N. Y.) 491; *Rogers v. Nichols*, 20 Tex. 719; *Shackelford v. Shackelford*, 32 Gratt. (Va.) 481. And see *Roop v. Herron*, 15 Neb. 73; *Marsh v. Bennett*, 5 McLean (U. S.) 117; *Sedam v. Williams*, 4 McLean (U. S.) 51, *Matter of Shepard*, 3 Ben. (U. S.) 347; *Payne v. Hornby*, 25 Beav. 280.

A promise by the remaining partner, however, to do the best he could with the assets transferred to him toward the payment of the debts of the firm, creates no lien. *Hapgood v. Cornwell*, 48 Ill. 64.

It was agreed between outgoing partners and those remaining, that the remaining partners should collect the debts due to the concern, and pay the debts out of the moneys collected. On a bill afterwards filed by the outgoing partners against those remaining, charging that the defendants had paid all the debts due from the old concern out of the proceeds of debts collected, and

assets at the time of the sale, and not merely to the retiring partner's share of them,¹ and it will be enforced in equity by reinvesting the retiring partner with his original rights as a partner, and giving the firm creditors the benefit of those rights by subrogation.² A purchaser of assets for value is not bound to see to the application of the purchase money, and is justified in assuming that it will be properly applied.³

1. Changes in Partnerships.—In case of a change in the personnel of a partnership, the property of the old firm is converted into that of the new, and the lien of the partners in the new firm will be enforced for the benefit of its creditors to the exclusion of those

had a surplus in their hands sufficient to pay the complainants the amount agreed to be paid them, it was held that the bill presented a proper case for relief as well as for discovery. *Kelsey v. Hobby*, 16 Pet. (U. S.) 269.

In the absence of an agreement to the contrary, it is fair to presume that a retiring partner does not intend that the partnership property shall be used for the individual benefit of a partner who continues the business, leaving the debts of the firm unpaid; and this was held to be the presumption, where the retiring partner transferred the partnership effects to a partner continuing the business, who agreed to pay the partnership debts, and gave bond to that effect. *Topliff v. Vail*, Har. Ch. (Mich.) 340.

1. See *Northrup v. McGill*, 27 Mich. 234; *Shackelford v. Shackelford*, 32 Gratt. (Va.) 481; *Harmon v. Clark*, 13 Gray (Mass.) 114; *Kitchen v. Lee*, 11 Paige (N. Y.) 107; *Kerr v. Bradford*, 26 Up. Can. (C. P.) 318.

But where new rights have attached by reason of a change of interest, as where the transfer is to a sole partner and the right of his individual creditors have accrued, no lien attaches. *Menagh v. Whitwell*, 52 N. Y. 146; 11 Am. Rep. 683.

And where the articles of co-partnership provide that any partner may sell his share, and that the continuing partners and the buyers were bound to assume the payment of all debts and apply the assets for that purpose, and a partner sold his share and was afterwards compelled to pay debts, it was held that equity had no jurisdiction to wind up the affairs of the firm, and compel a reimbursement, and that the retiring partner was a mere creditor and not a partner. *Clarke's Appeal*, 107 Pa. St. 436.

2. See *McGown v. Sprague*, 23 Ala. 524; *Buck Store Co. v. Johnson*, 7 Lea (Tenn.) 282; *Darden v. Crosby*, 30 Tex. 150; *Shackelford v. Shackelford*, 32 Gratt. (Va.) 481; *Williamson v. Adams*, 16 Ill. App. 564.

Where, on the dissolution of a partnership, an amount of the stock of goods equal to the firm indebtedness is left with one who continues the business, to be converted into money, with which he is to pay the partnership indebtedness, he cannot be held a purchaser so as to subject the goods to the payment of his individual debts as against the equities of the retiring partner, but he is a trustee of such goods for the payment of the firm liabilities, and the trust may be enforced in equity by the retiring partner for the benefit of the partnership creditors, as against subsequent purchasers or execution creditors with notice of the equities of the retiring partner. *Parker v. Merritt*, 105 Ill. 293.

But the retiring partner who has retained a lien, cannot file a bill to have the assets applied to the firm's debts on a mere apprehension of loss, without misconduct or fraud on the part of the remaining partners. *Walker v. Trott*, 4 Edw. Ch. (N. Y.) 38.

3. *Langmead's Trusts*, 7 De G. M. & G. (Eng.) 353.

But such a lien may be enforced against a voluntary transferee. *Wildes v. Chapman*, 4 Edw. Ch. (N. Y.) 669.

Where a partner sells out his interest to another firm, with a provision that title to the interest sold should remain in him until paid for, and the remaining partner forms a partnership with the purchasers, continuing the business with the same property used by the original firm, and afterwards a third person purchased a part of the property of the new firm in good faith, and the new

of the old firm.¹ Thus, where a partner retires and a new one is taken in in his place, the right of the creditors of the old firm to follow the property into the hands of the new firm thus formed, as against its creditors, is lost.² The same result follows where a partner retires, no one being taken in in his place; the property will be devoted first to the debts of the firm made up of the remaining partners,³ and an assignment for creditors by such a firm must be for *its* creditors, the creditors of the old firm not being entitled to equality in payment with them.⁴ So, where an existing firm

firm appropriated the avails without paying the retired partner, it was held in an action of trover against the purchaser that the reservation was only as against his former partner who had the same power of disposition after as before dissolution, and that the purchasers were not liable for participation in a sale which the seller had power to make. *Kellogg v. Fox*, 45 Vt. 348.

1. See *Camp v. Mayer*, 47 Ga. 414; *Gorden v. Cannon*, 18 Gratt. (Va.) 387; *Hobbs v. Wilson*, 1 W. Va. 50; *Tracy v. Walker*, 1 Flip. (U. S.) 41; 3 West. Law Month. 574; *Penn. Bank v. Furness*, 114 U. S. 376.

2. *Allen v. Grissom*, 90 N. C. 90; *Richardson v. Tobey*, 3 Allen (Mass.) 81; *Ackley v. Winkelmeyer*, 56 Mo. 562; *Dayton v. Wilkes*, 5 Bosw. (N. Y.) 655; *McCauly v. McFarlane*, 2 Desaus. (S. Car.) 239; *Menagh v. Whitwell*, 52 N. Y. 146; *Hart v. Tomlinson*, 2 Vt. 101; *Crane v. Morrison*, 4 Sawy. (U. S.), 138; 17 Nat. Bankr. Reg. 393. And see *Uiley v. Smith*, 24 Conn. 290. But see *Nixdorff v. Smith*, 16 Pet. (U. S.) 132.

But where the property thus transferred is not an entire interest but only a specific share upon which a purchase money mortgage is given to the retiring partner, such mortgage will have priority over subsequent debts and encumbrances to subsequent creditors. *Beecher v. Stevens*, 43 Conn. 587.

In *New Hampshire*, A's sale to C of A's interest in the firm of A and B, does not destroy the priority of the right of a creditor of A and B to payment of his debt out of the A and B property to the extent of B's interest therein, the creditors' equity not depending on the partner's equity. *Spurr v. Russell*, 59 N. H. 338.

3. *Baker's Appeal*, 21 Pa. St. 76; *Scully v. Alter*, 16 N. J. L. 147. And see *Dennis v. Ray*, 9 Ga. 449.

If the executor of a deceased partner consents to the surviving partner's con-

tinuing the business with the assets of the firm, his lien on property thereafter acquired will be postponed to that of creditors, when a case arises for an equitable marshaling of assets; as, where the surviving partners make a general assignment for the benefit of creditors. *Hoyt v. Sprague*, 103 U. S. 613.

But where an administrator does not part with his equitable right to require debts to be paid, a continuance of business by the survivor with the old assets will not postpone the old debts to the new. *Deveau v. Fowler*, 2 Paige (N. Y.) 400. In such case the creditors of the old firm and those whose claims accrued after the death of the former partner are entitled to share *pro rata*. *Tilley v. Phelps*, 18 Conn. 294.

In *New Hampshire*, the property of the partnership remains subject to the preference of the partnership creditors notwithstanding the survivor may have managed and treated it as his own, with the assent of the administrator of the deceased partner, and may have contracted debts upon the credit of the property. *Benson v. Ela*, 35 N. H. 402.

T, having sold his interest in a firm, executed an agreement with the members of the new firm, which recited that the new firm should not be responsible for the debts of the old firm, and that T had deposited a certain sum with the new firm to be applied to the payment of such debts. *Held*, that the members of the new firm, as individuals, have no interest in this fund, but it is held in trust for the specific purpose of paying the creditors of the old firm, who may claim it at any time. *Fries v. Ennis*, 132 Pa. St. 195.

4. *Lester v. Pollock*, 3 Robt. (N. Y.) 691; *Lester v. Abbott*, 28 How. Pr. (N. Y.) 488.

One of three partners retired, selling his interest to the others, taking their note in part payment, and they assumed the partnership debts. They continued the business awhile as partners, and

takes in a new partner, the lien of the original partners to have the assets subjected to the debts of the old firm is lost,¹ and an attachment for a debt of the old firm will be regarded as an attachment of an individual interest for a separate debt, over which the claims of the creditors of the new firm, including those of the new partner, have priority.²

2. Legality of the Conversion.—As a general rule a sale by a partner to his co-partner or a third person for a valuable consideration not made in contemplation of insolvency, of all his interest in the firm, is valid, even though the buyer, or the seller or both are actually insolvent, and the creditors are thus defeated.³ The

then failed, and made a general assignment in trust for their creditors, preferring this note, and providing for the payment, *pro rata*, of the debts of both the old and the new firms. *Held*, that it being shown that the sale was in good faith, the creditors of the old firm had no equity against the partnership property of the old firm in the hands of the new firm or their assignee, superior to that of the creditors of the new firm. *Smith v. Howard*, 20 How. Pr. (N. Y.) 121.

1. *Coffin v. McCullough*, 30 Ala. 107. And see *Meador v. Hughes*, 14 Bush. (Ky.) 652; *Locke v. Hall*, 9 Me. 133; *Scull v. Alter*, 16 N. J. L. 147.

Where the new firm has assumed the debts of the old with the assent of the creditors, the creditors of the old firm will be entitled to share *pro rata* with those of the new firm. *Smead v. Lacey*, 1 Disney (Ohio) 239.

So, where the incoming partner is a secret partner, the assets will still be regarded as those of the ostensible partners, leaving both the old and the new creditors upon the same footing. See *Filley v. Phelps*, 18 Conn. 294; *Ex parte Chuck*, 8 Bing. 469.

2. See *Locke v. Hall*, 9 Me. 133; *Hurlbut v. Johnson*, 74 Ill. 64; *Childs v. Walker*, 2 Allen (Mass.) 259; *Meyberg v. Steagall*, 51 Tex. 351.

Vermont, like *New Hampshire*, has adopted the rule that a creditor's priority is independent of a partner's lien; the creditors of the old firm, therefore, will share equally with those of the new, the assets and liabilities continuing after the admission of a new partner the same as before, the creditors of the old firm having a superior rather than an inferior equity. *Shedd v. Bank of Brattleboro*, 32 Vt. 709; *Spurr v. Russell*, 59 N. H. 338.

3. *Reese v. Bradford*, 13 Ala. 846;

Lamkin v. Phillips, 9 Port. (Ala.) 9; *McTown v. Sprague*, 23 Ala. 52; *Mayer v. Clark*, 40 Ala. 259; *Jones v. Fletcher*, 42 Ark. 422; *Brown v. Miller*, 11 Colo. 431; *Allen v. Centre Valley Co.*, 21 Conn. 130; 54 Am. Dec. 33; *Upson v. Arnold*, 19 Ga. 190; 63 Am. Dec. 302; *Robertson v. Baker*, 11 Fl. 192; *Hapgood v. Cornwell*, 48 Ill. 6; *Williamson v. Adams*, 16 Ill. App. 56; *Dunham v. Hanna*, 18 Ind. 270; *Schaffer v. Fithian*, 17 Ind. 463; *Dean v. Phillips*, 17 Ind. 406; *Trentman v. Swartzell*, 85 Ind. 443; *McDonald v. Beach*, 2 Blackf. (Ind.) 55; *George v. Wamsley*, 64 Iowa 175; *Hawkey Woolen Mills v. Conklin*, 26 Iowa 422; *Armstrong v. Fahnestock*, 19 Md. 58; *Coakley v. Weil*, 47 Md. 277; *Evans v. Hawley*, 35 Iowa 83; *Guild v. Leonard*, 18 Pick. (Mass.) 511; *Richardson v. Tobey*, 3 Allen (Mass.) 81; *Kimball v. Thompson*, 13 Met. (Mass.) 283; *How v. Lawrence*, 9 Cush. (Mass.) 553; 5 Am. Dec. 68; *Richards v. Manson*, 10 Mass. 482; *Parish v. Lewis*, 1 Freen (Miss.) 299; *Fulton v. Hughes*, 63 Miss. 61; *Robb v. Stevens*, Clarke Ch. (N. Y.) 191; *Sage v. Chollar*, 21 Barb. (N. Y.) 596; *Dimon v. Hazard*, 32 N. Y. 61; *Field v. Chapman*, 15 Abb. Pr. (N. Y.) 434; *Stanton v. Westover*, 101 N. Y. 265; *Rankin v. Jones*, 2 Jones' Eq. (N. Car.) 169; *Potts v. Blackwell*, 4 Jones' Eq. (N. Car.) 58; *McGregor v. Ellis*, 1 Disn. (Ohio) 286; *Pfirman v. Koch*, Cin. Sup. Ct. Rep. 460; *Wilcox v. Kellogg*, 11 Ohio 394; *Miller v. Estill*, Ohio St. 508; *Clark v. McClelland*, Grant's Cas. (Pa.) 31; *Waterman v. Hunt*, 2 R. I. 298; *Gallagher's Appeal*, 114 Pa. St. 353; *White v. Parish*, 2 Tex. 688; *Shackelford v. Shackelford*, 32 Gratt. (Va.) 481; *David v. Burchard*, 53 Wis. 492; *Case v. Beauregard*, 9 U. S. 119; 1 Woods (U. S.) 127; *Fitzpatrick v. Flannagan*, 106 U. S. 648

principle applies where the partners divide the property among themselves, the release of the interest of each by the other being the consideration,¹ and the property thus becoming individual assets, homestead rights and exemption from execution may be claimed in it.² The rule has been laid down and followed to some extent, however, that a conveyance of his interest by one partner to another in consideration of the buyer's as-

Huiskamp v. Moline Wagon Co., 121 U. S. 310; 12 Fed. Rep. 658; 14 Fed. Rep. 155; Tracey v. Walker, 1 Flip. (U. S.) 41; Shimer v. Huber, 19 Nat. Bankr. Reg. 414; Austin v. Seligman, 21 Blatchf. (U. S.) 506; 18 Fed. Rep. 519; Parker v. Ramsbottom, 3 B. & C. 257; 5 Dow. & Ry. 138; *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Williams 11 Ves. 3.

Notes given by one member of a firm, who assumes the liabilities and receives a transfer of the effects of the firm, to his co-partners, on a dissolution, cannot be subjected, in the hands of their assignee, to the partnership debts. Belknap v. Cram, 11 Ohio 411.

Though the creditors of a partnership are entitled to a priority of payment, as between them and creditors of an individual partner, out of the partnership funds, so long as they continue partnership funds; yet they have no specific lien thereon; and while the partnership remains and its business is going on, whether it be in fact solvent or not, there is no legal objection to a *bona fide* distribution of the partnership funds among the members of the firm, or a *bona fide* change of them from joint to separate estate. Allen v. Centre Valley Co., 21 Conn. 130.

The promise of one partner to the other, upon a purchase of the entire stock of goods, etc., of the firm, to pay the partnership debts, will not create any lien on the goods sold. It creates only a personal obligation on the part of the purchaser, and will not of itself prevent the latter from subsequently selling the goods for the payment of his individual debt. Goembel v. Arnett, 100 Ill. 34.

A transfer by a partnership of the partnership property, to a corporation formed by the partners for that purpose, in payment for which the partners take the stock of the corporation in their individual names, is not *per se* fraudulent as to the creditors of the partnership. Perse & Brooks Paper Works v. Willett, 19 Abb. Pr. (N. Y.) 416; Birtman v. McKinzie, 11 Ohio W. L. B. 272. And see Francklyn v. Sprague, 121 U.

S. 215; Case v. Beauregard, 99 U. S. 119.

1. Robertson v. Baker, 11 Fla. 192; Poole v. Seney, 66 Iowa 502; Jones v. Lusk, 2 Met. (Ky.) 356; Marlin v. Kirksey, 23 Ga. 164; Mechanics' Bank v. Hildreth, 9 Cush. (Mass.) 356; Giddings v. Palmer, 107 Mass. 269; Crosby v. Nichols, 3 Bosw. (N. Y.) 450; Sigler v. Knox Co. Bank, 8 Ohio St. 511; Bulger v. Rosa, 53 Hun (N. Y.) 239; Whitmore v. Parks, 3 Humph. (Tenn.) 95; Holmes v. Hawes, 8 Ired. Eq. (N. Car.) 21; McKinney v. Barker, 9 Oregon 74; Wiesenfeld v. Stevens, 15 S. Car. 554; Burtus v. Tisdall, 4 Barb. (N. Y.) 571; Lingen v. Simpson, 1 Sim. & Stu. 600; Crane v. Morrison, 4 Sawy. (U. S.) 138; 17 Nat. Bankr. Reg. 393; Moline Wagon Co. v. Rumwell, 14 Fed. Rep. 155; 12 Fed. Rep. 658. But see to the contrary Schiele v. Healy, 61 How. Pr. (N. Y.) 73; Ransom v. Van Deventer, 41 Barb. (N. Y.) 307; Wilkinson v. Gale, 6 McLean (U. S.) 16.

If the circumstances show that one partner is buying out the interest of his copartners, for the purpose of securing the partnership property to pay his individual creditors, and those circumstances are known to the copartners, they cannot impugn the transaction on that account. Arnold v. Hagerman, 45 N. J. Eq. 186.

An agreement by a partner with special experience desiring to retire, to remain in the firm is a sufficient consideration for the payment of a debt of his out of the capital of the firm. George v. Wamsley, 64 Iowa, 175.

2. Goudy v. Werbe, 117 Ind. 154; Burton v. Baum, 32 Kan. 641; Workman v. Giddey, 30 Mich. 151; State v. Thomas, 7 Mo. App. 205; Gill v. Latimore, 9 Lea (Tenn.) 381; Griffie v. Maxey, 58 Tex. 210. And see Succession of Beer, 12 La. Ann. 698; Watson v. McKinnon, 73 Tex. 210.

Where the members of a firm, acting in good faith, dissolve the partnership, and one member sells his interest in the partnership property to the other, the latter will not be deprived of the

sumption of the debts, where both the firm and the partners are insolvent, is void, as the consideration is valueless, and its consequence is the alteration of the property in such a manner as to defeat or delay the joint creditors.¹

A partnership has an unlimited power, with the consent of all, to convert their joint property into separate assets by applying it in payment of the debts of one of the partners, so long as they do not thereby violate any of the provisions of the bankruptcy laws or of the statutes against voluntary conveyances in fraud of creditors;² and there is a class of cases holding that a firm has an absolute right of disposition of its property by payment of the debts of

right to hold such property exempt from the payment of a debt thereafter asserted against him, on the ground that such debt was a partnership debt due at the time of the dissolution; nor will the fact that the partners knew the firm to be insolvent, at the time of such dissolution make any difference. *Mortley v. Flanagan*, 38 Ohio St. 401.

But where the conversion from joint to separate property is so close upon the eve of insolvency as to raise an inference of fraudulent intent as against the joint creditors, a claim of a homestead exemption will not be permitted. See *Bishop v. Hubbard*, 23 Cal. 514; *Mortley v. Flanagan*, 38 Ohio St. 401; *Gill v. Lattermore*, 9 Lea (Tenn.) 381; *Chalfant v. Grant*, 3 Lea (Tenn.) 118; *Commercial & S. Bank v. Corbett*, 5 Sawy. (U. S.) 172; *In re Melvin*, 17 Nat. Bankr. Reg. 543; *In re Sauthoff*, 8 Biss. (U. S.) 35.

1. See *Phillips v. Ames*, 5 Allen, (Mass.) 183; *Conroy v. Woods*, 13 Cal. 626; *Saloy v. Albrecht*, 17 La. Ann. 75; *Sanderson v. Stockdale*, 11 Md. 563; *Flack v. Charron*, 29 Md. 311; *Phelps v. McNeely*, 66 Mo. 554; 27 Am. Rep. 378; *Roop v. Herron*, 15 Neb. 73; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb. 489; *Moorehead v. Adams*, 18 Neb. 569; *Tenney v. Johnson*, 43 N. H. 144; *Caldwell v. Scott*, 54 N. H. 414; *Arnold v. Hagerman*, 45 N. J. Eq. 186; *Burtus v. Tisdall*, 4 Barb. (N. Y.) 571; *Ransom v. Van Deventer*, 41 Barb. (N. Y.) 307; *Heye v. Bolles*, 2 Daly (N. Y.) 231; 33 How. Pr. (N. Y.) 266; *Burnham v. Kelly* (Supreme Ct.), 2 N. Y. Supp. 175; *Menagh v. Whitwell*, 52 N. Y. 146; 11 Am. Rep. 683; *David v. Birchard*, 53 Wis. 492; *Weaver v. Ashcroft*, 50 Tex. 427; *In re Long*, 7 Ben. (U. S.) 141; 9 Nat. Bankr. Reg. 227; *In re Tomes*, 19 Nat. Bankr. Reg. 36; *Johnston v. Straus*, 26 Fed. Rep.

57; *In re Waite*, 1 Low. (U. S.) 207; *Collins v. Hood*, 4 McLean (U. S.) 186; *Wilkinson v. Yale*, 6 McLean (U. S.) 16; *Marsh v. Bennett*, 5 McLean, (U. S.) 117; *Ex parte Shouse*, *Crabbe* 482; *In re Canton*, 24 Up. Can. C. P. 308; *Ex parte Walker*, 4 De G. F. & J. 509; *Anderson v. Maltby*, 2 Ves. Jr. 244; *Bulliter v. Young*, 6 El. & B. 40; *Ex parte Mayon*, 4 De G. J. & S. 664; *Farmers' Bank v. Smith*, 26 W. Va. 541; *Johnson v. Strauss*, 26 Fed. Rep. 57; *Collins v. Hood*, 4 McLean (U. S.) 186; *Ex parte Morley*, 8 Ch. App. 1026.

When partners are, in fact, insolvent, they should be considered in equity as holding the partnership effects in trust for the benefit of the firm creditors, and cannot, by a transfer of the interest of one to the other, defeat this trust. *In re Cook*, 3 Biss. (U. S.) 122.

Such a transfer has been sustained, however, when both parties believed themselves solvent and the failure did not occur until a long time afterwards. *Stanton v. Westover*, 101 N. Y. 265. And the agreement of a partner to remain in the firm and continue to contribute his peculiar skill instead of withdrawing as he had intended has been held to be a sufficient consideration to support the payment of his debt by the firm. *George v. Wamsley*, 64 Iowa 175.

2. *Jewett v. Meech*, 101 Ind. 289; *Fisher v. Syfers*, 109 Ind. 514; *Purple v. Farrington*, 119 Ind. 164; *Stokes v. Stevens*, 40 Cal. 391; *Woodward v. Horst*, 10 Iowa 120; *Fargo v. Ames*, 45 Iowa 491; *George v. Wamsley*, 64 Iowa 175; *Jones v. Lusk*, 2 Metc. (Ky.) 356; *Sexton v. Anderson*, 95 Mo. 373; *Schmidlapp v. Currie*, 55 Miss. 597; 30 Am. Dec. 530; *Whitney v. Dean*, 5 N. H. 249; *Goodbar v. Cary*, 16 Fed. Rep. 316; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Potts v. Blackwell*, 3 Jones' Eq. (N. Car.) 449; 4 Jones Eq. (N. Car.)

a partner or otherwise, even though by so doing the partners leave themselves unable to pay partnership creditors;¹ but the largely prevalent rule is that if the property so disposed of has not gone into the hands of a *bona fide* holder, such a transfer is a gift, and is void, as to all existing firm creditors who are prejudicial thereby, as well as to the individual creditors of the partner whose inter-

58; *Pepper v. Peck* (R. I. 1890), 20 Atl. Rep. 16; *Anderson v. Norton*, 15 Lea (Tenn.) 14; *Decaussay v. Baily*, 57 Tex. 665; *Churchill v. Bowman*, 39 Vt. 518; *Camp v. Page*, 42 Vt. 739; *Clark v. Lyman*, 8 Vt. 290; *Coffin v. Day*, 34 Fed. Rep. 687; *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310. And see *Saunders v. Reilly*, 105 N. Y. 12; *Marks v. Hill*, 15 Gratt. (Va.) 400; *In re Kahley*, 2 Biss. (U. S.) 383.

But a transfer of his interest by an insolvent partner to his copartner within the period forbidden by the bankruptcy laws, is void. *Crampton v. Jerowski*, 2 Fed. Rep. 489; *In re Johnson*, 2 Low. (U. S.) 129; *Wilson v. Greenwood*, 1 Swans 471. Though validity may be imparted to such a conveyance by the assent of the joint creditors, who will thereby be let in to share in the separate estate with the separate creditors. *In re Johnson*, 2 Low. (U. S.) 129; *In re Long*, 7 Ben. (U. S.) 141; 9 Nat. Bankr. Reg. 227.

One partner having, with the consent of the other, used firm money to pay for insurance on his life in favor of his wife, to whom he was indebted in excess of the amounts so paid, no part of the proceeds thereof can be subjected to the payment of the firm debts, though when the premiums were paid both he and the firm were insolvent. *Hanover Nat. Bank v. Klein* (Miss. 1886), 8 So. Rep. 508.

Where one member of a firm died indebted individually to a third person and the surviving partner supposing the firm to be solvent, paid the debt out of partnership means, taking a receipt from the administrator of his deceased copartner who took one from the creditor, his remedy to recover back the money so paid is against the administrator and not against the creditor. *Bailey v. Clark*, 6 Pick. (Mass.) 372.

But a transfer of partnership assets by one partner, without the consent of the others, in payment of his individual debt, is a fraud on the other partners, and does not divest the title of the partnership; and it is immaterial whether the partnership is existing or

dissolved, and whether the creditor receiving the money had knowledge or not that it belonged to the partnership. *Cannon v. Lindsey*, 85 Ala. 198; *Brewster v. Reel*, 74 Iowa 506.

1. See *Penn. Bank v. Furness*, 141 U. S. 376; *Schaeffer v. Fithian*, 17 Ind. 463; *Jones v. Lusk*, 2 Metc. (Ky.) 356; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Sigler v. Knox Co. Bank*, 8 Ohio St. 511; *McDonald v. Beach*, 2 Blackf. (Ind.) 55; *Kingsbury v. Tharp*, 61 Mich. 216; *Schmidlapp v. Currie*, 55 Miss. 597; 30 Am. Rep. 530; *Whitney v. Dean*, 5 N. H. 249; *Fisher v. Syfers*, 109 Ind. 514; *Day v. Witherby*, 29 Wis. 363; *Case v. Beauregard*, 99 U. S. 119; *Wilcox v. Kellogg*, 11 Ohio 394; *Gwin v. Selby*, 5 Ohio St. 96; *Allen v. Center Valley, Co.* 21 Conn. 130; *Rice v. Barnard*, 20 Vt. 479; *Haben v. Harshaw*, 49 Wis. 379; *White v. Parish*, 20 Tex. 688; *Whitton v. Smith*, 1 Freem. Ch. (Miss.) 231; *Freeman v. Stewart*, 41 Miss. 138; *Potts v. Blackwell*, 4 Jones' Eq. (N. Car.) 58; *Ex parte Ruffin*, 6 Ves. 119.

In *Sigler v. Knox Co. Bank*, 8 Ohio St. 511, the court, by PECK, J., said: "It would never do to adopt a rule so uncertain as that the power of the partners over the joint property is to cease whenever it can be shown that their assets for the time being are insufficient to discharge their liability. Such a rule would be productive of much inconvenience, injustice, and uncertainty. The true rule should be that the power of partners thus to act ceases upon the issuing of a commission of insolvency and not from a mere inability at the time to pay their debts."

And in *Woodmansie v. Holcomb*, 34 Kan. 35, the court by Johnston, J., said: "The weight of authority seems to be that a mere insolvency where no actual fraud intervenes will not deprive the partners of their legal control over the property and of the right to dispose of the same as they may choose, and when the separate creditor purchased from the firm in good faith and the individual indebtedness is a fair price for the property purchased, such purchase can-

est is thus given away;¹ and the same principle applies to the withdrawal of funds by a partner in excess of the amount to which he is entitled, whether with the consent of the others or not, when the firm is insolvent, or when there is not enough left to satisfy the joint creditors,² as well as to any appropriation of joint funds

not of itself, be held fraudulent as against the general creditors of the firm."

Where a deceased partner bequeathed his interest in the firm to his wife, and the survivor paid over the amount due to her, such interest cannot be subjected to the survivor's debts, after a finding that no partnership existed between the widow and the surviving partner. *Dulaney v. Elford*, 29 S. Car. 19.

1. *Feucht v. Evans*, 52 Ark. 556; *Edwards v. Entwisle*, 2 Mackey (D. C.) 43; *Keith v. Fink*, 47 Ill. 272; *Patterson v. Seaton*, 70 Iowa, 689; *Saloy v. Albrecht*, 17 La. Ann. 75; *Carter v. Galloway*, 36 La. Ann. 473; *Flack v. Charon*, 29 Md. 311; *Phillips v. Ames*, 5 Allen (Mass.) 183; *Heineman v. Hart*, 55 Mich. 64; *Cron v. Cron*, 56 Mich. 8; *Kitchen v. Reinsky*, 42 Mo. 427; *Rhodes v. Williams*, 12 Nev. 20; *French v. Lovejoy*, 12 N. H. 458; *Ferson v. Monroe*, 21 N. H. 462; *Elliott v. Stevens*, 38 N. H. 311; *Kidder v. Page*, 48 N. H. 380; *Farwell v. Metcalf*, 63 N. H. 276; *Arnold v. Hagerman*, 45 N. J. Eq. 186; *Blackwell v. Rankin*, 7 N. J. Eq. 152; *National Bank v. Sprague*, 21 N. J. Eq. 530, 544; *Clements v. Jessup*, 36 N. J. Eq. 569; *Kirby v. Schoomaker*, 3 Barb. Ch. (N. Y.) 46; *Geortner v. Canajoharie*, 2 Barb. (N. Y.) 625; *Burtus v. Tisdall*, 4 Barb. (N. Y.) 571; *Dart v. Farmers' Bank*, 27 Barb. (N. Y.) 337; *Cox v. Platt*, 32 Barb. (N. Y.) 126; 19 How. Pr. (N. Y.) 121; *Knauth v. Bassett*, 34 Barb. (N. Y.) 31; *Walsh v. Kelly*, 42 Barb. (N. Y.) 98; 27 How. Pr. (N. Y.) 359; *Lester v. Abbott*, 3 Robt. (N. Y.) 691; 28 How. Pr. (N. Y.) 488; *O'Neill v. Salmon*, 25 How. Pr. (N. Y.) 246; *Ruhl v. Phillips*, 2 Daly (N. Y.) 45; *Heye v. Bolles*, 2 Daly (N. Y.) 231; 33 How. Pr. (N. Y.) 266; *Wilson v. Robertson*, 21 N. Y. 587; *Hurlbert v. Dean*, 2 Keyes (N. Y.) 97; 2 Abb. App. Dec. (N. Y.) 428; *Menagh v. Whitwell*, 52 N. Y. 146; 11 Am. Rep. 683; *Walker v. Marine Nat. Bank*, 98 Pa. St. 574; *Henderson v. Haddon*, 12 Rich. Eq. (S. Car.) 393; *Snyder v. Lunsford*, 9 W. Va. 223; *Cribb v. Morse*, 77 Wis. 126;

Keith v. Armstrong, 65 Wis. 225; *Brecher v. Fox*, 1 Fed. Rep. 273; *In re Lane*, 2 Low. (U. S.) 333; 10 Nat. Bankr. Reg. 135; *In re Sauthoff*, 16 Nat. Bankr. Reg. 181; *Goodbar v. Cary*, 4 Wood (U. S.) 663; 16 Fed. Rep. 316; *Anderson v. Maltby*, 2 Ves. Jr. 244; *Ex parte Snowball*, L. R., 7 Ch. App. 534.

Creditors of a member of a firm will not be allowed to apply the firm assets to pay his debt, to the prejudice of the partnership creditors, even though the other members have acquiesced therein. *Carter v. Allen*, 36 La. Ann. 730.

If there are unsettled partnership debts, the purchaser cannot recover the value of the property from the other partner in trover. *Kingsbury v. Tharp*, 61 Mich. 216.

Where the parties moving to set aside for fraud a senior judgment by confession are the junior judgment creditors of only one of the firm which confessed the judgment, it should be set aside, so far as it obstructs a levy on the interest of the partner, who is the judgment debtor of the moving parties. *Utter v. McLean*, 53 Hun (N. Y.) 568; 17 Civ. Pro. Rep. (N. Y.) 150.

A partner who, with knowledge that his co-partner has applied moneys of the firm to the payment of his individual creditors, delays for nineteen months to question their right to hold such moneys, is estopped from recovering against them. *Davies v. Atkinson*, 25 Ill. App. 260; affirmed, 124 Ill. 474.

If a separate creditor be paid with firm money, without the consent of the other partners, the money cannot be recovered back, if he did not believe, and had no reason to believe that it was partnership money he was paid with. *Wiley v. Allen*, 26 Ga. 568.

2. *Edwards v. Entwisle*, 2 Mackey (D. C.) 43; *Phipps v. Sedgwick*, 95 U. S. 3; *Greene v. Ferrie*, 1 Desaus. (S. Car.) 164; *In re Melvin*, 17 Nat. Bankr. Reg. 543; *In re Santhoff*, 16 Nat. Bankr. Reg. 181; 8 Biss (U. S.) 35; *In re Kemptner*, L. R., 8 Eq. 286. But see to the contrary, *Allen v. Centre Valley Co.*, 21 Conn. 130, where the partner sold some of the assets and divided the

to individual purposes whereby they are removed from the reach of joint creditors.¹ It has been held by some authorities, however, that the payment of or securing a debt of a partner by the firm is valid and no fraud upon creditors, where the debt was one of which the firm had the benefit and which in equity and justice it should pay.² An assignment for the benefit of creditors made by a firm with preferences to individual creditors is, to the extent of such preferences at least, fraudulent and void,³ and the creditors of one firm which has succeeded, or acquired the property of another, have priority in the distribution of the assets over the creditors of the old firm.⁴

proceeds. This was held to be a valid conversion of joint inter-separate property. And in *Turner v. Jaycox*, 40 N. Y. 470, where the partnership contract contained a provision that if either of the partners owed any debt, it was to be paid out of the common stock, and a note of the firm was given to pay their board bills, this note was held to be a partnership debt entitled to a preference in an assignment for the benefit of creditors.

The partners are entitled to draw reasonably small amounts for individual expenses although the firm may be in some difficulty but having a reasonable hope of extrication. *McKinney v. Rosenband*, 23 Fed. Rep. 785.

1. See *Place v. Sedgwick*, 95 U. S. 3; *Bishop v. Hubbard*, 23 Cal. 514; *Edwards v. Entwisle*, 2 Mackey (D. C.) 43; *Stegall v. Coney*, 49 Miss. 761; *Rhodes v. Williams*, 12 Nev. 20; *Re Santhoff*, 16 Nat. Bankr. Reg. 181.

A chattel mortgage given without consideration to secure the antecedent individual debt of one of the partners is fraudulent as against creditors of the firm, if, at the time it was given, the firm was insolvent or would become so by such a shrinkage in outstanding accounts as might reasonably be expected. *Heineman v. Hart*, 55 Mich. 64.

But the appropriation of partnership property to the payment of the individual debts of a partner is valid against subsequent creditors of the firm, though not against existing ones. *Farwell v. Metcalf*, 63 N. H. 276.

A and B, partners, borrowed money of a bank, for part of which they gave their individual notes and for part the firm notes. The money, as the bank knew, was to be used to pay the individual indebtedness of A, and he was charged with the amount on the firm books. Afterwards, all the notes were taken up, and firm note, secured by

chattel mortgage, given for the whole loan. *Held*, that an assignee of the firm for the benefit of creditors having knowledge of the transaction, was bound to pay the whole of the mortgage out of the firm assets. *In re Stewart*, 62 Iowa, 614.

2. See *Gwin v. Selby*, 5 Ohio St. 96; *Siegel v. Chedsey*, 28 Pa. St. 279; *Haben v. Hershaw*, 49 Wis. 379; *Coffin's Appeal*, 106 Pa. St. 280; *Head v. Horn*, 18 Cal. 211; *Walker v. Marine Nat. Bank*, 98 Pa. St. 574; *Rose v. Keystone Shoe Co.*, 18 W. N. C. (Pa.) 565; *Marks v. Hill*, 15 Gratt. (Va.) 400; *Saunders v. Reilly*, 105 N. Y. 12. But see to the contrary *Blackwell v. Rankin*, 7 N. J. Eq. 152. And in *Hilliker v. Francisco*, 65 Mo. 598, it was held that the assets of a partnership could not be appropriated for the payment of debts due from the several partners as individuals.

Such a conveyance is fraudulent as to existing creditors, although valid as to the parties thereto, and will be set aside at the suit of a creditor who has obtained a judgment against the firm. *Goodbar v. Cary*, 16 Fed. Rep. 316.

3. *Jackson v. Cornell*, 1 Sandf. Ch. (N. Y.) 348; *Schiele v. Healy*, 61 How. Pr. (N. Y.) 73; *Willis v. Bremner*, 60 Wis. 622; *Vernon v. Upson*, 60 Wis. 418; *Knauth v. Bassett*, 34 Barb. (N. Y.) 31.

But a transfer by an insolvent firm of its property to one who had indorsed the paper of the firm and of its individual members to a large amount, and who, in consideration of the transfer, agreed to pay the obligations of the firm and of its individual members to a specified amount, including the paper on which he was indorser, being made in good faith, and for an adequate price, is not fraudulent as to firm creditors. *Coffin v. Day*, 34 Fed. Rep. 687*.

4. *Coffin v. McCullough*, 30 Ala.

A sale by one partner to another, or a division of the property between them, is valid and binding as to their individual creditors,¹ it being a mere separation of their interests. And an application of individual assets to the payment of partnership debts is merely giving preference to a different class of creditors and therefore not fraudulent as to individual creditors.² In States where individual creditors are preferred to joint ones in the distribution of the separate estates an assignment of separate estate for separate creditors is valid,³ and where no distinction is made in the instrument the court will devote each kind of property to its own class of creditors.⁴ But an assignment of separate assets for the benefit of joint creditors is usually either void or inures to the benefit of the separate creditors,⁵ and a voluntary

107; *Lester v. Pollock*, 3 Robt. (N. Y.) 691; *Menagh v. Whitwell*, 52 N. Y. 146; *McCauley v. McFarlane*, 2 De-saus. (S. Car.) 239; *Crane v. Morrison*, 4 Sawy. (U. S.) 138; 17 Nat. Bankr. Reg. 393.

1. *Darland v. Rosencrans*, 56 Iowa 122; *Atkins v. Saxton*, 77 N. Y. 195; *Griffin v. Cranston*, 10 Bosw. (N. Y.) 1.

Where one member assigned his interest in the partnership stock, and the stock was seized by attachment against the party making the transfer at suit of an individual creditor, it was held that it was error to submit as a controlling issue whether the assignment was made for the preference of the partnership creditors. *Weaver v. Ashcroft*, 50 Tex. 427.

2. *Savings & Loan Assoc. v. Gibb*, 21 Cal. 595; *Utle v. Smith*, 24 Conn. 290; *Evans v. Hawley*, 35 Ind. 83; *Hardy v. Overman*, 36 Ind. 549; *Lanier v. Wallace* (Ind. 1888), 17 N. E. Rep. 923; *Indianapolis Board of Trade v. Wallace*, 117 Ind. 599; *Talbot v. Pierce*, 14 B. Mon. (Ky.) 158; *Newman v. Bagley*, 16 Pick. (Mass.) 570; *Kirby v. Schoomaker*, 3 Barb. Ch. (N. Y.) 46, 50; *Crook v. Rindskopf*, 105 N. Y. 476; *Auburn Exchange Bank v. Fitch*, 48 Barb. (N. Y.) 344; *Gadsden v. Carson*, 9 Rich. Eq. (S. Car.) 252; *Gallagher's Appeal*, 114 Pa. St. 353; *Whitmore v. Parks*, 3 Humph. (Tenn.) 95; *Straus v. Kerngood*, 21 Gratt. (Va.) 584, 590; *Morris v. Morris*, 4 Gratt. (Va.) 293; *Stewart v. Slater*, 6 Duer (N. Y.) 83.

A joint execution upon a judgment for a partnership debt may be executed, not only against the partnership property, but against the separate estate of each partner. *Randolph v. Daly*, 16 N. J. Eq. 313.

Where the owner of a business who

was indebted took in two of his creditors as partners and continued the business, incurring new debts, thereby subordinating the rights of his individual creditors to those of the firm, the parties having acted in good faith, the transaction was held not to be fraudulent as against the individual creditors. *Utle v. Smith*, 24 Conn. 290.

3. *Evans v. Winston*, 74 Ala. 349; *Holton v. Holton*, 40 N. H. 77; *Lord v. Devendorf*, 54 Wis. 491.

4. *Bank of Mobile v. Dunn*, 67 Ala. 381; *Friend v. Michaelis*, 15 Abb. N. Cas. (N. Y.) 354; *Crook v. Rindskopf*, 105 N. Y. 476; *Eyre v. Beebe*, 28 How. Pr. (N. Y.) 333; *Andress v. Miller*, 15 Pa. St. 316; *McCullough v. Somerville*, 8 Leigh (Va.) 415; *Murrill v. Mill*, 8 How. (U. S.) 414.

5. See *Collomb v. Caldwell*, 16 N. Y. 484; *Jackson v. Cornell*, 1 Sandf. Ch. (N. Y.) 348; *O'Neil v. Salmon*, 25 How. Pr. (N. Y.) 246; *Holton v. Holton*, 40 N. H. 77; *Stewart v. Stater*, 6 Duer (N. Y.) 83; *Smith v. Howard*, 20 How. Pr. (N. Y.) 121; *Van Rossum v. Walker*, 11 Barb. (N. Y.) 237; *Averill v. Loucks*, 6 Barb. (N. Y.) 470; *Pennington v. Bell*, 4 Sneed (Tenn.) 200. But see *Newman v. Bagley*, 16 Pick. (Mass.) 570; *Gadsden v. Carson*, 9 Rich. Eq. (S. Car.) 252.

The rule in equity, governing the administration of insolvent partnerships is that partnership creditors shall, in the first instance, be satisfied from the partnership estate, and separate or private creditors of the individual partners from the separate and private estates of the partners by whom the separate or private debts were respectively contracted, and that the private and individual property of the partners shall not be applied in ex-

conveyance of separate estate may be attacked by either partnership or individual creditors.¹

XV. POWERS AND RIGHTS OF PARTNERS.—It is a principle of universal application that each partner is, in contemplation of law, the general and accredited agent of the whole firm, with power as such to bind it in all matters within the scope of and which legitimately pertain to the partnership business;² limited, how-

tinguishment of partnership debts until the separate and individual creditors of the respective partners shall be paid. *Murrill v. Neill*, 8 How. (U. S.) 415; *Re Warren, Dav.* (U. S.) 320.

But where a debtor partner, by his will, has only subjected his real estate to the payment of his debts, his partnership creditors are entitled to share with the separate creditors in that fund. *Morris v. Morris*, 4 Gratt. (Va.) 293. And see *Strauss v. Kerngood*, 21 Gratt. (Va.) 584. And an assignment for individual creditors providing for a return of the residuum without providing for partnership debts is void. *Goddard v. Bridgman*, 25 Vt. 351; 60 Am. Dec. 272.

1. See *Randolph v. Daly*, 16 N. J. Eq. 313; *Barhydt v. Perry*, 57 Iowa 416; *Forbes v. Davidson*, 11 Vt. 660.

Both sets of creditors may join in an attack upon such a conveyance. *Hardy v. Mitchell*, 67 Ind. 485.

A partnership creditor attacking a conveyance of separate estate must allege that there are no separate debts, or that there would be a surplus after their payment. *Hardy v. Mitchell*, 67 Ind. 485.

2. *Sage v. Sherman*, 2 N. Y. 417; *London Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 498; *Edwards v. Tracy*, 62 Pa. St. 374; *Congdon v. Morgan*, 13 S. Car. 190; *Selden v. Bank of Commerce*, 3 Minn. 166; *Mauldin v. Branch Bank*, 2 Ala. 502; *Johnson v. Dutton*, 27 Ala. 245; *Chandler v. Sherman*, 16 Fla. 99; *Breckinridge v. Shrieve*, 4 Dana (Ky.) 376; *Heim v. McCaughan*, 32 Miss. 17; *Faler v. Jordan*, 44 Miss. 283; *Cadwallader, Kroesen*, 22 Md. 200; *Che-mung Canal Bank v. Bradner*, 44 N. Y. 680; *Knowlton v. Reed*, 38 Me. 246; *Fletcher v. Ingram*, 46 Wis. 191; *London etc. Society v. Hagerstown etc. Bank*, 36 Pa. St. 434. And see *Western Stage Co. v. Walker*, 2 Iowa 504; 65 Am. Dec. 789; *Crozier v. Kirker*, 4 Tex. 252; 51 Am. Dec. 724; *Kinsler v. McCants*, 4 Rich. (S. Car.) 46; 53 Am. Dec. 711; *Burgan v. Lyell*, 2 Mich. 102;

55 Am. Dec. 53; *Barker v. Mann*, 5 Bush (Ky.) 672; 96 Am. Dec. 373; *Kenney v. Altwater*, 77 Pa. St. 34; *Blodgett v. Weed*, 119 Mass. 215; *Pahlman v. Taylor*, 75 Ill. 629; *Decker v. Howell*, 42 Cal. 636; *First Nat. Bank v. Carpenter*, 41 Iowa 518; *Cox v. Hickman*, 2 H. L. Cas. 268; *Campbell v. Dent*, 54 Mo. 325; *Eastman v. Clark*, 53 N. H. 276; 16 Am. Rep. 192; *Davis v. Richardson*, 45 Miss. 499; 7 Am. Rep. 732; *Norton v. Thatcher*, 8 Neb. 186; *Davis v. Richardson*, 45 Miss. 499; *Boardman v. Adams*, 5 Iowa 224; *Abraham v. Hall*, 59 Ala. 386; *Davis v. Blackwell*, 5 Bradw. (Ill.) 32; *Swan v. Steele*, 7 East 210; *Rothwell v. Humphreys*, 2 Esp. 406; *Sandelands v. Marsh*, 2 B. & Ald. 673; *Ex parte Agace*, 2 Cox. 312; *Gerard v. Basse*, 1 Dall. (U. S.) 119; *Lamb v. Durant*, 12 Mass. 57; *Mills v. Barber*, 4 Day (Conn.) 428; *Bank v. Binney*, 5 Mason (U. S.) 187; *Etheridge v. Binney*, 9 Pick. (Mass.) 272; *Winship v. United States Bank*, 5 Pet. (U. S.) 529; *Gano v. Sammel*, 14 Ohio 592; *Everit v. Strong*, 5 Hill (N. Y.) 163; *Le Roy v. Johnson*, 2 Pet. (U. S.) 186; *Stockwell v. Dillingham*, 50 Me. 442; *Willis v. March*, 30 N. Y. 344. And see generally the other cases cited in the chapter.

Partnerships between attorneys are subject to the incidents to mercantile partnerships; and one partner is liable upon the contracts made by the other within the scope of the partnership business, and for his negligence in respect to a partnership contract, and a right of action against the firm, survives against the survivor alone. *Livingston v. Cox*, 6 Pa. St. 360.

Acting by Agent.—Where in a contract of partnership between a wife and a third person, it is stipulated that her husband shall represent the wife in all partnership business, and that his acts shall be binding on the firm, "the same as if he were a member of said firm," such stipulation vests him with all the powers of a partner, and his signature of the firm name to notes given in the business of the firm is as binding as if

ever, to the exercise of the powers of the firm within the scope of its ordinary business, and not extending to other and distinct matters,¹ and confined to an agency for the whole partnership when acting as an entity and not extending to an authority to act for or bind any number of the partners less than the whole when acting separately and individually.² This power of each partner to represent and bind the rest is sometimes regarded as arising from the agency which all confer on each, and sometimes from the community of interest whereby no partner owns any part of the partnership property exclusively of the rest, but each partner owns the whole in common with all the others.³

signed by a partner. *State Nat. Bank v. Scott*, 42 La. Ann. —; 7 So. Rep. 720.

Joint Stock Companies.—The acts of the trustees of an unincorporated association, done in good faith, and within the scope of their authority, are binding upon the stockholders individually, in a suit against them by a creditor of the company under the statute. *Slee v. Bloom*, 20 John. (N. Y.) 669.

1. *Croughton v. Forrest*, 17 Mo. 131; *Thompson v. Howard*, 2 Ind. 245; *Eastman v. Cooper*, 15 Pick. (Mass.) 276; *Jones v. O'Farrel*, 1 Nev. 354; *Cayton v. Hardy*, 27 Mo. 536; *Goodman v. White*, 25 Miss. 163; *Goode v. Linecum*, 1 How. (Miss.) 281; *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251; *Mercein v. Andrus*, 10 Wend. (N. Y.) 461; *Nichols v. Hughes*, 2 Bail. (S. Car.) 109; *Morans v. Armstrong*, Arm. M. & O. Ir., N. P. Rep. 25; *Stegall v. Coney*, 49 Miss. 761; *Town v. Hendee*, 27 Vt. 258; *Atkin v. Berry*, 1 Lea (Tenn.) 91; *Thompson v. Howard*, 2 Ind. 245; *Bank of Fort Madison v. Alden*, 129 U. S. 372.

One partner has no authority to agree that private property of the other partner, pledged by him for a firm debt, shall also stand as security for further advances. *Beardsley v. Tuttle*, 11 Wis. 74.

Where a partner makes a contract concerning partnership property, but does not in any way assume to act for the firm, the obligation belongs to him personally, and not to the firm. *Hubenthal v. Kennedy*, 76 Iowa 707.

A partner of a lessee, in the business pursued on the leased premises, who is not a joint lessee or interested in the lease, has no authority to make a valid surrender of the lease. *Bergland v. Frawley*, 72 Wis. 557.

2. *Terrell v. Hurst*, 76 Ala. 588; *Shaw*

v. State, 56 Ind. 188; *Ryerson v. Hendrie*, 22 Iowa 480; *Sherman v. Christie*, 17 Iowa 322; *Marlett v. Jackman*, 3 Allen (Mass.) 287; *Marvin v. Wilber*, 52 N. Y. 270; *Snow v. Howard*, 35 Barb. (N. Y.) 55; *Elliott v. Davis*, 2 B. & P. 338; *Gillow v. Lillie*, 1 Bing. N. Cas. 695.

A contract executed by one member of a co-partnership binds all, if it was so intended, and if the requisite authority exists. *Pearson v. Post*, 2 Dakota 220.

A note executed by a partner in the name of his firm while acting as the general manager and financial agent of the firm, is binding upon the partnership. *Wiley v. Stewart*, 23 Ill. App. 236; affirmed, 122 Ill. 545.

Attorney and Counselor.—Partnership may exist between a counselor at law and an attorney, in their professional business; but the attorney must have the sole and entire superintendence of the attorney's business, for which he is responsible; and no person, on the ground of such co-partnership, can take any part in the conduct of a suit, whose office is at a different place from that of the attorney. *In re Woodward* 4 Johns. (N. Y.) 289.

In *New Jersey*, it is not lawful for two or more attorneys to create a partnership, and prosecute and defend suits in the name of the firm. *Wilson v. Wilson*, 5 N. J. L. 791.

3. 1 Parsons on Cont. (7th ed.), 196, *174.

It is perhaps more accurate to trace a partner's power to his standing as a co-principal, and to consider his agency an incident of this relation. *Pooley v. Driver*, 5 Ch. D. 458; *L. R.* 7 Ex. 218.

"It is true that there may have been a co-partnership where one or more of the partners has no interest in the

The extent of the powers of a co-partnership or of one of its members to bind the firm, as well as of the liability of its members, must be determined by the law of the place where the partnership was formed and had its place of business.¹

1. Scope of the Business.—Scope of the business as the term is used with relation to the power of partners to bind the firm, generally includes what is reasonably necessary to the successful conduct of the business, measured by its nature, the usage of others engaged in the same occupation in the same locality, and the known habits, conduct and usage of the particular firm in question.²

a. NATURE OF THE BUSINESS.—The intrinsic characteristics of well known callings are recognized by the courts as presumptive limitations, and an act which cannot be fairly regarded as coming within the ordinary necessities of the business, is in itself notice to all of its non-partnership character.³ Thus a firm formed for

capital stock by agreement among themselves. But even then all own together the profits, and so much of the funds or capital of the firm as consists of profits. Partners are undoubtedly in some way, agents of each other. But the principle of agency alone will not explain the whole law of their mutual responsibility. Out of the combination of this principle with those which grow out of the community of property and of interest, the law of partnership is formed. And this law may often be illustrated by a reference to the principles of agency; but must still be regarded as consisting of a distinct system or rules and principles peculiar to itself." 1 Parsons on Cont. (7th ed.) 197, *175.

1. Cutler v. Thomas, 25 Vt. 73; **Hastings v. Hopkinson**, 28 Vt. 108.

Time of the Essence of the Contract.—A partner competent to contract for the firm is competent to make time of the essence of the contract. **Van Winkle v. Wilkins**, 81 Ga. 93.

2. Bates' Law of Part., § 315.

Scope was held to be a question of law in **Banner Tobacco Co. v. Jenison**, 48 Mich. 459. But it was treated as a question of fact in **Hodges v. Ninth Nat. Bank**, 54 Md. 406, **Taylor v. Jones**, 42 N. H. 25; **Mace v. Heath** (Neb. 1890), 46 N. W. Rep. 918. See also **National Exchange Bank v. White**, 30 Fed. Rep. 412; **Stillman v. Harvey**, 47 Conn. 26.

One partner has no authority to bind another by purchasing the interest of a third. **Summerlot v. Hamilton**, 121 Ind. 87.

A transaction not within the scope of the firm business does not bind the partners who did not participate in it or ratify it though plaintiff believed that it was within the scope of the firm business. **Nolan Co. v. Simpson**, 74 Tex. 218.

The owner of certain mares sold a half interest in them to defendant, payment to be made in four years. Defendant was to have the possession of them during that time; and they were to be kept for breeding purposes only, at the joint expense of the parties. **Held**, that whether the relation between the parties under the agreement to keep the mares for breeding be considered that of partners or not, neither could sell the interest of the other, as the purpose of the business required the keeping of the property, and the power of a partner to sell is confined to those things kept for sale. **Lowman v. Sheets**, 124 Ind. 416.

May Acquire Lien.—A petition for a lien on logs for supplies used in cutting, hauling and driving them, furnished by a partnership, which petition was signed by only one of the partners, who made oath in the verification that he was one of the firm, and that he made the verification in behalf of himself and his co-partner, is sufficient to give the partnership a lien, though the petition claims a lien upon the logs only for the sum due "him." **Garland v. Hickey**, 75 Wis. 178.

3. See Irwin v. Williar, 110 U. S. 499; **Hotchin v. Kent**, 8 Mich. 526; **Thompson v. Head**, 2 Ind. 245; **Wag-**

the purpose of carrying on a particular class of business, will not be bound by purchases by one partner of goods or property which are not and cannot be used in that business.¹ Nor can a mercantile partnership be bound by an undertaking on the part of one of the partners to make collections or perform other services for third persons;² nor by an undertaking on the part of a partner to engage in a particular class of work when the firm is engaged in an entirely different class;³ and in general, a firm engaged in any kind of business or undertaking, cannot be bound by the engagements of a partner to enter into transactions of a radically different character.⁴ But, upon the other hand where the person desir-

non *v. Clay*, 1 A. K. Marsh. (Ky.) 257; *Maltby v. Northwestern etc. R. Co.*, 16 Md. 422; *Conely v. Wood*, 73 Mich. 203; *Goode v. Linecum*, 1 How. (Miss.) 422; *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251; 4 Am. Dec. 273; *Biggs v. Hubert*, 14 S. Car. 620; *Bankhead v. Alloway*, 6 Coldw. (Tenn.) 56; *Goode v. McCartney*, 10 Tex. 193; *U. S. Bank v. Binney*, 5 Mason (U. S.) 176; *Frasier v. McLeod*, 8 Grant's Ch. (Up. Can.) 268.

W & Co. were engaged in the business of street improvement, and took contracts to do certain work for a city, payment to be made at the completion of the work. *W* borrowed money of a bank, to be used in the work, and assigned an equal amount of the contract price of the work as collateral. The money was loaned on the strength of this security, and the assignment was recorded by the register in a book kept for that purpose, such assignments having long been in use in the register's office. The nature of the business required the use of large amounts of money before any could be realized from the contracts. *Held*, that *W* was authorized by the nature of the business to borrow money for the partnership, and to execute the assignment as security. *Harris v. Baltimore* (Md. 1889), 17 Atl. Rep. 1046.

1. *Ferguson v. Shepard*, 1 Sneed (Tenn.) 254; *Waller v. Keyes*, 6 Vt. 257; *Taylor v. Webster*, 39 N. J. L. 102; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459; *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251; 4 Am. Dec. 273.

The members of a firm engaged in the insurance, real estate and collecting business have no implied power to bind each other by commercial paper in the name of the firm. Such power can only arise from consent, ratifica-

tion, custom or necessity. [Overruling *Hickman v. Kunkle*, 27 Mo. 401.] *Deardorf v. Thacher*, 78 Mo. 128; 47 Am. Rep. 95.

2. *Pickles v. McPherson*, 59 Miss. 216; *Hogan v. Reynolds*, 8 Ala. 59; *Toof v. Duncan*, 45 Miss. 48; *Hutchins v. Gilman*, 9 N. H. 359; *Rimel v. Hayes*, 83 Mo. 200; *Lawrence v. Dale*, 3 Johns. Ch. (N. Y.) 23; *Goodman v. White*, 13 Smed. & M. (Miss.) 163.

3. *Boardman v. Adams*, 5 Iowa 224; *Wills v. Turner*, 16 Md. 133; *Humes v. O'Bryan*, 74 Ala. 64; *Roberts' Appeal*, 92 Pa. St. 407; *Einstman v. Black*, 14 Ill. App. 381.

A partner in a firm formed for the purpose of transporting passengers and their baggage by a line of stages is not authorized by the nature of the business to bind the firm by a contract to carry a person a certain distance in a specified time. *Walcott v. Canfield*, 3 Conn. 194.

4. See *Hatheway's Appeal*, 52 Mich. 112; *Irwin v. Williar*, 110 U. S. 499; *Roberts' Appeal*, 92 Pa. St. 407; *Freeman v. Bloomfield*, 43 Mo. 391; *Chandler v. Sherman*, 16 Fla. 99; *Berry v. Folks*, 60 Miss. 576; *McCauley v. Palmer* (Supreme Ct.), 6 N. Y. Supp. 402.

Decedent was a member of an unincorporated association organized to build, equip and operate a certain railroad. Some of the partners contracted to purchase the entire stock of a competing road. *Held*, that said contract was not within the scope of the authority of those making it and not binding upon decedent's estate. *Roberts' Appeal*, 92 Pa. St. 407.

Where a firm bought and paid for property, but the vendor returned the money to one of the partners without the knowledge of the rest to be held until the buyers satisfied themselves as

ing to hold the partnership upon a contract made by a partner, is reasonably justified in believing that the transaction in question is of a like nature with those in which the firm is engaged, it will be treated as the contract of the firm,¹ the presumption being that the contracts of a partner are made on account of the partnership unless the contrary appears;² though in transactions of a different nature from those in which the firm is engaged, the acting partner will be presumed to be dealing in his individual capacity.³

b. USAGE OF SIMILAR FIRMS.—Persons dealing with a firm are justified in supposing that the business will be conducted in the usual and ordinary manner; hence the conduct of the same kind of business by others furnishes a criterion as to the scope of the business of the firm in question.⁴ But proof of such usage must be confined to the immediate locality of the firm in question,⁵ and it should be of sufficient publicity and notoriety as to

to the title, the firm was held not responsible for the money. *Battle v. Street*, 85 Tenn. 282.

1. *Jackson v. Todd*, 56 Ind. 406; *Manville v. Parks*, 7 Colo. 128; *Todd v. Jackson*, 75 Ind. 272; *Maltby v. Northwestern etc. R. Co.*, 16 Md. 422. And see *Collier v. McCall*, 84 Ala. 190; *Union Hotel Co. v. Hersee*, 79 N. Y. 454; *Ogdensburgh etc. R. Co. v. Frost*, 21 Barb. (N. Y.) 546; *Vaiden v. Hawkins* (Miss. 1889), 6 So. Rep. 227.

A purchase of wine by a partner in a firm engaged in the manufacture of cider vinegar, was held binding on the firm. *Augusta Wine Co. v. Weippert*, 14 Mo. App. 483.

2. *Le Roy v. Johnson*, 2 Pet. (U. S.) 198; *Rochester v. Trotter*, 1 A. K. Marsh. (Ky.) 54; *Vienne v. Harris*, 14 La. Ann. 283; *Campbell v. Bowen*, 49 Ga. 417; *Leffler v. Rice*, 44 Ind. 103; *Dupree v. Boyd*, 23 La. Ann. 495; *Bodwell v. Eastman*, 106 Mass. 525; *Schwank v. Davis*, 25 Neb. 196; *Johnston v. Trask*, 116 N. Y. 136; *Donnelly v. Elser*, 69 Tex. 282.

If an act is done by one partner on behalf of the firm and it was necessary for carrying on the partnership business in the ordinary way, the firm will *prima facie* be liable although in point of fact the act was not authorized by the other partners. *Lindley on Part.* 236.

Where a note is given in the name of a partnership, it is *prima facie* evidence that it was given on partnership account, and the burden is upon him who asserts the contrary to show that

it was not. *McMullan v. Mackenzie*, 2 Greene (Iowa) 368. And see *Schwank v. Davis*, 25 Neb. 196.

One seeking to rescind in a contract for the purchase of real estate, on the ground that grantor's interest in the property was less than that of his co-partners, and that the land was liable for partnership debts, has the burden of proving these statements. *Moore v. Bare*, 11 Iowa 198.

3. *Davis v. Blackwell*, 5 Ill. App. 32; *Judge v. Braswell*, 13 Bush (Ky.) 67; 26 Am. Rep. 85; *Holmes v. Burton*, 9 Vt. 252; *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 278; *Dow v. Sayward*, 12 N. H. 275; *Maltby v. Northwestern etc. R. Co.*, 16 Md. 422; *Merchant v. Belding*, 49 How. (N. Y.) Pr. 342; *Eastman v. Cooper*, 15 Pick. (Mass.) 276; 26 Am. Dec. 601.

If an act is done by one partner on behalf of the firm, and it was not necessary for carrying on the partnership business in the ordinary way, the firm will *prima facie* not be liable. *Lindley on Part.* 237.

4. *Smith v. Collins*, 115 Mass. 388; *Pierce v. Jarmagin*, 57 Miss. 106; *Irwin v. Williar*, 110 U. S. 499; *Galloway v. Hughes*, 1 Bailey (S. Car.) 553; *Waring v. Grady*, 49 Ala. 465.

Dealing in grain is not a technical phrase from which a court can properly infer, as matter of law, authority to bind the firm in dealing in futures by means of contracts of sale or purchase for purposes of speculating upon the course of the market. *Irwin v. Williar*, 110 U. S. 499.

5. *Irwin v. Williar*, 110 U. S. 499.

raise the presumption that the copartners were acquainted with it.¹

c. FORMER PRACTICE OF THE SAME FIRM.—A partner's authority to perform an act on behalf of the firm may be established by a prior similar custom, or acts acquiesced in by the firm.² As secret or unknown restrictions upon or grants of power may have been made, the acts and declarations of the parties and the course of business is most cogent evidence of its existing extent.³ But in order to give it the effect of binding the firm upon a contract upon which it would not otherwise have been held, it must have amounted to a general course of dealing.⁴

d. INFLUENCE OF NECESSITY ON SCOPE.—What is necessary for carrying on the business of the firm in the ordinary way is the test of its scope.⁵ The mere fact that an unusual or extraordinary act is, owing to unforeseen circumstances, convenient and advantageous, confers no power upon a partner to perform it.⁶ Nor will an emergency so serious as to render the step an absolute necessity to the preservation of the firm, empower him to take it.⁷

1. Prince v. Crawford, 50 Miss. 344.

2. Pahlman v. Taylor, 75 Ill. 629; Folk v. Wilson, 21 Md. 538; Hamilton v. Phoenix Ins. Co., 106 Mass. 395; Holt Simmons, 16 Mo. App. 97; McGregor v. Cleveland, 5 Wend. (N. Y.) 477; Hoskinson v. Eliot, 62 Pa. St. 393; Lee v. McDonald, 6 Up. Can. Q. B., O. S. 130. And see Conley v. Wood, 73 Mich. 203; McGhees v. McCutchen, 82 Ga. 788.

Where one partner in a newspaper and printing business undertook to sell pianos for the firm after both partners had accepted an agency for the sale of pianos, each was held liable for the acts of the other in the scope of the new business. Boardman v. Adams, 5 Iowa 224.

3. McNeish v. Hulless Oat Co., 57 Vt. 316; Keltoner v. Leonard, 54 Vt. 230; Waller v. Keyes, 6 Vt. 257; Irwin v. Williar, 110 U. S. 499; Lyman v. Lyman, 2 Paine (U. S.) 11.

4. See Catlin v. Gilders, 3 Ala. 536; Fraser v. McLeod, 8 Grant's Ch. 268; Alabama Fertilizer Co. v. Reynolds, 79 Ala. 479; Williar v. Irwin, 11 Biss. (U. S.) 57.

5. Lindley on Part. 238.

"Notwithstanding the fact, that every partner is, to a certain extent a principal, as well as an agent, the liability of his co-partners for his acts can only be established on the ground of agency as their agent. He has no discretion, except within the limits set by them to his authority, and the fact that he is, him-

self as one of the firm, a principal, does not warrant him in extending these limits save on his own responsibility." Lindley on Partnership 239, citing Ricketts v. Bennett, 4 C. B. 686; Dickinson v. Valpy, 10 B. & C. 128.

6. Brittel v. Williams, 4 Exch. 623. And see Russell v. Amable, 109 Mass. 72; Moore v. Stroms, 60 Miss. 809; Macklin v. Kerr, 28 Up. Can. C. P. 90; Barnard v. Lapeer etc. Plank Road Co., 6 Mich. 274; Roberts' Appeal, 92 Pa. St. 470; Walcott v. Canfield, 3 Conn. 194; Thomas v. Harding, 8 Me. 417. But see Morss v. Hagenagh, 68 Wis. 603; Andrews v. Conger, 20 Am. Law Reg., N. S. 328.

Though a customer can be retained only by allowing his debt to the firm as an offset to a debt owing to him by one of the partners, no power is conferred upon the debtor partner to make such an allowance. Cotzhausen v. Judd, 43 Wis. 213; 28 Am. Rep. 539. Though in some localities a custom of trading out debts may render such an allowance valid and binding. Eaton v. Whetcomb, 17 Vt. 641.

Where a firm carried on business upon leasehold property, one partner has no implied power at the expiration of a lease to procure its renewal. And if the premises should be burned down, he could not contract to rebuild in behalf of the firm. Clements v. Norris, 8 Ch. Div. 129.

7. Hawtayne v. Bourne, 7 M. & W. 595; Ex parte Chippendale, 4 De G.

But while necessity will not create power, unexpected emergencies may be allowed to expand or contract existing power in the exercise of a *bona fide* and reasonable discretion within the general intent of the partnership.¹

2. Distinction Between Trading and Non-Trading Firms.—A partner in a partnership of a general commercial nature may pledge or sell the partnership property, buy goods, borrow money, contract and pay debts, draw, make, sign, indorse, accept, transfer, negotiate and procure to be discounted, promissory notes, bills of exchange and other negotiable paper in the name of and on account of the partnership.² But in non-trading firms a

M. & G. 19; *Pierce v. Jarnagin*, 57 Miss. 107. And see *Berry v. Folkes*, 60 Miss. 576; *Ricketts v. Bennett*, 4 C. B. 686.

On the other hand, the fact that a firm is rich and does not need money does not deprive a partner of the power to borrow. *Pierce Jarnagin*, 57 Miss. 107.

1. See *Woodward v. Winship*, 12 Pick (Mass.) 430; *Arnold v. Brown*, 24 Pick (Mass.) 89; 35 Am. Dec. 296; *Lamb v. Durant*, 12 Mass. 54; *Forkner v. Stewart*, 6 Gratt. (Va.) 197; *Ex parte Chippendale*, 4 De G. M. & G. 19; *Burden v. Barkus*, 4 De G. F. & J. 35; *Hodges v. Ninth Nat. Bank*, 54 Md. 406.

In *Woodward v. Winship*, 12 Pick. (Mass.) 430, the court held, that where a member of a partnership for a particular business does an act on account of the firm *prima facie* not within the scope of his authority, evidence is admissible to show that with the exercise of good faith and reasonable discretion, he was warranted in so doing by the course pursued by the firm in the management of their business, and that, therefore, the other partners were responsible for his act.

Where partners were engaged in the business of buying cattle in Texas and bringing them to *Virginia* to sell, and they found that in *Virginia* the price was very low and they could neither sell their cattle nor obtain pasture for them, and some of the partners contracted to sell the cattle guaranteeing certain profit at the end of the next year, this was held, under the peculiar circumstances of case, not to be an excess of their powers. *Jordan v. Miller*, 75 Va. 442.

Where a firm occupied a part of a building and the extent of their business rendered the occupation of the

whole necessary to carry on the business in the ordinary way, a contract for a five years' lease of the entire building made by one of the partners was held to be binding upon the firm. *Seaman v. Ascherman*, 57 Wis. 547.

2. Story on Agency, § 124; 3 Kent's Com. 40; Story on Part., §§ 101, 125; 3 Collyer on Part. 215. And see *Howze v. Patterson*, 53 Ala. 205; 25 Am. Rep. 607; *Freeman v. Carpenter*, 17 Wis. 126; *Quiner v. Marblehead Ins. Co.*, 10 Mass. 476; *Lamb v. Durant*, 12 Mass. 56; *Pierson v. Hooker*, 3 Johns. (N. Y.) 68; *Bulkley v. Dayton*, 14 Johns. (N. Y.) 387; *Wells v. Evans*, 20 Wend. (N. Y.) 251; *McBride v. Hagan*, 1 Wend. (N. Y.) 326; *Salmon v. Davis*, 4 Binn. (Pa.) 375; *McConeghy v. Kirk*, 68 Pa. St. 200; *Robinson v. Johnson*, 1 Mo. 233; *Beach v. State Bank*, 2 Ind. 488; *Pannell v. Phillips*, 55 Ga. 618; *Potter v. Dillon*, 7 Mo. 228; *Caldwell v. Sithens*, 5 Blackf. (Ind.) 99; *Hubbell v. Woolf*, 15 Ind. 204; *Graser v. Stellwagon*, 25 N. Y. 316; *Cameron v. Blackman*, 39 Mich. 108; *Radcliffe v. Varner*, 55 Ga. 427; *Knox v. Buffington*, 50 Iowa 320; *Pollock v. Williams*, 42 Miss. 88; *Church v. Sparrow*, 5 Wend. (N. Y.) 223; *Miller v. Manice*, 6 Hill (N. Y.) 115; *Roney v. Buckland*, 4 Nev. 45; *Stockwell v. Dillingham*, 50 Me. 442; *Beaman v. Whitney*, 20 Me. 413; *Bascom v. Young*, 7 Mo. 1; *Laffer v. Rice*, 44 Ind. 103; *Dillon v. McRae*, 40 Ga. 107; *Kleinhaus v. Generous*, 25 Ohio St. 617; *McKee v. Hamilton*, 33 Ohio St. 7; *Winship v. Bank of U. S.* 5 Pet. (U. S.) 530; *Steel v. Jennings*, *Cheves* (S. Car.) 183; *Faler v. Jordan*, 44 Miss. 283; *Smith v. Lusher*, 5 Cow. (N. Y.) 688; *Jemison v. Dearing*, 41 Ala. 283; *Hickman v. Kunkle*, 27 Mo. 401; *Burgess v. Northern Bank*, 4 Bush (Ky.) 604; *Zuel v. Bowen*, 78 Ill. 234;

partner does not possess general power to bind the partnership and has no power as a general rule to contract debts and issue commercial paper.¹ The power of one partner to bind his co-partners, rests alone upon the usage of merchants, and does not amount to a rule of law in other than commercial partnerships.² While in case of such a partnership, therefore, the court may generally determine as matter of law whether the contract was within the scope of the implied powers of a partner,³ in a non-commercial partnership each case must be left to be decided upon its particular facts, and in order to hold the firm it must be affirmatively established that the acting partner had the power to make the contract in question.⁴

Wright v. Brosseau, 73 Ill. 381; *Ensminger v. Marvin*, 5 Blackf. (Ind.) 210; *Miller v. Hines*, 15 Ga. 197; *Potter v. Price*, 3 Pitts. (Pa.) 136; *Cunningham v. Littlefield*, 1 Edw. Ch. (N. Y.) 104; *Patch v. Wheatland*, 8 Allen (Mass.) 102; *Nelson v. Wheelock*, 46 Ill. 25; *Willett v. Stringer*, 17 Abb. Pr. (N. Y.) 152; *Sweetzer v. Mead*, 5 Mich. 107; *Milton v. Mosher*, 7 Met. (Mass.) 244; *Gates v. Bennett*, 33 Ark. 475; *Woodruff v. King*, 47 Wis. 261.

The distinction between trading and non-trading partnerships with reference to the power of the partners will be further illustrated in the section on Particular Powers of Partners.

1. See *Bradley v. Linn*, 19 Ill. App. 322; *Pooley v. Whitmore*, 10 Heisk. (Tenn.) 629; 27 Am. Rep. 733; *Friend v. Duryee*, 17 Fla. 111; 35 Am. Rep. 89; *Miller v. Hines*, 15 Ga. 197; *Breckenridge v. Shrieve*, 4 Dana (Ky.) 375; *Marsh v. Gold*, 2 Pick. (Mass.) 285; *Smith v. Sloan*, 37 Wis. 285; 19 Am. Rep. 757; *McCrary v. Slaughter*, 58 Ala. 230; *Ulery v. Ginrich*, 57 Ill. 531; *Davis v. Richardson*, 45 Miss. 490; *Prince v. Crawford*, 50 Miss. 344; *Hunt v. Chapin*, 6 Lans. (N. Y.) 139; *Decker v. Howell*, 42 Cal. 636; *Jones v. Clark*, 42 Cal. 180; *Skillman v. Lachman*, 23 Cal. 199; *Higgins v. Armstrong*, 9 Colo. 38; *Charles v. Eshelman*, 5 Colo. 107; *Manville v. Parks*, 7 Colo. 128; *Judge v. Braswell*, 13 Bush (Ky.) 607; 26 Am. Rep. 185; *Shaw v. McGregory*, 105 Mass. 96; *National State Capital Bank v. Noyes*, 62 N. H. 35; *Kimbrow v. Bullitt*, 22 How. (U. S.) 256; *Wilson v. Brown*, 6 Ont. App. 411; *Workman v. McKinstrey*, 21 Up. Can. Q. B. 623; *Brown v. Byers*, 16 M. & W. 252; *Dickinson v. Valpy*, 10 B. & C. 128; *Thicknesse v. Bromilow*, 2 Cr. & J. 425; *Greenslade*

v. Dower, 7 B. & C. 635; *Hedley v. Bainbridge*, 3 Q. B. 315; *Harman v. Johnson*, 2 E. & B. 61.

As a general rule a partner in a partnership formed for a single enterprise has no power to make negotiable paper. *Gray v. Ward*, 18 Ill. 32; *Bentley v. White*, 3 B. Mon. (Ky.) 263; 38 Am. Dec. 185.

A partner in the practice of physic has the power to bind his co-partner by the execution of a note in the name of the firm for the purchase of all things necessary to be used by them in their vocation, such as medicines, surgical instruments, and the like, but has no power to draw bills or make notes for the purpose of raising money, money not being an article for which such a firm has a direct use. *Crosthwaite v. Ross*, 1 Humph. (Tenn.) 23.

2. *Judge v. Braswell*, 13 Bush (Ky.) 69; 26 Am. Rep. 185; *Story on Part.*, § 126; *Collyer on Part.* 103.

3. *Judge v. Braswell*, 13 Bush (Ky.) 69; 26 Am. Rep. 185; *Pooley v. Whitmore*, 10 Heisk. (Tenn.) 629; 27 Am. Rep. 733; *Crosthwaite v. Ross*, 1 Humph. (Tenn.) 23; *Dickinson v. Valpy*, 10 B. & C. 128.

4. *Judge v. Braswell*, 13 Bush (Ky.) 69; 26 Am. Rep. 185; *Boor v. Moschell*, (Supreme Ct.) 1 N. Y. Supp. 731; *Pooley v. Whitmore*, 10 Heisk. (Tenn.) 626; 27 Am. Rep. 733; *Crosthwaite v. Ross*, 1 Humph. (Tenn.) 23; *Smith v. Sloan*, 37 Wis. 289; 19 Am. Rep. 757; *Dickinson v. Valpy*, 10 B. & C. 128; *Prince v. Crawford*, 50 Miss. 344; *Brown v. Byers*, 16 M. & W. 252; *Hedley v. Bainbridge*, 3 Q. B. 315; *Thicknesse v. Bromilow*, 2 Cr. & J. 425; *Greenslade v. Dower*, 7 B. & C. 635; *Levy v. Pyne*, Car. & M. 453; *Harman v. Johnson*, 2 E. & B. 161. And see *Brewer v. Wright*, 25 Neb. 305;

3. Restrictions Upon the Powers of a Partner.—Third persons dealing with a partnership are warranted in assuming that each partner is clothed with the usual powers pertaining to a partnership formed for the transaction of that particular kind of business,¹ and so far as they are concerned, restrictions upon such powers, contained in the articles, or resulting from private arrangements between the partners, of which they have no knowledge, can be given no force or effect.² But if they have actual notice or knowl-

Bass v. Messick, 30 La. Ann., pt. 1, 373.

Under Code Georgia, § 1904, providing that a partner has power to bind the partnership in matters connected with its business, a partner in a farming copartnership can bind the firm by giving in its name a negotiable note, the consideration of which was supplies to be used in carrying on the business which the association was formed to conduct. Selman v. Brown, 78 Ga. 332.

H, defendant's partner in farming, promised for the firm to pay plaintiff for medical services to laborers on their plantation. Held, that, unless it appears that H had express authority so to promise, or that such authority was incident to like partnerships, defendants cannot be bound thereby. Woodruff v. Scaife, 83 Ala. 152.

1. See Knox v. Buffington, 50 Iowa, 320; Radcliffe v. Varner, 55 Ga. 427; Campbell v. Bowen, 49 Ga. 417; Lefter v. Rice, 48 Ind. 103; Dupre v. Boyd, 23 La. Ann. 495; Bodwell v. Eastman, 106 Mass. 525.

A partner may bind his co-partners within the scope of the partnership business, so long as the relation continues, notwithstanding their dissent and refusal to agree to the transaction involved. Wilkins v. Pearce, 5 Den. (N. Y.) 541. And a partner is bound by the act of his co-partner within the scope of the business, even if that act be fraudulent as between the parties. Capelle v. Hall, 12 Nat. Bankr. Reg. 1.

The fact that one partner is assigned the care of one department of the business does not prevent another partner from binding the firm by a contract in that department. Barker v. Mann, 5 Bush (Ky.) 672; 96 Am. Dec. 373; Sweet v. Morrison, 103 N. Y. 235; Morans v. Armstrong, Ir. N. P. Rep. 25.

A partner who has contributed services only and no capital, has the same power in the firm as any other partner. Kennedy v. Kennedy, 3 Dana (Ky.) 239.

2. Humes v. O'Bryan, 74 Ala. 64; Guice v. Thornton, 76 Ala. 466; Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Manville v. Parks, 7 Colo. 128; Bradley v. Camp, Kirby (Conn.) 77; 1 Am. Dec. 13; Everitt v. Chapman, 6 Conn. 347; Butler v. American Toy Co., 46 Conn. 136; Purseley v. Ramsey, 31 Ga. 403; Stark v. Corey, 45 Ill. 431; Devin v. Harris, 3 Greene, (Iowa) 186; Medberry v. Soper, 17 Kan. 369; Miller v. Hughes, 1 A. K. Marsh. (Ky.) 181; Bank of Kentucky v. Brooking, 2 Litt. (Ky.) 41; Barker v. Mann, 5 Bush (Ky.) 672; 96 Am. Dec. 373; Williams v. Rogers, 14 Bush (Ky.) 776; White v. Kearney, 2 La. Ann. 639; Maltby v. Northwestern etc. R. Co., 16 Md. 422; Brent v. Davis, 9 Md. 217; Taylor v. Hill, 36 Md. 494; Stimson v. Whitney, 130 Mass. 591; Perry v. Randolph, 6 Smed. & M. (Miss.) 335; Davis v. Richardson, 45 Miss. 499; Prince v. Crawford, 50 Miss. 344; Bloom v. Helm, 53 Miss. 21; Pierce v. Jarnagin, 57 Miss. 107; Lynch v. Thompson, 61 Miss. 354; Cargill v. Corby, 15 Mo. 425; Lonnie v. Kintzing, 1 Mont. 290; Bromley v. Elliot, 38 N. H. 287; Elliot v. Stevens, 38 N. H. 311; Corning v. Abbott, 54 N. H. 469; Wagner v. Freschl, 56 N. H. 495; Bank of Rochester v. Monteath, 1 Den. (N. Y.) 402; 43 Am. Dec. 681; Tradesmen's Bank v. Astor, 11 Wend. (N. Y.) 87; Frost v. Hanford, 1 E. D. Smith (N. Y.) 540; National Union Bank v. Landon, 66 Barb. (N. Y.) 189; Sage v. Sherman, 2 N. Y. 417; Johnson v. Mon Lee, 10 N. Y. Supp. 9; Seybold v. Greenwald, 1 Disney (Ohio) 425; Benninger v. Hess, 41 Ohio St. 64; Tillier v. Whitehead, 1 Dall. (U. S.) 269; Churchman v. Smith, 6 Whart. (Pa.) 146; Hoskinson v. Eliot, 62 Pa. St. 393; Nichols v. Chearis, 4 Sneed (Tenn.) 229; Coons v. Renick, 11 Tex. 134, 138; Waller v. Keyes, 6 Vt. 257, 264; Barrett v. Russell, 45 Vt. 43; Kelton v. Leonard, 54 Vt. 230; McNeish v. Hulless Oat Co. 57 Vt. 316; U. S. v. Binney, 5 Mason

edge of such limitations or restrictions, they will be bound accordingly and will be deemed to have dealt with the restricted partner in his individual capacity, and must rely upon his responsibility only, even though the firm may have received the benefits of the transaction.¹ Knowledge of restrictions upon the power of a partner may be established by circumstantial evi-

(U. S.) 176; *Winship v. Bank of U. S.* 5 Pet. (U. S.) 529; *Kimbrow v. Bullitt*, 22 How. (U. S.) 25; *National Exchange Bank v. White*, 30 Fed. Rep. 412; *Michigan Ins. Bank v. Eldred*, 9 Wall. (U. S.) 544; *Andrews v. Congar*, 20 Am. Law Reg., N. S. 328; *Cox v. Hickman*, 8 H. C. L. 304.

The nature of the copartnership is to be determined by what it assumes to the public to be, and by its mode of doing business. *National Exchange Bank v. White*, 30 Fed. Rep. 412.

Where one partner is appointed a special agent to manage a business, his powers as a partner are not thereby limited but he retains them to the same extent as though not also an agent. *Hoskinson v. Eliot*, 62 Pa. St. 393.

In a suit upon a promissory note brought against members of a copartnership, the firm name being signed as maker, articles showing an agreement between the partners not to sign or indorse negotiable paper without the consent of the other partners are not admissible in evidence, as they are a private agreement, of which the holder of the note cannot be charged with notice. *Bates v. Forcht*, 89 Mo. 121.

Where one partner was to furnish all the capital, payable in such sums as may be drawn for, by operating agent, to be used in buying logs, but neither of the partners nor the agent were to sign the firm name to any note, this clause does not limit the first, and orders drawn on the partners to pay for logs, signed P. & B. by W., agent, are rightly executed. *Gaslin v. Pinney*, 23 Minn. 26.

1. *New York F. Ins. Co. v. Bennett*, 5 Conn. 574; *Radcliffe v. Varner*, 55 Ga. 427; *Gince v. Thornton*, 76 Ala. 466; *Urquhart v. Powell*, 54 Ga. 29; *Knox v. Buffington*, 50 Iowa 320; *Williams v. Barnett*, 10 Kan. 455; *Combs v. Boswell*, 1 Dana (Ky.) 473; *Miller v. Hughes*, 1 A. K. Marsh (Ky.) 181; *Brent v. Davis*, 9 Md. 217; *Bailey v. Clark*, 6 Pick. (Mass.) 372; *Boardman v. Gore*, 15 Mass. 339; *Wilson v. Richards*, 28 Minn. 337; *Lynch v. Thomp-*

son, 61 Miss. 354; *Pollock v. Williams*, 42 Miss. 88; *Langan v. Hewett*, 21 Miss. 122; *Corgill v. Corby*, 15 Mo. 425; *Nolan v. Lovelock*, 1 Mont. 224; *Bromley v. Elliot*, 38 N. H. 287; *Dow v. Sayward*, 12 N. H. 271; *Frost v. Hanford*, 1 E. D. Smith (N. Y.) 540; *Ensign v. Wands*, 1 Johns. Cas. (N. Y.) 171; *Gram v. Cadwell*, 5 Cow. (N. Y.) 489; *Mason v. Partridge*, 66 N. Y. 633; *Baxter v. Clark*, 4 Ired. (N. Car.) 127; *Johnson v. Bernheim*, 76 N. Car. 139; 86 N. Car. 339; *Anthony v. Wheatons*, 7 R. I. 490; *Chapman v. Devereux*, 32 Vt. 616; *Hastings v. Hopkinson*, 28 Vt. 108; *Coleman v. Bellhouse*, 9 Up. Can. C. P. 31; *Alderson v. Pope*, 1 Camp. 404; *Ex parte Holdsworth*, 1 M. D. & D. 475. And see *McDonald v. Clough*, 10 Colo. 59.

Where the articles of a joint stock mercantile association prohibited the officers intrusted with the conduct of its business from making purchases on credit, and they notwithstanding, made a purchase on credit, first giving the seller a copy of the article, it was held that the association was not liable for the purchase, unless subsequently ratified by them. *Hotchin v. Kent*, 8 Mich. 526.

A client who knows that a law firm is formed to do business in a certain city cannot hold the firm on a receipt in its name, made by one partner of a note for collection elsewhere. *Brent v. Davis*, 9 Md. 217.

To a suit against partners upon a promissory note by the payee, an answer by one that his co-partner, without his consent, executed the note in the firm name, of which the plaintiff, at the time, had notice, is bad on demurrer. *Aliter*, if it be averred that the defendant, at the time of the execution of the note, did not consent and objected thereto, of which the plaintiff then had notice. *Moffitt v. Roche*, 92 Ind. 96.

An agreement that a person held out as a partner shall have no interest or liability of any kind, does not make him a partner as to those who have notice of the agreement, but he is partner with full power as to every one else. *Phillips*

dence as well as by direct proof of notice¹ and information of facts which should have led a reasonably prudent and cautious man to inquire may be sufficient.²

Restrictions may have been placed upon the right to dispose of property as well as upon the right to acquire it and incur liability; in which case a buyer with knowledge of the restrictions gets no title.³ In case of a restriction of the right to incur liability beyond a certain amount, there must be not only knowledge of the limitation, but also of violation;⁴ but the court may observe such restriction in subjecting the individual property of the partners, by selling in the order of liability, although the restriction may not have been known.⁵

It is within the power of a part of the partners, to some extent to revoke or limit the implied powers of a particular partner as to future contracts, or to object to the formation of a particular contract and relieve themselves from liability therefor.⁶

v. Nash, 47 Ga. 218; *Sanfley v. Howard*, 7 Dana (Ky.) 367; *Williams v. Rogers*, 14 Bush (Ky.) 776; *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497; *Perry v. Randolph*, 6 Smed. & M. (Miss.) 335.

1. Publication of the objects of the partnership and its sign and the knowledge of the public as to its usual business may be sufficient to establish knowledge of restrictions upon the power of a partner. *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251; 4 Am. Dec. 273.

That the partnership was engaged in the business of a co-operative store or concerned in a protective union, based upon the principle of purchasing for cash only, may be notice of a restriction upon the power to purchase on credit. *Chapman v. Devereux*, 32 Vt. 616. And see *Skinner v. Dayton*, 19 John. (N. Y.) 513; 10 Am. Dec. 286.

The mere fact that one partner usually signed the notes and checks, is not sufficient to establish a restriction to sign upon the other partner. *Tillford v. Ramsey*, 37 Mo. 563.

Constructive or implied notice never really brought to the attention of the third party like notice of dissolution is not sufficient. *Devin v. Harris*, 3 Greene (Iowa) 186.

Telling a third person that one has ceased to be a partner but that his name is to continue for a certain time is not a sufficient disclaimer of his power to enter into future contracts and incur debts. *Brown v. Leonard*, 2 Chit. 120.

2. *Bromley v. Eliot*, 38 N. H. 287. And see *Wagner v. Freschl*, 56 N. H. 495.

Where one partner has for many years had the exclusive conduct of the business and his interest was known to be large and the others small it was held to be evidence of knowledge of a restriction upon the powers of the latter. *Anthony v. Wheatons*, 7 R. I. 409.

Primary Evidence.—If a partner desires to prove a restriction in the articles he can do so only by producing the articles themselves, the testimony of a co-partner not being the best evidence. *Hastings v. Hopkinson*, 28 Vt. 108. Though creditors could prove it independently of the articles, especially if notice to produce had been given. *Bogart v. Brown*, 5 Pick. (Mass.) 18; *Hastings v. Hopkinson*, 28 Vt. 108.

3. *Radcliffe v. Varner*, 55 Ga. 427; *Williams v. Barnett*, 10 Kan. 455; *Ensign v. Wands*, 1 John. Cas. (N. Y.) 171; *Anthony v. Wheatons*, 7 R. I. 490. And see *Chapman v. Devereux*, 32 Vt. 616.

4. See *Butler v. American Toy Co.*, 46 Conn. 136; *Lomme v. Kintznig*, 1 Mont. 290; *Mason v. Partridge*, 66 N. Y. 633; *Greenwood's Case*, 3 De G. M. & G. 476; *Merdith's Case*, 1 B. & P. New Rep. 510.

Creditors of the firm have a right to make all the members liable to the full extent of their claims against the firm, without regard or even in direct opposition to their partnership contract, which is not known to their party. *Nichols v. Chairs*, 4 Sneed (Tenn.) 230.

5. See *Kent v. Chapman*, 18 W. Va. 485.

6. *Leavitt v. Peck*, 3 Conn. 124; 8

But where all of such powers have been uniformly exercised by each of the partners, the intention thus to interfere must have been brought to the knowledge of the parties to be affected by such restriction, and be clear and beyond a reasonable doubt.¹ And if after such restriction the disclaiming partners receive and enjoy the benefits of the prohibited transaction, they will be held to have assumed its obligations,² though it would appear that a mere reception of goods purchased, from which no benefits are derived, is not enough to bind the firm.³

The power to forbid transactions with a co-partner 'cannot be used to prevent a debtor from paying his debt to such co-partner.⁴ Nor can it be used by a minority to prevent or defeat the action of a majority in matters within the scope of the partnership business.⁵ Nor, where the number of partners is equal, can one limit the exercise of the legitimate powers of the other.⁶

Am. Dec. 157; *Noyes v. New Haven* etc. R. Co. 30 Conn. 1, 14; *Wilcox v. Jackson*, 7 Colo. 521; *Knox v. Buffington*, 50 Iowa, 320; *Bull v. Harris*, 18 B. Mon. (Ky.) 195; *Matthews v. Dare*, 20 Md. 248; *Griswold v. Waddington*, 16 Johns. (N. Y.) 438; *Yeager v. Wallace*, 57 Pa. St. 365; *Williams v. Roberts*, 6 Coldw. (Tenn.) 493; *Tyler v. Scott*, 45 Vt. 261; *Hastings v. Hopkinson*, 28 Vt. 108; *Bowen v. Clark*, 1 Biss. (U. S.) 128; *Willis v. Dyson*, 1 Stark 164; *Galway v. Mathew*, 10 East. 264; *Galway v. Matthew*, 1 Camp. 403; *Rooth v. Quin*, 7 Price, 193; *Minnet v. Whitney*, 5 Bro. P. C. 489; *Anonymous v. Layfield*, 1 Salk. 291.

One partner is not bound by a contract entered into by his co-partner, after giving actual notice to the party proposing to make it that he will not be bound thereby, although the fruits of the contract have been enjoyed by the partnership of which he is a member. *Monroe v. Conner*, 15 Me. 178; 32 Am. Dec. 148.

1. See *Tyler v. Scott*, 45 Vt. 261; *Cannon v. Wildmann*, 28 Conn. 472; *Seaman v. Aschermap*, 57 Wis. 547. And see also the cases cited in the note last above.

2. *Johnston v. Bernheim*, 86 N. Car. 339; *Johnston v. Bernheim*, 76 N. Car. 139; *Campbell v. Bowen*, 49 Ga. 417; *Willis v. Dyson*, 1 Stark 164. *Gow on Partnership* 69; 3 Kent's Com. 45.

3. *Johnson v. Bernheim*, 86 N. Car. 339; *Monroe v. Conner*, 15 Me. 178; 32 Am. Dec. 148; *Leavett v. Peck*, 3 Conn. 124; 8 Am. Dec. 157; *Galaway v. Matthew*, 10 East 264. And see

Hotchin v. Kent, 8 Mich. 526; *Matthews v. Dare*, 20 Md. 248; *Brown v. Leonard*, 2 Chit. 120.

The partners committing the unauthorized act cannot themselves ratify it, and a reception or even a disposition of the goods improperly purchased, by the other partners, cannot be deemed a ratification as they cannot be supposed to have known that the purchase was made in violation of their articles. *Hotchin v. Kent*, 8 Mich. 526.

4. *Noyes v. New Haven* etc. R., 30 Conn. 1; *Steele v. First Nat. Bank*, 60 Ill. 23; *Granger v. McGilnra*, 24 Ill. 152; *Carlisle v. Magara Dock Co.*, 5 Up. Can., Q. B. 660. And see *Cannon v. Wildman*, 28 Conn. 472.

5. *Johnson v. Dutton*, 27 Ala. 245; *Nolan v. Lovelock*, 1 Mont. 224.

6. *Johnson v. Bernheim*, 76 N. Car. 139; *Wilkins v. Pearce*, 5 Den. (N. Y.) 541.

Where one partner placed accounts in the hands of an attorney and absconded, and the other partner notified a debtor to pay no one but himself, but the debtor paid the attorney and the absconding partner approved the payment, the court held that the attorney was the agent of the firm and not of one partner, and so accountable to either and subject to the control of one as much as of the other. That the partner had the right to demand the returns of the accounts and discharge the attorney, and the notice, not to pay constituted such a discharge, and that the subsequent approval of the other partner could give no validity to the attorney's unauthorized act. *Ayer v. Ayer*, 41 Vt. 346.

But in *Johnson v. Dutton*, 27 Ala.

4. Power of a Majority.—In the event of differences between the partners there is an important distinction between those which relate to matters incidental to carrying on the legitimate business of the firm, and those which relate to matters with which it was never intended that the partnership should concern itself.¹ Where no provision is made in the articles, while one of a partnership of two may revoke the agency of the other in minor matters,² regard must usually be had to the existing state of affairs, and those who forbid a change must have their way.³ But where the partners are unequally divided, in all matters relating to the mode of conducting ordinary transactions or regulating the internal affairs of the partnership, the minority must give way to the majority;⁴ and if the views of the majority should change from time to time, effect should be given them as they change.⁵ The majority, however, to have weight, must act with perfect good faith, and for the interests of the whole firm,⁶ after giving the

245, and in *Nolan v. Lovelock*, 1 Mont. 224, the court recognized the duty of a party dealing with a firm not to make a contract from which a co-partner dissents, if the firm consists of only two persons.

1. *Lindley on Part.* 598.

2. See *Johnston v. Dutton*, 27 Ala. 245; *Western Stage Co. v. Walker*, 2 Iowa 504; *Carithers v. Jarrell*, 20 Ga. 842; *Nolan v. Lovelock*, 1 Mont. 224; *Anon. v. Layfield*, 1 Salk. 292.

And see also *infra* this title, *Restrictions Upon the Powers of a Partner*.

Where provision is made in the articles that should control. See *Waterbury v. Merchant's Union Express Co.* 50 Barb. (N. Y.) 157; 3 Abb. Pr., N. S. (N. Y.) 163.

3. See *Donaldson v. Williamson*, 1 Cr. & M. 345; *Lindley on Part.* 598.

4. *Johnson v. Dutton*, 27 Ala. 245; *Western Stage Co. v. Walker*, 2 Iowa 504; *Nolan v. Lovelock*, 1 Mont. 224; *Zabirskie v. Hackensack etc. R. Co.*, 18 N. J. Eq. 178; *Kirk v. Hodgson*, 3 Johns. Ch. (N. Y.) 400; *Peacock v. Cummings*, 46 Pa. St. 434; *Waterbury v. Merchants' Union Express Co.*, 50 Barb. (N. Y.) 157; 3 Abb. Pr., N. S. (N. Y.) 162; *Campbell v. Bowen*, 49 Ga. 417; *Irvine v. Forbes*, 11 Barb. (N. Y.) 587; *Dougherty v. Creary*, 30 Cal. 290; *Faulds v. Gates*, 57 Ill. 416; *Const. v. Harris, Turn. & R.* 496; *Blisset v. Daneil*, 10 Hare 493; *Robinson v. Thompson*, 1 Vern. 465.

Lindley, in his work on *Partnership* (pages 598, 599) says: "This doctrine has been held to apply where the majority wished to make a division of profits,

without first paying an outstanding debt (*citing Stevens v. South Devon R. Co.*, 9 Ha. 326; *Gregory v. Patchett*, 33 Beav. 595), where the majority wished to borrow money (*citing Byron v. Metropolitan Saloon etc. Co.*, 3 De G. & J. 123; 4 Jur., N. S. 680; *Australian etc. Co. v. Mounsey*, 4 K. & J. 733); where the majority resolved to assign all the joint property to trustees, upon trust for sale and distribution amongst the joint creditors (*citing Lord v. Governor etc. Miners*, 2 Ph. 740); where the majority resolved on leasing a part of the property of the company for a temporary purposes (*citing Simpson v. Westminster etc. Co.*, 2 De G. F. & J. 141; *Forest v. Manchester etc. R. Co.*, 30 Beav. 40; 4 De G. F. & J. 126); where the majority of the subscribers to an abortive company resolved that the subscriptions should be returned (*citing Kent v. Jackson*, 14 Beav. 367; 2 De G. M. & G. 49); and where the majority approved and adopted accounts fairly laid before them" (*citing Kent v. Jackson*, 2 De G. M. & G. 49; 14 Beav. 367; *Stupart v. Arrowsmith*, 3 Sm. & G. 176.)

A warrant of attorney signed in the firm name by the majority of the partners is sufficient to authorize the use of the firm name in a suit upon a contract made by the firm. *Clark v. Slate Valley R. Co.*, 136 Pa. St. 408.

5. See *Exeter Rail Co. v. Buller*, 5 Ry. Cas. 211; *A. G. v. Gould*, 28 Beav. 485; *Chicago etc. R. Co. v. Hoyt*, 1 Ill. App. 374.

6. *Const. v. Harris, Turn. & Russ.* 496; *Blisset v. Daniel*, 10 Hare 493.

dissenting partner due opportunity to be heard and to urge his objections,¹ the interests of the minority remaining unaffected by the transaction, if the majority have acted in bad faith.²

Beyond the limit set by the original intent of the partnership, however, any number of partners less than the whole cannot go,³ even though the articles provide that the majority shall govern.⁴ Thus, the principle upon which profits are to be dealt with cannot be altered,⁵ nor can the property be divided among the partners,⁶ nor can a change be made in the membership,⁷ or the capital.⁸

1. *Western Stage Co. v. Walker*, 2 Iowa 504; 65 Am. Dec. 789; *Const. v. Harris, Turn. & Russ.* 496.

In *Const. v. Harris, Turn. & R.* 525, the court, by LORD ELDON, J. said: "The act of all, which is the act of the majority, provided all are consulted, and the majority are acting *bona fide*, meeting, not for the purpose of negating what any one may have to offer, but for the purpose of negating what, when they are met together, they may, after due consideration, think proper to negative. For a majority of partners to say, 'we don't care what one partner may say, we, being the majority, will do what we please,' is, I apprehend, what a court of equity will not allow."

2. *Western Stage Co. v. Walker*, 2 Iowa 504; 65 Am. Dec. 789.

But when perfect good faith is used, the majority are not accountable to the minority for the sale of stock at a low price, even though a much better price might have been obtained. *Staples v. Sprague*, 75 Me. 458.

3. *Lindley on Part.* 608; *Smith v. Goldsworthy*, 4 Q. B. 430; *Abbot v. Johnson*, 32 N. H. 9; *Jenning's Appeal* (Pa., 1888), 16 Atl. Rep. 19; *Livingston v. Lynch*, 4 John. Ch. (N. Y.) 573; *Kean v. Johnson*, 9 N. J. Eq. 401; *Natusch v. Irving*, 2 Coop. Ch. 358; *Const. v. Harris, Turn. & R.* 525; *Zabreskie v. Hackensack etc. R. Co.*, 18 N. J. Eq. 178.

One company cannot without unanimous consent, purchase the assets and liabilities of another, nor can two companies amalgamate without the unanimous consent of all the members of both. *Ernest v. Nicholls*, 6 H. L. C. 401.

A majority of the partners cannot procure the incorporation of the company, and subscriptions cannot be collected from those who do not assent. *Southern Steam Packet Co. v. Magrath, McMull.* (S. Car.) Eq. 93.

4. *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 573.

One member of a partnership, formed for the purpose of prosecuting certain suits under contract with the creditors of an insolvent, cannot without the consent of the other members, cancel the partnership contract, and deprive them of their rights under the executory contracts. *Manegold v. Grange*, 70 Wis. 575.

5. *Const. v. Harris, Turn. & R.* 496. And see *Macdougall v. Jeasey etc. Hotel Co.*, 2 Hem. & M. (Va.) 528.

A final settlement of accounts between two of three partners will not bind the third. *Chadsey v. Harrison*, 11 Ill. 151; *Cooper v. Frederick*, 4 Greene (Iowa) 403; *Lamalere v. Caze*, 1 Wash. (U. S.) 435.

No number of partners less than the whole can agree that a purchaser from the firm may settle his debt by crediting it on his individual account against one partner. *Harper v. Wrigley*, 48 Ga. 495.

6. See *Cooper v. Frederick*, 4 Greene (Iowa) 403; *Bird v. Fake*, 1 Pin. (Wis.) 290; *Horbach v. Huey*, 4 Watts (Pa.) 455; *Bunn v. Morris*, 3 Cai. (N. Y.) 54; *Gregory v. Patchett*, 33 Beav. 595; *Moore v. Knott*, 12 Oregon 260; *Ménier v. Hooper's Tel. Co.*, 9 Ch. 350; *Griffith v. Paget*, 5 Ch. D. 894; *Holmes v. Newcastle Abattoir Co.*, 1 Ch. D. 682. And see *infra* this title, *Conversion of Joint Into Separate Property*.

7. *Bates Law of Part.* § 435. And see *Tabb v. Gist*, 6 Call (Va.) 279.

8. *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 573; *Smith v. Goldsworthy*, 4 Q. B. 430; *Hope v. International Financial Soc.*, 4 Ch. D. 327. And see *Gansvoort v. Kennedy*, 30 Barb. (N. Y.) 279.

Plaintiff and defendant having formed a co-partnership for the purpose of dealing in town lots, it was agreed that the partner making sales should receive a commission. A dispute having arisen as to the amount of such commissions,

or the business¹ of the firm, nor in the articles of co-partnership.²

In such case the non-consenting partners may retire,³ or arrest the prosecution of the forbidden enterprise by injunction.⁴

5. Powers to Perform Particular Acts—*a.* TO EXECUTE SEALED INSTRUMENTS—(See also SEAL).—The rule is almost if not quite universal that one partner has no implied power to bind the firm by instrument under seal.⁵ A release of a debt or demand, however, as it creates no new obligation but merely bars a right of action,

defendant, who had made no sales, notified plaintiff that the agreement for commissions was at an end. Plaintiff, however, continued to make sales. *Held*, that he was still entitled to commissions, since the agreement could not be rescinded without mutual consent. *Askev v. Springer*, 111 Ill. 662.

1. *Zabreskie v. Hackensack etc. R. Co.*, 18 N. J. Eq. 178; *Const v. Harris, Turn. & R.* 517; *Natusch v. Irving*, 2 Coop. Ch. 358; *Bagshaw v. The Eastern Union R. Co.*, 7 Ha. 114.

A majority of partners cannot make a loan outside of the scope of the business. *Cooke v. Allison*, 30 La. Ann., pt. 2, 963.

Where partnership articles contain stipulations against trading in spirituous liquors, it is made fundamental, and if the majority change it, the non-assenting partner may withdraw and dissolve the firm. *Abbott v. Johnson*, 32 N. H. 9.

2. *Const v. Harris, Turn & R.* 517; *Morgan's Case*, 1 Mac. & G. 225; *Davison's Case*, 4 K. & J. 688; *Smith v. Goldsworthy*, 4 Q. B. 430; *Davirs v. Hawkins*, 3 M. & S. 488.

A majority cannot release a partner from his contingent liability to the firm. *Bill v. Porter*, 9 Conn. 23.

3. *Abbott v. Johnson*, 32 N. H. 9.

4. *Jenning's Appeal* (Pa. 1888), 16 Atl. Rep. 19; *Natusch v. Irving*, 2 Coop. Ch. 358.

5. *Dodge v. McKay*, 4 Ala. 346; *Posey v. Bullett*, 1 Blackf. (Ind.) 100; *Albus v. Wilkinson*, 6 Gill & J. (Md.) 358; *Smith v. Tupper*, 4 Smed. & M. (Miss.) 261; 43 Am. Dec. 483; *McKnight v. Wilkins*, 1 Mo. 308; *Green v. Beals*, 2 Cai. (N. Y.) 254; *McBride v. Hagan*, 1 Wend. (N. Y.) 326; *People v. Judges*, 5 Cow. (N. Y.) 34; *Gerard v. Basse*, 1 Dall. (U. S.) 119; *Trimble v. Coons*, 2 A. K. Marsh. (Ky.) 375; *McCart v. Lewis*, 2 B. Mon. (Ky.) 267; *Burwell v. Linthicum*, 100 N. Car. 145; *Anonymous*, 2 Hayw. (N. Car.) 99; *Anonymous*, Tayl. (N. Car.) 113; *Mc-*

Kee v. Bank of Mt. Pleasant, 7 Ohio. 2nd. pt., 175; *Fisher v. Tucker*, 1 McCord Eq. (S. Cor.) 169; *Sibley v. Young*, 26 S. Car. 415; *Nunnely v. Doherty*, 1 Yerg. (Tenn.) 26; *McDonald v. Eggleston*, 26 Vt. 154; 60 Am. Dec. 303; *Morgan v. Scott*, Minor (Ala.) 81; *Shirley v. Fearne*, 33 Miss. 653; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280; *Massey v. Pike*, 20 Ark. 92; *Bentzen v. Zierlein*, 4 Mo. 417; *Henry Co. v. Gates*, 26 Mo. 315; *Drumwright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 738; *Morse v. Bellew*, 7 N. H. 556; *Clement v. Brush*, 3 Johns. Cas. (N. Y.) 680; *Van Deusen v. Blum*, 18 Pick. (Mass.) 229; *Blackburn v. McAlister*, Pick. (Tenn.) 371; *Morris v. Jones*, 9 Harr. (Del.) 428; *Cummins v. Cassily*, 5 B. Mon. (Ky.) 74; *Harrison v. Jackson*, 7 T. R. 207; *Steiglitz v. Eggington*, Holt. 141; 3 Kent Com. 48; *Collyer on Part.* 308-312.

A sealed contract is subject, as against the firm, to the Statute of Limitations applying to parol contracts. *Burwell v. Linthicum*, 100 N. Car. 145.

The fact that partnership articles are under seal gives a partner no power to bind the firm by instrument under seal. *Harrison v. Jackson*, 7 T. R. 207.

In an action against one member of a firm on a sealed note executed by his co-partner in the firm name, the fact that the note was executed in a State where specialties were, by statute, made negotiable by indorsement, does not render defendant liable thereon; one partner not having power to bind the firm by the execution of a sealed instrument, even though as to him such instrument is negotiable. *Hull v. Young*, 30 S. Car. 121.

Where a partner executes a bond in the name of the firm, and upon being informed that it did not bind the partners, removed the seal and redelivered it with the consent of the obligee with the intent to bind the company, it is effectual as their promissory note. *Horton v. Child*, 3 Dev. (N. Car.) 460.

will bind the firm, though executed by one partner only.¹ The rule that a partner cannot bind the firm by instrument under seal has been subjected to much criticism,² and it has been so far relaxed that an instrument under seal executed by one partner in the name and in the presence of his co-partners, is deemed to have been executed by the firm,³ and that validity and effect may be given to such act by prior oral assent or subsequent parol ratification or by implication of authority from acts, declarations and circumstances;⁴ though the English and some of the Ameri-

Where a statute requires notes to be executed under seal, it does not limit the power of a partner to make a note. *Southard v. Steele*, 3 T. B. Mon. (Ky.) 435; *Montgomery v. Boone*, 2 B. Mon. (Ky.) 244.

1. *M'Lane v. Sharp*, 2 Harr. (Del.) 481; *Morse v. Bellows*, 7 N. H. 549; 28 Am. Dec. 372; *Smith v. Stone*, 4 Gill & J. (Md.) 310; *Allen v. Cheever*, 61 N. H. 32; *Pierson v. Hooker*, 3 Johns. (N. Y.) 68; 3 Am. Dec. 467; *Bruen v. Marquand*, 17 Johns. (N. Y.) 58; *Wells v. Evans*, 20 Wend. (N. Y.) 251. Reversed in part in *Evans v. Wells*, 22 Wend. (N. Y.) 324; *Beach v. Ollendorf*, 1 Hilt. (N. Y.) 41; *Perlberg v. Gorham*, 10 Cal. 120; *Gates v. Pollock*, 5 Jones (N. Car.) 344; *Fox v. Norton*, 9 Mich. 207; *McBride v. Hagan*, 1 Wend. (N. Y.) 326; *Halsey v. Whitney*, 4 Mason (U. S.) 206; *U. S. v. Astley*, 3 Wash. (U. S.) 508; *Hockless v. Mitchell*, 4 Esp. 86; *Hawkshaw v. Parkins*, 2 Swanst. 539. But see *Waldo Bank v. Lumbert*, 16 Me. 416.

KENT, C. J., in *Pierson v. Hooker*, 3 Johns. (N. Y.) 68, gives the reason for this rule to be that the deed of release is good as to the partner signing, and a release by one of joint creditors is good as to all.

In *Wells v. Evans*, 20 Wend. (N. Y.) 251, the court held, that as a partner could release a debtor under seal, he could also delegate his power by executing a power of attorney under seal to a third person to discharge the debt.

2. See *Gram v. Seton*, 1 Hall (N. Y.) 262; *Drumright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 738; *Straffin v. Newell*, T. U. P. Charlt. (Ga.) 163; 4 Am. Dec. 705; *Sloo v. State Bank*, 2 Ill. 428; *Montgomery v. Boone*, 2 B. Mon. (Ky.) 244; *Henry Co. v. Gates*, 26 Mo. 315; *Gwinn v. Rooker*, 24 Mo. 290.

Where an appeal bond was executed in the firm name, the presumption in the absence of proof is that it was so

executed as to bind both partners. *Kasson v. Brocker*, 47 Wis. 79.

3. See *Day v. Lafferty*, 4 Ark. 450; *Lee v. Onstott*, 1 Ark. 206; *Henderson v. Barbee*, 6 Blatchf. (Ind.) 26; *Price v. Alexander*, 2 Greene (Iowa) 427; *Pettis v. Bloomer*, 21 How. Pr. (N. Y.) 317; *James v. Bostwick*, *Wright* (Ohio) 142; *Kasson v. Brocker*, 47 Wis. 79; *Person v. Carter*, 3 Murph. (N. Car.) 321; *Trimble v. Coons*, 2 A. K. Marsh. (Ky.) 375; *Ball v. Dunkesville*, 4 T. R. 313; *Burn v. Burn*, 3 Ves. 578; *Gardner v. Gardner*, 5 Cush. Mass. 483.

Where two of three partners were present, and one wrote and the other sealed a note given in the name of the firm, it is competent to go to the jury on the joint execution, and it is not material to the liability of the two that they used the name of the firm without the third partner's assent. *Potter v. McCoy*, 26 Pa. St. 458.

In *Modisett v. Lindley*, 2 Blackf. (Ind.) 119, it is held that presence is merely evidence of consent, and that a partner, though present, is not bound if he has no knowledge of the act.

4. *Herbert v. Hanrich*, 16 Ala. 581; *Grady v. Robinson*, 28 Ala. 289; *Gunter v. Williams*, 40 Ala. 561; *Lee v. Onstott*, 1 Ark. 206; *Hobson v. Porter*, 2 Colo. 28; *Jeffreys v. Coleman*, 20 Fla. 536; *Drumright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 738; *Sutlive v. Jones*, 61 Ga. 676; *Peine v. Weber*, 47 Ill. 41; *Wilcox v. Dodge*, 12 Ill. App. 517; *Modisett v. Lindley*, 2 Blackf. (Ind.) 119; *Price v. Alexander*, 2 Greene (Iowa) 427; 52 Am. Dec. 526; *Haynes v. Seachrest*, 13 Iowa 455; *Craig v. Alverson*, 6 J. J. Marsh. (Ky.) 609; *Daniel v. Toney*, 2 Metc. (Ky.) 523; *McCart v. Lewis*, 2 B. Mon. (Ky.) 267; *Pike v. Bacon*, 21 Me. 280; 38 Am. Dec. 259; *Herzog v. Sawyer*, 61 Md. 344; *Cady v. Shepherd*, 11 Pick. (Mass.) 400; 22 Am. Dec. 379; *Swan v. Stedman*, 4 Met. (Mass.) 548; *Rus-*

can courts still hold that authority to bind an absent partner by seal must have been conferred by an instrument under seal.¹

sell *v.* Annable, 109 Mass. 72; Holbrook *v.* Chamberlain, 116 Mass. 155; Sweetzer *v.* Mead, 5 Mich. 107; Fox *v.* Norton, 9 Mich. 207; Sterling *v.* Bock, 40 Minn. 11; Shirley *v.* Fearne, 33 Miss. 653; Gwinn *v.* Rooker, 24 Mo. 290; Mackay *v.* Bloodgood, 9 Johns. (N. Y.) 285; Skinner *v.* Dayton, 19 Johns. (N. Y.) 513; Gates *v.* Graham, 12 Wend. (N. Y.) 53; Gram *v.* Seton, 1 Hall (N. Y.) 262; Pettit *v.* Bloomer, 21 How. Pr. (N. Y.) 317; Smith *v.* Kerr, 3 N. Y. 144; Person *v.* Carter, 3 Murph. (N. Car.) 321; Potter *v.* McCoy, 26 Pa. St. 458; Fichthorn *v.* Boyer, 5 Watts. (Pa.) 159; Purviance *v.* Sutherland, 2 Ohio St. 478; Martin *v.* Bray (Pa. 1889), 16 Atl. Rep. 515; Bond *v.* Aitkin, 6 W. & S. (Pa.) 163; 40 Am. Dec. 550; Taylor *v.* Corryel, 12 S. & R. (Pa.) 243; Johns. *v.* Battin, 30 Pa. St. 84; Schmertz *v.* Shreeve, 62 Pa. St. 457; 1 Am. Rep. 439; Hull *v.* Young, 30 S. Car. 121; Fleming *v.* Dunbar, 2 Hill (S. Car.) 532; Lucas *v.* Sanders, 1 McMull. (S. Car.) 311; Fant *v.* West, 10 Rich. (S. Car.) 149; Stroman *v.* Varn, 19 S. Car. 307; Lambden *v.* Sharp, 9 Humph. (Tenn.) 224; 34 Am. Dec. 642; Lowery *v.* Drew, 18 Tex. 786; Baldwin *v.* Richardson, 33 Tex. 16; McDonald *v.* Eggleston, 26 Vt. 154; 60 Am. Dec. 303; Black *v.* Campbell, 6 W. Va. 51; Wilson *v.* Hunter, 14 Wis. 683; Mann *v.* Aetna Ins. Co., 40 Wis. 549; Gibson *v.* Warden, 14 Wall. (U. S.) 244; Anthony *v.* Butler, 13 Pet. (U. S.) 423; United States *v.* Astley, 3 Wash. (U. S.) 508; Darst *v.* Roth, 4 Wash. (U. S.) 471; Hawkins *v.* Hastings Bank, 1 Dill. (U. S.) 462; 4 Nat. Bankr. Reg. 108; *In re* Lawrence, 5 Fed. Rep. 349; Henderson *v.* Barbee, 2 Blatchf. (U. S.) 26; Moor *v.* Boyd, 15 Up. Can. C. P. 513; Bloomley *v.* Grinton, 9 Up. Can. Q. B. 455; Howell *v.* McFarland, 2 Ont. App. 31.

An assent or ratification to the execution of a sealed instrument need not be simultaneous by all; it may be made by one partner at one time and by another at another. Sweetzer *v.* Mead, 5 Mich. 107.

A ratification may be made after the dissolution of the firm, but the intention so to do must have been made to appear by more express acts than in case of a ratification before dissolution.

Swan *v.* Stedman, 4 Met. (Mass.) 548; Gwinn *v.* Rooker, 24 Mo. 290.

An action brought by a partnership upon a sealed instrument executed by one of the partners in the partnership name is an adoption of the instrument and cannot be afterwards objected to upon the ground that it is not the deed of the partnership. Dodge *v.* M'Kay, 4 Ala. 346.

A writing under seal, executed by one partner in the name of the firm, is admissible in an action of assumpsit, to prove a promise of the firm, if made on sufficient consideration. Fagely *v.* Bellas, 17 Pa. St. 67.

Conveyance of Partnership Real Estate.—See *infra*, this title, *Partnership Real Estate, The Legal Title*.

Where a lease of partnership realty is made by one partner in the partnership name without the authority of his co-partner and without his subsequent ratification, it will not pass the interest of such co-partner even though a seal may be unnecessary. Dillon *v.* Brown, 11 Gray (Mass.) 179.

In an action against one member of a firm on a sealed note executed by his co-partner in the firm name, where the jury are charged that ratification may be proved by direct testimony, or that if they are satisfied that defendant ratified the note, that is sufficient, a refusal to charge that the ratification may be either express or implied is not error. Hull *v.* Young, 30 S. Car. 121.

A partner assented to the signing of the firm name to a proposition for the sale of land, and verbally agreed to be bound by the acts of his partners in carrying it out; they made a contract and signed the firm name in his absence; he signed a deed in pursuance of that contract. It was held, that if he had not authorized, he had ratified the making of the contract, and was therefore bound by it. Waterman *v.* Dutton, 6 Wis. 265.

1. See Harrison *v.* Jackson, 7 T. R. 207; Steiglitz *v.* Egginton, Holt N. P. 141; Little *v.* Hazard, 5 Har. (Del.) 291; Cummins *v.* Cassidy, 5 B. Mon. (Ky.) 74; Trimble *v.* Coons, 2 A. K. Marsh. (Ky.) 375; Smith *v.* Tupper, 4 Smed. & M. (Miss.) 261; Beutzen *v.* Zierlein, 4 Mo. 417; Tappan *v.* Redfield, 5 N. J. Eq. 339; Fisher *v.* Pender, 7 Jones (N. Car.) 483; Sellers *v.* Streater,

The mere addition of a seal to a contract within the ordinary scope of the business, which requires none, does not vitiate the contract,¹ and in States where all distinction between sealed and unsealed instruments is abolished, a contract by one partner under seal is valid.² So contracts which can be consummated by delivery, when executed and complete, are not affected by the fact that a seal was added, the instrument being merely evidence of the transaction.³

Where the execution of instruments under seal is authorized, the use of a single seal is sufficient.⁴

5 Jones (N. Car.) 261; Turbeville v. Ryan, 1 Humph. (Tenn.) 113; Snyder v. May, 19 Pa. St. 235.

Where power to execute a sealed instrument has been conferred upon one partner, the dissolution of the firm revokes it, and the renewal of the firm does not revive the power. Napier v. Katron, 2 Humph. (Tenn.) 534.

1. Drumright v. Philpot, 16 Ga. 424; 60 Am. Dec. 738; Walsh v. Lennon, 98 Ill. 27; 38 Am. Rep. 75; Price v. Alexander, 2 Greene (Iowa) 427; 52 Am. Dec. 526; Van Deusen v. Blum, 18 Pick. (Mass.) 229; 29 Am. Dec. 582; Tapley v. Butterfield, 1 Met. (Mass.) 515; 35 Am. Dec. 374; Sterling v. Bock, 40 Minn. 11; Milton v. Mosher, 7 Met. (Mass.) 244; Sweetzer v. Mead, 5 Mich. 107; Moore v. Stevens, 60 Miss. 809; Henry Co. v. Gates, 26 Mo. 316; Human v. Cuniffe, 32 Mo. 316; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205; Purviance v. Sutherland, 2 Ohio St. 478; Patten v. Kavanagh, 11 Daly (N. Y.) 348; Everit v. Strong, 5 Hill (N. Y.) 163; 7 Hill (N. Y.) 585; Deckard v. Case, 5 Watts (Pa.) 22; 30 Am. Dec. 287; Dubois' Appeal, 38 Pa. St. 231; Schmertz v. Shreeve, 62 Pa. St. 457; 1 Am. Rep. 439; Robinson v. Crowder, 4 McCord (S. Car.) 519; 17 Am. Dec. 762; Lasell v. Tucker, 5 Sneed (Tenn.) 33; McDonald v. Eggleston, 26 Vt. 154; 60 Am. Dec. 303; McCulough v. Somerville, 8 Leigh (Va.) 415; Woodruff v. King, 47 Wis. 261; Gibson v. Warden, 14 Wall. (U. S.) 244; Anderson v. Tompkins, 1 Brock. (U. S.) 456; Hawkins v. Hastings Bank, 1 Dill. 462; 4 Nat. Bankr. Reg. 108; Hunter v. Parker, 7 M. & W. 322; Bloomley v. Grinton, 9 Up. Can. Q. B. 455.

But in *Pennsylvania* where a different Statute of Limitations applies to contracts under seal, the nature of the contract is held to be changed by the

addition of a seal. See *Schmetz v. Shreeves*, 62 Pa. St. 456.

A partnership is bound by an agreement under seal, though not required to be sealed, signed by an attorney who has the requisite authority in its name. *Schoregge v. Gordon*, 29 Minn. 367.

In *McDonald v. Eggleston*, 26 Vt. 154; 60 Am. Dec. 303, the court intimated that an unnecessary seal might be disregarded in instruments of transfer, but not in those creating an obligation.

2. *Pearson v. Post*, 2 Dakota 220.

Seals have been abolished in *Arkansas, California, Dakota, Indiana, Iowa, Kansas, Kentucky, Mississippi, Montana, Nebraska, Ohio, Oregon, Tennessee* and *Texas*. *Bates' Law of Part.*, § 419, note.

3. *Schmertz v. Shreeve*, 62 Pa. St. 457; 1 Am. Rep. 429; *Deckard v. Case*, 5 Watts. (Pa.) 22; 30 Am. Dec. 287; *Dubois' Appeal*, 38 Pa. St. 231; *Everit v. Strong*, 5 Hill (N. Y.) 163; 7 Hill (N. Y.) 585; *Forkner v. Stuart*, 6 Gratt. (Va.) 197; *McClelland v. Remson*, 3 Keyes (N. Y.) 454; 3 Abb. App. Dec. (N. Y.) 74; 36 Barb. (N. Y.) 22; 23 How. Pr. (N. Y.) 175; 14 Abb. Pr. (N. Y.) 331; *Anderson v. Tompkins*, 1 Brock. (U. S.) 456; *Hennessey v. Western Bank*, 6 W. & S. (Pa.) 300; 40 Am. Dec. 560; *Moore v. Stevens*, 60 Miss. 809; *Petition of Daniels*, 14 R. I. 500.

4. *Lee v. Onstott*, 1 Ark. 206; *Day v. Lafferty*, 4 Ark. 450; *Massey v. Pike*, 20 Ark. 92; *Witter v. McNeil*, 4 Ill. 433; *Modisett v. Lindley*, 2 Blackf. (Ind.) 119; *Price v. Alexander*, 2 Greene (Iowa) 427; 52 Am. Dec. 526; *Pike v. Bacon*, 21 Me. 280; 38 Am. Dec. 259; *McKnight v. Wilkins*, 1 Mo. 220; *Mackay v. Bloodgood*, 9 Johns. 285; *Pettis v. Bloomer*, 21 How. Pr. (N. Y.) 317; *Button v. Hampson*, *Wright*

If the sealed contract is executed by a partner in his own name he alone can sue or be sued upon it, even though the fact that he was a partner and acting as such be known to the person with whom the contract was made.¹ This rule, however, is not applicable in case of a secret partnership.²

(1) *The Effect of Unauthorized Execution.*—Although one partner cannot bind his co-partners by the unauthorized execution of instruments under seal, it is nevertheless binding upon the executing partner,³ and while it has been held that a sealed obligation in the firm name executed by one partner extinguishes the original indebtedness as to all, by merging it in the higher security,⁴ the preponderance of authority holds, that as against the other partners, the creditor not having intended to release, the original indebtedness does not merge,⁵ though if the sealed

(Ohio) 93; *Lambden v. Sharp*, 9 *Humph. (Tenn.)* 224; 34 *Am. Dec.* 642; *Henderson v. Barbee*, 2 *Blatchf. (U. S.)* 26; *Moor v. Boyd*, 15 *Up. Can. C. P.* 513; *Ball v. Duntersville*, 4 *T. R.* 313. But see *Moor v. Boyd*, 23 *Up. Can. Q. B.* 459.

1. See *Tom v. O'Goodrich*, 2 *Johns. (N. Y.)* 213; *Moore v. Stevens*, 60 *Miss.* 809; *Walden v. Sherburne*, 15 *Johns. (N. Y.)* 423; *Williams v. Gillie*, 75 *N. Y.* 197; *Butterfield v. Hemsley*, 12 *Gray (Mass.)* 226; *Willis v. Hill*, 2 *Dev. & B. (N. Car.)* 231; *North Pennsylvania Coal Co's Appeal*, 45 *Pa. St.* 181; *Krafts v. Creighton*, 3 *Rich. (S. Car.)* 273; *Harris v. Miller, Meigs (Tenn.)* 158; 33 *Am. Dec.* 138; *Tuttle v. Eshridge*, 2 *Munf. (Va.)* 330; *U. S. v. Astley*, 3 *Wash. (U. S.)* 508; *Hancock v. Hodgson*, 4 *Bing.* 269; *Hall v. Bainbridge*, 1 *M. & G.* 42.

One partner may be authorized to make such a contract. *Morse v. Richmond*, 97 *Ill.* 303.

2. *Chamberlain v. Madden* 7 *Rich. (S. Car.)* 395. But see to the contrary *Davidson v. Kelly*, 1 *Md.* 492.

3. *Layton v. Hastings*, 2 *Harr. (Del.)* 147; *Morris v. Jones*, 4 *Harr. (Del.)* 428; *Williams v. Hodgson*, 2 *Har. & J. (Md.)* 474; *Armstrong v. Robinson*, 5 *Gill. & J. (Md.)* 412; *Herzog v. Sawyer*, 61 *Md.* 344; *Fletcher v. Vanzant*, 1 *Mo.* 196; *Bentzen v. Zierlein*, 4 *Mo.* 417; *Settle v. Davidson* 7 *Mo.* 604; *Weeks v. Mascoma Rake Co.*, 58 *N. H.* 101; *Green v. Beals*, 2 *Cai. (N. Y.)* 254; *Clement v. Brush*, 3 *Johns. Cas. (N. Y.)* 180; *Skinner v. Dayton*, 19 *Johns. (N. Y.)* 518; *McBride v. Hogan*, 1 *Wend. (N. Y.)* 326; *Gates v. Graham*, 21 *Wend. (N. Y.)* 53; *James v. Bostwick*, *Wright (Ohio)* 142; *Mc-*

Naughten v. Partridge, 11 *Ohio* 223; *Pierce v. Cameron*, 7 *Rich. (S. Car.)* 114; 38 *Am. Dec.* 731; *Pelzer v. Campbell*, 15 *S. Car.* 581; *Sloo v. Powell*, *Dall. (Tex.)* 467; *Regina v. McNaney*, 5 *Up. Can. P. C.* 438; *Elliot v. Davis*, 2 *B. & P.* 338.

The contrary has been held upon the theory that it was not made as, nor intended for his own act or obligation. See *Hart v. Withers*, P. & W. (Pa.) 285; *Sellers v. Streatton*, 5 *Jones (N. Car.)* 261; *Fisher v. Pender*, 7 *Jones (N. Car.)* 483; *Lucas v. Sanders*, 1 *McMull. (S. Car.)* 311.

4. *Morris v. Jones*, 4 *Harr. (Del.)* 428; *Williams v. Hodgson*, 2 *Har. & J. (Md.)* 474; *Davidson v. Kelly*, 1 *Md.* 492; *Settle v. Davidson*, 7 *Mo.* 604; *Gwinn v. Rooker*, 24 *Mo.* 291; *Clement v. Brush*, 3 *Johns. Cas. (N. Y.)* 180; *Skinner v. Dayton*, 19 *Johns. (N. Y.)* 513; *Spear v. Gillet*, 1 *Dev. Eq. (N. Car.)* 466; *Bond v. Aitkin*, 6 *W. & S. (Pa.)* 165; *Harris v. Miller, Meigs (Tenn.)* 158; 33 *Am. Dec.* 138; *Nunnely v. Doherty*, 1 *Yerg. (Tenn.)* 26; *Waugh v. Carriger*, 1 *Yerg. (Tenn.)* 31; *McNaughten v. Partridge*, 11 *Ohio* 223; 38 *Am. Dec.* 731; *Bennett v. Cadwell*, 70 *Pa. St.* 253.

In *McNaughten v. Partridge*, 11 *Ohio* 223; 38 *Am. Dec.* 731, it is held that taking a sealed obligation made by one partner for the indebtedness of the firm, will be presumed to be intended to effect a merger.

5. *Walsh v. Lennon*, 98 *Ill.* 27; *Daniel v. Toney*, 2 *Metc. (Ky.)* 523; *Doniphan v. Gill*, 1 *B. Mon. (Ky.)* 199; *Van Deusen v. Blum*, 18 *Pick. (Mass.)* 229; 29 *Am. Dec.* 582; *Dispatch Line v. Bellmay Mfg. Co.*, 12 *N. H.* 205; *Walden v. Sherburne*, 15 *Johns. (N. Y.)*

obligation is in the name of the executing partner only the contract debt is extinguished and it becomes his separate debt.¹ Where the unauthorized sealed instrument is also executed by a surety, some cases have adopted the theory that as the principal is not bound, neither is the surety,² but there has been an equally respectable holding that the surety's knowledge of such execution estops him from raising the question of want of authority or claiming exoneration.³

(2) *The Remedy*.—In States in which a sealed obligation extinguishes the original indebtedness as to the executing partner but not as to the others, as suit cannot be brought on the original indebtedness without joining all the partners, the remedy against the remaining partners must be sought in equity,⁴ and payment

409; *Blanchard v. Pasteur*, 2 Hayw. (N. Car.) 393; *Spear v. Gillet*, 1 Dev. Eq. (N. Car.) 466; *Froneberger v. Henry*, 6 Jones (N. Car.) 348; *Horton v. Child*, 4 Dev. (N. Car.) 460; *Purviance v. Sitherland*, 2 Ohio St. 478; *Hoskinson v. Eliot*, 62 Pa. St. 393; *Fleming v. Lawhorn*, *Dudley* (S. Car.) 360; *Pierce v. Cameron*, 7 Rich. (S. Car.) 114; *Pelzer v. Campbell*, 15 S. Car. 582; *Sale v. Dishman*, 3 Leigh (Va.) 548. And see also, MERGER, vol. 15, p. 352.

In *Dispatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, it was held that taking a sealed instrument executed by one partner for a firm debt was not a merger, even as to the signing partner, and that all the partners could be sued on the original consideration.

Where the unauthorized seal was placed upon a contract for a purpose within the scope of the partnership business, a firm having received the benefit is liable on an implied promise to pay, and an express promise does not exclude the implied one. *Van-Deusen v. Blum*, 18 Pick. (Mass.) 2292; 9 Am. Dec. 582.

1. *Settle v. Davidson*, 7 Mo. 604; *Baxter v. Bell*, 19 Hun (N. Y.) 367; *Reed v. Girty*, 6 Bosw. (N. Y.) 567; *Bennett v. Cadwell*, 70 Pa. St. 253; *Jacobs v. McBee*, 2 McMull. (S. Car.) 348; *Niday v. Harvey*, 9 Gratt. (Va.) 454; *United States v. Astley*, 3 Wash. (U. S.) 508; *In re International Contract Co.*, L. R. 6 Ch. App. 525. But see *Dickinson v. Legare*, 1 Desaus. (S. Car.) 337.

A sealed note made by the ostensible partner, however, in his own name, that being the name under which the firm did business, does not merge the original cause of action against

the secret partner. *Chamberlain v. Madden*, 7 Rich. (S. Car.) 395; *Robinson v. Wilkinson*, 3 Price 538. But the contrary is held in *Davidson v. Kelly*, 1 Md. 492; *Anderson v. Levan*, 1 W. & S. (Pa.) 334; *Ward v. Motter*, 2 Rob. (Va.) 536.

2. *Russell v. Annable*, 109 Mass. 72. And see *Garland v. Jacomb*, L. R. 8 Ex. 216.

3. *Harter v. Moore*, 5 Blackf. (Ind.) 367; *Stewart v. Behm*, 2 Watts (Pa.) 356; *Pelzer v. Campbell*, 15 S. Car. 581.

4. *James v. Bostwick*, *Wright* (Ohio) 142; *Boston etc. Smelting Co. v. Smith*, 13 R. I. 27; 43 Am. Rep. 3; *Blanchard v. Pasteur*, 2 Hayw. (N. Car.) 393; *Niday v. Harvey*, 9 Gratt. (Va.) 454.

The plea of *non est factum* to an action on the sealed instrument is an estoppel to the claim of a merger in an action on the original debt. *Doniphan v. Gill*, 1 B. Mon. (Ky.) 199.

The instrument must be alleged to be the bond of the individual partner. It is improper to declare upon it as the joint covenant of all. *Herzog v. Sawyer*, 61 Md. 344; *Lucas v. Sanders*, 1 McMull. (S. Car.) 311; *Henry Co. v. Gates*, 26 Mo. 315; *Hart v. Withers*, 1 P. & W. (Pa.) 285; 21 Am. Dec. 382.

If the execution was authorized or ratified by the firm, however, it can be declared upon as the act of all. *Tuttle v. Eskridge*, 2 Munf. (Va.) 330.

In *Alabama*, a declaration alleging that the partners "made their certain writing obligatory, signed by their firm name, and sealed with their seal," is good on demurrer. If it was the deed of but one it must be shown by plea on the part of the partner who did not execute the bond. *Massey v. Pike*, 20 Ark. 92.

of the debt will sometimes be enforced upon the ground of mistake,¹ in which case the sealed instrument is treated as an admission of indebtedness by the firm.² In other cases the suit must be against the party signing as upon his individual obligation.³ Equity will relieve one partner against a judgment taken against both upon a sealed instrument made by the other in fraud of his rights.⁴

6. TO EMPLOY SERVANTS AND AGENTS.—Each partner being a principal as well as an agent, has implied power to employ such labor or engage such services as are necessary to the conduct of the ordinary business of the firm;⁵ but the employment of an agent to perform services not within the power of a partner to perform without special authorization, can only be effected by a con-

1. See *Hoskinson v. Eliot*, 62 Pa. St. 393; *Purviance v. Sutherland*, 2 Ohio St. 478; *Wharton v. Woodburn*, 4 Dev. & B. (N. Car.) 507; *McNaughten v. Partridge*, 11 Ohio 223; 38 Am. Dec. 731; *Brooke v. Washington*, 8 Gratt. (Va.) 248; 56 Am. Dec. 143; *Weaver v. Tapscott*, 9 Leigh (Va.) 424; *Sale v. Dishman*, 3 Leigh (Va.) 548.

2. *Froneberger v. Henry*, 6 Jones (N. Car.) L. 548; *Purviance v. Sutherland*, 2 Ohio St. 478; *Hoskinson v. Eliot*, 62 Pa. St. 393; *Foster v. Rison*, 17 Gratt. (Va.) 321. But see to the contrary *Hart v. Withers, P. & W.* (Pa.) 285; 21 Am. Dec. 382; *U. S. v. Astley*, 3 Wash. (U. S.) 508.

A bond made by one of the partners for goods sold may be evidence of the time of payment, or of the amount, but it does not amount to proof of the consideration, so as of itself to entitle the plaintiff to recover for the goods sold and delivered. *Froneberger v. Henry*, 6 Jones (N. Car.) 548.

3. *Clement v. Brush*, 3 Johns. Cas. (N. Y.) 180; *Button v. Hampson*, *Wright* (Ohio) 93; *Nunnely v. Doherty*, 1 Yerg. (Tenn.) 26; *Waugh v. Carriger*, 1 Yerg. (Tenn.) 31; *Morris v. Jones*, 4 Harr. (Del.) 428.

If the bond is declared upon against all the partners as a joint obligation, no recovery can be had even against the one who signed. *Lucas v. Sanders*, 1 McMull. (S. Car.) 311.

4. *Morgan v. Scott*, Minor (Ala.) 81; 12 Am. Dec. 35.

5. *Smith v. Cisson*, 1 Colo. 29; *Mead v. Shepard*, 54 Barb. (N. Y.) 474; *Carley v. Jenkins*, 46 Vt. 721; *Nolan v. Lovelock*, 1 Mont. 224; *Burgan v. Lyell*, 2 Mich. 102; 55 Am. Dec. 53; *Potter v. Moses*, 1 R. I. 430; *Coons v. Renick*, 11 Tex. 134; 60 Am. Dec.

230; *Durgin v. Somers*, 117 Mass. 55; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459; *Wheatley v. Tutt*, 4 Kan. 240; *Beckham v. Drake*, 9 M. & W. 79; *Harvey v. McAdams*, 32 Mich. 472; *Bank of North America v. Embury*, 21 How. Pr. (N. Y.) 14. And see *Frye v. Sanders*, 21 Kan. 26; 30 Am. Rep. 421; *Swan v. Steadman*, 4 Met. (Mass.) 548.

In *Tillier v. Whitehead*, 1 Dall. (U. S.) 269, one partner was held to have power to authorize a clerk to sign checks, notes, etc., for the firm. But in *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, it was doubted whether one partner could authorize a third person to give a note in the firm's name.

Where an iron foundry concern, which was in arrears to its workmen, was sold to a partnership, one of the partners of which promised to pay the workmen the same wages as before, and to pay the arrears one-half in the following January, and one-half in February, to induce them to continue working, the promise was held to be within the scope of his authority and the firm was bound by it. *Wills v. Cutler*, 61 N. H. 405.

Where one member of an insolvent manufacturing firm, having on hand unfinished articles, contracted with a person to finish the articles and sell them at his own expense to reimburse himself, the transaction was held valid. *Carnes v. White*, 15 Gray (Mass.) 378.

One partner may appoint an agent, by parol, to make and indorse bills, etc., and such power is not void, though given by one partner by writing under seal. *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280.

currence of all the partners.¹ An agent or servant properly employed by one partner is equally accountable to and subject to the control of each and all the partners, and may be discharged by one partner as well as by another, subject to the powers of the majority,² and if one partner has employed and paid for necessary assistance he is entitled to contribution from his co-partners.³

c. TO PURCHASE PROPERTY.—It is within the implied power of every member or an ordinary trading partnership to purchase for and on the credit of the firm such goods as are or may be necessary for carrying on its business in the usual way,⁴ and if the purchase is made for the use of the firm, though upon the single credit of the buyer, and though the seller be not aware of the object of the purchase or even of the existence of the firm, he may nevertheless hold the partners liable for the purchase price.⁵ But whether made individually or in the name of the firm, if the purchase is outside of the real and apparent scope of the partnership business, the firm is not bound.⁶ Nor is the power to bind the firm by purchases confined to partners in trading partnerships: as material, tools, etc., are usually essential to the purposes of a non-trading firm, one partner may bind the firm by the purchase of whatever is necessary to the promotion of the

1. Bates' Law of Part., § 234.

In *Charles v. Eshelman*, 5 Colo. 107, it was held that one partner could not employ an attorney to appear and represent a mining firm in suits, as this was not a necessary part of its business.

Where a firm employed workmen, agreeing to pay them in the share of the profits, and a number of the partners went to California to transact a mining enterprise with such workmen, and the workmen deserted, the court expressed a doubt whether these partners had power to engage new hands at wages instead of a share of the profits. *Potter v. Moses*, 1 R. I. 430.

2. See *Ayer v. Ayer*, 41 Vt. 346; *Donaldson v. Williams*, 1 Cr. & M. 343. And see generally AGENCY, vol. 1, p. 331.

The agent of one partner, coming into possession of the effects, will be regarded as a trustee, and accountable in equity to the creditors of the firm, and the other partners, though his principal has deceased, and no administration has been granted. *Peterson v. Poignard*, 6 B. Mon. (Ky.) 570.

3. *Halloway v. Turner*, 61 Md. 217.

But the employment of an incompetent relative, by one partner without the other's knowledge, does not bind the latter to reimburse him. *Beste v. His Creditors*, 15 La. Ann. 55.

4. *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497; *Dickson v. Alexander*, 7 Ired. (N. Car.) 4; *Venable v. Levick*, 2 Head. (Tenn.) 351; *Hyatt v. Hare*, Comb. 383; *Bond v. Gibson*, 1 Camp. 185.

A note may be indorsed to a partnership of which the indorser is a member in the same manner and with the same effect as if he were not a member. *Allen v. Mason*, 17 Ill. App. 318.

5. *Griffith v. Buffum*, 22 Vt. 181; *Bisel v. Hobbs*, 6 Blackf. (Ind.) 479; *Bracken v. March*, 4 Mo. 74; *Braches v. Anderson*, 14 Mo. 441; *Rupell v. Roberts*, 4 Nev. & M. 31; *Gardiner v. Childs*, 8 Car. & P. 345.

But the mere declaration of a partner, after having purchased a chattel, that he bought it for the firm, is not sufficient or competent evidence to render a co-partner liable. *White v. Gibson*, 11 Ired. (N. Car.) 283.

6. *Wagnon v. Clay*, 1 A. K. Marsh. (Ky.) 257; *Maltby v. Northwestern etc. R. Co.*, 16 Md. 422; *Goode v. Linecum*, 1 How. (Miss.) 281; *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251; 4 Am. Dec. 273; *Briggs v. Ilubert*, 14 S. Car. 620; *Bankhead v. Alloway*, 6 Coldw. (Tenn.) 56; *Venable v. Levick*, 2 Head. (Tenn.) 351; *Irwin v. Williar*, 110 U. S. 499; *U. S. Bank v. Benney*, 5 Mason (U. S.) 176; *Fraser v. McLeod*, 8 Grant's Ch. (Up. Can.) 268.

joint enterprise.¹ But the power to purchase is not presumed, and must be established by proof to authorize a recovery.²

Delivery of goods purchased, to one partner, is delivery to the firm,³ and one partner may return goods which the firm are unable to pay for,⁴ or he may take back and pay for goods sold which were unsatisfactory to the buyer,⁵ or he may extend the time for the fulfillment of a contract.⁶

Where a partner purchases for his own use in the name of the firm, or without stating for whom, the contract will be deemed to be

In a partnership formed for the purpose of purchasing a single drove of cattle, the power of purchasing is exhausted when the drove is bought, and the partner who, on the way to market, makes additional purchases in the name of the firm, exceeds his power and does not bind the co-partnership. *Bentley v. White*, 3 B. Mon. (Ky.) 263; 38 Am. Dec. 185.

1. *Lynch v. Thompson*, 61 Miss. 354; *Jones v. Clark*, 42 Cal. 180; *Higgins v. Armstrong*, 9 Colo. 38; *Manville v. Parks*, 7 Colo. 128; *Kenney v. Altwater*, 77 Pa. St. 34; *Gavin v. Walker*, 14 Lea (Tenn.) 643; *Johnson v. Dutton*, 27 Ala. 245; *Gardiner v. Childs*, 8 C. & P. 345. And see *Leffler v. Rice*, 44 Ind. 103; *Folk v. Wilson*, 21 Md. 538; *Tate v. Clements*, 16 Fla. 339; 26 Am. Rep. 709; *Sage v. Sherman*, 2 N. Y. 417; *Davis v. Cook*, 14 Nev. 265; *Stillman v. Harvey*, 47 Conn. 26; *Wilson v. Whitehead*, 10 M. & W. 503.

Where a partnership was formed for the purpose of manufacturing iron, the acting partner was held to be authorized to buy timber land to get fuel for the business. *Brooke v. Washington*, 8 Gratt. (Va.) 248; 56 Am. Dec. 142.

In some cases the courts have permitted a purchase on credit by non-trading partnerships, of appliances convenient for the business rather than strictly necessary, to effect the purpose of the partnership, as stoves in a livery stable. *Hickman v. Kunkle*, 27 Mo. 401. Law books for a law firm, *Miller v. Hines*, 15 Ga. 197. And medicines by a medical firm, *Crosthwait v. Ross*, 1 Humph. (Tenn.) 23; 34 Am. Dec. 16.

When a member of a partnership, formed for growing and selling seeds for agricultural purposes, orders a large quantity of roses and carnations from one who is acquainted with the business of the firm, he acts beyond the scope of the partnership authority, and does not bind the firm. *Sargent v. Henderson*, 79 Ga. 268.

2. *Judge v. Braswell*, 13 Bush (Ky.) 67; 26 Am. Rep. 185. And see *McCrary v. Slaughter*, 58 Ala. 230.

A purchase, by a managing partner in a saw-mill, representing that the goods purchased were required in the business with proof that they were actually so used, is sufficient to establish a presumption that the purchase was within the scope of the business. *Tate v. Clements*, 16 Fla. 76; 26 Am. Rep. 709.

Where one partner is deprived of authority to buy supplies, but the other refuses to do so, this would constitute an implied assent on the part of the latter, to the former's purchasing. *Nichol v. Stewart*, 36 Ark. 612. But see *Morgan v. Pierce*, 59 Miss. 210.

3. *Crosswell v. Lehman*, 54 Ala. 563; *Kenney v. Altwater*, 77 Pa. St. 34; *Byington v. Gaff*, 44 Ill. 510.

The same rule applies to the delivery of a deed. *Henry v. Anderson*, 77 Ind. 361. A delivery in escrow, therefore, cannot be made to one partner. *Moss v. Riddle*, 5 Cranch (U. S.) 357.

Where a managing partner authorized a vendor to deliver goods to a third party, the firm was held liable upon the doctrine, that it is usual and proper for merchants in different kinds of business to furnish each other's customers with articles which are charged to the house and not to the buyer, the court taking judicial notice of such custom. *Cameron v. Blackman*, 39 Mich. 108.

4. *De Tastet v. Carroll*, 1 Stark. 88.

5. *Where the Goods Were Inferior.*—*Wilson v. Elliott*, 57 N. H. 316; *Torrey v. Baxter*, 13 Vt. 452.

Where There Was a Breach of Warranty.—*Huguly v. Morris*, 65 Ga. 666. And see generally *Detroit v. Robinson*, 42 Mich. 198; *Leiden v. Lawrence*, 2 New Rep. 283.

6. See *Leiden v. Lawrence*, 2 New Rep. 283; *Holton v. McPike*, 27 Kan. 286.

for the firm unless the contrary appears,¹ and that a purchasing partner subsequently misappropriates goods purchased upon the credit of the firm, to his own use, does not affect the right of the seller to look to the firm for payment.² On the other hand, if the sale is made upon the individual credit of the buying partner, that the goods are afterwards turned over by him to the firm does not render the firm responsible for the purchase price.³

d. TO SELL OR INCUMBER PROPERTY.—Each partner has, by reason of his agency, power to sell any specific part of the partnership property which is held for sale,⁴ the power extending to the as

1. *Stark v. Corey*, 45 Ill. 431; *Hamilton v. Eimer*, 20 La. Ann. 391; *Stecker v. Smith*, 46 Mich. 14; *Augusta Wine Co. v. Weippert*, 14 Mo. App. 483; *Church v. Sparrow*, 5 Wend. (N. Y.) 223; *Walden v. Sherburne*, 15 Johns. (N. Y.) 409; *Allen v. Owens*, 2 Spears (S. Car.) 170; *Steel v. Jennings*, Cheeves (S. Car.) 183; *Venable v. Levick*, 2 Head (Tenn.) 351; *McKinney v. Bradbury*, Dall. (Tex.) 441. And see *Mills v. Bunce*, 29 Mich. 364.

Where a person who is a partner in two different firms orders goods without specifying for which firm, the seller may hold the firm for which the goods were suitable notwithstanding the general rule that the seller must take ordinary care to learn for which firm goods are intended where he knows of the existence of two firms. *Baker v. Napier*, 19 Ga. 520.

2. See *infra* this title, *Power to Borrow Money*.

Where the jury found that defendant had assented to the sale of the produce by his partner for plaintiff, defendant cannot escape liability for the proceeds of such produce, on the ground that they had afterwards been misappropriated by P without his knowledge. *Galway v. Nordlinger* (Supreme Ct.), 4 N. Y. Supp. 649.

3. *Wittram v. Van Wormer*, 44 Ill. 525; *Bird v. Lannus*, 7 Ind. 615; *Macklin v. Crutcher*, 6 Bush (Ky.) 401; *Lafon v. Chinn*, 6 B. Mon. (Ky.) 305; *Bracken v. March*, 4 Mo. 74; *Gates v. Watson*, 54 Mo. 585; *Nichols v. English*, 3 Brewst. (Pa.) 260; *McDonald v. Parker*, Sneed (Ky.) 245; *Venable v. Levick*, 2 Head (Tenn.) 351; *Chapman v. Devereaux*, 32 Vt. 616; 9 Am. Law Reg., O. S. 419; *Holmes v. Burton*, 9 Vt. 252; 31 Am. Dec. 621; *Law v. Cross*, 1 Black (U. S.) 533; *Simpson v. Baker*, 2 Black (U. S.) 581.

Where one partner makes purchase in his own behalf, but within the scope of the business of the firm, and the firm claims the benefit of the transaction, the firm does not become responsible to the seller for the purchase, as this is a right which cannot avail any one else. *Lockwood v. Beckworth*, 6 Mich. 168.

In *Louisiana*, while the contract does not bind the firm, the partners are liable in proportion to the benefits received. *Lallande v. McRae*, 16 La. Ann. 193.

4. *Bates' Law of Part.*, § 401; *Drake v. Thyng*, 37 Ark. 228. And see *Henderson v. Nicholas*, 67 Cal. 152; *Peden v. Mail*, 118 Ind. 560; *Hunter v. Waynick*, 67 Iowa 555; *Myers v. Moulton*, 71 Cal. 498; *Shellito v. Sampson*, 61 Iowa 40; *Blaker v. Sands*, 29 Kan. 551; *Goddard v. Renner*, 57 Ind. 532; *Cayton v. Hardy*, 27 Mo. 536; *Christ v. Firestone* (Pa. 1887), 11 Atl. Rep. 395; *Sloan v. Moore*, 37 Pa. St. 217; *Crossman v. Shears*, 3 Ont. App. (Ca.) 583; *Hewitt v. Sturdevant*, 4 B. Mon. (Ky.) 453; *Mussey v. Holt*, 24 N. H. 248; 55 Am. Dec. 234; *Hudson v. McKinzie*, 1 E. D. Smith (N. Y.) 358; *Simonton v. Sibley*, 122 U. S. 220.

It is competent for a member of a mining partnership to agree to deliver ore to a mill in sufficient quantities. *Pearson v. Post*, 2 Dakota 220.

The authority to sell may expand on contract according to the emergencies that may arise, and if a favorable opportunity occurs, one partner can sell a great part or the whole at once, of the partnership property, though the ordinary business of the firm would not warrant it. *Arnold v. Brown*, 24 Pick (Mass.) 89; 35 Am. Dec. 296; *Lamb v. Durant*, 12 Mass. 54; 7 Am. Dec. 31; *Forkner v. Stewart*, 6 Gratt. (Va.) 197.

The managing partner of a firm is authorized to allow a clerk of the firm

signment of choses in action¹ and the indorsement and transfer of commercial paper² belonging to the firm, as well as to tangible chattels, but a partner can have no implied power to sell property upon the continued possession and use of which the transactions of the firm's business depends.³ Subject to these restrictions, the power to dispose of the firm's property extends, as a general rule, to the whole bulk of such property as an entirety as well as to specific parts,⁴ though many authorities have restricted the power of dis-

to buy clothing for himself, and charge it to the account of the firm, so as to bind the firm to the seller. *Cameron v. Blackman*, 39 Mich. 108.

1. *Cullum v. Bloodgood*, 15 Ala. 34; *Caulfield v. Sanders*, 17 Cal. 569; *Mills v. Barber*, 4 Day (Conn.) 428; *Randolph Bank v. Armstrong*, 11 Iowa 515; *Kull v. Thompson*, 38 Mich. 685; *Everit v. Strong*, 5 Hill (N. Y.) 163; *McClelland v. Remsen*, 36 Barb. (N. Y.) 622; 23 How. Pr. (N. Y.) 175; *Clarke v. Hogeman*, 13 W. Va. 718. And see *Commercial Nat. Bank v. Proctor*, 98 Ill. 558; *Quiner v. Marblehead Ins. Co.*, 10 Mass. 476; *Lamb v. Durant*, 12 Mass. 54; *Harrison v. Steny*, 5 Cranch (U. S.) 289; *Anderson v. Tompkins*, 1 Brock. (U. S.) 456; *Fromme v. Jones*, 13 Iowa 474; *U. S. Bank v. Binney*, 5 Mason (U. S.) 176; *Hodges v. Harris*, 6 (Pick.) Mass. 360; *Halsey v. Whitney*, 4 Mason (U. S.) 206; *Clark v. Rives*, 33 Mo. 579; *Boswell v. Green*, 25 N. J. L. 390.

2. *Alabama Coal Min. Co. v. Brainard*, 35 Ala. 476; *Halstead v. Shepard*, 23 Ala. 558; *Cullum v. Bloodgood*, 15 Ala. 34; *Planters' etc. Bank v. Willis*, 5 Ala. 770; *Manning v. Hays*, 6 Md. 5; *First Nat. Bank v. Freeman*, 47 Mich. 408; *Commercial Bank v. Lewis*, 13 Smed. & M. (Miss.) 226; *Windham Co. Bank v. Kendall*, 7 R. I. 77; *Walker v. Kee*, 14 S. Car. 142; *Barrett v. Russell*, 45 Vt. 43; *George v. Tate*, 102 U. S. 564. And see *Pierce v. Jannagin*, 57 Miss. 107.

When partners divide the notes of the firm between them, each can indorse the firm name upon his own notes to perfect his title. *Mechanics' Bank v. Hildreth*, 9 Cush. (Mass.) 356.

While an indorsement of a note payable to the firm by one partner in his individual name does not pass the legal title in the note, it is still a good assignment and conveys the entire beneficial interest of all the partners. *Planters' etc. Bank v. Willis*, 5 Ala. 770; *Ala-*

bama Coal Min. Co. v. Brainard, 35 Ala. 476.

So the assignment, in the partnership name may be by one partner, of a note payable to the firm in the individual names of its members, such an assignment giving title to the assignee as against the maker. *Mick v. Howard*, 1 Ind. 250.

3. See *Lowman v. Sheets*, 124 Ind. 416; *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614; *McNair v. Wilcox*, 121 Pa. St. 437; *Dore v. Wilkinson*, 2 Stark. 287; and cases cited in notes above.

A transfer of all of the firm property by one of the partners to his father, in payment of a loan made by the father to aid him in buying his interest in the business, which transfer was made without the consent, express or implied, of his co-partner, is void, as against the partnership creditors, though no wrong was actually intended, and though a part of the money loaned by the father was used in paying firm debts. *Feucht v. Evans*, 52 Ark. 556.

4. *Ellis v. Allen*, 80 Ala. 515; *Halstead v. Shepard*, 23 Ala. 558; *Hyrschfelder v. Keyser*, 59 Ala. 338; *Drake v. Thyng*, 37 Ark. 228; *Mason v. Tipton*, 4 Cal. 276; *Crites v. Wilkinson*, 65 Cal. 559; *Mills v. Barber*, 4 Day (Conn.) 428; *Williams v. Barnett*, 10 Kan. 455; *Montjoy v. Holden*, Litt. Sel. Cas. (Ky.) 447; *Lamb v. Durant*, 12 Mass. 54; *Arnold v. Brown*, 24 Pick. (Mass.) 89; 35 Am. Dec. 296; *Tapley v. Butterfield*, 1 Met. 1 (Mass.) 515; 35 Am. Dec. 374; *Kirby v. Ingersoll*, 1 Dougl. (Mich.) 477; *Harr. Ch.* 172. See *Sirrine v. Briggs*, 31 Mich. 443; *Whitton v. Smith*, 1 Freem. Ch. (Miss.) 231; *Cayton v. Hardy*, 27 Mo. 536; *Holt v. Simmons*, 16 Mo. App. 97; *Mabbett v. White*, 12 N. Y. 442; *Pettee v. Orser*, 6 Bosw. (N. Y.) 123; *Graser v. Stellwagen*, 25 N. Y. 315; *Wetter v. Schlieper*, 4 E. D. Smith (N. Y.) 707; *Willett v. Stringer*, 17 Abb. Pr. (N. Y.) 152. See *High v. Lack*, Phil. Eq. (N. Car.) 175; *McGregor v. Ellis*, 2

position to personal property.¹ This power of disposition, however, in order to be valid, must have been exercised in the course of business and without fraud or collusion,² and when so exercised, the usual rule of agency that a power to sell includes a power to warrant as to quality or soundness applies to a partner's power to sell.³

Disney (Ohio) 286; Deckard v. Case, 5 Watts, (Pa.) 22; 30 Am. Dec. 287; Dickinson v. Legare, 1 Desaus. (S. Car.) 537; Mygatt v. McClure, 3 Head (Tenn.) 495; Barcroft v. Snodgrass, 1 Coldw. (Tenn.) 430; Williams v. Roberts, 6 Coldw. (Tenn.) 493; Lasell v. Tucker, 5 Sneed (Tenn.) 33; Schneider v. Sansom, 62 Tex. 201; 50 Am. Rep. 521; McCullough v. Sommerville, 8 Leigh (Va.) 415; Forkner v. Stewart, 6 Gratt. (Va.) 197; Pearpont v. Graham, 4 Wash. (U. S.) 232; Anderson v. Tompkins, 1 Brock. (U. S.) 456; Bowen v. Clark, 1 Biss. (U. S.) 128; Fox v. Rose, 10 Up. Can., Q. B. 16; Paterson v. Maughn, 39 Up. Can., Q. B. 371; Lambert's Case, Godbolt, 244; Fox v. Hanbury, Cowp. 445.

It has been implied in many of the cases that the power of a partner to dispose of the firm's property extends to chattels of every kind whether held by the firm for the purpose of sale or not. See Clark v. Rives, 33 Mo. 579; Lamb v. Durant, 12 Mass. 54; 7 Am. Dec. 31; Patch v. Wheatland, 8 Allen (Mass.) 102; *Ex parte* Howden, 2 Mont. D. & DeG. 574.

Other authorities have sought to find the limit to the power of selling, in the doctrine that the power is to be exercised in subordination to the joint benefit. See Williams v. Barnett, 10 Kan. 455; Halstead v. Shepard, 23 Ala. 558; Williams v. Roberts, 6 Coldw. (Tenn.) 493; Stegall v. Coney, 49 Miss. 761; Wallace v. Yeager, 4 Phila. (Pa.) 251.

1 See Goddard v. Renner, 57 Ind. 532; Weld v. Peters, 1 La. Ann. 432; Tapley v. Butterfield, 1 Met. (Mass.) 519; 35 Am. Dec. 374; Kech v. Fisher, 58 Mo. 532; Barcroft v. Snodgrass, 1 Coldw. (Tenn.) 430; Williams v. Roberts, 6 Coldw. (Tenn.) 493; McCullough v. Sommerville, 8 Leigh (Va.) 415. See also *infra*, this title, *Partnership Real Estate; Power to Execute Sealed Instruments*.

One of two partners, who are co-lessees of a building, cannot, in the absence of a stipulation to that effect in the lease, make a valid surrender of the lease, if his co-partner is reasonably ac-

cessible, and can be consulted. Bergland v. Frawley, 72 Wis. 559.

2. See Hale v. Nashua etc. R. Co., 60 N. H. 333; Dickinson v. Legare, 1 Desaus. (S. Car.) 537; Kimball v. Hamilton Fire Ins. Co., 8 Bosw. (N. Y.) 495; Edgar v. Donnally, 2 Munf. (Va.) 387; Sirrine v. Briggs, 31 Mich. 443; Osborne v. Barge, 29 Fed. Rep. 725; Pearpont v. Graham, 4 Wash. (U. S.) 232; Fox v. Rose, 10 Up. Can., Q. B. 16.

Where a member of a partnership, not strictly a trading one, without authority, undertakes to sell without the consent of his co-partner, and, in his temporary absence, all of the joint property of the partnership, such sale is not valid against his co-partner but is binding upon the partner making the sale, and thereby the partner selling disposes of his interest in the joint property of the partnership. Blaker v. Sands, 29 Kan. 551.

Where a note past due, and payable to a firm, is transferred, by indorsement in the firm name, by one partner, in payment of his individual debt, without the knowledge or consent of the other partner, and the indorsee knows of the existence of the firm, the assignment is void in respect to the partnership. Hartness v. Wallace, 106 N. Car. 427.

Fair dealing between partners requires that, before one undertakes to sell the entire stock, either for cash or in payment of a debt, he should consult the other, if conveniently accessible, no sudden imperative exigency arising, so that the other may protect himself by forbidding the sale, or dissenting before it is complete; and if it is consummated without notice to him, and works any wrong or injury to him, he may obtain relief in equity; but if he acquiesces in it or declines to enforce his equitable rights, a partnership creditor cannot assail it except on grounds which would avoid a sale by the partnership. Ellis v. Allen, 80 Ala. 515.

3. Drumright v. Philpot, 16 Ga. 424; 60 Am. Dec. 738; Jordan v. Miller, 75 Va. 424. And see Sweet v. Bradley, 24 Barb. (N. Y.) 549.

Upon the same principles and subject to the same limitations, one partner has power to mortgage or otherwise incumber the entire stock or property of the partnership.¹ The power to mortgage or pledge such property as is held by the firm for sale, however, is also upheld as incident to the power to borrow and to pay debts.² And the theory has been adopted to some extent that each partner is authorized to mortgage the entire personal property of the firm as security for debts;³ so property held for the purpose of sale may be incumbered to secure future advances of merchandise,⁴ or the performance of services and labor upon the articles incumbered.⁵ And for these purposes a partner may

Where land is given in exchange for other land by one partner for the firm, the other partner is bound by his representations as to such land, though he did not know that they were made. *Stanhope v. Swafford*, 80 Iowa 45.

In *Hamil v. Purvis*, 2 P. & W. (Pa.) 177, however, it was held that the sale of a judgment belonging to the firm, by one partner, guarantying its payment, in the absence of proof of usage, is beyond his power.

1. *Wilcox v. Jackson*, 7 Colo. 521; *McCoy v. Boley*, 21 Fla. 803; *Bull v. Harris*, 18 B. Mon. (Ky.) 195; *Tapley v. Butterfield*, 1 Met. (Mass.) 515; 35 Am. Dec. 374; *Holt v. Simmons*, 16 Mo. App. 97; *Neer v. Oakley*, 2 N. Y. Supp. 482; *Arnold v. Morris*, 7 Daly (N. Y.) 498; *Willett v. Stringer*, 17 Abb. Pr. (N. Y.) 152; *Hagan v. Campbell* (Wis. 1890), 47 N. W. Rep. 179; *Paterson v. Manghan*, 39 Up. Can. Q. B. 371.

A mortgage upon partnership property to secure a partnership debt, which is signed by two of the partners and assented to by the third, is valid as to subsequent creditors of the firm, though it does not purport to be the mortgage of the partnership. *Citizens' Nat. Bank v. Jonson*, 79 Iowa 290.

2. *Cullum v. Bloodgood*, 15 Ala. 34; *Gates v. Bennett*, 33 Ark. 475; *Mills v. Barber*, 4 Day (Conn.) 428; *Wilcox v. Jackson*, 7 Colo. 521; *McCoy v. Boley*, 21 Fla. 803; *Nelson v. Wheelock*, 46 Ill. 25; *Richardson v. Lester*, 83 Ill. 55; *Morse v. Richmond*, 6 Ill. App. 166; *Fromme v. Jones*, 13 Iowa 474; *Stockwell v. Dillingham*, 50 Me. 442; *Milton v. Mosher*, 7 Met. (Mass.) 244; *Tapley v. Butterfield*, 1 Met. (Mass.) 515; 35 Am. Dec. 374; *Patch v. Wheatland*, 8 Allen (Mass.) 102; *Holt v. Simmons*, 16 Mo. App. 97; *Keck v. Fisher*, 58 Mo. 532; *Arnold v. Morris*, 7 Daly (N. Y.) 498;

McClelland v. Remsen, 3 Keyes (N. Y.) 454; 3 Abb. App. Dec. 74; 36 Barb. (N. Y.) 622; 14 Abb. Pr. (N. Y.) 331; *Willett v. Stringer*, 17 Abb. Pr. (N. Y.) 152; *McGregor v. Ellis*, 2 Disney (Ohio) 286; *Galway v. Fullerton*, 17 N. J. Eq. 389; *George v. Tate*, 102 U. S. 564; *Roots v. Mason City S. & M. Co.*, 27 W. Va. 483.

A partner having authority to borrow money for the firm, and who does so on his own note, may assign the partnership assets to secure an accommodation indorser. *Hopkins v. Thomas*, 61 Mich. 389.

Where a mortgage of firm property is made by one partner in the firm name, and immediately assigned by the mortgagee to the wife of the partner executing it, evidence is admissible to show that the mortgage was made to secure a firm debt to the assignee instead of the mortgagee. *Neer v. Oakley*, 2 N. Y. Supp. 482.

3. *Donald v. Hewitt*, 33 Ala. 534; *Tapley v. Butterfield*, 1 Met. (Mass.) 515; 35 Am. Dec. 374; *Clark v. Rives*, 33 Mo. 579; *Willett v. Stringer*, 17 Abb. Pr. (N. Y.) 152; *Reid v. Hollinshead*, 4 B. & C. 867. And see *Ex parte Bonbonus*, 8 Ves. 540.

In *Roots v. Mason City S. & M. Co.*, 27 W. Va. 483, it was doubted whether one partner could pledge the property of the firm to secure a debt due to another firm in which he was a partner having a large interest. All of the property of a partnership cannot be mortgaged or pledged by a partner if such act practically terminates the business. *Osborn v. Barge*, 29 Fed. Rep. 725.

4. *Keegan v. Cox*, 116 Mass. 289; *McGregor v. Ellis*, 2 Disney (Ohio) 286.

5. *Carnes v. White*, 15 Gray (Mass.) 378.

assign notes and claims,¹ or sell and deliver goods in payment.²

A mortgage upon firm property by one partner in his own name passes no title,³ but when the firm is named as the mortgagor, even though the individual names of the partners are also given, a signature in the firm name is sufficient,⁴ and when so signed it may be acknowledged by one partner,⁵ and the addition of a seal being surplusage does not invalidate it.⁶

The right of disposition or incumbrance of partnership property does not extend to the payment or securing of his individual debts by a partner, through its exercise,⁷ and a partner cannot appropriate partnership assets to pay an individual debt without the consent of his co-partner, even though they both owe it.⁸ Property so transferred, though it may have passed into the hands of third parties, if taken with notice or without consideration, will be deemed in equity as held in trust subject to the rights of the firm,⁹ the fact that the creditor of one partner was induced by

1. *Cullum v. Bloodgood*, 15 Ala. 34; *Mills v. Barber*, 4 Day (Conn.) 428; *Commercial Bank v. Lewis*, 13 Smed. & M. (Miss.) 226; *McClelland v. Remsen*, 36 Barb. (N. Y.) 622; 26 How. Pr. (N. Y.) 175.

2. *Boswell v. Green*, 25 N. J. L., 390; *Scott v. Shepherd*, 3 Vt. 104; *Forkner v. Stuart*, 6 Gratt. (Va.) 197.

3. *Clark v. Houghton*, 12 Gray (Mass.) 38. And see *infra*, this title, *Interests of the Partners*.

A mortgage by one partner, of his separate interest, is not a mortgage on "goods and chattels" and filing is not notice. *Tarbel v. Bradley*, 7 Abb. N. Cas. (N. Y.) 273.

4. *McCoy v. Boley*, 21 Fla. 803; *Sloan v. Owens etc. Mach. Co.*, 70 Mo. 206; *Hembree v. Blackburn*, 16 Oregon 53.

One partner may execute a chattel mortgage by signing the individual names of each of his co-partners, instead of signing the firm name. *Patch v. Wheatland*, 8 Allen (Mass.) 102; *Tapley v. Butterfield*, 1 Met. (Mass.) 515; 34 Am. Dec. 374.

5. *McCoy v. Boley*, 21 Fla. 803; *Gibson v. Warden*, 14 Wall. (U. S.) 244.

Where the mortgage is executed by one partner in the name of the firm an acknowledgment of such partner in the firm name is sufficient. *Randall v. Baker*, 20 N. H. 335. But see to the contrary, *Sloan v. Owens etc. Mach. Co.*, 70 Mo. 206.

Where a chattel mortgage of a firm is signed by all the individual partners, it should be acknowledged by

each. *Sanders v. Papoon*, 4 Fla. 465. And see *Walton v. Tusten*, 49 Miss. 569.

6. *Sweetzer v. Mead*, 5 Mich. 107; *Tapley v. Butterfield*, 1 Met. Mass. 515; 35 Am. Dec. 374; *Milton v. Mosher*, 7 Met. (Mass.) 244; *Woodruff v. King*, 47 Wis. 261. And see *infra*, this title, *Power to Execute Sealed Instruments*.

7. *Cook v. Bloodgood*, 7 Ala. 683; *Fall River Union Bank v. Sturtevant*, 12 Cush. (Mass.) 372; *Chase v. Buhl Iron Works*, 55 Mich. 139; *Clark v. Sparhawk*, 2 W. N. C. (Pa.) 115; *Vance v. Campbell*, 8 Humph. (Tenn.) 524; *Converse v. McKee*, 14 Tex. 20; *Snyder v. Lensford*, 9 W. Va. 223; *Coldwell v. Scott*, 54 N. H. 414; *Hirschfelder v. Keyser*, 59 Ala. 338; *Stegall v. Coney*, 49 Miss. 761; *Geery v. Cockcroft*, 33 N. Y. Super. Ct. 147; *Post v. Kimberly*, 9 Johns. (N. Y.) 470; *Williams v. Barnett*, 10 Kan. 455; *Rogers v. Batchelor*, 12 Pet. (U. S.) 221. And see *infra*, this title, *Conversion of Joint Into Separate Property*.

Where a partner delivered whiskey of the firm to his private creditor, with directions to pay the taxes and sell it to pay his individual debt, the pledge is valid to the extent of the taxes paid by the creditor, but void as to the balance. *Flanagan v. Alexander*, 50 Mo. 50.

8. See *Johnson v. Hersey*, 73 Me. 291; *Hilliker v. Francisco*, 65 Mo. 598; *Updegraff v. Rowland*, 52 Pa. St. 317.

9. *Croughton v. Forrest*, 17 Mo. 131;

him to trade out the debt, or that the goods were received on that condition only, having no effect upon the rights of the other partners,¹ though a sale made upon a promise to receive in payment something other than money, if the articles in which payment is to be made are intended for the firm, and the transaction is within the apparent scope of its business, it is binding.² And the employment of a partner for the purpose of the extinguishment of his debt, or a contract to pay him for services in articles designed for his use only, when the existence of the partnership is unknown, will be effectual as a discharge or set-off.³

e. TO BORROW MONEY.—The sudden exigencies of commerce render it absolutely necessary that the borrowing power should exist in the members of a trading partnership, and unless the money is procured for a purpose outside the scope of the partnership business to the knowledge of the lender, the power to thus bind the firm is deemed to follow the establishment of the relation as a legal consequence,⁴ and has in some instances been per-

Fall River Union Bank *v.* Sturtevant, 12 Cush. Mass. 372; Forney *v.* Adams, 74 Mo. 138; Vance *v.* Campbell, 8 Humph. (Tenn.) 524.

1. Harper *v.* Wrigley, 48 Ga. 495; Warder *v.* Newdigate, 11 B. Mon. (Ky.) 174; 53 Am. Dec. 567; McNair *v.* Platt, 46 Ill. 211; Cadwallader *v.* Kroesen, 22 Md. 200; Johnson *v.* Crichton, 56 Md. 108; Broadus *v.* Evans, 63 N. Car. 633; Todd *v.* Lorch, 75 Pa. St. 155; Ramey *v.* McBride, 4 Strobb. (S. Car.) 12; Liberty Sav. Bank *v.* Campbell, 75 Va. 534; Williams *v.* Brunhall, 13 Gray (Mass.) 462. But see Arnold *v.* Brown, 24 Pick. (Mass.) 89; 35 Am. Dec. 296; Mitchell *v.* Sellman, 5 Md. 376; Kirkpatrick *v.* Turnbull, Add. (Pa.) 259; McKee *v.* Stroup, Rice (S. Car.) 291; Tyler *v.* Scott, 45 Vt. 261; Strong *v.* Fish, 13 Vt. 277.

A promise by a partner to deliver assets or money of the firm in payment of his separate debt, does not entitle his creditor, who is also a debtor to the firm, to a credit on account of such promise as against the firm. See Pierce *v.* Pass, 1 Port. (Ala.) 232; Carlow *v.* Rossa, 28 Ga. 219; Price *v.* Hunt, 59 Mo. 258; Minor *v.* Gaw, 11 Smed. & M. (Miss.) 322; Cook *v.* Bloodgood, 7 Ala. 683; Armistead *v.* Butler, 1 Hen. & M. (Va.) 176.

2. Lemon *v.* Fox, 21 Kan. 152; Warder *v.* Newdigate, 11 B. Mon. (Ky.) 174; 53 Am. Dec. 567; Hood *v.* Riley, 15 N. J. L. 127; Liberty Sav. Bank *v.* Campbell, 75 Va. 534. And

see White *v.* Toles, 7 Ala. 569; Greeley *v.* Wyeth, 10 N. H. 15.

The rule against the appropriation of firm assets to pay private debts applies to a partnership, the joint feature of which is the labor or services of the partners, as in a mercantile or professional partnership. The services of the partners belong to the firm, and an agreement by one partner to pay his private debt by rendering private services, stands upon the same footing as an appropriation of joint property. Williams *v.* Brimhall, 13 Gray (Mass.) 462; Ramey *v.* McBride, 4 Strobb. (S. Car.) 12.

3. See Bryant *v.* Clifford, 27 Vt. 664; Strong *v.* Fish, 13 Vt. 277; McBain *v.* Austin, 16 Wis. 87.

4. Saltmarsh *v.* Bower, 22 Ala. 221; Howze *v.* Patterson, 53 Ala. 205; 25 Am. Rep. 607; Wagner *v.* Simmons, 61 Ala. 143; Decker *v.* Howell, 42 Cal. 636; Pahlman *v.* Taylor, 75 Ill. 629; Walsh *v.* Lennon, 98 Ill. 27; 38 Am. Rep. 75; Gregg *v.* Fisher, 3 Ill. App. 261; Hunt *v.* Hall, 8 Ind. 215; Leffler *v.* Rice, 41 Ind. 103; Sherwood *v.* Snow, 46 Iowa 481; 26 Am. Rep. 155; Lindh *v.* Crowley, 29 Kan. 756; Emerson *v.* Harmon, 14 Me. 271; Etheridge *v.* Binney, 9 Pick. (Mass.) 272; Smith *v.* Collins, 115 Mass. 388; Faler *v.* Jordan, 44 Miss. 283; Bascom *v.* Young, 7 Mo. 1; Roney *v.* Buckland, 4 Nev. 45; Church *v.* Sparrow, 5 Wend. (N. Y.) 223; Whitaker *v.* Brown, 16 Wend. (N. Y.) 505; Onondaga Co. Bank *v.* DePuy, 17 Wend. (N. Y.) 47;

mitted to be exercised for the promotion of enterprises outside of the scope of the partnership affairs, in which the firm has taken an interest.¹ A lender is warranted in assuming, when nothing is said, that money borrowed by a partner is for the firm;² but where the money is borrowed on the individual credit of the partner, though it is applied to the use of the firm, it does not thereby become an indebtedness of the firm.³ And the same rule applies where money comes to the hands of a partner through a transaction outside of the scope of the firm's business, and is afterwards applied to its use.⁴ So, on the other hand, if money is borrowed or goods purchased for the firm and upon its credit, the subsequent misappropriation of the avails by the borrowing or purchasing partner, does not relieve the firm from its liability therefor.⁵

Miller *v.* Manice, 6 Hill (N. Y.) 119; Seybold *v.* Greenwald, 1 Disney (Ohio) 425; Gano *v.* Samuel, 14 Ohio 592; Kleinhaus *v.* Generous, 25 Ohio St. 667; Benniger *v.* Hess, 41 Ohio St. 64; Hoskinson *v.* Eliot, 62 Pa. St. 393; Steel *v.* Jennings, Cheves (S. Car.) 183; Ford *v.* McBryde, 45 Tex. 498; Winship *v.* Bank of U. S., 5 Pet. (U. S.) 529; 5 Mason (U. S.) 176; Rothwell *v.* Humphreys, 1 Esp. 406; Thicknesse *v.* Bromilow, 2 Cr. & J. 425; Lane *v.* Williams, 2 Vern. 277; Denton *v.* Rodie, 3 Camp. 493; *Ex parte* Bonbonus, 8 Ves. 540; Lloyd *v.* Freshfield, 1 C. & P. 333; Brown *v.* Kidger, 3 H. & N. 853.

If money be borrowed by a member of a firm for the use of the firm, without the actual knowledge of the other partner, if the money is necessary for the business of the firm, and is actually put into the funds of the firm, and used by the firm in the usual course of business, the partnership is liable therefor. Deitz *v.* Regnier, 27 Kan. 94.

Where a partner who is the manager of the business of the firm, and has authority to borrow money, borrows money from his wife to be used in paying of partnership debts, the transaction will be upheld in equity as against the firm, where it is shown to be fair and honest. Heitman *v.* Griffith, 43 Kan. 553.

1. See Morse *v.* Hagenah, 68 Wis. 603; Andrews *v.* Congar, 20 Am. Law Reg., N. S. 328.

There is no agency in partners for each other to borrow money in order to increase the fixed capital of the firm, and a lender having knowledge of such purposes cannot charge the

other partner with the loan. Fisher *v.* Taylor, 2 Hare 218.

2. Sherwood *v.* Snow, 46 Iowa 481; 26 Am. Rep. 155; Rose *v.* Baker, 13 Barb. (N. Y.) 230.

And see Mills *v.* Bunce, 29 Mich. 364.

3. Guice *v.* Thornton, 76 Ala. 466; Mechanics' etc. Ins. Co. *v.* Richardson, 33 La. Ann. 1308; 39 Am. Rep. 290; Green *v.* Tanner, 8 Met. (Mass.) 411; Goodrich *v.* Leland, 18 Mich. 110; Farmers' Bank *v.* Bayless, 41 Mo. 274; Farmers' Bank *v.* Bayliss, 35 Mo. 428; Ashbury *v.* Flesher, 11 Mo. 610; Wiggins *v.* Hammond, 1 Mo. 121; Tucker *v.* Peaslee, 36 N. H. 167; National Bank *v.* Thomas, 47 N. Y. 15; Ryder *v.* Gilbert, 16 Hun (N. Y.) 163; Caster *v.* Clarke, 3 Edw. Ch. (N. Y.) 411; Willis *v.* Hill, 2 Dev. & B. (N. Car.) 231; Peterson *v.* Roach, 32 Ohio St. 374; 30 Am. Rep. 607; Norwalk Nat. Bank *v.* Sawyer, 38 Ohio St. 339; Ah Lep *v.* Gong Choy, 13 Oregon 205; Graeff *v.* Hitchman, 5 Watts (Pa.) 454; Union etc. Bank *v.* Day, 12 Heisk. (Tenn.) 413; Foster *v.* Hall, 4 Humph. (Tenn.) 346; Willis *v.* Bremner, 60 Wis. 622; McLinden *v.* Wentworth, 51 Wis. 170; Smith *v.* Hoffman, 2 Cranch (C. C.) 651; Le Roy *v.* Johnson, 2 Pet. (U. S.) 186; McCord *v.* Field, 27 Up. Can., C. P. 391.

4. Pickles *v.* McPherson, 59 Miss. 216; Hogan *v.* Reynolds, 8 Ala. 59; Dounce *v.* Parsons, 45 N. Y. 180.

5. Houze *v.* Patterson, 53 Ala. 205; 25 Am. Rep. 607; Carver *v.* Dows, 40 Ill. 374; Stark *v.* Corey, 45 Ill. 431; Gregg *v.* Fisher, 3 Ill. App. 261; Davis *v.* Blackwell, 5 Ill. App. 32; Rend *v.* Boord, 75 Ind. 307; Sherwood *v.* Snow, 46 Iowa 481; 26 Am. Rep.

The power of a partner to borrow money for the firm may be exercised by the use of the firm's indorsement or of borrowed indorsements,¹ or by the use of accommodation signatures or indorsements,² as well as by the use of the firm's notes, and as a general rule he may take any steps to secure the loan and provide for its repayment that could be taken by an individual dealing for himself.³

155; *Lemon v. Fox*, 21 Kan. 152; *Lindh v. Crowley*, 29 Kan. 756; *Harris v. Baltimore* (Md. 1890), 17 Atl. Rep. 1046; *Warren v. French*, 6 Allen (Mass.) 317; *Hayward v. French*, 12 Gray (Mass.) 453; *Littell v. Fitch*, 11 Mich. 525; *Sylverstein v. Atkinson*, 45 Miss. 81; *Bascom v. Young*, 7 Mo. 1; *Bank v. St. Joseph Lead Co.*, 12 Mo. App. 587; *Wagner v. Freschl*, 56 N. H. 495; *Church v. Sparrow*, 5 Wend. (N. Y.) 223; *Whitaker v. Brown*, 16 Wend. (N. Y.) 505; *Onondaga Co. Bank v. De Puy*, 17 Wend. (N. Y.) 47; *Bank of St. Albans v. Gilliland*, 23 Wend. (N. Y.) 311; 35 Am. Dec. 566; *National Bank v. Ingraham*, 58 Barb. (N. Y.) 290; *Miller v. Manice*, 6 Hill (N. Y.) 114; *Wharton v. Woodburn*, 1 Dev. & B. (N. Car.) 507; *Dickson v. Alexander*, 7 Ired. (N. Car.) 4; *Kleinhaus v. Generous*, 25 Ohio St. 667; *Halderman v. Bank of Middletown*, 28 Pa. St. 440; *Windham Co. Bank v. Kendall*, 7 R. I. 77; *Crosthwait v. Ross*, 1 Humph. (Tenn.) 23; 34 Am. Dec. 613; *Venable v. Levick*, 2 Head. (Tenn.) 351; *Van-Alstyne v. Bertrand*, 15 Tex. 177; *Gilchrist v. Brande*, 58 Wis. 184; *Kimbro v. Bullitt*, 22 How. (U. S.) 256; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529; *Simpson v. McDonough*, 1 Up. Can., Q. B. 157; *Bond v. Gibson*, 1 Camp. 185.

A draft in the firm name, on a debtor of the firm, payable to one partner, is binding although the partner absconds with the money, and although the draft was for more than the drawer owed and was therefore in part a loan, for the reason that each partner has power to collect debts. *Darlington v. Garrett*, 14 Ill. App. 238.

1. See *Deitz v. Regneir*, 27 Kan. 94; *Emerson v. Harmon*, 14 Me. 271; *Manning v. Hays*, 6 Md. 5; *Roney v. Buckland*, 4 Nev. 45; *Moorehead v. Gilmore*, 77 Pa. St. 118; 18 Am. Rep. 435; *Miller v. Consolidation Bank*, 48 Pa. St. 514; *Hutchins v. Hudson*, 8 Humph. (Tenn.) 426.

A general partner in a mercantile

business having obtained from a third person certain *United States* bonds, payable to bearer, for the benefit of the firm, while on his way to pledge or otherwise raise the money on them for the purchase of goods for the firm, met his death by disaster and the bonds were lost. It was held, that the transaction constituted a loan to the partnership and that the firm was responsible for the value of the bonds. *Roney v. Buckland*, 4 Nev. 45.

2. See *Hogan v. Reynolds*, 8 Ala. 59; *Fahr v. Jordan*, 44 Miss. 283; *Sorg v. Thornton*, 1 Cin. Super. Ct., Ohio 383; *Johnson v. Peck*, 3 Stark. 66.

An acting partner may, for the benefit of his firm and in order to raise money, use the name of the firm by accepting a bill of exchange to be exchanged for the acceptance of another firm, it being in substance, giving the name of the partnership to secure an indorser. *Gano v. Samuel*, 14 Ohio 592.

3. A partner may contract to pay a share of profits in lieu of interest. *Ford v. McBryde*, 45 Tex. 498, and a member of a manufacturing firm may deliver unfinished articles to another to finish and sell to reimburse himself for his advances. *Carnes v. White*, 15 Gray (Mass.) 378.

In a partnership to buy and sell oats, one partner borrowed oats and agreed to repay the loan in oats, this was held valid and binding upon the firm. *Adee v. Demorest*, 54 Barb. (N. Y.) 433.

But where a partner borrows at a usurious rate of interest, the usury being illegal, the transaction is binding upon the non-assenting partner only to the extent of the principal and a legal rate of interest. See *Chandler v. Sherman*, 16 Fla. 99; *Dillon v. McRae*, 40 Ga. 107.

And a managing partner's contract to pay twenty-five per cent. of the net profits in lieu of interest, where the interest would amount to more than the lender's proportion of the profits would

The borrowing power, however, is confined strictly to commercial partnerships, and exists in non-trading firms only when expressly conferred,¹ and when so conferred, the authority will not be extended beyond the terms of the power.² Partnerships in which the borrowing power is restricted in the articles, where the lender has notice of the restriction, are subject to the same rules.³

f. TO MAKE NEGOTIABLE PAPER.—(See also *BILLS AND NOTES*, vol. 2, p. 313).—"As a general proposition, a co-partner has the right to give a promissory note in the name of the firm, without and even against the assent of his co-partners, and all the members of the firm will be liable thereon, provided it be given in good faith, for partnership purposes, or to one who gives for it a valuable consideration without notice that it is given for a purpose not within the scope of the partnership,"⁴ this power being so essential to the transaction of business through the medium of a partnership that it is implied from the very existence of the firm.⁵

(1) *Trading Partnerships*.—Any member of an ordinary trading partnership can bind the firm by making, drawing, accepting or indorsing mercantile paper, in the usual course of business as a part of the usual routine of their affairs,⁶ irrespective of restric-

have amounted to, had he been a partner, is not within his authority. *Chandler v. Sherman*, 16 Fla. 99.

1. *Pease v. Cole*, 53 Conn. 53; *Ulery v. Ginrich*, 57 Ill. 531; *Bays v. Conner*, 105 Ind. 415; *Breckenridge v. Shrieve*, 4 Dana (Ky.) 375; *Prince v. Crawford*, 50 Miss. 344; *Hunt v. Chapin*, 6 Lans. (N. Y.) 139; *Crosthwait v. Ross*, 1 Humph. (Tenn.) 23; 34 Am. Dec. 613; *Freeman v. Carpenter*, 17 Wis. 126; *Wilson v. Brown*, 6 Ont. App. 411; *McCord v. Field*, 27 Up. Can., C. P. 391; *Forster v. Mackreth*, L. R., 2 Ex. 163; *Plumer v. Gregory*, L. R., 18 Eq. 621.

A partner, unless he is member of a commercial firm or one engaged in general promiscuous trading, has no implied authority to bind the firm by borrowing money and executing promissory notes or other securities, unless the money is necessary for the business, and such pledge of the credit of the firm is usual, as shown by the practice of his firm or others in similar business. *Davis v. Richardson*, 45 Miss. 500.

2. See *Greenslade v. Dower*, 7 B. & C. 635.

3. *In re Worcester Corn Exchange Co.*, 3 De G. M. & G. 180.

But if exercised for the purpose of the purchase of supplies essential to the prosecution of the enterprise the

rule would be different. *Gavin v. Walker*, 14 Lea (Tenn.) 643.

4. *MULLIN, J.*, in *National Union Bank v. Landon*, 66 Barb. (N. Y.) 193. And see *Porter v. White*, 39 Md. 613; *Blodgett v. Weed*, 119 Mass. 215; *Wagner v. Freschl*, 56 N. H. 495; *Mechanics' Bank v. Foster*, 44 Barb. (N. Y.) 87; *Gale v. Miller*, 44 Barb. (N. Y.) 420.

Where each of two partners gave a bill in the name of the firm without the knowledge of the other, for the same debt, the firm was held liable on both bills to a *bona fide* holder. *Davidson v. Robertson*, 3 Dow. 218.

Bills drawn upon a firm in a fictitious name to raise money for the firm, are binding upon the partners. *Thicknesse v. Bromilow*, 2 Cr. & J. 425.

5. *Faler v. Jordan*, 44 Miss. 283; *Sylverstein v. Atkinson*, 45 Miss. 81; *Windham Co. Bank v. Kendall*, 7 R. I. 77; *Swan v. Steel*, 7 East 210; *Fox v. Clifton*, 7 Bing. 795.

Where a draft was drawn upon a firm by one of the partners, having the name of the drawer forged upon it and he thereupon procured its discount at the plaintiff's bank, it was held that, as a partner issued the paper, the firm was estopped to deny the genuineness of its indorsement. *Burges v. Northern Bank*, 4 Bush (Ky.) 600.

6. *Cocke v. Branch Bank*, 3 Ala. 175;

tions in the articles not brought to the knowledge of the payee.¹ One partner, however, has no implied power to bind his co-partners otherwise than jointly with himself, and he cannot, therefore, by a joint and several note, bind each member severally, or any number less than all,² but when possible so to do, effect will be given such a note as a joint obligation,³ though the signing part-

Howze v. Patterson, 53 Ala. 205; 25 Am. Rep. 607; *Wagner v. Simmons*, 61 Ala. 143; *Palmer v. Scott*, 68 Ala. 380; *Storer v. Hinkley, Kirby* (Conn.) 147; *Champion v. Mumford, Kirby* (Conn.) 170; *Pease v. Cole*, 53 Conn. 53; *Dow v. Phillips*, 24 Ill. 249; *Walsh v. Lannan*, 98 Ill. 27; 38 Am. Rep. 75; *Gregg v. Fisher*, 3 Ill. App. 261; *Sherwood v. Snow*, 46 Iowa 481; 26 Am. Rep. 155; *Deitz v. Regnier*, 27 Kan. 94; *Lindh v. Crowley*, 29 Kan. 756; *Smith v. Turner*, 9 Bush (Ky.) 417; *Judge v. Braswell*, 13 Bush (Ky.) 67; 26 Am. Rep. 185; *Coursey v. Baker*, 7 Har. & J. (Md.) 28; *Richardson v. French*, 4 Met. (Mass.) 577; *Smith v. Collins*, 115 Mass. 388; *Stimson v. Whitney*, 130 Mass. 591; *Carrier v. Cameron*, 31 Mich. 373; *Faler v. Jordan*, 44 Miss. 283; *Holt v. Simmons*, 16 Mo. App. 97; *Feurt v. Brown*, 23 Mo. App. 332; *Roney v. Buckland*, 4 Nev. 45; *Dow v. Moore*, 47 N. H. 419; *Benninger v. Hess*, 41 Ohio St. 64; *Hoskinson v. Eliot*, 62 Pa. St. 393; *Moorehead v. Gilmore*, 77 Pa. St. 118; *Crosthwait v. Ross*, 1 Humph. (Tenn.) 23; 34 Am. Dec. 613; *Crozier v. Kiker*, 4 Tex. 252; 51 Am. Dec. 724; *Michael v. Workman*, 5 W. Va. 391; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529; *Kimbro v. Bullitt*, 22 How. (U. S.) 256; *Pinkney v. Hall*, Ld. Raym. 175; 1 Salk. 126; *Smith v. Bailey*, 11 Mod. 401; *Ex parte Bonbonus*, 8 Ves. 540; *Davison v. Robertson*, 3 Dow 218; *Brown v. Kidger*, 3 H. & N. 853; *Stephens v. Reynolds*, 5 H. & N. 513; *Ex parte Darlington Banking Co.*, 4 DeG. J. & S. 581; *Sutton v. Gregory*, 2 Peake 150; *Lewis v. Reilly*, 1 Q. B. 349; *Swan v. Steele*, 7 East 210; 3 Smith 199.

A member of a firm to which a negotiable note is executed has power to indorse it in the firm name while the partnership still exists, and if by mutual agreement he purchases the note from the firm he becomes the legal holder, and may, when it is so indorsed, sue thereon in his own name. *Fulton v. Loughlin*, 118 Ind. 286.

Where one of two partners abscond-

ed, and the other partner gave a note to a creditor in the name of the firm payable on demand, in place of an old note not yet due, to enable him to attach, it was held to be outside of the usual course of business and the attachment was set aside. *Whitman v. Leonard*, 3 Pick. (Mass.) 177.

Where one firm gave a note to another secured by the individual mortgage of one partner, and both firms dissolved, whereupon the partner who gave the mortgage made new notes in the firm's name and delivered them to a member of the other firm, and released the mortgage, it was held to be outside of the ordinary course of trade and to be binding upon neither firm. *Hicks v. Russell*, 72 Ill. 230.

A partner has the same power to renew a note as he originally had to make it. *Tilford v. Ramsey*, 37 Mo. 563.

One partner may alter the note of a trading firm by the insertion of a place of payment. *Pahlman v. Taylor*, 75 Ill. 629. Or he may destroy one note and substitute another in its place. *Mosely v. Ames*, 5 Allen (Mass.) 163.

1. *Bloom v. Helm*, 53 Miss. 21; *Benninger v. Hess*, 41 Ohio St. 64; *Ontario Bank v. Hennessey*, 48 N. Y. 545; *Bank of Rochester v. Monteath*, 1 Den. (N. Y.) 402; 43 Am. Dec. 681; *Barratt v. Russell*, 45 Vt. 43.

2. *Sherman v. Christy*, 17 Iowa 322; *Marlett v. Jackman*, 3 Allen (Mass.) 287; *Snow v. Howard*, 25 Barb. (N. Y.) 55; *Perring v. Home*, 4 Bing. 32; 2 Car. & P. 401.

Where the signatures of the several partners are so placed upon a note that the apparent interest and legal obligations of the signers would be different, as where one appears as maker and another as surety, it is doubtful whether the non-assenting partner is bound at all. *Stroh v. Hinckman*, 37 Mich. 490.

3. *Sherman v. Christy*, 17 Iowa 322. *Doty v. Bates*, 11 Johns. (N. Y.) 544; *MacLae v. Sutherland*, 3 El. & B. 36.

The firm is jointly liable upon a note beginning with "I promise," and signed either by one partner or by all. See *Doty v. Bates*, 11 Johns. (N. Y.) 544;

ner will be bound severally as well as jointly, even though the firm name was signed;¹ but where the words "I promise" are used with a signature in the firm name, the note is joint only and the signer is not severally liable,² and a joint and several note signed by the firm and a third person will severally bind the third person and the firm as one person.³

So, a firm note given by one partner to pay his individual debt is a fraud upon his co-partners, and unless authorized will bind one but himself.⁴ Nor has a partner any right to issue the note of a new firm to pay the debts of a prior firm composed in part of the same members,⁵ nor to procure a loan to himself or for a

Galway *v.* Matthew, 1 Camp. 403; *Ex parte* Buckley, 14 M. & W. 469; *Ex parte* Clark, DeG. 153.

So a firm is jointly bound by a note commencing "We jointly and severally promise for the firm." Van Tine *v.* Crane, 1 Wend. (N. Y.) 524; Snow *v.* Howard, 35 Barb. (N. Y.) 55; Brown *v.* Fitch, 33 N. J. L. 418; *In re* Holbrook, 2 Low. (U. S.) 259; MacLae *v.* Sutherland, 3 E. & B. 1.

1. Fulton *v.* Williams, 11 Cush. (Mass.) 108; Sherman *v.* Christy, 17 Iowa 322; Snow *v.* Howard, 35 Barb. (N. Y.) 55; Elliott *v.* Davis, 2 B. & P. 338; Gillow *v.* Lillie, 1 Bing. N. Cas. 695.

2. Brown *v.* Fitch, 33 N. J. L. 418; Doty *v.* Bates, 11 Johns. (N. Y.) 544; Van Tine *v.* Crane, 1 Wend. (N. Y.) 524; *Ex parte* Buckley, 14 M. & W. 469; *Ex parte* Clark, DeG. 153.

3. Van Tine *v.* Crane, 1 Wend. (N. Y.) 524; *In re* Holbrook, 2 Low. (U. S.) 259.

4. See Scott *v.* Dansby, 12 Ala. 714; Freeman *v.* Ross, 15 Ga. 252; Gray *v.* Ward, 18 Ill. 32; Wittram *v.* Van Wormer, 44 Ill. 525; Taylor *v.* Hillyer, 3 Blackf. (Ind.) 433; 26 Am. Dec. 430; Hagar *v.* Mounts, 3 Blackf. (Ind.) 57; Hickman *v.* Reineking, 6 Blackf. (Ind.) 387; Flagg *v.* Upham, 10 Pick. (Mass.) 147; Adams' Bank *v.* Jones, 16 Pick. (Mass.) 574; Roberts *v.* Pepple, 55 Mich. 367; Robinson *v.* Aldridge, 34 Miss. 352; Klein *v.* Keyes, 17 Mo. 326; Ferguson *v.* Thacher, 79 Mo. 511; Davis *v.* Cook, 9 Nev. 134; Davenport *v.* Runlett, 3 N. H. 386; Williams *v.* Gilchrist, 11 N. H. 535; Dob *v.* Halsey, 16 Johns. (N. Y.) 34; 8 Am. Dec. 293; Williams *v.* Walbridge, 3 Wend. (N. Y.) 415; Ganesvoort *v.* Williams, 14 Wend. (N. Y.) 133; Rust *v.* Hauselt, 41 N. Y. Super. Ct. 467; 76 N. Y. 614; Gale *v.* Miller, 54 N. Y. 536; Atlantic

State Bank *v.* Savery, 82 N. Y. 291; Hun (N. Y.) 36; Cotton *v.* Evans Dev. & B. Eq. (N. Car.) 284; Him right *v.* Johnson, 40 Ohio St. 40; Cl *v.* Cottrell, 18 Pa. St. 408; Baird Cochran, 4 S. & R. (Pa.) 397; Port *v.* Gunnison, 2 Grant's Cas. (Pa.) 25; McKinney *v.* Brabbury, Dall. (Tex.) 441; Van Alstyne *v.* Bertrand, 15 Tex. 177; Poindexter *v.* Waddy, 6 Mu (Va.) 418; 8 Am. Dec. 749; Beals Sheldon, 4 Up. Can., Q. B. 302.

Where part of the amount of a firm note given to a bank was applied to the payment of an individual debt by one partner, with the knowledge of the bank, the loan to that amount is a loan to such partner individually, for which the firm is not liable. Eyrich *v.* Capital State Bank, 67 Miss. 60.

The fact that a small firm debt is included in a note for a separate debt does not make the note valid. King Faber, 22 Pa. St. 21; Bell *v.* Faber Grant's Cas. (Pa.) 31. But such note can be enforced so far as the consideration is valid. Gamble *v.* Grimes, Ind. 392; Guild *v.* Belcher, 119 Mass. 215; Wilson *v.* Lewis, 2 W. & G. 19; Ellston *v.* Deacon, L. R., 2 C. P. 20.

Where a partnership agreement provides that an existing individual debt of one of the partners shall be assumed and paid by the firm, either of the partners has authority to execute the note of the firm to secure the payment of such indebtedness. Following Randall *v.* Hunter, 66 Cal. 512; Randall Hunter, 76 Cal. 255.

5. Hester *v.* Lumpkin, 4 Ala. 50; Bryan *v.* Tooke, 60 Ga. 437; Waller Davis, 59 Iowa 103; Elkin *v.* Green, Bush (Ky.) 612; Guild *v.* Belcher, 1 Mass. 257; Howell *v.* Sewing Machine Co., 12 Neb. 177.

Where one party goes out of a firm in order to make the debts of the other

other individual purpose;¹ though if the new firm has assumed the debts of the old one, one partner may pay them with the firm note.² And a power to use the firm name for private purposes is implied where it is necessary to perfect a joint transaction.³

It is no part of the business of a partnership to give a guaranty of,⁴ or become surety for,⁵ the payment of the debts of others, or

partnership a charge upon the new there must be the concurrent consent of three parties—the creditors, the old firm, and the new. *Spaunhorst v. Link*, 46 Mo. 197.

1. *Rutledge v. Squires*, 23 Iowa 53; *Bank of Commerce v. Selden*, 3 Minn. 155; *In Re Forsyth*, 7 Nat. Bankr. Reg. 174; *Stainer v. Tysen*, 3 Hill (N. Y.) 279; *Noble v. McClintock*, 2 W. & S. (Pa.) 152; *Gullat v. Tucker*, 2 Cranch (U. S.) 33.

An acceptance by one member of a firm of a bill of exchange, which represents a private debt of his own, binds the firm, if the holder of the bill was ignorant of the nature of its consideration. *Potter v. Dillon*, 7 Mo. 228; 37 Am. Dec. 185.

2. *Randall v. Hunter*, 66 Cal. 512; *Morris v. Merquez*, 74 Ga. 86; *Markham v. Hazen*, 48 Ga. 570; *Johnson v. Barry*, 95 Ill. 483; *Silverman v. Chase*, 90 Ill. 37; *Shaw v. McGregory*, 105 Mass. 96.

Where a new firm is formed from an old one by the retirement of a member, and it succeeds to, and continues the business of the old firm in the same place, slight evidence is sufficient to warrant the inference that it has assumed the liabilities of the old firm. And if it has assumed them, a partner has the same right to give partnership notes in their payment, as he has to give such notes in payment of the debts of the new firm. *Gano v. Samuel* 14.

3. See *Mechanics' Bank v. Hildreth*, 9 Cush. (Mass.) 356; *Busfield v. Wheeler*, 14 Allen (Mass.) 139; *Jones v. Hurst*, 67 Mo. 568.

In *Mechanics' Bank v. Hildreth*, 9 Cush. (Mass.) 356, partners were permitted to indorse firm notes to themselves, respectively, which had been divided up amongst them.

4. See *First Nat. Bank v. Carpenter*, 34 Iowa 433; *Sweetser v. French*, 2 Cush. (Mass.) 310; 48 Am. Dec. 666; *Osborne v. Stone*, 30 Minn. 25; *Selden v. Bank of Commerce*, 3 Minn. 166; *Fielden v. Lahens*, 2 Abb. App. Dec. (N. Y.) 111; *Sutton v. Irwine*, 12 S. & R. (Pa.) 13; *Hamil v. Purvis*, 2 Pa.

177; *Thompkins v. Woodward*, 5 W. Va. 216; *Brettel v. Williams*, 4 Ex. 623.

One member of a partnership, by virtue of his being the general agent of the firm, has authority to bind the firm by a contract of guaranty, if such contract is within the scope of the business of the partnership, notwithstanding any understanding between the partners in respect to such transactions. *First Nat. Bank v. Carpenter*, 41 Iowa 518.

If one partner has been authorized by his co-partner to borrow money for the firm, and has been allowed by them to fill up notes over their blank signatures, and to sign the names of the firm to obligations, he may bind the other members of the firm by a contract of guaranty, signed by him in their names, and indorsed on a note given by him for money borrowed for the firm. *Pahlman v. Taylor*, 75 Ill. 629.

A contract of a suretyship signed by one partner in the name of the firm without authority, may become binding by the subsequent ratification of the firm. *Kidder v. Page*, 48 N. H. 380; *Cockroft v. Claflin*, 64 Barb. (N. Y.) 464.

A firm may become the surety of another firm when it is within its power to do so, in the same manner that one individual may become surety for another. *Allen v. Morgan*, 5 Humph. (Tenn.) 624.

In *First Nat. Bank v. Carpenter*, 41 Iowa 518, it was held to be a question for the jury, whether the guaranty of a customer's paper was within the scope of the business of a banking firm. But see *Selden v. Bank of Commerce*, 3 Minn. 166.

5. See *Rollins v. Stevens*, 31 Me. 454; *Whitmore v. Adams*, 17 Iowa 567; *White v. Davidson*, 8 Md. 169; 63 Am. Dec. 699; *Butterfield v. Hemsley*, 12 Gray (Mass.) 226; *Wagon v. Clay*, 1 A. K. Marsh. (Ky.) 257; *Andrews v. Planters' Bank*, 7 Smed. & M. (Miss.) 192; 45 Am. Dec. 300; *Langan v. Hewitt*, 13 Smed. & M. (Miss.) 122; *Vaiden v. Hawkins* (Miss. 1889), 6 So.

to bind its credit to third persons.¹ A holder of a note made indorsed by one partner without the consent of the firm, therefore who knows that the signature of the firm was given for the purpose of accommodation or as surety, cannot recover as against the partnership,² though the partner who thus uses the firm name

Rep. 227; *Bank of Rochester v. Bowen*, 7 Wend. (N. Y.) 158; *Wilson v. Williams*, 14 Wend. (N. Y.) 146; 28 Am. Dec. 518; *Lavery v. Burr*, 1 Wend. (N. Y.) 529; *Foot v. Sabin*, 19 Johns. (N. Y.) 154; 10 Am. Dec. 208; *Bank of Virgennes v. Cameron*, 7 Barb. (N. Y.) 143. But see *Odiorne v. Maxey*, 15 Mass. 39.

The power to sign the firm name, by indorsement, for accommodation purposes, would not authorize the signature of the firm name on the face of the note, as an unconditional and distinct surety. *McGuire v. Blanton*, 5 Humph. (Tenn.) 361; *Early v. Reed*, 6 Hill (N. Y.) 12.

An agreement made by one partner of a mercantile firm, in the partnership name, to indemnify a third person for accepting, for the accommodation of the firm, a draft drawn upon him by such partner, is valid, although another of the partners at the time dissented from the agreement. *Wilkins v. Pearce*, 5 Den. (N. Y.) 541.

1. See *Lavery v. Burr*, 1 Wend. (N. Y.) 529; *Lang v. Waring*, 17 Ala. 145; *Heffron v. Hanaford*, 40 Mich. 305; *Chenoweth v. Chamberlin*, 6 B. Mon. (Ky.) 60; 43 Am. Dec. 145; *Osborne v. Thompson*, 35 Minn. 229; *Foot v. Sabin*, 19 Johns. (N. Y.) 154; 10 Am. Dec. 208; *Shaabar v. Bushong*, 105 Pa. St. 514. To the contrary see *Flemming v. Prescott*, 3 Rich. (S. Car.) 307; 45 Am. Dec. 766; *Ex parte Gardom*, 15 Ves. 286.

An indorsement of the note of a third person by a partner in the firm name, made without the knowledge or consent of the other member of the firm, and having no connection with its business, does not bind the firm. *Bank of Fort Madison v. Alden*, 129 U. S. 372.

2. *Maudlin v. Branch Bank*, 2 Ala. 502; *Hibbler v. De Forest*, 6 Ala. 92; *Lang v. Waring*, 17 Ala. 145; *Rolston v. Click*, 1 Stew. (Ala.) 526; *Hendrie v. Berkowitz*, 37 Cal. 113; *New York Firemans' Ins. Co. v. Bennett*, 5 Conn. 574; 13 Am. Dec. 109; *Mix v. Muzzy*, 28 Conn. 186; *Mayberry v. Bainton*, 2 Harr. (Del.) 24; *Marsh v. Thompson Nat. Bank*, 2 Ill. App. 217; *Davis v.*

Blackwell, 5 Ill. App. 32; *Beach State Bank*, 2 Ind. 488; *Whitmore Adams*, 17 Iowa 567; *Clark v. Hyn*, 55 Iowa 14; *Silvers v. Foster*, 9 K 56; *Wagnon v. Clay*, 1 A. K. Ma (Ky.) 257; *Chenoweth v. Chamber B. Mon. (Ky.)* 60; 43 Am. Dec. 1; *Vredenburg v. Lagan*, 28 La. A 941; *Darling v. March*, 22 Me. 1; *Rollins v. Stevens*, 31 Me. 454; *Red v. Churchill*, 73 Me. 146; 40 Am. R 345; *Hopkins v. Boyd*, 11 Md. 1; *Sweetser v. French*, 2 Cush. (Mas 309; 48 Am. Dec. 666; *Butterfield Hemsley*, 12 Gray (Mass.) 226; *National Bank v. Law*, 127 Mass. 72; *Frans' Nat. Bank v. Savery*, 127 Ma 75; *Heffron v. Hanaford*, 40 Mi 305; *Moynahan v. Hanaford*, 42 Mich 329; *Selden v. Bank of Commerce Minn.* 166; *Osborne v. Thompson*, Minn. 229; *Osborne v. Stone*, 30 Min 25; *Andrews v. Planters' Bank*, Smed. & M. (Miss.) 192; 45 Am. D 300; *Langan v. Hewett*, 13 Smed. & (Miss.) 122; *Sylverstein v. Atkins*, 45 Miss. 81; *Bloom v. Helm*, 53 Mi 21; *Kidder v. Page*, 48 N. H. 38; *Livingston v. Roosevelt*, 4 Johns. (Y.) 251; 4 Am. Dec. 273; *Foot Sabin*, 19 Johns. (N. Y.) 154; *Schermerhorn v. Schermerhorn*, 1 Wen (N. Y.) 119; *Lavery v. Burr*, 1 Wen (N. Y.) 529; *Boyd v. Plumb*, 7 Wen (N. Y.) 309; *Mercein v. Andrus*, Wend. (N. Y.) 461; *Joyce v. Williams*, 14 Wend. (N. Y.) 141; *Wilson v. Williams*, 14 Wend. (N. Y.) 14 28 Am. Dec. 518; *Stall v. Catsk Bank*, 18 Wend. (N. Y.) 466; 15 Wen (N. Y.) 364; *Gansevoort v. William* 14 Wend. (N. Y.) 133; *Elliott v. Du ley*, 19 Barb. (N. Y.) 326; *Mechanic Bank v. Livingston*, 33 Barb. (N. Y.) 458; *Fielden v. Lahens*, 9 Bosw. (Y.) 436; 2 Abb. Dec. (N. Y.) 11; *Butler v. Stocking*, 8 N. Y. 40; *Chemung Canal Bank v. Bradner*, N. Y. 680; *Atlantic State Bank v. Savery*, 82 N. Y. 291; 18 Hun (N. Y.) 36; *Long v. Carter*, 3 Ired. (N. Car 238; *Smith v. Loring*, 2 Ohio 44; *Gano v. Samuel*, 14 Ohio 592; *Sutton v. Irwine*, 12 S. & R. (Pa.) 13; *Bell v. Faber*, 1 Grant's Cas. (Pa.) 31; *Bow*

is himself bound as though he had given his individual signature.¹ The substance and not the form of the transaction, however, is the controlling element, and though the firm name is apparently used as security, if it is in fact given for a debt of, or a loan to the firm, all the partners are bound.² And though it may appear to be an

man *v. Cecil Bank*, 3 Grant's Cas. (Pa.) 33; *McQuewans v. Hamlin*, 35 Pa. St. 517; *Kaiser v. Fendrick*, 98 Pa. St. 528; *Shaaber v. Bushong*, 105 Pa. St. 514; *Berryhill v. McKee*, 1 Humph. (Tenn.) 31; *Whaley v. Moody*, 2 Humph. (Tenn.) 495; *Bank of Tenn. v. Safferrans*, 3 Humph. (Tenn.) 597; *Scott v. Bandy*, 2 Head (Tenn.) 197; *Pooley v. Whitmore*, 10 Heisk. (Tenn.) 629; 27 Am. Rep. 733; *Green v. Burton*, 59 Vt. 423; *Huntington v. Lyman* 1 D. Chip. (Vt.) 438; 12 Am. Dec. 716; *Jones v. Booth*, 10 Vt. 268; *Tompkins v. Woodward*, 5 W. Va. 216; *Avery v. Rowell*, 59 Wis. 82; *Harris v. McLeod*, 14 Up. Can., Q. B. 164; *Henderson v. Carveth*, 16 Up. Can., Q. B. 324; *Macklin v. Kerr*, 28 Up. Can., C. P. 90; *McConnell v. Wilkins*, 13 Ont. App. 438; *Stewart v. Parker*, 18 New Brunswick 223; *Crawford v. Stirling*, 4 Esp. 207; *Duncan v. Lowndes*, 3 Camp. 478; *Brettel v. Williams*, 4 Ex. 623; *Hasleham v. Young*, 5 Q. B. 833; *In re Irving*, 17 Bankr. Reg. 22.

If on the face of the paper it appears that the firm purports to execute it, not as a principal, but as a mere surety or guarantor for some other person, the party taking the paper has actual notice of the fact that it is not signed in the ordinary course of the partnership business, and he must at his peril ascertain that there was a special authority given the partner to use the firm name as such guarantor, or that the paper was in fact given in the course of the partnership business. *Marsh v. Thompson Nat. Bank*, 2 Ill. App. 217.

As one partner cannot make an accommodation note where the firm is surety, he cannot renew one or extend the time of payment. *Milmine v. Bass*, 29 Fed. Rep. 632; *Tilford v. Ramsey*, 37 Mo. 563.

The right of a partner to sign the firm name to a contract of indemnity in favor of third persons, must be strictly proved, but not necessarily by a written authority to him. *Moran v. Prather*, 23 Wall. (U. S.) 492.

The burden of proof is on a party

taking a guaranty purporting to be made by a partnership, to show that the partner who signed the firm name was authorized so to do, or that his act was subsequently ratified. *Sweetser v. French*, 2 Cush. (Mass.) 309; 48 Am. Dec. 666.

That one partner was authorized to subscribe the firm name as accommodation sureties for a third person may be proved by circumstances. *Butler v. Stocking*, 8 N. Y. 408.

1. *Myatts v. Bell*, 41 Ala. 222; *First Nat. Bank v. Carpenter*, 34 Iowa 433; *Silvers v. Foster*, 9 Kan. 56; *Wiggin v. Lewis*, 12 Cush. (Mass.) 486; *Fowle v. Harrington*, 1 Cush. (Mass.) 146; *Brown v. Broach*, 52 Miss. 536; *Ferguson v. Thacher*, 79 Mo. 511; *Hubbard v. Matthews*, 54 N. Y. 43; 13 Am. Rep. 562; *Stiles v. Myer*, 64 Barb. (N. Y.) 77; *Parker v. Jackson*, 16 Barb. (N. Y.) 33; *Merchant v. Belding*, 49 How. Pr. (N. Y.) 344; *Avery v. Rowell*, 59 Wis. 82; *Wilson v. Brown*, 6 Ont. App. 411; *Eliot v. Davis*, 2 B. & P. 338; *Nichols v. Diamond*, 9 Ex. 154; *Ramsbottom v. Lewis*, 1 Camp 279; *Owen v. Van Uster*, 20 L. J. C. P. 61.

One partner signed the firm name to a guaranty in the following form: "If you rent your house to H, I will be responsible for the rent of the same as long as H remains in our employ." *Held*, that, by the terms of the guaranty, that partner alone, and not the firm, was bound. *Avery v. Rowell*, 59 Wis. 82.

2. *Langan v. Hewett*, 13 Smed. & M. (Miss.) 122; *Saltmarsh v. Bower*, 22 Ala. 221; *Davis v. Blackwell*, 5 Ill. App. 32; *Faler v. Jordan*, 44 Miss. 283; *Bank of Commonwealth v. Mudgett*, 44 N. Y. 514; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529; *Day v. McLeod*, 18 Up. Can., Q. B. 256; *Wilson v. Richards*, 28 Minn. 337; *Trullinger v. Corcoran*, 81½ Pa. St. 395.

Where notes have been exchanged for the purpose of raising money, and a new note is used to take up the old one upon which the firm's name appears as an indorser, partners will be liable upon the new note. *Steuben Co. Bank v. Alberger*, 101 N. Y. 202.

accommodation signature, if given in the *bona fide* exercise of the borrowing power, the transaction will be sustained.¹ So, on the other hand, a person who signs as surety for the firm upon the request of a partner, is a creditor of the firm, though such partner misappropriates the note or its proceeds.² The principle upon which a partner is prohibited from using the firm name on commercial paper as security for the debts of others, applies to prohibit such use of the firm name as security in other ways.³

The signature or indorsement of the name of a firm upon a bill or note is presumed to constitute a joint obligation incurred in good faith and in the regular course of business, the burden of proof resting with the partners to establish the contrary;⁴ but up-

And one member of a firm may order the contents of a negotiable note payable to the firm to be paid to himself without the knowledge or consent of the other members and may maintain an action thereon in his own name. *Burnham v. Whittier*, 5 N. H. 334.

One partner in selling the firm's notes may guarantee their payment. *Day v. McLeod*, 18 Up. Can., Q. B. 236.

1. See *Gano v. Samuel*, 14 Ohio 592; *Wilson v. Richards*, 28 Minn. 337. And see *infra*, this title, *Power to Borrow Money*.

2. *Dietz v. Rignier*, 27 Kan. 94; *Stockwell v. Dillingham*, 50 Me. 442. *Littell v. Fitch*, 11 Mich. 525; *Wilkins v. Pearce*, 5 Den. (N. Y.) 541; *St. Albans v. Gilliland*, 23 Wend. (N. Y.) 311; 35 Am. Dec. 566; *Wharton v. Woodburne*, 4 Dev. & B. (N. Car.) 507; *Purviance v. Sutherland*, 2 Ohio St. 478; *Capelle v. Hall*, 12 Nat. Bankr. Reg. 1; *National Exchange Bank v. White*, 30 Fed. Rep. 412. And see *infra*, this title, *Power to Borrow Money*.

3. See *Charman v. McLane*, 1 Oregon 339; *White v. Davidson*, 8 Md. 169; *Marsh v. Gould*, 2 Pick. (Mass.) 285; *Hasleham v. Young*, 5 Q. B. 833.

But where property attached at the suit of a partnership, is claimed by a third person, and, in order to retain it, one of the partners executes in his own name a bond of indemnity to the sheriff, the other partner is liable to exonerate the surety on such bond. *Donegan v. Moran*, 53 Hun (N. Y.) 21. And see *Tessier v. Crowley*, 17 Neb. 207.

Where a firm is prosecuting or defending a suit on its own behalf, one partner may give necessary attachment or appeal bonds, in the firm

name, or procure sureties upon the credit of the firm. *Dow v. Smith*, 8 Ga. 551; *Durant v. Rogers*, 87 Ill. 508. And it has been held that where one firm is a member of another firm, one partner can bind it by guaranty of a debt to be incurred by the latter in the prosecution of its business. See *Hodges v. Ninth Nat. Bank*, 54 Md. 406; *Princeton etc. Turnpike Co. v. Gulick*, 16 N. J. L. 161.

4. *Jones v. Rives*, 3 Ala. 11; *Knapp v. McBride*, 7 Ala. 19; *Jemison v. Dearing*, 4 Ala. 283; *Miller v. Hines*, 15 Ga. 197; *Ensiminger v. Marvin*, 5 Blackf. (Ind.) 210; *Gregg v. Fisher*, 3 Ill. App. 261; *McMullan v. Mackenzie*, 2 Greene (Iowa) 368; *Deitz v. Reginier*, 27 Kan. 94; *Lindh v. Crowley*, 29 Kan. 756; *Rochester v. Trotter*, 1 A. K. Marsh. (Ky.) 54; *McGowan v. Bank of Kentucky*, 5 Litt. (Ky.) 271; *Magill v. Merrie*, 5 B. Mon. (Ky.) 168; *Hamilton v. Summers*, 12 B. Mon. (Ky.) 11; 54 Am. Dec. 509; *Walworth v. Henderson*, 9 La. Ann. 339; *Waldo Bank v. Greely*, 16 Me. 419; *Barrett v. Swann*, 17 Me. 180; *Davenport v. Davis*, 22 Me. 24; *Thurston v. Lloyd*, 4 Md. 283; *Manning v. Hays*, 6 Md. 5; *Porter v. White*, 39 Md. 613; *Manufacturers' etc. Bank v. Winship*, 5 Pick. (Mass.) 11; *Littell v. Fitch*, 11 Mich. 525; *Carrier v. Cameron*, 31 Mich. 373; 18 Am. Rep. 192; *Robinson v. Aldridge*, 34 Miss. 352; *Faler v. Jordan*, 44 Miss. 283; *Slyverstein v. Atkinson*, 45 Miss. 81; *Feurt v. Brown*, 23 Mo. App. 332; *Hickman v. Kunkle*, 27 Mo. 40; *Davis v. Cook*, 14 Nev. 265; *Schwank v. Davis*, 25 Neb. 196; *Drake v. Elwyn*, 1 Cai. (N. Y.) 184; *Doty v. Bates*, 11 Johns. (N. Y.) 544; *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Whitaker v. Brown*, 16 Wend. (N. Y.) 505; *Farmers' etc. Bank v. Butchers' etc.*

on the establishment of the fact that the obligation was given by the signing partner to pay an individual debt, or to obtain a loan for himself, or as an accommodation or security for others, or for a purpose outside of the scope of the business, or for other unauthorized or illegal purposes, the burden is shifted, and it then rests with the holder to establish that the partners either authorized or subsequently ratified its issue.¹

Bank, 16 N. Y. 125; First Nat. Bank v. Morgan, 73 N. Y. 593; National Union Bank v. Landon, 66 Barb. (N. Y.) 189; Cotton v. Evans, 1 Dev. & B. Eq. (N. Car.) 284; Chaffin v. Chaffin, 2 Dev. & B. Eq. (N. Car.) 255; Foster v. Andrews, 2 P. & W. (Pa.) 160; Hogg v. Orgill, 34 Pa. St. 344; McKinney v. Bradbury, Dall. (Tex.) 441; Crozier v. Kirker, 4 Tex. 252; 51 Am. Dec. 724; Powell v. Messer, 18 Tex. 401; Le Roy v. Johnson, 2 Pet. (U. S.) 186; Glasgow Bank v. Murdock, 11 Up. Can. C. P. 138; Stewart v. Parker, 18 N. B. 223.

This presumption is not destroyed by the fact that the bill drawn in the firm name was made payable to one partner and discounted by him and the proceeds of the discount paid to him. *Haldeman v. Bank of Middletown*, 28 Pa. St. 430.

The liability of partners upon paper given by one partner in the firm is derived from their consent expressed or implied. In general, such consent is implied from the business of the firm and the custom of merchants. If the paper is not given in the partnership business and this fact appears, the consent of the other partners must be proved affirmatively. 1 *Randolph on Commercial Paper*, citing *Mercein v. Andrus*, 10 Wend. (N. Y.) 461; *Waller v. Keyes*, 6 Vt. 257.

1. *Rolston v. Click*, 1 Stew. (Ala.) 526; *Maudlin v. Branch Bank*, 2 Ala. 502; *Hibbler v. De Forest*, 6 Ala. 92; *Scott v. Dansby*, 12 Ala. 714; *Tyree v. Lyon*, 67 Ala. 1; *Guice v. Thornton*, 76 Ala. 466; *Hendrie v. Berkowitz*, 37 Cal. 113; *New York Firemen's Ins. Co. v. Bennett*, 5 Conn. 574; 13 Am. Dec. 109; *Miller v. Hines*, 15 Ga. 197; *Bryan v. Tooke*, 60 Ga. 437; *Lucas v. Baldwin*, 97 Ind. 471; *Chenoweth v. Chamberlain*, 6 B. Mon. (Ky.) 60; *Mechanics' etc. Ins. Co. v. Richardson*, 33 La. Ann. 308; 139 Am. Rep. 290; *Mutual Nat. Bank v. Richardson*, 33 La. Ann. 1312; *Darling v. March*, 22 Me. 184; *Chazournes v. Edwards*, 3 Pick. (Mass.) 5; *Eastman v. Cooper*,

15 Pick. (Mass.) 276; 25 Am. Dec. 600; *Heffron v. Hanaford*, 40 Mich. 305; *Selden v. Bank of Commerce*, 3 Minn. 166; *Osborne v. Stone*, 30 Minn. 25; *Robinson v. Aldridge*, 34 Miss. 562; *Deardorf v. Thacher*, 78 Mo. 128; 47 Am. Rep. 95; *Davenport v. Runlett*, 3 N. H. 396; *Mecutchen v. Kennaday*, 27 N. J. L. 230; *Livingston v. Hastie*, 2 Cal. (N. Y.) 246; *Dob v. Halsey*, 16 Johns. (N. Y.) 34; 8 Am. Dec. 293; *Foot v. Sabin*, 19 Johns. (N. Y.) 154; 10 Am. Dec. 208; *Schermerhorn v. Schermerhorn*, 1 Wend. (N. Y.) 119; *Laverty v. Burr*, 1 Wend. (N. Y.) 529; *Williams v. Walbridge*, 3 Wend. (N. Y.) 415; *Boyd v. Plumb*, 7 Wend. (N. Y.) 309; *Gansevoort v. Williams*, 14 Wend. (N. Y.) 133; *Wilson v. Williams*, 14 Wend. (N. Y.) 146; 28 Am. Dec. 518; *Butler v. Stocking*, 8 N. Y. 408; *Rust v. Hauselt*, 41 N. Y. Super. Ct. 467; *St. Nicholas Bank v. Savery*, 13 Jones & Sp. (N. Y.) 97; *Weed v. Richardson*, 2 Dev. & B. (N. Car.) 535; *Himelright v. Johnson*, 40 Ohio St. 40; *Porter v. Gunnison*, 2 Grant's Cas. (Pa.) 297; *Bowman v. Cecil Bank*, 3 Grant's Cas. (Pa.) 33; *Bank of Tennessee v. Saffarrans*, 3 Humph. (Tenn.) 597; *Powell v. Messer*, 18 Tex. 401; *Goode v. McCartney*, 10 Tex. 193; *Tore v. Hittson*, 70 Tex. 517; *Young v. Read*, 25 Tex. Supp. 113; *Huntington v. Lyman*, 1 D. Chip. (Vt.) 438; 12 Am. Dec. 716; *Waller v. Keyes*, 6 Vt. 257; *Tompkins v. Woodyard*, 5 W. Va. 216; *Royal Canadian Bank v. Wilson*, 24 Up. Can. C. P. 362; *Leverson v. Lane*, 13 C. B., N. S. 278; *Re Riches*, 5 N. R. 287. But see *Williams v. Walbridge*, 3 Wend. (N. Y.) 415; *Henderson v. Carvith*, 16 Up. Can., Q. B. 324. And the contrary was held in *Chazournes v. Edwards*, 3 Pick. (Mass.) 5; *Fuller v. Scott*, 8 Kan. 25; *First Nat. Bank v. Carpenter*, 34 Iowa 433; *Flemming v. Prescott*, 3 Rich. (S. Car.) 307; 45 Am. Dec. 766; *Ridley v. Taylor*, 13 East 175.

Even proof of a habit of giving accommodation indorsements will not be evidence of the firm's assent to an ac-

(2) *Non-Trading Partnerships*.—While the rules applicable to negotiable paper of a non-trading partnership made by one partner, so far as they are permitted to make such paper, are the same as those applicable to the commercial paper of a trading firm, the general rule is that the partners in such a firm have no implied power thus to bind the partnership.¹ Thus a partner in a farming partnership has no power to bind the firm with a note,² and partners engaged in the practice of law or of medicine have no such power.³ Notes made by a member of such partnerships in the name of the firm have, however, in a number of instances, been held to be valid and binding, the test question appearing to be whether or not the paper is essential to carry into effect an ordinary purpose for which the partnership was formed,⁴ the burden

commodation note given by one partner. *Early v. Reed*, 6 Hill (N. Y.) 12.

In an action by a firm, as indorsee of a note void between the original parties, where only two members of the firm had any part in the purchase, or knew anything about it, the presumption is that the rest of the firm were ignorant of the consideration. *Ward v. Doane*, 77 Mich. 328.

If the firm has given its assent to the execution of partnership paper in payment of an individual debt of one partner, this consent is revocable until actually used and the paper delivered. *National Bank v. Mapes*, 85 Ill. 67.

1. See *Ulery v. Ginrich*, 57 Ill. 531; *Hunt v. Chapin*, 6 Lans. (N. Y.) 139; *Smith v. Sloan*, 37 Wis. 285; *Prince v. Crawford*, 50 Miss. 344; *McCrary v. Slaughter*, 58 Ala. 230; *Benton v. Roberts*, 4 La. Ann. 216; *Hermanos v. DuVigneaud*, 10 La. Ann. 114; *McCord v. Field*, 27 Up. Can., C. P. 391. And see *Greenslade v. Dower*, 7 B. & C. 635.

A firm in the dry goods business also carrying on a plantation is, as to the latter branch of its business, a non-trading firm, and a note given to carry on the plantation is presumptively unauthorized. *Hunt v. Chapin*, 6 Lans. (N. Y.) 139.

One partner cannot alter the note of a non-trading firm. *Horn v. Newton City Bank*, 32 Kan. 518.

The power of one partner to bind another does not extend to making negotiable paper in relation to property held by them as tenants in common. *Lime Rock etc. Ins. Co. v. Treat*, 58 Me. 415.

The fact that a note is signed by a firm will not make the partners sever-

ally liable on a judgment rendered on such note which does not show that the firm were commercial partners, as by Rev. Civil Code *Louisiana*, § 2872, ordinary partners are bound jointly and not severally, and solidarity is never presumed. *Bank of Commerce v. Mayer*, 42 La. Ann. 8 So. 260.

2. *Ulery v. Ginrich*, 57 Ill. 531; *Benton v. Roberts*, 4 La. Ann. 216; *Prince v. Crawford*, 50 Miss. 344; *Hunt v. Chapin*, 6 Lans. (N. Y.) 139; *Greenslade v. Dower*, 7 B. & C. 635.

3. See *Friend v. Duryee*, 17 Fla. 111; 35 Am. Rep. 89; *Crosthwait v. Ross*, 1 Humph. (Tenn.) 23; 34 Am. Dec. 613; *Smith v. Sloan*, 37 Wis. 285; 19 Am. Rep. 756; *Hedley v. Bainbridge*, 3 Q. B. 315; *Harmon v. Johnson*, 2 E. & B. 61.

The same rule has been applied to other like partnerships. See as to tavern keepers, *Cocke v. Branch Bank*, 3 Ala. 175; partnership in a patent, *Hermanos v. DuVigneaud*, 10 La. Ann. 114; to deal in lands, *Corgill v. Corby*, 15 Mo. 425; insurance, real estate and collection, *Deardorf v. Thatcher*, 78 Mo. 128; 47 Am. Rep. 95; to conduct a theater, *Pease v. Cole*, 53 Conn. 53; 55 Am. Rep. 53; quarry workers, *Thicknesse v. Bromilow*, 3 Cr. & J. 635; to operate a furnace, *Weller v. Keyes*, 6 Vt. 257.

4. See *Johnston v. Dutton*, 27 Ala. 245; *Gavin v. Walker*, 14 Lea (Tenn.) 643; *Miller v. Hines*, 15 Ga. 197; *Newell v. Smith*, 23 Ga. 170; *Pease v. Cole*, 53 Conn. 53; 55 Am. Rep. 53; *Crosthwait v. Ross*, 1 Humph. (Tenn.) 23; 34 Am. Dec. 613; *Hickman v. Kunkle*, 27 Mo. 401; *Levi v. Latham*, 15 Neb. 509; 48 Am. Rep. 361; *Voorhees v. Jones*, 29 N. J. L. 270; *Brayley v. Hedges*, 52 Iowa 623; *Van Brunt v.*

of proof to establish such fact resting with the party claiming to hold the firm.¹ So, it rests with the holder to show that a note was given with the authority of the other partners.² And where a member of a non-trading firm concurs in or authorizes the drawing or making of a bill or note, he impliedly authorizes its indorsement in the same name for the purposes for which it was drawn.³

(3) *Negotiable Paper in the Name of a Partner*.—Negotiable paper made in the name of one partner, when his name is not also that of the firm, is not, as a general rule, binding upon the partnership.⁴

Mather, 48 Iowa 503; Doty v. Bates, 11 Johns. (Me.) 544; Tanier v. McCabe, 2 Fla. 32; 48 Am. Dec. 173. See also, *infra*, this title, *Distinction Between Trading and Non-trading Firms*.

A non-trading firm cannot borrow upon a note made by one partner to pay a debt. Bays v. Conner, 105 Ind. 415; Smith v. Sloan, 37 Wis. 285; 19 Am. Rep. 757; Deardorf v. Thacher, 78 Mo. 128; 47 Am. Rep. 95; Breckenridge v. Shieve, 4 Dana (Ky.) 375; Benton v. Roberts, 4 La. Ann. 217; Ulery v. Ginrich, 57 Ill. 531.

A member of a non-trading partnership, who has been authorized to borrow money for the use of the firm, may give a firm note therefor, but he cannot bind the firm by stipulating to pay 10 per cent. attorney's fees for collection, in the absence of evidence of custom. The borrowed money, with interest can be recovered, however—the unauthorized provision for attorney's fees does not invalidate the whole instrument. Webb v. Allington, 27 Mo. App. 559.

Where T agrees to convey lands to E and S payable in their notes, a tender of notes signed by E in the firm name is a good tender. Smith v. Jones, 12 Me. 332.

Either partner in a non-trading partnership may draw a sight check on the firm's deposit or a draft on a debtor of the firm. Bates' L. Partnership, § 343.

In Davis v. Cook, 14 Nev. 265, the court expressed the opinion that a power to purchase involves the power to give notes in payment. See also Brooke v. Washington, 8 Gratt. (Va.) 248; 56 Am. Dec. 142.

But in Sherman v. Kreul, 42 Wis. 33, it was held, that a power in a non-trading firm to buy on credit does not involve the power to bind the firm, by

a negotiable note made by one partner. See also Bradley v. Linn, 19 Ill. App. 322; Skillman v. Lachman, 23 Cal. 199.

In Deardorf v. Thacher, 78 Mo. 128; 47 Am. Rep. 95, it was held, that if the holder could show that the consideration of the note was articles or labor, necessary in the business of the firm, the firm would be bound.

1. Pooley v. Whettmore, 10 Heisk. (Tenn.) 629; 27 Am. Rep. 733; Judge v. Braswell, 13 Bush (Ky.) 67; 26 Am. Rep. 185. And see *infra*, this title, *Distinction Between Trading and Non-trading Firms*.

An express authority given to a partner to indorse notes received, in order to turn them into money, does not authorize a partner to bind the firm by an accommodation indorsement outside the scope of the business. Hotchkiss v. English, 4 Hun (N. Y.) 369.

2. Smith v. Sloan, 37 Wis. 285. And see Lanier v. McCabe, 2 Fla. 32; 48 Am. Dec. 173.

3. Lindley on Part., § 267, citing Garland v. Jacomb, 8 Ex. 216; Lewis v. Reilly, 1 Q. B. 349.

4. Ripley v. Kingsbury, 1 Day (Conn.) 150, note a; Strauss v. Waldo, 25 Ga. 641; Macklin v. Crutcher, 6 Bush (Ky.) 401; Ostrom v. Jacobs, 9 Met. (Mass.) 454; Farmers' Bank v. Bayless, 35 Mo. 428; Dryer v. Sander, 48 Mo. 400; Coster v. Clarke, 3 Edw. Ch. (N. Y.) 411; Allen v. Coit, 6 Hill (N. Y.) 318; Uhler v. Browning, 28 N. J. L., 79; Graeff v. Hitchman, 5 Watts (Pa.) 454; Siegel v. Chidsey, 28 Pa. St. 279; National Bank v. Thomas, 47 N. Y. 15; Holmes v. Burton, 9 Vt. 252; 31 Am. Dec. 621; Cunningham v. Smithson, 12 Leigh (Va.) 32; Le Roy v. Johnson, 2 Pet. (U. S.) 186; Coote v. Bank of U. S., 3 Cranch (C. C.) 95; *In re Herrick*, 13 Bankr. Reg.

though the contrary has been held to some extent.¹ An acceptance by one partner in his own name, of a draft drawn upon the firm, in the absence of statutes requiring an acceptance to be in writing, however, will bind the firm;² though the accepting partner may be sued separately if his acceptance was unauthorized and not binding.³ An acceptance by a partner in the firm name, adding his own name also, creates no individual liabil-

312; *Goldie v. Maxwell*, 1 Up. Can. Q. B. 424; *Siffkin v. Walker*, 2 Camp. 308; *Emly v. Lye*, 15 East 7; *Lloyd v. Ashby*, 2 C. & P. 138; *Ex parte Bolitho*, Buck 100; *Bevan v. Lewis*, 1 Sim. 376; *Driver v. Burton*, 17 Q. B. 989; *Nicholson v. Ricketts*, 2 E. & E. 497; *Williams v. Thomas*, 6 Esp. 18; *Murray v. Somerville*, 2 Camp. 99; *Bottomley v. Nuttall*, 5 C. B., N. S. 122; *Miles' Claim, L. R.*, 9 Ch. 635. *Mason v. Rumsey*, 1 Camp. 384. And see *Mechanics' etc. Bank v. Dakin*, 24 Wend. (N. Y.) 411.

Whether a personal check for a loan is such a payment as to take away recourse to the firm or not, is a question of intention or agreement to be left to the jury. *Smith v. Collins*, 115 Mass. 388.

Where one partner has not consented to the issue of notes by the other in his name alone, and the payee knows that the firm name is not that of such partner, but takes a note in his name, the maker's declarations at the time of making it cannot be given to show a loan to the firm. *Ostrom v. Jacobs*, 9 Met. (Mass.) 454. *Coote v. Bank of U. S., Cranch (C. C.)* 95; *Uhler v. Browning*, 28 N. J. L. 79.

This rule does not apply to non-negotiable paper, as weighers' tickets or receipts in the name of one partner. See *Smith v. Smyth*, 42 Iowa 493; *Reeves v. Hardy*, 7 Mo. 348; *Brown v. Lawrence*, 5 Conn. 397; *Hersom v. Henderson* 23 N. H. 498.

A firm is liable upon a bill drawn by its authority and on its account in the name of one partner only. *Van Reimsdyk v. Kane*, 1 Gall. (U. S.) 630; *Farmers' Bank v. Bayless*, 41 Mo. 274. And see *Morse v. Richmond*, 97 Ill. 303; *Beebe v. Rogers*, 3 Greene (Iowa) 319.

1. See *Seckell v. Fletcher*, 53 Iowa 330; *Paine v. Dwinel*, 53 Me. 52; *Tucker v. Peaslee*, 36 N. H. 167; *Hill v. Voorhies*, 22 Pa. St. 68; *Puckett v. Stokes*, 2 Baxt. (Tenn.) 442; *Foster v. Hal*, 4 Humph. (Tenn.) 346; *Sessums*

v. Henry, 38 Tex. 37; *Burnley v. Rice*, 18 Tex. 481.

Plaintiff gave money to a banking firm, of which W was a member, to loan. W took the money, and used it in the business of defendant's firm, of which he was also a member, and placed in the private package of plaintiff in said bank the note sued on, executed by him for said money in the name of defendant's firm. Held, that defendant was estopped to deny the validity of the transaction. *Wiley v. Stewart*, 23 Ill. App. 236; affirmed 122 Ill. 545.

2. *May v. Hewitt*, 33 Ala. 161; *Dougal v. Cowles*, 5 Day (Conn.) 511; *Pannell v. Phillips*, 55 Ga. 618; *Beach v. State Bank*, 2 Ind. 488; *Cunningham v. Smithson*, 12 Leigh (Va.) 32; *Tolman v. Hanrahan*, 44 Wis. 133.

But the contrary is held where the acceptance is required to be in writing. *Hallman v. Nash*, 8 Minn. 407; *Hovey v. Cassels*, 30 Up. Can., C. P., 230; *Re Adanson & Co., L. R.*, 9 Ch App. 635; *Tabor v. Cannon*, 8 Met. (Mass.) 456.

Where partnership did business in Rochester in the name of John Allen, and in Albany by the name of William Monteath, and the former drew a bill upon the latter, who accepted it, it was held to be a bill upon themselves on which both could be held as drawers or indorsers as well as for money lent. *Bank of Rochester v. Monteath*, 1 Den. (N. Y.) 402; 49 Am. Dec. 681. And see *Wright v. Hooker*, 10 N. Y. 51.

In *Markham v. Hazem*, 48 Ga. 570, a bill was drawn upon a firm in the name of the Republican Association which was its correct name. Its business was the publication of a newspaper called the "Opinion." One partner accepted the bill by writing upon it, "accepted for the Opinion Newspaper," with his initials. This was held a sufficient acceptance on the ground that it sufficiently identified the firm.

3. *Owen v. Van Uster*, 10 C. B. 318.

ity,¹ and where a bill is drawn by a partner in his own name upon his firm and for its use, the drawing is, in legal contemplation, an acceptance by the firm, rendering it liable on the bill.² A bill drawn upon a partner and accepted by him in the name of the firm, will not bind his co-partners.³

Individual paper of one partner taken when the obligation was incurred by the partnership or upon its credit will be regarded as merely collateral, and the other partners will be held liable upon the original consideration,⁴ and in case of the renewal of a firm debt on the individual note of a single partner, the firm continues liable on the original indebtedness.⁵

1. *Re Barnard*, 32 Ch. D. 447; *Malcolmson v. Malcolmson*, 1 Irish L. R., Ch. D. 228.

A bill drawn upon a firm in an incorrect name but accepted in the correct name, is binding upon the firm. See *Lloyd v. Ashby*, 2 B. & A. 23; *Faith v. Richmond*, 11 A. & E. 339.

2. *Dougal v. Cowles*, 5 Day (Conn.) 511; *Beach v. State Bank*, 2 Ind. 488; *McKinney v. Bradbury*, Dall. (Tex.) 441. And see *Denton v. Rodie*, 3 Camp. 493; *Addison v. Burckmyer*, 4 Sandf. Ch. (N. Y.) 498.

One partner may bind his firm by indorsing in the firm name a bill drawn in a fictitious name. *Randolph on Com. Paper*, § 400, citing *Byles* 45; 1 *Parsons* 130; *Thicknesse v. Bromilow*, 2 C. & J. 425.

3. *Mare v. Charles*, 5 E. & B. 978; *Nicholls v. Diamond*, 9 Ex. 154.

The acceptance of a draft of a third person on one partner "on account of" the firm and accepted by him in his own name, is his personal acceptance only, though the firm may be liable for the amount. *Cunningham v. Smithson*, 12 Leigh (Va.) 32.

But an order drawn on the general partner as such and accepted in the name of the firm, the firm consisting of a general and a special partner, is an order on the firm. *Carney v. Hotchkiss*, 48 Mich. 276.

4. *Macklin v. Crutcher*, 6 Bush (Ky.) 401; *Burns v. Parish*, 3 B. Mon. (Ky.) 8; *Martin v. Muncy*, 40 La. Ann. 190; *Smith v. Collins*, 115 Mass. 388; *Dryer v. Sander*, 48 Mo. 400; *Allen v. Coit*, 6 Hill (N. Y.) 318; *Duval v. Wood*, 3 Lans. (N. Y.) 489; *Uhler v. Browning*, 28 N. J. L. 79; *Maffet v. Leuckel*, 93 Pa. St. 468; *Graeff v. Hitchman*, 5 Watts (Pa.) 454; *Sorg v. Thornton*, 1 Cin. Sup. Ct. Rep. (Ohio) 383; *Weaver v. Tapscott*, 9

Leigh (Va.) 424; *Cunningham v. Smithson*, 12 Leigh (Va.) 32; *Hoeflinger v. Wills*, 47 Wis. 628; *Ex parte Brown*, 1 Atk. 225; *Denton v. Robie*, 3 Camp. 493; *Skiffin v. Walker*, 2 Camp. 308. And see *Beebe v. Rogers*, 3 Greene (Iowa) 319; *Emly v. Lye*, 15 East 7; *Melsheimer v. Hommel* (Colo. 1891), 24 Pac. Rep. 1079.

Where a complaint averred in substance that B, as a partner in the then existing firm of A & B, borrowed from plaintiff, for and on account of and for the use of said firm, a certain sum, which loan was evidenced by a note for the amount, signed by B, dated on the same day; and that the money so loaned was expended for the firm, it was held, that under these averments, plaintiff might show that the money was loaned by him to and upon the credit of the firm; and that there was no admission that the note was taken in payment. *Hoeflinger v. Wells*, 47 Wis. 628.

A partnership was accustomed to raise funds on notes of one partner indorsed by the other. The proceeds went to the firm, and were entered directly in the cash-book, and not as in account with any person. The notes and renewals were entered in the firm books, and the interest on the renewals was paid by the firm. The notes were made in the individual form, with the full knowledge and consent of both partners. *Held*, that the making and indorsing were partnership acts, and the firm being dissolved by death of one of the partners, and the other being insolvent, the holders could prove as partnership creditors. *Cowell v. Weybosset Nat. Bank*, 16 R. I. 288.

5. See *McKee v. Hamilton*, 33 Ohio St. 7; *Horsley v. Heath*, 5 Ohio 353.

Where the separate note of one

Commercial paper in the name of one partner is presumptively his obligation only, even though the firm does business under his name;¹ though if a partner carries on no other business, his signature to a note will be deemed to be the signature of the firm.² Evidence that the signing partner declared the transaction to be for a partnership purpose, or otherwise led the creditor to believe that he was trusting the firm, however, will establish a partnership liability.³ And the indorsement of paper belonging to the firm, by a partner whose name is the name of the firm, is binding upon

partner is taken by a creditor holding the note of the firm, it is a question of intention whether this amounts to an extinguishment of the joint debt. The onus of showing that it is an extinguishment lies upon those who allege it; and it is not necessary for them to show a specific contract to that effect, or that the joint note was given up; and even where that is the case, the presumption may be rebutted by countervailing proof. *Davies' Estate*, 5 Whart. (Pa.) 530.

Where a firm can be sued upon the original consideration in case of the invalidity of the note, damages upon the protested paper cannot be included in the recovery. *Hermanos v. Duvigneaud*, 10 La. Ann. 114.

1. *Strauss v. Waldo*, 25 Ga. 641; *Buckner v. Lee*, 8 Ga. 285; *Mercantile Bank v. Cox*, 38 Me. 500; *Manufacturers' etc. Bank v. Winship*, 5 Pick. (Mass.) 11; 16 Am. Dec. 369; *Etheridge v. Binney*, 9 Pick. (Mass.) 272; *Gernon v. Hoyt*, 90 N. Y. 631; *Bank of Rochester v. Monteath*, 1 Den. (N. Y.) 402; 43 Am. Dec. 681; *Oliphant v. Mathews*, 16 Barb. (N. Y.) 608; *Williams v. Gillies*, 75 N. Y. 197; *National Bank v. Ingraham*, 58 Barb. (N. Y.) 290; *Puckett v. Stokes*, 2 Baxt. (Tenn.) 442; *U. S. Bank v. Binney*, 5 Mass. (U. S.) 176; *Ex parte Blith*, Buck 100; *Yorkshire Banking Co. v. Beatson*, 4 C. P. D. 204. But see to the contrary, *Mifflin v. Smith*, 17 S. & R. (Pa.) 165; *Jones v. Fegely*, 4 Phila. (Pa.) 1; *Burrough's Appeal*, 26 Pa. St. 264.

Where two firms were doing business under the same firm name, and both were composed of the same persons, except that in one there was a dormant partner who had no interest in the other, it was held that a note made in the given firm name by a common partner would be presumed to be the note of the firm with which the dormant partner was not con-

nected unless it be proved to have been taken upon credit of the other firm. *Fosdick v. Van Horn*, 40 Ohio St. 459. And see *In re Munn*, 3 Biss. (U. S.) 442.

2. *Bank of Rochester v. Monteath*, 1 Den. (N. Y.) 402; 43 Am. Dec. 681; *Yorkshire Banking Co. v. Beatson*, 4 C. P. D. 204. And see *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529; *Manufacturers' etc. Bank v. Winship*, 5 Pick. (Mass.) 11; 16 Am. Dec. 369.

Where the firm business is carried on in the name of one partner and a bill addressed to such name is accepted by the other partner in his own name, and the proceeds go to the partnership business, the firm will be bound by the acceptance. *Stephens v. Reynolds*, 5 H. & N. 513.

Where two firms have the same name and a bill of exchange is given by one who is a member of both firms, it has been held that the holder may elect which of the two firms he may look to for payment. *Baker v. Charlton*, Peake 80; *McNara v. Fleming*, Mont. 32; *Swan v. Steele*, 7 East 210.

Where a firm business has been carried on in the name of one partner, it has been held that indorsements in his name will only bind the firm where they were received as its indorsements upon a representation to that effect, and were made in the firm business. *U. S. Bank v. Binney*, 5 Mason (U. S.) 176.

3. See *Theilen v. Hann*, 27 Kan. 778; *Macclin v. Crutcher*, 6 Bush (Ky.) 401; *Moale v. Hollins*, 11 Gill & J. (Md.) 11; *Getchell v. Foster*, 106 Mass. 42; *Gernon v. Hoyt*, 90 N. Y. 631; *Crocker v. Colwell*, 46 N. Y. 212; *National Bank v. Ingraham*, 58 Barb. (N. Y.) 290; *Thorn v. Smith*, 21 Wend. (N. Y.) 364; *Gavin v. Walker*, 14 Lea (Tenn.) 643; *U. S. Bank v. Binney*, 5 Mason (U. S.) 196; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529; *Yorkshire*

his co-partners.¹ The same rules apply where the name of one co-partner is used with the express or implied authority of the others, though not adopted generally as the firm name.²

A note or other commercial paper signed by each member of a partnership is presumptively a personal and not a partnership obligation, whether it is in terms joint or joint and several,³ and while a mere intention that it shall be a firm debt is sufficient as between themselves, it is not enough as against firm creditors on distribution unless the consideration or use of the note had been ap-

Banking Co. v. Beatson, 4 C. P. D. 204; Stephens v. Reynolds, 5 H. & N. 513.

Where the manager of a bank signed certificates of deposit in his own name, omitting the designation "manager," with the intention of taking the money as a loan to himself, but the depositor intending it as a deposit and not noticing the omission, the partners were held liable on the certificate. Lemon v. Fox, 21 Kan. 152.

Where partners sometimes dealt in the name of one partner as a firm name, this may be left to the jury as evidence that it was adopted as the firm name in the transaction in question. LeRoy v. Johnson, 2 Pet. (U. S.) 186.

Where a firm kept its bank account in the name of one partner, that partner's name is the firm name for the purpose of drawing checks, and his checks on partnership account bind the firm. Crocker v. Colwell, 46 N. Y. 212.

If the partner borrows on his own account, however, mere representation that the name is to be used in the firm's business, is not sufficient to establish the firm's liability. The lender must have been led to understand that he was dealing with the firm. Ah Lep. v. Long-choy, 13 Oregon 205.

1. Mohawk Nat. Bank v. Van Slyck, 29 Hun (N. Y.) 188.

But a note given by the ostensible partner in whose name the firm is carried on, to his dormant partner, for the amount of capital the latter contributed, is the maker's individual note. *In re* Waite, 1 Low. (U. S.) 207.

2. See Morse v. Richmond, 97 Ill. 303; *In re* Warren, 1 Dav. (U. S.) 322; South Carolina Bank v. Case, 8 B. & C. 427; 2 Man. & Ry. 459; Seekell v. Fletcher, 53 Iowa 330; Folk v. Wilson, 21 Md. 538; Sprague v. Ainsworth, 40 Vt. 47.

If the partners assent to the use of

the name of one to designate the firm in certain transactions, he can bind the firm in his own name in such transactions, though there be a firm name. Palmer v. Stephens, 1 Den. (N. Y.) 471.

When insurance is taken in the name of one partner without disclosing the fact of partnership, it will cover the entire interest, and proofs of loss stating that such partner is the sole owner, are not false, as the property belongs to the firm of that name. Clement v. British American Ins. Co., 141 Mass. 298.

The same rule applies where one partner introduces a name without the concurrence of the rest, no name having been agreed upon. Holland v. Long, 57 Ga. 36.

3. De Jarnette v. McQueen, 31 Ala. 230; Freeman v. Campbell, 55 Cal. 197; Pahlman v. Taylor, 75 Ill. 629; Wellman v. Southard, 30 Me. 425; *Ex parte* Weston, 12 Met. (Mass.) 1; Harmon v. Clark, 13 Gray (Mass.) 114; Ensign v. Briggs, 6 Gray (Mass.) 329; Buffan v. Seaver, 16 N. H. 160; Turner v. Jaycox, 40 N. Y. 470; Berkshire Woolen Co. v. Juillard, 75 N. Y. 535; 31 Am. Rep. 488; Gandolfo v. Appleton, 40 N. Y. 533; Ellinger's Appeal, 114 Pa. St. 505. And see McKenna's Appeal, 11 Phila. (Pa.) 84; Dabney v. Stidger, 4 Smed. & M. (Miss.) 749; Fowkes v. Bowers, 11 Lea (Tenn.) 144; Walsh v. Moser, 38 Tex. 290; *In re* Roddin, 6 Biss. (U. S.) 377.

Separate notes given by each partner for his portion of a debt due from the firm, are not partnership liabilities. Emanuel v. Martin, 12 Ala. 233; but the debt itself remains a partnership debt. See Taylor v. Farmer (Ill. 1886), 4 N. E. Rep. 370; Gandolfo v. Appleton, 40 N. Y. 533.

A contract in the names of the individual partners though signed in the firm name, is a contract of the individual partners and not of the firm. Hilliker v. Francisco, 65 Mo. 598.

plied to partnership purposes.¹ If no firm name has been adopted,² or if that is their customary mode of executing partnership paper,³ a note thus signed will bind the firm; and the same rule applies to a signature by one, of the several names of the different partners.⁴ A note thus signed, if given for a partnership purpose, may, as a general rule, be considered either as the joint obligation of the firm or as the several obligation of the individual partners at the election of the holder,⁵ and where signed both with the firm name and with the names of the partners it may be dealt with as both a firm obligation and a personal one.⁶

1. *De Jarnette v. McQueen*, 31 Ala. 230; *Filley v. Phelps*, 18 Conn. 294; *Nelson v. Healey*, 62 Ind. 194; *Carson v. Byers*, 67 Iowa 606; *Spalding v. Wilson*, 80 Ky. 589; *Mitchell v. D'Armond*, 30 La. Ann., pt. 1, 396; *Trowbridge v. Cushman*, 24 Pick. (Mass.) 310; *Agawam Bank v. Morris*, 4 Cush. (Mass.) 99; *Berkshire Woolen Co. v. Juillard*, 75 N. Y. 535; 31 Am. Rep. 488; 13 Hun (N. Y.) 506; *Turner v. Jaycox*, 40 N. Y. 470; *In re Waldron*, 98 N. Y. 671; *Smith v. Felton*, 43 N. Y. 419; *Maynard v. Fellows*, 43 N. H. 255; *Gay v. Johnson*, 45 N. H. 587; *Clanton v. Price*, 90 N. Car. 96; *Richardson v. Huggins*, 23 N. H. 122; *McKee v. Hamilton*, 33 Ohio St. 7; *Frow's Estate*, 73 Pa. St. 459; *Crouch v. Bowman*, 3 Humph. (Tenn.) 209; *Kendrick v. Tarbell*, 27 Vt. 512; *Mix v. Shattuck*, 50 Vt. 421; *In re Warren*, 2 Ware (U. S.) 322; *In re Thomas*, 8 Biss. (U. S.) 139; 17 Bankr. Reg. 54; *Ex parte Stone*, 8 Ch. App. 914. And see *Ensign v. Briggs*, 6 Gray (Mass.) 329; *Crooker v. Crooker*, 52 Me. 267. But see to the contrary, *In re Holbrook*, 2 Low. (U. S.) 259; *Kendrick v. Tarbell*, 27 Vt. 512; *Maynard v. Fellows*, 43 N. H. 255.

The joint and several obligations of continuing partners given to a retiring one to pay the debts and indemnify him, is inferred from the nature of the transaction to be a partnership and not an individual obligation. *Frow's Estate*, 73 Pa. St. 459.

2. *Ex parte Nason*, 70 Me. 363; *Ex parte First Nat. Bank*, 70 Me. 369.

Three persons formed a partnership and bought out a livery stable giving their joint and several notes. These were held to be partnership debts *Filley v. Phelps*, 18 Conn. 294.

3. *McKee v. Hiamilton*, 33 Ohio St. 7.

4. *City Bank of New Haven's Appeal*, 54 Conn. 269; *Ex parte First Nat. Bank*, 70 Me. 369; *Thayer v. Smith*,

116 Mass. 363; *Booth v. Farmers' etc. Bank*, 74 N. Y. 228; *Smith v. Felton*, 43 N. Y. 419; *Crozier v. Kirker*, 4 Tex. 252; 51 Am. Dec. 724. And see *Ladd v. Griswold*, 9 Ill. 25; 46 Am. Dec. 443.

A partner may be bound by a note given in the firm business by his partner in their individual names, although he has issued a circular stating that the firm business would be carried on in another name. *Norton v. Seymour*, 3 C. B. 792.

Where a note was signed by two partners in their individual names and by sureties who were induced to sign by a representation that it was for the accommodation of the firm, and the proceeds having been used by the firm, the firm will not be discharged by a renewal afterwards by one partner with the same sureties. *McKee v. Hamilton*, 33 Ohio St. 7.

5. *In re Bucyrus Mach. Co.*, 5 Nat. Bankr. Reg. 303; *Ex parte First Nat. Bank*, 70 Me. 369; *Maynard v. Fellows*, 43 N. H. 255; *Page v. Carpenter*, 10 N. H. 77; *Drake v. Taylor*, 6 Blatchf. (U. S.) 14; *Ex parte Stone*, L. R., 8 Ch. App. 914. See *Agawam Bank v. Morris*, 4 Cush. (Mass.) 99.

Prosecuting an action against one partner alone is an election to consider the debt as that of the partners and not of the firm. *Page v. Carpenter*, 10 N. H. 77; *Gay v. Johnson*, 45 N. H. 587. And the rule is the same when the note is given for a partnership debt and is signed by one partner as principal and by the other as surety. *Pollard v. Stanton*, 5 Ala. 451.

6. See *Fowlkes v. Bowers*, 11 Lea (Tenn.) 144; *Union Nat. Bank v. Bank of Commerce*, 94 Ill. 271; *In re Adams*, 29 Fed. Rep. 843; *In re Bradley*, 2 Biss. (U. S.) 515; *Re Farnum*, 6 L. R. 21; *Ex parte Harding*, 12 Ch. D. 557.

In Donley v. Bank, 40 Ohio St. 47, it was held where a note is signed in

Commercial paper signed with the names of all the partners given for a purpose not connected with or outside of the scope of the partnership business, however, will be treated as the separate debts of the individual partners.¹

(4) *To Draw Checks on the Firm's Deposit.*—One partner has implied power to bind the firm by checks, not post dated, drawn in the partnership name upon the bankers of the partnership,² and if the moneys are deposited in the name of one partner, the other partners will have the right to change the deposit during the lifetime of the depositing partner, placing it in the name of the firm.³ If the bank pays the firm moneys to one partner in fraud of the rights of the others, resort must be had to a court of equity for the relief of the injured partners.⁴

(5) *How Far Bona Fide Holders Are Protected.*—Where the scope of the business of a firm is such that a partner has implied power to issue commercial paper in the name of the firm in any event, paper thus issued, when in the hands of a *bona fide* holder or indorsee, is binding upon the firm.⁵ But where the scope of

the firm name and indorsed by the partners individually, such double execution dispenses with proof of the membership of the firm and renders the individuals liable as sureties for the firm. But in *Tuten v. Ryan*, 1 Spears (S. Car.) 240, where one of the partners indorsed his individual name on the firm's note, it was held that he was not chargeable either as indorser or as maker. See also *Fayette Nat. Bank v. Kenney*, 79 Ky. 133; *Stevens v. West*, 1 How. (Miss.) 308; *In re Blumer*, 13 Fed. Rep. 622.

No separate liability is created by the indorsement by a partner of his individual name upon a bill drawn upon his firm and accepted in the firm name. *In re Barnard*, 32 Ch. Div. 447; *Malcolmson v. Malcolmson*, 1 Ir. L. R., Ch. Div. 228.

The signing of a partnership note individually does not import an agreement that the parties are to contribute to each other, but the usual rule that one partner cannot sue another at law for a firm matter applies. *De Jarnette v. McQueen*, 31 Ala. 230; *Booth v. Farmers' etc. Bank*, 74 N. Y. 228. And see *Kendrick v. Tarbell*, 27 Vt. 512.

1. See *Forsyth v. Woods*, 11 Wall. (U. S.) 484; *Pahlman v. Taylor*, 75 Ill. 629; *Lill v. Egan*, 89 Ill. 609; *Spalding v. Wilson*, 80 Ky. 589; *Ex parte Weston*, 12 Met. (Mass.) 1; *Burns v. Mason*, 11 Mo. 469; *Marvin v. Buchanan*, 62 Barb. (N. Y.) 468.

2. *Commercial Bank v. Proctor*, 98 Ill. 558; *Gale v. Miller*, 44 Barb. (N. Y.) 420; *Foster v. Mackreth*, L. R., 2 Ex. 163; *Bull v. O'Sullivan*, L. R., 6 Q. B. 209; *Laws v. Rand*, 3 C. B., N. S. 442.

"If one partner directs the bankers of the firm not to pay a check of the firm the bankers incur no liability to the firm if they follow such directions." *Lindley on Part.* 275.

3. *Commercial Bank v. Proctor*, 98 Ill. 558.

4. *Church v. First Nat. Bank*, 87 Ill. 68. And see *Miller v. Price*, 20 Wis. 117.

Where the banker has the funds of a firm deposited with him, for the purpose of its business, and knows that one of the firm is engaged in individual speculations, and transfers these funds to the separate account of this member, with knowledge that the latter appropriates the funds to such speculations, the banker is liable to the firm for the funds thus misapplied, unless the firm has first assured him of their consent. *Billings v. Meigs*, 53 Barb. (N. Y.) 272.

5. *Knapp v. McBride*, 7 Ala. 19; *Maudlin v. Branch Bank*, 2 Ala. 502; *Rich v. Davis*, 4 Cal. 22; *Freeman v. Rose*, 15 Ga. 252; *Wright v. Brosseau*, 73 Ill. 381; *Beach v. State Bank*, 2 Ind. 488; *Walworth v. Henderson*, 9 La. Ann. 339; *Waldo Bank v. Lumbert*, 16 Me. 416; *Hopkins v. Boyd*, 11 Md. 107; *Boyd v. McCann*, 10 Md.

the firm's business does not authorize the making of notes by one partner, as in case of non-trading firms in general, the buyer of their notes takes them at his peril, as the paper is invalid both in the hands of the original payee and in those of an innocent holder for value.¹

As to who is a *bona fide* holder is governed generally by the rules applicable to ordinary commercial paper.² Thus, though a holder had no actual notice of the defective character of the paper, if by the exercise of proper diligence he would have learned it, he cannot be regarded as a *bona fide* buyer,³ though mere circumstances which might have aroused a prudent buyer's suspicion

118; Central Nat. Bank v. Frye, 148 Mass. 498; Blodgett v. Weed, 119 Mass. 215; Connecticut River Bank v. French, 6 Allen (Mass.) 313; Boardman v. Gore, 15 Mass. 331; Nichols v. Sober, 38 Mich. 678; Bloom v. Helm, 53 Miss. 21; Murphy v. Camden, 18 Mo. 122; First Nat. Bank v. Wolf (Supreme Ct.), 4 N. Y. Supp. 278; Atlantic State Bank v. Savery, 82 N. Y. 291; First Nat. Bank v. Morgan, 73 N. Y. 593; Mechanics' Bank v. Foster, 19 Abb. (N. Y.) Pr. 47; 44 Barb. 87; Austin v. Vandermark, 4 Hill (N. Y.) 259; Evans v. Wells, 22 Wend. (N. Y.) 324; Stall v. Catskill Bank, 18 Wend. (N. Y.) 466; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251; Cotton v. Evans, 1 Dev. & B. Eq. (N. Car.) 284; Moorehead v. Gilmore, 77 Pa. St. 118; 18 Am. Rep. 435; Sedgwick v. Lewis, 70 Pa. St. 217; Parker v. Burghuss, 5 R. I. 277; Duncan v. Clark, 2 Rich. (S. Car.) 587; Hawes v. Duntun, 1 Bailey (S. Car.) 146; 19 Am. Dec. 663; Roth v. Colvin, 32 Vt. 125; Bush v. Crawford, 7 Nat. Bankr. Reg. 299; Lewis v. Reilly, 1 Q. B. 349. And see State Capital Bank v. Thompson, 42 N. H. 369.

A surviving partner is not responsible for a loan made to the deceased partner on his own account, even though such loan be represented by a bill drawn by the deceased partner in the firm name, unless money appears to have been borrowed on the firm's request, from one having no knowledge that it was to be used for other than firm purposes. Klopfer v. Levi, 33 Mo. App. 322.

Where a partner executed a note in the firm name to raise his share of the capital stock, and such note was executed to a person ignorant of that fact, the firm was held responsible for the note, and the other partner entitled to

his bill for contribution. His bill for contribution could be defeated, however, by proof under appropriate pleadings, showing that the defendant had paid his proportion of the debts of the firm. Fletcher v. Brown, 7 Humph. (Tenn.) 385.

1. Cöcke v. Branch Bank, 3 Ala. 175; Pease v. Cole, 53 Conn. 53; Benedict v. Thompson, 33 La. Ann. 196; Judge v. Braswell, 13 Bush (Ky.) 67; 26 Am. Rep. 185; Prince v. Crawford, 50 Miss. 344; Lynch v. Thompson, 61 Miss. 354; Deardorf v. Thacher, 78 Mo. 128; 47 Am. Rep. 95; Dickinson v. Valpy, 10 B. & C. 128. And see Greenslade v. Dower, 7 B. & C. 635; Williams v. Thomas, 6 Esp. 18.

The assent of a partner to the indorsement, by his co-partner, of a note given out of the course of the partnership business, must be proved, not presumed. Mercein v. Andrus, 18 Wend. (N. Y.) 461.

2. See BILLS AND NOTES, vol. 2, p. 390.

3. New York Fireman's Ins. Co. v. Bennett, 5 Conn. 574; 13 Am. Dec. 109; Cotton v. Evans, 1 Dev. & B. Eq. (N. Car.) 284. And see Spaulding v. Kelley, 43 Hun (N. Y.) 301; Graham v. Taggart (Pa. 1887), 11 Atl. Rep. 652; Cooper v. McClurkan, 22 Pa. St. 80.

In Roth v. Colvin, 32 Vt. 125, it was held that a purchaser of notes signed by a partner in the firm name who knew that the firm was located in New York, and needed but little money, and that the partner signing, lived in Vermont and was not an active partner, that the payee was insolvent and that the notes were for a large amount and for even numbers, should, in the exercise of due diligence be put upon inquiry as to the authority of such partner to make such paper.

Where the firm's acceptance was in

will not defeat his claim.¹ That a note is payable on demand² or that it calls for a usurious rate of interest³ or that it was offered for sale by a broker at a usurious rate of discount,⁴ affords no reasonable ground to suspect fraud in its issue, and a note broker being the agent of the seller and not of the buyer, though a purchase from the payee would have shown that the partnership indorsement was given as security only, a purchase of such a broker without knowledge as to whom he represented would confer good title.⁵ So, a party once a *bona fide* holder and entitled to recover against a firm, may recover upon a renewal of the paper made after notice to the holder, of the defect in the original paper;⁶ and while a purchaser after maturity is not ordinarily a *bona fide* holder,⁷ he may be so, even though having notice of the defects, by having, by his purchase, obtained the title of a *bona fide* holder.⁸ The fact that a common member of several partnerships has, as the representative of each, drawn paper in the name

the handwriting of the partner who drew the bill, and the firm was located at a distant place, and the draft and acceptance were dated upon the same day, it was held that the buyer knew the acceptance was written by the drawer. *Royal Canadian Bank v. Wilson*, 24 Up. Can. C. P. 362.

1. *Stimson v. Whitney*, 130 Mass. 591; *Freeman's Nat. Bank v. Savery*, 127 Mass. 75; *Nichols v. Sober*, 38 Mich. 678; *Cotton v. Evans*, 1 Dev. & B. Eq. (N. Car.) 284; *Walker v. Kee*, 14 S. Car. 142.

The mere fact that a lender had had previous dealings with a partner on his individual account carries no notice of an intent to appropriate the proceeds of a partnership note discounted by the lender. *Hayward v. French*, 12 Gray, (Mass.) 453.

But where the lender knew that the guilty partner had previously given firm notes for his private purposes, this is admissible as tending to show his knowledge that the note was fraudulently indorsed. *Eastman v. Cooper*, 15 Pick. (Mass.) 276; 26 Am. Dec. 600.

In view of the frequent custom of dealers in merchandise to have goods sent to a customer direct from the person from whom they themselves buy, the fact of such order creates no presumption to put a prudent vendor on inquiry as to the validity of partnership paper given in payment for such goods. *Clark v. Johnson*, 90 Pa. St. 442.

As partners sometimes buy land, knowledge of the indorsee that a note made in the firm name had been given to pay for land, is not sufficient notice

that it was not authorized. *Dudley v. Littlefield*, 21 Me. 418.

2. *Blodgett v. Weed*, 119 Mass. 215.

3. *Hurd v. Haggarty*, 24 Ill. 171; *Blodgett v. Weed*, 119 Mass. 215.

4. *Sprague v. Zunts*, 18 Ala. 382; *Connecticut River Bank v. French*, 6 Allen (Mass.) 313.

5. See *Redlon v. Churchill*, 73 Me. 146; 40 Am. Rep. 345; *Emerson v. Harmon*, 14 Me. 271; *Freeman's Nat. Bank v. Savery*, 127 Mass. 75; *Tanner v. Hall*, 1 Pa. St. 417; *Moorehead v. Gilmore*, 77 Pa. St. 118; 18 Am. Rep. 435; *Parker v. Burgess*, 5 R. I. 277. And see *Osgood v. Glover*, 7 Daly (N. Y.) 367; *Smyth v. Strader*, 4 How. (U. S.) 404.

A note made by a partner in his own name to his own order, then indorsed by himself followed by his indorsement of the firm name and disposed of by a note broker, gives no notice of a fraudulent character. *Redlon v. Churchill*, 72 Me. 146; 40 Am. Rep. 345. And see *Moorehead v. Gilmore*, 77 Pa. St. 118; 18 Am. Rep. 435.

6. *Hopkins v. Boyd*, 11 Md. 117. But see *Mix v. Muzzy*, 28 Conn. 186.

7. *Rich v. Davis*, 4 Cal. 22; *Freeman v. Ross*, 15 Ga. 252.

8. *Boyd v. McCann*, 10 Md. 118.

But where H being one of the firm of H & G and also of the firm of H & E, drew in the name of H & G in favor of H & E, and after acceptance, indorsed the draft in the name of H & E, and the draft was discounted, and H received the proceeds, the acceptor not being indebted to either firm and the draft not being for the benefit of either firm and

of one firm and indorsed it in the name of another is not alone notice to the holder that the act was fraudulent as to either firm,¹ though the paper itself may convey notice to the purchaser that the partnership signature was made as security or for accommodation only, as in case of the addition of the word "sureties" to the partnership name,² and where an indorsement of the name of a firm is not in the chain of title, the presumption arises that it was made for accommodation or security only.³

The burden of proof rests with the holder to show that he is a *bona fide* holder for value.⁴

the whole transaction being without the authority or knowledge of any of his partners, the discounting bank having recovered the amount of the draft from H & E, it was held in a suit by H & E against H & G that the latter were not liable for contribution. *Grubb v. Cottrell*, 62 Pa. St. 23.

1. See *Freeman's Nat. Bank v. Savery*, 127 Mass. 75; *Walker v. Kee*, 14 S. Car. 142; *Stimson v. Whitney*, 130 Mass. 591; *Miller v. Consolidation Bank*, 48 Pa. St. 514; *Ihmsen v. Negley*, 25 Pa. St. 297; *Chemung Canal Bank v. Bradner*, 44 N. Y. 680; *Tutts v. Addams*, 24 Mo. 186; *Bank of Com. v. Nudgett*, 44 N. Y. 514; *Babcock v. Stone*, 3 McLean (U. S.) 172. But see *Davis v. Blackwell*, 5 Ill. App. 32; *Patterson v. Camden*, 25 Mo. 13.

Where a borrower or purchaser gives a draft on a firm which is accepted by one partner, the lender or seller has no notice that the firm name is signed as surety. *Joyce v. Williams*, 14 Wend. (N. Y.) 141; *Bloom v. Helm*, 53 Miss. 21. And see *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466.

Where a bank lends money to a firm, whose members are also members of another firm, knowing that the money is to be used by the latter firm, a member of a firm using the money cannot bind the firm by afterwards giving a note to the bank for the money without the consent of the other members. *Green v. Waco State Bank*, 78 Tex. 2.

2. *Rollins v. Stevens*, 31 Me. 454; *Foot v. Sabin*, 19 Johns. (N. Y.) 154; 10 Am. Dec. 208; *Marsh v. Thompson Nat. Bank*, 2 Ill. App. 217.

A memoranda placed upon the back of a firm note by the payee, "this note was held by me for a note signed by G," carries notice to the holder that the partnership note was made as security only. *National security Bank v. McDonald*, 127 Mass. 82.

A statement by a partner, that he de-

sired the money in order to retire the notes of certain customers, without his co-partner's knowledge, is in itself, notice that he is using the firm name on accommodation paper. *McConnell v. Wilkins*, Ont. App. (Can.) 438.

3. *Bowman v. Cecil Bank*, 3 Grant's Cas. Pa. 33; *Chenoweth v. Chamberlin*, 6 B. Mon. (Ky.) 60; 43 Am. Dec. 145; *St. Nicholas Bank v. Savery*, 45 N. Y. Super. Ct. 97; *Statt v. Catskill Bank*, 18 Wend. (N. Y.) 466; *National Bank v. Law*, 127 Mass. 72; *Moynahan v. Hanaford*, 42 Mich. 329; *Wilson v. Williams*, 14 Wend. (N. Y.) 146; 28 Am. Dec. 518; *Union Nat. Bank v. Underhill*, 21 Hun (N. Y.) 178.

No inference of fraud or that the firm signed as surety can be drawn from a note signed by one partner and also by the firm name, after his, as common makers. *Sylvertein v. Atkinson*, 45 Miss. 81. But such a note commencing "I promise" is a circumstance to be considered in connection with others to ascertain if the holder should have taken notice. *Sherwood v. Snow*, 46 Iowa, 481; 26 Am. Rep. 155.

Where a partner who has surety on a note which the principal was unable to pay delivered to him a draft drawn by the firm, and payable to defendant, who was an officer of the bank at which the note was payable, which draft was to be applied to payment of the note by such partner, and there was nothing upon the face of the draft to show the partner's connection with or interest in it, otherwise than as the member of the firm who signed its name, it was held, that upon presentation of the draft by the principal, defendant had the right to assume that it belonged to him, and having paid the money to him, defendant was not liable to the firm. *Beal v. Stevens*, 79 Iowa 28.

4. *Fisher v. Hume*, 6 Mackey (D. C.) 9; *Wright v. Brosseau*, 73 Ill. 341;

g. TO COLLECT AND PAY DEBTS—(1) *Collection of Debts Due the Firm*.—One partner has implied power to collect and receipt for debts due the firm, and payment to one partner extinguishes the obligation.¹ So, one partner may make proof of the claim of the firm upon the bankruptcy of the debtor, vote for an assignee and sign the certificate;² and authority to proceed by process of law is involved in the ordinary power of collection.³ While it is

Munroe v. Cooper, 5 Pick. (Mass.) 412; Clark v. Dearborn, 6 Duer (N. Y.) 309; Bank of St. Albans v. Gillingland, 23 Wend. (N. Y.) 311; 35 Am. Dec. 566; Woodson v. Wood, 84 Va. 478; Heath v. Sanson, 2 B. & Ad. 291; Hogg v. Skeen, 18 C. B., N. S. 426. And see Central Nat. Bank v. Frye, 148 Mass. 498. And see Hendrie v. Berkowitz, 37 Cal. 113; Tevis v. Tevis, 24 Mo. 535; Mecutechen v. Kennady, 27 N. J. L. 230; Manning v. Hays, 6 Md. 5; Wait v. Thayer, 118 Mass. 473.

Where a check was drawn by a member of a banking firm, on the firm, which he accepted in the firm name, to raise money from a third person claiming that the loan was for the firm, as a check purports to be on the drawer's own deposit, it is presumably a loan to the partner. Bank of Commerce v. Selden, 3 Minn. 155.

A note in the firm name made by one partner payable to his own order and indorsed by him is presumptively valid against the firm. Adams v. Rugles, 17 Kan. 237. But the creditor of an individual partner receiving such a note from him is not a *bona fide* holder as against the firm. Gale v. Miller, 54 N. Y. 536.

Intent.—A payee's belief that a note was for the private use of a partner, does not prevent his recovery if the loan really was for the firm and used for its benefit, an intent to do an unjust act being of no effect unless it is actually an unjust one. Hamilton v. Summers, 12 B. Mon. (Ky.) 11; 54 Am. Dec. 509.

1. Williams v. Mor, 63 Cal. 50; Brown v. Lawrence, 5 Conn. 397; Noyes v. New Haven, etc. R. Co., 30 Conn. 1; Coursey v. Baker, 7 Har. & J. (Del.) 28; Gordon v. Freeman, 11 Ill. 14; Granger v. McGilvra, 24 Ill. 152; Steele v. First Nat. Bank, 60 Ill. 23; Gregg v. James, 19 Ill. 107; 12 Am. Dec. 151; Yandes v. Lafavour, 2 Blackf. (Ind.) 371; Selking v. Jones, 52 Ind. 409; White v. Jones, 14 La. Ann.

692; Codman v. Armstrong, 28 Me. 91; Flarsheim v. Brestrup, 43 Minn. 298; Vanderberg v. Bassett, 4 Minn. 242; Morse v. Bellows, 7 N. H. 568; Black v. Bird, 1 Hayw. (N. Car.) 273; Salmon v. Davis, 4 Binn. (Pa.) 375; Allen v. Farrington, 2 Sneed (Tenn.) 526; Scott v. Trent, 1 Wash. (Va.) 77; *In re* Barrett, 2 Hughes (U. S.) 444; Carlisle v. Niagara Dock Co., 5 Up. Can., Q. B., O. S. 660; Anon. 12 Mod. 446; Duff v. East India Co., 15 Ves. 198; Brasier v. Hudson, 9 Sim. 1; King v. Smith, 4 C. & P. 108; McKee v. Stroup, Rice 291; Tomlin v. Lawrence, 3 Moo. & P. 555; Porter v. Taylor, 6 Moo. & S. 156; Stead v. Salt, 3 Bing. 103. And see Jacand v. French, 12 East 317.

One joint lessor can appoint a bailiff to distrain for rent due for all. Robinson v. Hofman, 4 Bing. 562; and one partner has power to transfer a bank account due the firm to the bank's successor. Beale v. Chaddick, 2 H. & N. 326.

A note given to one partner may be evidence of a settlement with his firm, he being in the habit of taking in his own name notes due the firm. Boffandick v. Raleigh, 11 Ind. 136.

Payment to an agent of a firm, of a bill drawn in his own name and payable to his own order in respect of the debt due to the firm, is not payment to the firm, unless he has authority to draw in that, or the firm gets the money. See Hogarth v. Whertley, L. R. 10 C. P. 630.

2. See *In re* Purvis, 1 Nat. Bankr. Reg. 163; *In re* Barrett, 2 Hughes (U. S.) 444; Emerson v. Knower, 8 Pick. (Mass.) 63; *Ex parte* Mitchell, 14 Ves. 597; *Ex parte* Hodgkinson, 19 Ves. 291; *Ex parte* Hall, 1 Rose 2; *Ex parte* Bignold, 2 Mont. & A. 633; *Ex parte* Bank of England, 2 Glyn. & J. 127; *Ex parte* Shaw, 1 Glyn. & J. 127.

3. Bates' Law of Part., § 382.

The employment of coercive and extortionate methods for the collection

usually held that the power to collect debts does not extend to receiving payment in property,¹ a partner may take a bill or other obligation in payment of an indebtedness to the firm² even though it runs to him in his own name.³ So, a partner may compromise debts due to the firm,⁴ and in the absence of fraud or bad faith,

of a debt, however, does not render innocent co-partners liable. See *post*, subtit., *Liability for Torts*.

The power to collect debts implies the power to perfect a mechanic's lien to secure them. *German Bank v. Schloth*, 59 Iowa 316.

1. See *Lee v. Hamilton*, 12 Tex. 413; *Young v. White*, 7 Beav. 506; *Underwood v. Nicholls*, 17 C. B. 239; *Story on Agency*, § 98. And see also *infra*, this title, *Power to Sell or Incumber Property*. But see to the contrary, *Vanderburgh v. Bassett*, 4 Minn. 242; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459.

This rule is largely controlled by usages permitting debts to be traded out and sales to be made payable in goods. See *Warder v. Newdigate*, 11 B. Mon. (Ky.) 174; 52 Am. Dec. 567; *Lee v. Hamilton*, 12 Tex. 413.

A partner cannot compromise by receiving land from a debtor instead of money, money being due, though in case of an emergency the exercise of such a right might be upheld. *Russell v. Green*, 10 Conn. 269.

Nor can he receive payment in shares in a company though they are fully paid up. *Niemann v. Niemann*, 43 Ch. Div. 198.

Where notes belonged to the firm, the surviving partner was not precluded from bringing action thereon because certain property had been transferred to the deceased partner in consideration of the surrender of the notes to defendant, such property being purchased for himself, individually, without the consent of the survivor, and he being at the time insolvent, to the knowledge of defendant. *Clift v. Moses*, 112 N. Y. 426.

2. *Heartt v. Walsh*, 75 Ill. 200; *Tomlin v. Lawrence*, 3 Moo. & P. 555.

Where a debtor gives a partner notes to collect, and apply the proceeds on his debt, and the partner collects one and indorsed the amount upon the debtor's note to the firm, the firm is bound although the notes were received for by the partner individually. *Brown v. Lawrence*, 5 Conn. 397.

But the collection of notes not being within the scope of the business, if a partner receives the note of a third person from a firm debtor for collection to pay the firm and give the debtor the balance, and the partner uses the balance in the business of the firm, he alone is holding to the debtor for such balance. *Pickel v. McPherson*, 59 Miss. 216. And see *Hogan v. Reynolds*, 8 Ala. 59.

3. *Coursey v. Baker*, 7 Har. & J. (Del.) 28; *Tomlin v. Lawrence*, 3 Moo. & P. 555; *Hogarth v. Wherley, L. R.*, 10 C. P. 630.

Payment of an obligation thus given satisfies the debt to the partnership. *Chapin v. Clemiston*, 1 Barb. (N. Y.) 311.

Where a claim is assigned to one member of a firm, in payment of a debt due the firm, but without express words of trust, such partner is not a "trustee of an express trust," within the meaning of *Wisconsin Rev. Stat.*, ch. 122, § 14, so that he can maintain an action upon the claim in his own name. *Robbins v. Deverill*, 20 Wis. 142.

4. *Noyes v. New Haven etc. R. Co.*, 30 Conn. 1; *Doremus v. McCormick*, 7 Gill (Md.) 49; *Cunningham v. Littlefield*, 1 Edw. (N. Y.) Ch. 104; *Pierston v. Hooker*, 3 Johns. (N. Y.) 70; *Minto v. Bauer*, 17 N. Y. Civ. Proc. Rep. 314.

One partner is authorized to bind another by an agreement with an insurance company as to the extent of the loss occasioned by fire. *Brink v. New Amsterdam F. Ins. Co.*, 5 Robt. (N. Y.) 104. He can also settle the loss. *Brown v. Hartford F. Ins. Co.*, 117 Mass. 479.

A composition of debts of an insolvent debtor signed by his creditors, but it not appearing whether the signature of one of them was intended to apply to a debt due him individually, or to a debt due his firm, will be deemed to include the latter, and the burden is on the firm to show the contrary. *Emerson v. Knower*, 8 Pick. (Mass.) 63. And see *Halsey v. Whitney*, 4 Mason (U. S.) 206.

he can bind the firm by a release of a partnership claim whether it be a contract indebtedness or a demand in tort,¹ even though an action has been commenced upon the claim,² and notwithstanding his agreement not to interfere with the collection of the debts.³ But in case of fraud or collusion, the courts will protect the other partners by refusing to allow such a release to operate as a defense,⁴ a release by one partner by collusion or fraudulent connivance with the debtor being totally void;⁵ and if the protection of a co-partner requires it, the court will not permit the discontinuance of an action by another.⁶ A release

1. *Dyer v. Sutherland*, 75 Ill. 583; *Emmson v. Knower*, 8 Pick. (Mass.) 63; *Bulkley v. Dayton*, 14 Johns. (N. Y.) 387; *Nottridge v. Prichard*, 2 Cl. & Fin. 379; *Harkshaw v. Parkins*, 2 Swanst. 539; *Phillips v. Claggett*, 11 M. & W. 84; *Wallace v. Kelsall*, 7 M. & W. 264; *Metcalfe v. Rycroft*, 6 M. & S. 75; *Furnival v. Weston*, 7 J. B. Moore 192; *Arton v. Booth*, 4 J. B. Moore 192.

A covenant of all the partners not to sue operates as a release. *Duex v. Jeffreys*, *Croke's Eliz.* 352. And see *Richards v. Fisher*, 2 Allen, (Mass.) 527. But such a covenant by one partner is not a release and will not constitute a defense. *Emerson v. Baylies*, 19 Pick. (Mass.) 55; *Wamsley v. Cooper*, 11 A. & E. 216. And the same rule applies to an agreement by one partner to pay the debt and save the debtor harmless. *Emerson v. Baylies*, 19 Pick. (Mass.) 55.

2. *Perlberg v. Gorham*, 10 Cal. 120; *Wilson v. Mower*, 5 Mass. 411; *Noonan v. Orton*, 31 Wis. 265; *Barker v. Richardson*, 1 Young & J. 362; *Langdale v. Langdale*, 13 Ves. 167; *Furnival v. Weston*, 7 Ves. 356; *Jones v. Herbert*, 7 Taunt. 421; *Arton v. Booth*, 4 Moore 192.

In States having statutes providing that a "non-consenting joint tenant may be made defendant," the objecting partner may be allowed to withdraw and the court will permit the other partners to proceed, making him a defendant. *Noonan v. Orton*, 31 Wis. 265.

3. *Arton v. Booth*, 4 Moore 192.

4. *Loring v. Brackett*, 3 Pick. (Mass.) 403; *Beatson v. Harris*, 60 N. H. 83; *Sloan v. McDowell*, 71 N. Car. 356; *Nornan v. Orton*, 21 Wis. 283; *Jones v. Herbert*, 7 Taunt. 421; *Barker v. Richardson*, 1 G. & J. 362; *Phillips v. Claggett*, 11 M. & W. 84. And see *Stout v. Ennis Nat. Bank* (Tex. 1887),

8 S. W. Rep. 808; *Skaife v. Jackson*, 1 B. & C. 421.

It is held in *New York* that the other partners cannot set aside a settlement with one partner and recover the debt, or their share of it, but can only recover damages for waste of partnership funds to be ascertained on the counting; that they have the right to be placed as if the full debt had been honestly paid and they had their aliquot shares, and can make the debtor pay this when ascertained, even if they had to pay the full amount, less the part paid. *Sweet v. Morrison*, 103 N. Y. 235.

In *Lurgman v. Poole*, 1 Moo. & M. 223, it was held that the other partners can jointly sue a third person who colluded with a partner to injure them.

5. *Beatson v. Harris*, 60 N. H. 83; *Sweet v. Morrison*, 103 N. Y. 235; *South Fork Canal Co. v. Gordon*, 6 Wall. (U. S.) 561. And see also cases cited in the above note.

Although one partner has implied authority to get in debts owing to the firm, and to give discharges for them, still a receipt is not conclusive of payment. So that if one partner gives a receipt in fraud of his co-partner, it will not preclude the firm from recovering the money. *Lindley on Part.* 276, citing *Farrar v. Hutchinson*, 9 A. & E. 641; *Henderson v. Wild* 2 Camp. 561.

6. *Cunningham v. Carpenter*, 10 Ala. 109; *Daniel v. Daniel*, 9 B. Mon. (Ky.) 195; *Loring v. Brackett*, 3 Pick. (Mass.) 403. And see *Winslow v. Newlan*, 45 Ill. 145; *Holkirk v. Holkirk*, 4 Madd. 50.

Where, after dissolution, the partners agree that one of their number shall collect the debts, a release by another in order to defeat an action and subserve his own private ends, will not be permitted to be set up as a defense. *Barker v. Richardson*, 1 Younge & J.

of an indebtedness to the firm by one partner, in consideration of the discharge of his individual debt to the firm's debtor, is fraudulent as to his co-partners;¹ and a release by a partner after he has sold his interest, either to his co-partner² or to a third person,³ is fraudulent and without consideration and not binding upon the buyer.

(2) *Payment of Debts Due from the Firm.*—Implied power to pay the indebtedness of the firm also rests with each partner;⁴ and in the absence of statutory enactment,⁵ the almost universal rule, both of law and of equity, that a release of one joint debtor releases all, applies to partnerships.⁶ A mere covenant not to sue one

362; *Gram v. Cadwell*, 5 Cow. (N. Y.) 489.

1. *Harper v. Wrigley*, 48 Ga. 495; *Casey v. Carver*, 42 Ill. 225; *Mayer v. Garber*, 53 Iowa 688; *Bennett v. Colfax*, 53 Iowa 686; *Jackson v. Holloway*, 14 B. Mon. (Ky.) 108; *Williams v. Brimhall*, 13 Gray (Mass.) 462; *Chase v. Buhl Iron Works*, 55 Mich. 139; *Craig v. Hulschizer*, 34 N. J. L. 363; *Gram v. Cadwell*, 5 Cow. (N. Y.) 489; *Evernglim v. Ensworth*, 7 Wend. (N. Y.) 326; *Beudel v. Hettrick*, 45 How. Pr. (N. Y.) 198; *Broadus v. Evans*, 63 N. Car. 633; *Thomas v. Pennrich*, 28 Ohio St. 55; *Clark v. Sparhawk*, 2 W. N. C. (Pa.) 115; *Viles v. Bangs*, 36 Wis. 131; *Kendal v. Wood*, L. R. 6 Ex. 243; *Farrar v. Hutchinson*, 9 Ad. & El. 641; *Barker v. Richardson*, 1 Younge & J. 362; *Piercy v. Fynney*, L. R., 12 Eq. 69. And see *Lamb v. Saltus*, 3 Brev. (S. Car.) 130.

The power to discharge a firm debt in consideration of the discharge of an individual one, however, was upheld in *Combs v. Boswell*, 1 Dana (Ky.) 473; *Owings v. Trotter*, 1 Bibb (Ky.) 157; *Halls v. Coe*, 4 McCord (S. Car.) 136; *Beckham v. Peay*, 2 Bailey (S. Car.) 133.

2. *Combs v. Boswell*, 1 Dana (Ky.) 473; *Lunt v. Stevens*, 24 Me. 534; *Gram v. Cadwell*, 5 Cow. (N. Y.) 489. See *Legh v. Legh*, 1 B. & P. 447.

3. *Brayley v. Goff*, 40 Iowa 76; *Duncklee v. Greenfield Steam Mill Co.* 23 N. H. 245.

4. *Cannon v. Wildman*, 28 Conn. 472; *Murrell v. Murrell*, 33 La. Ann. 1233; *Tapley v. Butterfield*, 1 Met. (Mass.) 515; 35 Am. Dec. 374; *Averill Lyman*, 18 Pick. (Mass.) 351; *Osborn Osborn*, 36 Mich. 48; *Moist's Appeal* 74 Pa. St. 166; *Tyson v. Pollock*, 1 P. & W. (Pa.) 375; *Scott v. Shephard*, 3 Vt. 104; *Innes v. Stephenson*, 1 Moo. & Ry. 145; *Cheap v. Cramond*, 4 B. & A.

663. And see *Bray v. Morse*, 41 Wis. 343; *Matter of Lowenstein*, 7 How. Pr. (N. Y.) 100.

Where the members of a firm gave a bond, individually, for a debt of the firm and property was delivered by them and accepted as a payment thereof, the bond was thereby discharged, and it is not in the power of one of the obligors, by agreement with the obligee, to withdraw the payment, and thus again put the bond in force. *Yarman v. Ellis*, 7 Jones (N. Car.) 77.

5. Statutes have been enacted enabling a creditor to compromise and settle with or release one joint debtor without prejudice to his claim against the rest, in *California, Connecticut, Dakota, Kansas, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and Wisconsin*. In *Kansas, Michigan, Minnesota, Missouri, Montana, New Jersey, New York, Ohio, Pennsylvania, and South Carolina*, the co-partners' right to call upon such creditor for their proportion is reserved. These statutes are held to apply to partnerships. *Northern Ins. Co. v. Potter*, 63 Cal. 157; *Grant v. Holmes*, 75 Mo. 109; *Stitt v. Cass*, 4 Barb. (N. Y.) 92.

Where a partner sued his equal co-partner for an account and settlement, and pending suit settled with one of them for \$100 for his share of the estimated balance, and it turned out that the entire balance due the complainant from his co-partners was \$1,281, it was held this released one-half of the debt and he could only recover \$640.50 from the defendant. *Lord v. Anderson*, 16 Kan. 185.

6. *Gray v. Brown*, 20 Ala. 262; *Elliot v. Holbrook*, 33 Ala. 659; *Kendrick v. O'Neil*, 48 Ga. 631; *William-*

partner, or an unexecuted promise to release him, however, is not a technical release and amounts to nothing but a covenant to indemnify against the consequences of a suit;¹ and an agreement of release to one reserving the claim as against the rest is no discharge of the debt, and is only, in effect, an agreement not to make the debt out of the private property of the releasee,² and no discharge of the other partners as to whatever remains due.³

son *v.* McGinnis, 11 B. Mon. (Ky.) 74; Rice *v.* Woods, 21 Pick. (Mass.) 30; American Bank *v.* Doolittle, 14 Pick. (Mass.) 123; Tuckerman *v.* Newhall, 17 Mass. 581; Le Page *v.* McCrea, 1 Wend. (N. Y.) 164; 19 Am. Dec. 469; Burson *v.* Kincaid, 3 P. & W. (Pa.) 57; Cocks *v.* Nash, 9 Bing. 341; U. S. *v.* Thompson, Gilp. (U. S.) 614; Willings *v.* Consequa, Pet. (C. C.) 301; Cheetham *v.* Ward, 1 B. & P. 630.

A release of all causes of action, suits, debts, demands, etc., which the releasors now have or ever have had, in respect to any matter from the beginning of the world, includes liabilities as a partner. Hall *v.* Irons, 4 Up. Can. C. P. 351.

A release of a partner from all claims, either individually or as one of the firm, is a discharge in his capacity of surviving partner. Bean *v.* Barnum 21 Conn. 200.

1. Roberts *v.* Strang, 38 Ala. 566; Evans *v.* Carey, 29 Ala. 99; Mason *v.* Jouett, 2 Dana (Ky.) 107; Fagg *v.* Hambel, 21 Iowa 140; Walker *v.* McCulloch, 4 Me. 421; Lunt *v.* Stevens, 24 Me. 534; McLellan *v.* Cumberland Bank, 24 Me. 566; Shaw *v.* Pratt, 22 Pick. (Mass.) 305; Bemis *v.* Hoseley, 16 Gray (Mass.) 63; Berry *v.* Gillis, 17 N. H. 9; 43 Am. Dec. 584; Harrison *v.* Close, 2 Johns. (N. Y.) 448; Rowley *v.* Stoddard, 7 Johns. (N. Y.) 207; Catskill Bank *v.* Messenger, 9 Cow. (N. Y.) 37; Bank of Chenango *v.* Osgood, 4 Wend. (N. Y.) 607; De Zeng *v.* Bailey, 9 Wend. (N. Y.) 336; Hosack *v.* Rogers, 8 Paige (N. Y.) 229; Clayton *v.* Kynaston, 2 Salk. 573; Lacy *v.* Kynaston, 2 Salk. 575; 1 Ld. Raym. 688; Hutten *v.* Eyre, 6 Taunt. 289; Price *v.* Barker, 4 E. & B. 760; Durell *v.* Wendell, 8 N. H. 369; Couch *v.* Mills, 21 Wend. (N. Y.) 424; Dean *v.* Newhall, 8 T. R. 168; Walmesley *v.* Cooper, 11 Ad. & El. 216.

While an agreement to save harmless or indemnify, is not a release and therefore is no defense, if the rights of third persons are not concerned, it

may be so treated to save circuitry of action. Berry *v.* Gillis, 17 N. H. 9; 43 Am. Dec. 584; Shotwell *v.* Miller, 1 N. J. L. 95; Kendrick *v.* O'Neil, 48 Ga. 631.

2. See Sally *v.* Forbes, 2 Brod. & B. 38; Price *v.* Barker, 4 E. & B. 760; Thompson *v.* Spingall, 3 C. B. 540; Willis *v.* De Castro, 3 C. B., N. S. 216; Bateson *v.* Gosling, L. R., 4 C. P. 9.

But in Parmelee *v.* Lawrence, 44 Ill. 405, it was held, that where a release is given to one of several obligors, which is to operate as an absolute discharge of such obligor, it will also operate to release his co-obligors notwithstanding the instrument contains an express provision that such co-obligors shall not be released thereby. And the fact that the parties were ignorant of the legal effect of the release will not prevent it from effecting such release.

A release of all demands made to a debtor, after he had assigned all his property to a preferred creditor for the benefit of his creditors, if such preferred creditor was the debtor's dormant partner and this fact was concealed, it was void for fraud. Carter *v.* Connell, 1 Whart. (Pa.) 392.

3. Browning *v.* Grady, 10 Ala. 999; Northern Ins. Co. *v.* Potter, 63 Cal. 157; Bean *v.* Barnum, 21 Conn. 200; Seymour *v.* Butler, 8 Iowa 304; Gardner *v.* Baker, 25 Iowa 343; Claggett *v.* Salmon, 5 Gill. & J. (Md.) 314; Shed *v.* Pierce, 17 Mass. 623; Goodnow *v.* Smith, 18 Pick. (Mass.) 414; Chandler *v.* Herrick, 19 Johns. (N. Y.) 129; Bank of Chenango *v.* Osgood, 4 Wend. (N. Y.) 607; Greenwald *v.* Kaster, 86 Pa. St. 45; Williams *v.* Hitchings, 10 Lea (Tenn.) 326. And see Lysagt *v.* Phillips, 5 Duer (N. Y.) 106; Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.) 242.

The other partners are only liable for the balance, although their ratable proportion exceeds it. Lowell Nat. Bank *v.* Train, 2 Mich. Lawyer 27.

In tort cases generally, the damages can neither be estimated nor divided,

So, if one partner is severally as well as jointly liable, the release of another partner will affect him in his joint capacity only.¹ Primarily the construction and legal effect of a release of one partner are to be determined by the law of the place where the released contract was made and to be performed.²

h. To CONFESS JUDGMENT FOR FIRM INDEBTEDNESS—(See also JUDGMENTS, vol. 12, p. 58).—One partner cannot, when there is no suit pending, confess judgment and thereby bind his co-partners or the firm;³ nor can he execute a power or warrant of attorney to confess a judgment against the firm without the consent of his co-partners:⁴ some of

and a release of one releases all. *Gilpatrick v. Hunter*, 24 Me. 18.

But in *McCrillis v. Hawes*, 38 Me. 566, it was held, that if the tort consisted of a conversion of property, a settlement with one partner for his half does not preclude an action against the other, and the declaration could be for a conversion of half of the property converted.

1. See *Pearce v. Wilkins*, 2 N. Y. 469; *Hartley v. Manton*, 5 Q. B. 247.

No additional rights are conferred upon separate creditors by an agreement of partnership creditors who look only to partnership property. *Witter v. Richards*, 10 Conn. 37.

2. *Holdridge v. Farmers' etc. Bank*, 16 Mich. 66; *Beam v. Barnum*, 21 Conn. 200; *Rice v. McMartin*, 39 Conn. 573.

But in *Seymour v. Butler*, 8 Iowa 304, it was held, that no such effect could be given to the statutes of a foreign state any more than to the adjudication of her courts, as to give them an extra-territorial operation in furnishing an absolute rule of law in determining the validity or construction of the contract sued on, as to whether a release made in that state to one partner shall or shall not operate in the state of the forum to release and discharge the other.

To Pay Individual Debts.—A member of an insolvent firm may, with the consent of his partner, use the assets of such firm to pay premiums on a policy of insurance on his life for the benefit of his wife, to whom he is in good faith indebted, and the partnership creditors cannot set aside the transaction unless they show fraud. *Hanover Nat. Bank v. Klein*, 64 Miss. 141; 60 Am. Rep. 47.

3. *Grazebrook v. McCreddie*, 9 Wend. (N. Y.) 437; *Elliott v. Holbrook*, 33 Ala. 659; *Barlow v. Reno*, 1 Blackf.

(Ind.) 252; *Rhodes v. Amsink*, 38 Md. 345; *Soper v. Fry*, 37 Mich. 236; *Sloo v. State Bank*, 2 Ill. 428; *Binney v. Le Gal*, 19 Barb. (N. Y.) 592; *Everson v. Gehrman*, 10 How. Pr. (N. Y.) 301; *Bridenbecker v. Mason*, 16 How. Pr. (N. Y.) 203; *McKee v. Bank of Mt. Pleasant*, 7 Ohio, pt. 2, 175; *York Bank's Appeal*, 36 Pa. St. 458; *Grier v. Hood*, 25 Pa. St. 430; *Mills v. Dickson*, 6 Rich. (S. Car.) 487; *Bitzer v. Shunk*, 1 W. & S. (Pa.) 340; *Shedd v. Bank of Brattleboro*, 32 Vt. 709.

Where one partner, without authority, confessed a judgment against the firm and subsequently both confessed judgment in favor of another creditor, the latter has priority over the former on distribution. *Crane v. French*, 1 Wend. (N. Y.) 311.

A partner may, without the consent of his co-partner, however, take up a firm note, the amount of which exceeds the jurisdiction of the New York city court, and which is not yet due, by giving several notes in the firm name, so as to enable the creditor to sue without delay in the city court, and judgments on such notes are valid as against other creditors of the firm, though process was served only on the partner who executed the notes, and the pendency of the action was purposely concealed from the co-partner; Code Civil Proc. New York, § 1932, providing that, where summons is served on one of several defendants jointly indebted, judgment may be had against all. *Nealis v. Adler*, 19 Abb. N. Cas. 385.

4. *Elliot v. Holbrook*, 33 Ala. 659; *Wilcoxson v. Burton*, 27 Cal. 228; *Sloo v. State Bank*, 2 Ill. 428; *Barlow v. Reno*, 1 Blackf. (Ind.) 252; *Hopper v. Lucas*, 86 Ind. 43; *Christy v. Sherman*, 10 Iowa 535; *Edwards v. Pitzer*, 12 Iowa 607; *North v. Mudge*, 13 Iowa

the cases basing the rule upon the reason that one partner has no power to bind another under seal.¹ Even if the warrant to con-

496; Rhodes v. Amsinck, 38 Md. 345; Soper v. Fry, 37 Mich. 236; Hull v. Garner, 31 Miss. 145; Morgan v. Richardson, 16 Mo. 409; 57 Am. Dec. 235; Flannery v. Anderson, 4 Nev. 437; Ellis v. Ellis, 47 N. J. L. 69; Green v. Beals, 2 Cal. (N. Y.) 254; Crane v. French, 1 Wend. (N. Y.) 311; Stoutenburgh v. Vandenburg, 7 How. Pr. (N. Y.) 229; Everson v. Gehrman, 10 How. Pr. (N. Y.) 301; Lambert v. Converse, 22 How. Pr. (N. Y.) 265; Bridenbecker v. Mason, 16 How. Pr. (N. Y.) 203; McKee v. Bank of Mt. Pleasant, 7 Ohio, pt. 2, 175; McNaughten v. Partridge, 11 Ohio 223; Richardson v. Fuller, 2 Oregon 179; Gerard v. Basse, 1 Dall. (Pa.) 119; Bitzer v. Shunk, 1 W. & S. (Pa.) 340; 37 Am. Dec. 469; Cash v. Tozer, 1 W. & S. (Pa.) 519; Harper v. Fox, 7 W. & S. (Pa.) 142; York Bank's Appeal, 36 Pa. St. 458; Trenwith v. Meeser, 12 Phila. (Pa.) 366; Hoskinson v. Eliot, 62 Pa. St. 393; Mills v. Dickson, 6 Rich. (S. Car.) 487; Shedd v. Bank of Brattleboro, 32 Vt. 709; Remington v. Cummings, 5 Wis. 138; Hall v. Lanning, 91 U. S. 160; Holme v. Allan, Tayl. (Up. Can.) 348; Huff v. Cameron, 1 Up. Can. Prac. Rep. 255; Canada Lead Mine Co. v. Walker, 11 Low. Can. 433; Hambridge v. De La Crouee, 3 C. B. 742.

Even the borrowing power in a trading partnership will not authorize one member to secure a loan for the firm by giving a sealed power to confess judgment. Hoskinson v. Eliot, 62 Pa. St. 393.

The provisions of the Code of *Oregon* allowing a confession of judgment by one of several joint debtors, applies only to pending cases and does not apply to warrants of attorney to confess judgment. Richardson v. Fuller, 2 Oregon 179.

Under the *New York* statute allowing judgment to be rendered against a firm where all the partners have been sued, though service is had on but one, that one can execute a warrant to confess judgment against the firm. Leahey v. Kingon, 22 How. Pr. (N. Y.) 209; Binney v. Le Gal, 19 Barb. (N. Y.) 592; Waring v. Robinson, Hoffm. Ch. (N. Y.) 524; Blodget v. Conklin, 9 How. Pr. (N. Y.) 442; Grazebrook v. McCreddie, 9 Wend. (N. Y.) 437;

Pardee v. Haynes, 10 Wend. (N. Y.) 631. But this rule applies to pending cases only, and not to a case in which a partner seeks to confess judgment in person. Binney v. Le Gal, 19 Barb. (N. Y.) 592.

In *Pennsylvania*, a judgment confessed under a power of attorney, executed by one partner not under seal, is good against the partnership property. Kneib v. Graves, 72 Pa. St. 104; Ross v. Howell, 84 Pa. St. 129; Hamilton's Appeal, 103 Pa. St. 368. The other partners only can complain. Hamilton's Appeal, 103 Pa. St. 368; Grier v. Hood, 25 Pa. St. 430.

A confession in favor of a separate creditor of the individual partner, however, is a fraud on the creditors of the firm and can be attacked by them collaterally on distribution of the funds. McNaughton's Appeal, 101 Pa. St. 550.

The English rule is to give effect to the judgment and leave the dissenting partner to his remedy against the attorney, but in a case in which an execution can issue against the person, instead of against the property, this rule does not apply, as he could not be compensated for the loss of his liberty. See Hambridge v. De La Crouee, 3 C. B. 732. And where three persons had agreed to give a warrant of attorney and only two signed it, the judgment was set aside on account of the imperfect execution. Harris v. Wade, 1 Chitty 322.

The English rule was adopted in Hammond v. Harris, 2 How. Pr. (N. Y.) 115. But the contrary rule was held on account of the irresponsibility of the attorney in Groesbeck v. Brown, 2 How. Pr. (N. Y.) 21.

1. See Ellis v. Ellis, 47 N. J. L. 69; Green v. Beals, 2 Cal. (N. Y.) 254; Hoskinson v. Eliot, 62 Pa. St. 393; Cash v. Tozer, 1 W. & S. (Pa.) 519; McNaughten v. Partridge, 11 Ohio 223; Shedd v. Bank of Brattleboro, 32 Vt. 709; Gerard v. Basse, 1 Dall. (U. S.) 119.

Bates, in his *Law of Partnership*, § 377, gives the following reasons for the rule that one partner cannot confess a judgment against the firm: 1st, it enables one partner to create liens on the private and individual property of his co-partners, this objection is re-

fess is signed by all the partners, it is presumed to be for an individual matter unless proved to be for a partnership debt,¹ and that a partner has absconded, does not authorize a confession of judgment by a co-partner.²

A judgment entered upon such a confession, however, is valid as against the partner who executed the power or made the confession, and binds his individual property and his individual interest in the firm property, the same as a separate judgment against him,³ though if the individual names are not given it cannot be a lien, even upon the lands of the signing partner.⁴ It would seem in the absence of statutory provision that such a judgment merges and extinguishes the original indebtedness and bars further action upon it.⁵

The court will relieve the non-assenting partners from such a judgment, it having been done in some cases by setting it aside as to them,⁶ and in others by restraining execution upon it as against

moved where the partnership can be sued in the firm name; 2nd, such a power is not necessary to the management of the joint enterprise and is capable of great abuse, for it is an unlimited power to alienate and incumber, not only the transitory property of the firm, but its permanent investments, and enables one partner alone to plunge the firm into an inextricable debt which might absorb the whole fund and the private fortunes of each; 3rd, it deprives the other partners of opportunity to make a defense, and cuts off a resort to the regular tribunals quite as effectually as the power to submit to arbitration, which is also denied to a partner. And being capable of such abuse, the proper ground for denying the power is that it is outside the scope of the business and beyond the true limits of the partnership relation.

1. McKenna's Estate, 11 Phila. (Pa.) 84; Ellinger's Appeal, 114 Pa. St. 505.

To warrant a confession of judgment, it is held that the other partners must first have been brought into court by a regular service of process. Crane v. French, 1 Wend. (N. Y.) 311; Stoutenburgh v. Vandenburg, 7 How. Pr. (N. Y.) 229; Lambert v. Converse, 22 How. Pr. (N. Y.) 265; Richardson v. Fuller, 2 Oregon 179.

2. Gerard v. Basse, 1 Dall. (U. S.) 119. But see *infra*, this title, *Power to Assign for the Benefit of Creditors*.

3. Hopper v. Lucas, 86 Ind. 43; North v. Mudge, 13 Iowa 496; Rhodes v. Amsinck, 38 Md. 345; Flannery v.

Anderson, 4 Nev. 437; Crane v. French, 1 Wend. (N. Y.) 311; Green v. Beals, 2 Caines (N. Y.) 254; Mair v. Beck (Pa. 1886), 2 Atl. Rep. 218; York Bank's Appeal, 36 Pa. St. 458; Bitzer v. Shunk, 1 W. & S. (Pa.) 340; 37 Am. Dec. 469. And see *infra*, this title, *Power to Execute Sealed Instruments*. But see Trenwith v. Meeser, 12 Phila. (Pa.) 366.

But where a warrant of attorney to confess a judgment was executed in the name of the defendants, on error, the court will intend that the warrant, although executed by one partner only, was adopted by the others. Bissell v. Carville, 6 Ala. 503.

4. York Bank's Appeal, 36 Pa. St. 458.

5. See Crane v. French, 1 Wend. (N. Y.) 311; Kneib v. Graves, 72 Pa. St. 104; Haggerty v. Juday, 58 Ind. 154. And see also *infra*, this title *Merger*.

A judgment confessed by a partner against himself alone without the creditors' knowledge or ratification, does not merge the original right of action against the firm. Haggerty v. Juday, 58 Ind. 154.

A judgment confessed in an action against both partners, first by one partner and afterwards during the same terms by the other, is valid, the cause of action not being merged by the first judgment. Pitts v. Spotts, 86 Va. 71.

6. See Thompson v. Emmert, 15 Ill. 415; Morgan v. Richardson, 16 Mo. 409; 57 Am. Dec. 235; Everson v. Gehrman, 10 How. Pr. (N. Y.) 301; McKee v. Bank of Mt. Pleasant, 7 Ohio,

their individual property.¹ But it will not be inferred without proof that the confession was unauthorized;² and the judgment cannot be corrected on appeal,³ or collaterally impeached;⁴ and, as there is a remedy at law in the court in which the judgment was rendered, none can be had in chancery.⁵

Prior parol assent is sufficient, however, to authorize such a confession,⁶ and a subsequent ratification may be established by proof of circumstances indicating assent.⁷

i. TO ASSIGN FOR THE BENEFIT OF CREDITORS—(See also ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 845).—While it is within the implied power of a partner in a proper case to transfer and dispose of all the property of the firm,⁸ it can only be done in the conduct of the business of the firm, and for its preservation. It is not within the scope of the business of a partnership to deprive all the co-partners of the possession and control of the partnership property by an assignment for the benefit of creditors, and this can be done by no number less than all the co-partners.⁹ The power to make such an assignment, how-

pt. 2, 175; *Gerard v. Basse*, 1 Dall. (U. S.) 119.

A judgment confessed in a pending action was allowed to stand as security and the non-assenting partner was let in to defend in *Grazebrook v. McCreddie*, 9 Wend. (N. Y.) 437; *Sterne v. Bentley*, 3 How. Pr. (N. Y.) 331. And see *Everson v. Gehrman*, 10 How. Pr. (N. Y.) 301; 1 Abb. Pr. (N. Y.) 167.

In *St. John v. Holmes*, 20 Wend. (N. Y.) 609, the court refused to set aside the judgment on the application of creditors, on the ground that no one but the co-partners were aggrieved and no one else could complain. But in *Stoutenburgh v. Vandenburg*, 7 How. Pr. (N. Y.) 226, the judgment was said to be void as to those who did not authorize it.

1. *Christy v. Sherman*, 10 Iowa 535; *Morgan v. Richardson*, 16 Mo. 409; 57 Am. Dec. 235; *Ellis v. Ellis*, 47 N. J. L. 69; *Green v. Beals*, 2 Cai. (N. Y.) 254.

2. *Elliott v. Holbrook*, 33 Ala. 659; *Edwards v. Pitzer*, 12 Iowa 607; *Remington v. Cummings*, 5 Wis. 138; *Hull v. Garner*, 31 Miss. 145.

3. *Remington v. Cummings*, 5 Wis. 138.

No one can object to a confession of judgment except the other partner. *Grier v. Hood*, 25 Pa. St. 430.

4. *Elliott v. Holbrook*, 33 Ala. 659.

But in case of collusion, the judgment is fraudulent and void, and may

be attacked by creditors. *Stoutenburgh v. Vandenburg*, 7 How. Pr. (N. Y.) 229. And under statutes making all powers of attorney to confess judgment void, such a judgment is considered as wholly void and subject to collateral attack. *Mills v. Dixon*, 6 Rich. (S. Car.) 487.

5. *McKee v. Bank of Mt. Pleasant*, 7 Ohio, pt. 2, 175; *Shedd v. Bank of Brattleboro*, 32 Vt. 709.

6. *Brutton v. Burton*, 1 Chit. 707.

Where one partner confessed judgment, it was held that a revival of the judgment by the attorney of all the partners, cured the irregularity. *Cash v. Tozer*, 1 W. & S. (Pa.) 519.

7. *Overton v. Tozer*, 7 Watts (Pa. 331; *Cash v. Tozer*, 1 W. & S. (Pa. 519; *Bivingsville Cotton Mfg. Co. v. Bobo*, 11 Rich. (S. Car.) 386.

An admission that the judgment is "all right," is sufficient as a ratification. *Record v. Record*, 21 N. B. 277.

Failure to object to a judgment, rendered upon confession of one partner, for eighteen months after notice of its condition, is a sufficient ratification. *Brown v. Cingirs*, 2 Up. Can., Prac. Rep. 205.

A ratified judgment is good as against the party ratifying, only from the date of the ratification. *Wilcoxson v. Burton*, 27 Cal. 228.

8. See *infra*, this title, *Power to Sell or Incumber Property*.

9. *Adams v. Thornton* (Ala. 1887), 3 So. Rep. 20; *Dunklin v. Kimball*, 50

ever, may be expressly conferred by one partner upon another, or it may be inferred from the conduct of the partners, their manner of doing business, and the circumstances in which they place them-

Ala. 251; *Wilcox v. Jackson*, 7 Colo. 521; *Loeb v. Pierpoint*, 58 Iowa 469; 43 Am. Rep. 122; *Shattuck v. Chandler*, 40 Kan. 516; *Bull v. Harris*, 18 B. Mon. (Ky.) 195; *Collier v. Hanna*, 71 Ind. 253; *Maughlin v. Tyler*, 47 Md. 545; *Kirby v. Ingersoll*, 1 Dougl. (Mich.) 477; *Stejn v. La Dow*, 13 Minn. 412; *Hughes v. Ellison*, 5 Mo. 463; *Hook v. Stone*, 34 Mo. 329; *Steinhart v. Fyhrie*, 5 Mont. 463; *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614; *Pettee v. Orser*, 6 Bosw. (N. Y.) 123; 18 How. Pr. (N. Y.) 442; *Haggerty v. Granger*, 15 How. Pr. (N. Y.) 243; *Paton v. Wright*, 15 How. Pr. (N. Y.) 481; *Welles v. March*, 30 N. Y. 344; *Fish v. Miller*, 5 Paige (N. Y.) 26; *Hitchcock v. St. John*, *Hoffm. Ch.* (N. Y.) 511; *Kelly v. Baker*, 2 Hilt. (N. Y.) 531; *Deming v. Colt*, 3 Sandf. (N. Y.) 284; *Hayes v. Heyer*, 3 Sandf. (N. Y.) 293; *Fisher v. Murry*, 1 E. D. Smith (N. Y.) 341; *Wetter v. Schlieper*, 4 E. D. Smith (N. Y.) 707; 15 How. Pr. (N. Y.) 268; *Coope v. Bowles*, 42 Barb. (N. Y.) 87; 18 Abb. Pr. (N. Y.) 442; *Palmer v. Myers*, 43 Barb. (N. Y.) 509; 29 How. Pr. (N. Y.) 8; *Holland v. Drake*, 29 Ohio St. 441. *Ormsbee v. Davis*, 5 R. I. 442; *Petition of Daniels*, 14 R. I. 500; *Henderson v. Haddon*, 12 Rich. Eq. (S. Car.) 393; *Williams v. Roberts*, 6 Coldw. (Tenn.) 493; *Dana v. Lull*, 17 Vt. 391; *Brooks v. Sullivan*, 32 Wis. 444; *Rumery v. McCulloch*, 54 Wis. 565; *Coleman v. Darling*, 66 Wis. 155; *First Nat. Bank v. Hackett*, 61 Wis. 335; *Bowen v. Clark*, 1 Biss. (U. S.) 128; *Pearpont v. Graham*, 4 Wash. (U. S.) 232; *Wooldridge v. Irving*, 23 Fed. Rep. 676; *Cameron v. Stevenson*, 12 Up. Can. C. P. 389; *Stevenson v. Brown*, 9 L. J., Ch., Up. Can. 110; 2 Bell's Com. (Scotland) 615. And see *Barcroft v. Snodgrass*, 1 Coldw. (Tenn.) 430; *Williams v. Roberts*, 6 Coldw. (Tenn.) 493; *Graves v. Hall*, 32 Tex. 665; *Donoho v. Fish*, 58 Tex. 164.

A few cases uphold the power of one partner to make an assignment for the benefit of creditors as a necessary consequence of the power of disposition of the entire partnership property. See *Hennesey v. Western Bank*, 6 W. & S. (Pa.) 300; 40 Am. Dec. 560; *Robinson v. Crowder*, 4 McCord (S. Car.) 519; *Lasell v. Tucker*, 5 Sneed (Tenn.) 33;

Gordon v. Cannon, 18 Gratt. (Va.) 387; *Scruggs v. Burruss*, 25 W. Va. 670.

Burrill in his work on Assignments, § 86, sums up the reasons why an assignment for the benefit of creditors should not be permitted to be made by one partner as follows: that it is an act out of the course of trade not contemplated by the contract of partnership, and not within the implied powers incident to the partnership relation; and that it is an act in fraud of the rights of other partners to participate in the distribution of the partnership funds among the creditors, and in the decision of the question which of the creditors, if any, should have a preference in payment out of the property assigned.

In *Wooldridge v. Irving*, 23 Fed. Rep. 676, a power was denied, even though the firm was hopelessly insolvent and the other partner an imbecile, and the signing partner had a power of attorney to transact all business.

Though a memorandum of assignment be only signed by one member of a firm, yet, if it clearly show that the firm is in fact the assignee the memorandum is competent to prove the firm's title to the property assigned. *Erickson v. Lyon*, 26 Ill. App. 17.

In *Chicago Union Nat. Bank v. Kansas City Bank*, 136 U. S. 223, it was held that a deed of trust of partnership property to secure certain creditors to the exclusion of others will bind the partnership, though executed by two only out of three partners.

A single partner may apply to an insolvency court, however, for proceedings in bankruptcy against the firm. *Durgin v. Coolidge*, 3 Allen (Mass.) 554; *Second Nat. Bank v. Willing*, 66 Md. 314. *Contra*, in *California. California Furniture Co. v. Halsey*, 54 Cal. 315. And one partner may sign a petition for bankruptcy for the firm. *Pleasants v. Meng*, 1 Dall. (U. S.) 380. And see *Pelletier v. Couture*, 148 Mass. 269.

Where there is no actual partnership, but a mere holding out, the real owner can assign for creditors. *Whitworth v. Patterson*, 6 Lea (Tenn.) 119. The court also said that the same rule would obtain if the non-assenting partner were a dormant one. See also *Drake v. Rogers*, 6 Mo. 317.

selves in reference to the business of the firm.¹ Thus, validity may be given to such an assignment by subsequent ratification as well as by prior authority,² though a ratification cannot be permitted to relate back so as to interfere with intervening liens.³

So, where the other partner is absent and his whereabouts unknown, or in case of such an emergency that he could not be communicated with in season: as, if he had absconded and abandoned the business,⁴ or if he was absent and believed to have absconded,

1. Kirby v. Ingersoll, 1 Doug. 490. And see Osborne v. Barge, 29 Fed. Rep. 725.

An assignment for the benefit of creditors is so important and solemn an act that public policy requires that the authority be given in advance, and under such circumstances that no question can arise as to it. Steinhart v. Fyhrle, 5 Mont. 463.

A New York firm, composed of G and D, being financially embarrassed, G went to Australia to make sales sufficient to relieve the firm, and D remained in charge of the business. After G's departure, D became alarmed at the firm's increasing embarrassments and telegraphed G to return and help him. G replied, with reasons for not abandoning his Australian trip, advising D what course to pursue, and giving him directions as to preferences, etc., should an assignment become necessary. Held sufficient authority to D to execute an assignment for the benefit of creditors in the firm name at any time it should become necessary during G's absence in Australia. Klumpp v. Gardner, 114 N. Y. 153.

2. Dunklin v. Kimball, 50 Ala. 251; Ade v. Cornell, 93 N. Y. 572; Welles v. March, 30 N. Y. 344; Baldwin v. Tynes, 19 Abb. Pr. (N. Y.) 32; Roberts v. Shepard, 2 Daly (N. Y.) 110; Sheldon v. Smith, 28 Barb. (N. Y.) 593; Ely v. Hair, 16 B. Mon. (Ky.) 230; McNutt v. Strayhorn, 39 Pa. St. 269; Rumery v. McCulloch, 54 Wis. 565; Pierpont v. Graham, 4 Wash. (U. S.) 432.

Declarations to the effect that authority to assign had been given, made by the signing partner when he executed the assignment, and by the other partner when he ratified it, are not competent evidence. Kittrell v. Blum, 77 Tex. 336.

A failure on the part of the non-assenting creditor to repudiate the assignment, and allowing the assignees to make sales of the firm property, was

held not to estop him from resisting a replevin brought by the assignee to get possession of the partnership property in his hands. Brooks v. Sullivan, 32 Wis. 444. And see Steinhart v. Fyhrle, 5 Mont. 463; Hooper v. Baillie, 118 N. Y. 413.

3. See Loeb v. Pierpont, 58 Iowa 469; 43 Am. Rep. 122; Stein v. LaDow, 13 Minn. 412; Steinhart v. Fyhrle, 5 Mont. 463; Holland v. Drake, 29 Ohio St. 441; Coleman v. Darling, 66 Wis. 155. But compare Ade v. Cornell, 93 N. Y. 572.

Where an assignment of the partnership and individual property of a firm for the benefit of accepting creditors only is made by one partner alone, and afterwards ratified by his co-partner, a firm creditor who attaches the assigned property before the ratification takes the same free of the assignment, in the absence of any evidence that the partner who did not sign the assignment had previously authorized the other partner to sign it for him. Kittrell v. Blum, 77 Tex. 336.

4. Newhall v. Buckingham, 14 Ill. 405; Sullivan v. Smith, 15 Neb. 476; 47 Am. Rep. 354; Welles v. March, 30 N. Y. 344; Palmer v. Myers, 43 Barb. (N. Y.) 509; 29 How. Pr. 8; Kemp v. Carnley, 3 Duer (N. Y.) 1; National Bank v. Sackett, 2 Daly (N. Y.) 395; Deckard v. Case, 5 Watts (Pa.) 22; 30 Am. Dec. 287; Rumery v. McCulloch, 54 Wis. 565; Kelly v. Baker, 2 Hilt. (N. Y.) 531; Williams v. Gillespie, 30 W. Va. 586. And see Dupuy v. Leavenworth, 17 Cal. 263.

One partner has no authority to make a general assignment of the firm property for the benefit of the firm creditors, unless his copartners consent, or are absent from the country, and the burden is on him, or his assignee, to show such facts. Shattuck v. Chandler, 40 Kan. 516.

Where a partner has relinquished all control of the partnership affairs by absconding, this will be regarded as evi-

though he afterwards returns,¹ or if he is a great distance away and immediate and independent action is necessary to prevent involuntary preferences,² an assignment by the remaining partner in the firm-name will be upheld; but a mere temporary absence is not sufficient to warrant the exercise of such power.³ Such an assignment is usually, though not universally, required to be made without preferences.⁴

The right of one partner to dispose of partnership property by an assignment, for the benefit of creditors, is confined strictly to personal effects, and does not extend to real estate owned by the firm.⁵

j. TO SUBMIT TO ARBITRATION—(See also ARBITRATION AND AWARD, vol. 1, p. 646).—The power to submit to arbitration falls within the category of sealed instruments, and is not necessary to any business, and is not, therefore, within the power of one part-

dence of an authority, to the remaining partners to make an assignment. *Burrill on Assignments*, § 486. And see *Sullivan v. Smith*, 15 Neb. 476; 47 Am. Rep. 354.

In *Second Nat. Bank v. Willing*, 66 Md. 314, it was held that though one of the partners has absconded from the State, the remaining partner cannot, in the name of the partnership, apply for the benefit of the insolvent law of the State.

1. *Petition of Daniels*, 14 R. I. 500.

Though one partner cannot, without the authority of his copartners, make a general assignment, he can, in their absence, assign a part of the firm's assets in payment of a particular debt, and direct the distribution of the surplus among its other creditors. *Johnson v. Robinson*, 68 Tex. 399.

2. *Forbes v. Scannell*, 13 Cal. 242; *Williams v. Frost*, 27 Minn. 255; *Robinson v. Crowder*, 4 McCord (S. Car.) 519; 17 Am. Dec. 762; *Robinson v. Gregory*, 29 Barb. (N. Y.) 560; *Harrison v. Sterry*, 5 Cranch (U. S.) 289; *Anderson v. Tompkins*, 1 Brock. (U. S.) 456; *Graves v. Hall*, 32 Tex. 665; *Lasell v. Tucker*, 5 Sneed (Tenn.) 33.

If, in the course of things, a general assignment becomes necessary, there can be no reason why it should not be binding, though executed by two of three partners, the third being absent from the country. *Robinson v. Crowder*, 4 McCord (S. Car.) 519.

3. *Dunklin v. Kimball*, 50 Ala. 251; *Stein v. La Dow*, 13 Minn. 412; *Pettee v. Orser*, 6 Bosw. (N. Y.) 123; *Coope v. Bowles*, 42 Barb. (N. Y.) 87; 18 Abb. Pr. (N. Y.) 442; *Robinson v. Gregory*, 29 Barb. (N. Y.) 560.

Where the absent partner lived only seventy-five miles away, with daily mail communication between the towns, and also communication by telegraph, an assignment by the resident partner is unauthorized. *Hunter v. Waynick*, 67 Iowa 555.

An unauthorized assignment by one partner is such an exclusion of the copartner as will justify the appointment of a receiver, and an injunction against the assignee. *Ormsbee v. Davis*, 5 R. I. 442.

Insanity.—One partner is not authorized by the insanity of his copartner, where no inquisition has been had, to execute an assignment of the firm property for benefit of creditors. *Friedburgher v. Jaberg*, 20 Abb., N. Cas. (N. Y.) 279.

4. See *Wetter v. Schlieper*, 4 E. D. Smith (N. Y.) 707; 15 How. Pr. (N. Y.) 268; *Marsh v. Bennett*, 5 McLean (U. S.) 117; *Fisher v. Murray*, 1 E. D. Smith (N. Y.) 341; 3 Kent's Com. 47, note; *Parsons on Part.* 166. But see to the contrary *McCullough v. Somerville*, 8 Leigh (Va.) 415; *Burrill on Assignments*, § 86.

5. *Anderson v. Tompkins*, 1 Brock. (U. S.) 456; *Mills v. Barber*, 4 Day. (Conn.) 428; *Tapley v. Butterfield*, 1 Met. (Mass.) 518; 35 Am. Dec. 374; *McCullough v. Somerville*, 8 Leigh (Va.) 815; *Thompson v. Bowman*, 6 Wall. (U. S.) 316; *Callomb v. Caldwell*, 16 N. Y. 484; *Collumb v. Read*, 24 N. Y. 505; *Story on Part.*, § 101; *Collyer on Part.*, § 394.

Partnership property, having been bought by one member of the firm, and afterwards assigned in trust for creditors by a valid assignment, cannot be at-

ner;¹ though some of the authorities appear to hold that submissions under seal only are prohibited,² and others uphold the power upon the ground that a seal is unnecessary.³ Any distinct expression of the intent of the co-partners, however, to allow one to act for them in making such a submission is a sufficient authorization,⁴ and the want of authority to submit may be supplied by subsequent ratification.⁵ A submission by one partner for him-

tached by firm creditors. *Hart v. Blum*, 76 Tex. 113.

1. *Fanchon v. Bibb Furnace Co.* (Ala. 1887), 2 So. Rep. 268; *Jones v. Bailey*, 5 Cal. 345; *Barlow v. Reno*, 1 Blackf. (Ind.) 252; *Woody v. Pickard*, 8 Blackf. (Ind.) 55; *Armstrong v. Robinson*, 5 Gill & J. (Md.) 412; *Buchoz v. Grandjean*, 1 Mich. 367; *Backus v. Coyne*, 35 Mich. 5; *Walker v. Bean*, 34 Minn. 427; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137; 10 Am Dec. 200; *McBride v. Hagan*, 1 Wend. (N. Y.) 326; *Crane v. French*, 1 Wend. (N. Y.) 311; *Harrington v. Higman*, 13 Barb. (N. Y.) 660; 15 Barb. (N. Y.) 524; *Sloo v. State Bank*, 2 Ill. 428; *Wood v. Shepard*, 2 Patt. & H. (Va.) 442; *St. Martin v. Thrasher*, 40 Vt. 460; *Mills v. Dickson*, 1 Rich. (S. Car.) 487; *Karthaus v. Ferrer*, 1 Pet. (U. S.) 222; *Hall v. Lanning*, 91 U. S. 160; *Strangford v. Green*, 2 Mod. 228; *Stead v. Salt*, 3 Bing. 101; 10 Moore, 389; 1 Parsons on Cont. 101; *Story on Part.*, § 114; *Coll- yer on Part.* 238; *Russell on Arb.* 20. But see to the contrary, *Hallack v. March*, 25 Ill. 48; *Southard v. Steele*, 3 T. B. Mon. (Ky.) 435; *Gay v. Waltman*, 89 Pa. St. 453; *Taylor v. Coryell*, 12 S. & R. (Pa.) 243.

2. *Armstrong v. Robinson*, 5 Gill & J. (Md.) 412; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137; *Taylor v. Caryell*, 12 S. & R. (Pa.) 243; *Hallack v. Marsh*, 25 Ill. 48; *Southard v. Steele*, 3 T. B. Mon. (Ky.) 435; *Gay v. Waltman*, 89 Pa. St. 453; *Eastman v. Burleigh*, 2 N. H. 484; *Steiglitz v. Egginton*, Holt. 141.

3. *Wilcox v. Singletary*, Wright (Ohio) 420; *Hallack v. Marsh*, 25 Ill. 48; *Gay v. Waltman*, 89 Pa. St. 453; *Southard v. Steele*, 3 T. B. Mon. (Ky.) 435.

A surviving partner can submit a claim to arbitration with the administrator of the deceased partner relating to the state of accounts between the partners. *Clanton v. Price*, 60 N. Car. 96. And the administrators of both partners can submit to arbitration with

a creditor of the firm. *Whitney v. Cook*, 5 Mass. 139. But the surviving partner, being the administrator of the deceased partner, cannot arbitrate with the deceased partner's widow, as she is neither a debtor nor creditor. *Boynton v. Boynton*, 10 Vt. 107.

The controlling reason for the rule that one partner cannot bind his co-partners by submission to arbitration seems to be that the exigencies and conveniences of business do not require a partner to possess such power, and that the question of seal or no seal is of no consequence. *St. Martin v. Thrasher*, 40 Vt. 460; *Harrington v. Higham*, 13 Barb. (N. Y.) 660; *Stead v. Salt*, 3 Bing. 101; 10 Moore, 398.

4. *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *McBride v. Hagan*, 1 Wend. (N. Y.) 326; *Davis v. Berger*, 54 Mich. 652; *Wilcox v. Singletary*, Wright (Ohio) 420; *Karthaus v. Ferrier*, 1 Pet. (U. S.) 222; *Russell on Arb.* 20.

Where all the partners have assented to submission, notice to one is notice to all. *Haywood v. Harmon*, 17 Ill. 477.

The rule in the *United States* is that power to conduct the suit includes power to agree to refer it by rule of court. *Morse on Arbitration and Award* 10. But it is held in *England* that, if on dissolution of a partnership, one partner authorized the other to collect the assets and to sue in their joint names, this cannot empower the acting partner to refer to arbitration a suit brought by him under this authority. *Hatten v. Boyle*, 3 H. & N. 500. And see *Russell on Arbitration* 20.

5. See *Buchanan v. Curry*, 19 Johns. (N. Y.) 137; *Lee v. Onstott*, 1 Pike 206; *Davis v. Berger*, 54 Mich. 652; *Abbott v. Dexter*, 6 Cush. (Mass.) 108; *Hallack v. March*, 25 Ill. 48; *Hamilton v. Phoenix Ins. Co.*, 106 Mass. 395; *St. Martin v. Thrasher*, 40 Vt. 460.

It is too late for the non-signing partner to come forward and ratify after an award has been rendered in his favor, thereby entitling himself to obtain the benefits when he has taken no part in

self and his firm is binding upon him personally, whether his co-partners are bound or not.¹ These rules with reference to submissions to arbitration include any agreement of reference of a dispute to a third person;² and where two partners constitute the party of one part to a submission to arbitration, an award against only one of them is justifiable.³

6. Ratification Generally.—Acts relied upon as a ratification of the unauthorized act of a partner must have been done with a full knowledge upon the part of the ratifying partner of such unauthorized act,⁴ and assent to such an act is not to be presumed on

the previous proceedings, whereby he could have been bound by it, had the award been against him. *Eastman v. Burleigh*, 2 N. H. 484; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285.

Where the award was in favor of the partnership, and its amount was paid to the signing partner, who thereupon indorsed an acknowledgment of satisfaction on the back of the award, it was held, that the non-signing partner was bound; not by either the submission or the award, but by the compromise or liquidation of the claim, which the one partner might make for the firm, which was not invalidated by the fact, that it had been brought about through the intervention of arbitration. The receipt operated as a release or an accord and satisfaction. *Buchanan v. Curry*, 19 Johns. (N. Y.) 137.

As an award must be mutual, a subsequent ratification against the will of the other party does not bind him. *Buchoz v. Grandjean*, 1 Mich. 367. But see dissenting opinion in *Becker v. Boon*, 61 N. Y. 317.

1. *Harrington v. Higham*, 13 Barb. (N. Y.) 660; *McBride v. Hagen*, 1 Wend. (N. Y.) 326; *Brink v. New Amsterdam F. Ins. Co.*, 5 Robt. (N. Y.) 104; *Jones v. Bailey*, 5 Cal. 345; *Wood v. Shepherd*, 2 Patt. & H. (Va.) 442; *Karthauss v. Ferrer*, 1 Pet. (U. S.) 222; *Armstrong v. Robinson*, 5 Gill & J. (Md.) 251; *Strangford v. Green*, 2 Mod. 228; *Russell on Arb.* 20.

If only one partner submits, and does not profess to be acting in behalf of his co-partner, the co-partner will not be bound, though the subject matter of the submission was business of the firm. *Hutchins v. Johnson*, 12 Conn. 376.

But where the defect in a submission is the want of acknowledgment required by statute, even the signing partner would not be bound. *Abbott v. Dexter*, 6 Cush. (Mass.) 108.

2. See *Backus v. Coyne*, 35 Mich. 5;

Brink v. New Amsterdam F. Ins. Co., 5 Robt. (N. Y.) 104.

Where partners sought and obtained the aid of an accountant in adjusting their accounts, for the purpose of a settlement, and he prepared a paper showing what he considered a fair settlement between them, which they adopted, it was no arbitration, and the paper prepared by the accountant was no award, it was a mere settlement, liable to be opened for mistake. *Stage v. Gorich*, 107 Ill. 361.

A mere agreement by one partner who has purchased logs for the firm to adopt a run at the mill as the measurement of the quantity of the logs, is not a submission to arbitration and consequently is binding. *Perkins v. Hoyt*, 35 Mich. 506.

3. *Dater v. Wellington*, 1 Hill (N. Y.) 319.

In *Wesson v. Newton*, 10 Cush. (Mass.) 114, it was held, that an award against the firm in the firm name, not showing who the partners were, was bad, as it might compel the court to try over again a question as to who constituted the firm.

4. *Andrews v. Planters' Bank*, 7 Smed. & M. (Miss.) 192; 45 Am. Dec. 300; *Sargent v. Henderson*, 79 Ga. 268; *Gray v. Ward*, 18 Ill. 32; *Hotchin v. Kent*, 8 Mich. 526; *Norton v. Thatcher*, 8 Neb. 186; *Biggs v. Hubert*, 14 S. Car. 620; *Hull v. Young*, 30 S. Car. 121; *Sibley v. Young*, 26 S. Car. 415. See *Woodward v. Winship*, 12 Pick. (Mass.) 430; *Stillman v. Harvey*, 47 Con. 26; *Vaiden v. Hawkins* (Miss. 1889), 6 So. Rep. 227.

Evidence that a partner concurred in disposition of firm assets after the transfer was made, was properly excluded, in the absence of testimony that such subsequent assent was given before the rights of plaintiffs, who were attaching creditors, accrued. *Newell v. Martin*, (Iowa, 1890), 46 N. W. Rep. 1120.

slight and inconclusive circumstances.¹ The burden of proof to establish such assent or authority rests with the party alleging it,² the fact of ratification,³ as well as the question as to whether the act was within the scope of the business,⁴ being a question for the jury.

Mere silence or failure to dissent, upon being informed of the unauthorized act, is not in itself a ratification,⁵ though if a partner is silent when he ought to speak, or if he fails to repudiate or deny within a reasonable time, it is evidence of it;⁶ and an accept-

A custom practiced by a sole managing partner, without knowledge of the co-partner, is no proof of the latter's assent. *Thomas v. Stetson*, 62 Iowa, 537; 49 Am. Rep. 148.

1. *Gray v. Ward*, 18 Ill. 32; *Wilson v. Williams*, 14 Wend (N. Y.) 146; 28 Am. Dec. 518; *Sutton v. Irwine*, 12 S. & R. (Pa.) 13.

Assent must be clearly and distinctly proved. *Wise v. Copeley*, 36 Ga. 508; *Haynes v. Seachrest*, 13 Iowa, 455; *Hamilton v. Hodges*, 30 La. Ann., pt. 2, 1290; *Kemeys v. Richards*, 11 Barb. (N. Y.) 312; *Howell v. Sewing Machine Co.*, 12 Neb. 177.

A letter, expressing regret that the firm would lose in the transaction, written by the innocent partner, is neither a ratification nor proof of authority. *Berryhill v. McKee*, 1 Humph. (Tenn.) 31.

A promise to pay, on the part of the innocent partner, if he could get from the books and accounts of the other partner, sufficient evidence of ratification, is not alone sufficient. *Burleigh v. Parton*, 21 Tex. 585.

An offer by the innocent partner to allow a debt created by the guilty one as his set-off, if the debtor will pay the balance, is not a ratification. *Hurt v. Clarke*, 56 Ala. 19; 28 Am. Rep. 751.

2. *Johnston v. Crichton*, 56 Md. 108; *Kemeys v. Richards*, 11 Barb. (N. Y.) 312; *Corwin v. Suydam*, 24 Ohio St. 209.

In an action on a note signed in the firm name, an answer by one partner that it was made by the other partner without his knowledge and consent and for his separate debt, is sufficient without alleging that the firm did not assume it, the assumption by the firm, if relied upon, must be set forth in the reply. *Fordice v. Scribner*, 108 Ind. 85.

A letter from a member of a firm to his partner, stating that "we must give (complainant) an interest in the net proceeds" of the sale of land, is not a

sufficient memorandum in writing to create a trust, nor to ratify an agreement made by the partner, without the writer's knowledge, that complainant should share in the profits of certain transactions. *Horne v. Ingraham*, 125 Ill. 198.

3. *Johnson v. Crichton*, 56 Md. 108; *Hewes v. Parkman*, 20 Pick. (Mass.) 90; *Windham Co. Bank v. Kendall*, 7 R. I. 77; *Jones v. Booth*, 10 Vt. 268.

Assent or ratification may be either express or implied, and is a question for the jury, to be determined by a consideration of all the circumstances. *Ellis v. Allen*, 80 Ala. 515.

4. *Hodges v. Ninth Nat. Bank*, 54 Md. 406; *Maltby v. Northwestern etc. R. Co.*, 16 Md. 422; *Biggs v. Hubert*, 14 S. Car. 620; *Crozier v. Kirker*, 4 Tex. 252; 51 Am. Dec. 724; *McNeish v. Hulless Oat Co.*, 57 Vt. 316.

5. *Tyree v. Lyon*, 67 Ala. 1; *Hendrie v. Berkowitz*, 37 Cal. 113; *Marsh v. Thompson Nat. Bank*, 2 Ill. App. 217; *Hayes v. Baxter*, 65 Barb. (N. Y.) 181; *George v. Swafford*, 75 Iowa 491.

In *Crossman v. Shears*, 3 Ont. App. 583, it was held that the remaining silent after the sale of the hotel business, lease, and furniture, by one partner was an estoppel. But in *Sloan v. Moore*, 37 Pa. St. 217, it was held that knowledge of an intended sale of the whole assets by one partner, was not an assent.

Where one partner testified that he had informed the other of the unauthorized arrangement with plaintiff, and that he had assented to it, while the other denied having been so informed, the question as to whether the latter had assented to such arrangement is one of fact for the jury. *Galway v. Nordlinger* (Supreme Ct.), 4 N. Y. Supp. 649.

6. *Renbin v. Cohen*, 48 Cal. 545; *Roberts v. Barrow*, 53 Ga. 314; *Hewes v. Parkman*, 20 Pick. (Mass.) 90; *Sweetzer v. French*, 2 Cush. (Mass.) 309; 48 Am. Dec. 666; *Todd v. Lorah*, 75 Pa.

ance of the benefits arising from or acting under the unauthorized contract goes far toward establishing its adoption,¹ if not made in ignorance of the source of the benefit.²

A prior habit or usage between the members of a firm, known and assented to by all, to perform similar acts is evidence of authority to perform such acts, as well as of the scope of the business in general.³ But where prior authority is relied upon it must appear

St. 155; *Foster v. Andrews*, 2 P. & W. (Pa.) 160; *Woodward v. Winship*, 12 Pick. (Mass.) 430; *Barhard v. Lapeer*, etc. Plank Road Co., 6 Mich. 274; *Bankhead v. Alloway*, 6 Coldw. (Tenn.) 56; *Ferguson v. Shepherd*, 1 Sneed (Tenn.) 254. And see *Lowrey v. Drew*, 18 Tex. 786; *Miller v. Dow*, 17 Vt. 235; *Livingston v. Pittsburg etc. R. Co.*, 2 Grant's (Pa.) Cas. 219; *Gruner v. Stucken*, 39 La. Ann. 1076; *Winchester v. Glazier*, 152 Mass. 316; *Richardson v. Ames* (Wis. 1891), 48 N. W. Rep. 423.

If a partner fails to repudiate, at the earliest opportunity, the use of firm assets to pay a private debt, he ratifies such payment. *Casey v. Carver*, 42 Ill. 225; *Marine Co. v. Carver*, 42 Ill. 67; *Cotzhausen v. Judd*, 43 Wis. 213; 28 Am. Rep. 539.

Where one partner engages the firm in a new enterprise with others, the acquiescence of the other partner binds him. *Buckingham v. Hanna*, 20 Ind. 110; *Wood v. Connell*, 2 Whart. (Pa.) 542; *Mason v. Connell*, 1 Whart. (Pa.) 381; *Tabb v. Gist*, 1 Brock. (U. S.) 33.

Paying a subsequent debt created in the same manner, is evidence of assent. *Carter v. Beaman*, 6 Jones (N. Car.) 44.

But where a partner obtains the exclusive use of a right, which he ought to hold for the firm, the omission of the other partner's to complain is not an assent. *Weston v. Ketcham*, 39 N. Y. Super. Ct. Rep. 54.

1. *Drumright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 738; *Porter v. Curry*, 50 Ill. 319; *Porter v. Wilson*, 113 Ind. 350; *Dudley v. Littlefield*, 21 Me. 418; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459; *Michigan Air Lime R. Co. v. Melten*, 44 Mich. 321; *Levick's Appeal* (Pa. 1886), 2 Atl. Rep. 532; *Waller v. Keyes*, 6 Vt. 257; *Lynch v. Flint*, 56 Vt. 46; *Burnley v. Rice*, 18 Tex. 481. And see *Cockroft v. Claflin*, 64 Barb. (N. Y.) 464; *In re Dunkle*, 7 Nat. Bankr. Reg. 107; *Stewart v. Caldwell*, 9 La. Ann. 419.

Entering a transaction on the books of the firm, charging it to the partner who entered into it, or crediting the

third person with goods sold by the partner, is a sufficient ratification of the transaction. *Warder v. Newigate*, 11 B. Mon. (Ky.) 174; 52 Am. Dec. 563. And see *Foster v. Fifield*, 29 Me. 136; *Hood v. Riley*, 15 N. J. L. 127.

Where the innocent partner borrows the note made, without authority from the holder, in order to pursue the guilty partner, who had removed to another State, guarantying its payment in consideration of the loan, it was held to be a ratification of the note. *Flagg v. Upham*, 10 Pick. (Mass.) 147.

Where one partner purchased a store and stock in another town, and the other partners led people to believe that they had opened a store in that place, it is evidence of ratification or of prior authority to purchase. *Davis v. Cook*, 14 Neb. 265.

2. See *Biggs v. Hubert*, 14 S. Car. 620; *Eaton v. Taylor*, 10 Mass. 54; *Jones v. Clark*, 42 Cal. 180; *Porter v. Curry*, 50 Ill. 319; *Hotchin v. Kent*, 8 Mich. 526; *Clark v. Hyman*, 55 Iowa 14; *Holmes v. Kortlander*, 64 Mich. 591; *Livingston v. Pittsburgh & C. R. Co.*, 2 Grant's Cas. (Pa.) 219; *Andrews v. Planters' Bank*, 7 Smed. & M. (Miss.) 192; 45 Am. Dec. 300.

3. *Gray v. Ward*, 18 Ill. 32; *Pahlman v. Taylor*, 75 Ill. 629; *Ditts v. Lonsdale*, 49 Ind. 521; *First Nat. Bank v. Breese*, 39 Iowa 640; *Bank of Kentucky v. Brooking*, 2 Litt. (Ky.) 41; *Darling v. March*, 22 Me. 184; *Folk v. Wilson*, 21 Md. 538; *Porter v. White*, 39 Md. 613; *Hamilton v. Phoenix Ins. Co.*, 106 Mass. 395; *Tay v. Ladd*, 15 Gray (Mass.) 296; *Hayner v. Crow*, 79 Mo. 293; *Holt v. Simmons*, 16 Mo. App. 97; *McGregor v. Cleveland*, 5 Wend. (N. Y.) 477; *Bank of Rochester v. Bowen*, 7 Wend. (N. Y.) 158; *Steuben County Bank v. Alburger*, 101 N. Y. 202; *Carter v. Beaman*, 6 Jones (N. Car.) 44; *Hoskinson v. Eliot*, 62 Pa. St. 393; *Bank of Tennessee v. Saffarrans*, 3 Humph. (Tenn.) 597; *Scott v. Bandy*, 2 Head (Tenn.) 197; *Pooley v. Whitmore*, 12 Heisk. (Tenn.) 629; 27 Am. Rep. 733; *Lee v. Macdonald*, 6 Up.

that the act in question was in literal conformity with the power delegated.¹

A ratification may be established by acknowledgment of indebtedness on account of the act in question on the part of the other co-partners, or of authority in the acting co-partner to perform it;² though under the Statute of Frauds a verbal promise to perform or acknowledgment of a contract required to be in writing is sometimes held to be void,³ and the declarations of the guilty

Can., Q. B., O. S. 130; *Workman v. McKinstry*, 21 Up. Can., Q. B. 623; *Duncan v. Lowndes*, 3 Camp. 478. And see *Davis v. Dodge*, 30 Mich. 267; *Evernghim v. Ensworth*, 7 Wend. (N. Y.) 326; *Dundass v. Gallagher*, 4 Pa. St. 205; *Levy v. Pyne*, Car. & Marsh. 453.

A single act outside the scope of the business is not a usage and is no proof of authority. *Levi v. Latham*, 15 Neb. 509; 48 Am. Rep. 361. So occasionally drawing orders on the firm to pay separate debts not amounting to a uniform practice, and not known to the creditor, is no proof of assent to the others using the funds. *Brewster v. Mott*, 5 Ill. 378.

A habit or usage, between partners, to settle their private accounts by delivering goods of the firm, is binding on the firm after the admission of a new partner, if the creditor was not aware of the change. *Tay v. Ladd*, 15 Gray (Mass.) 296.

A local custom to trade out debts may be evidence of authority in a partner to collect debts by receiving articles for his own use. *Eaton v. Whitcomb*, 71 Vt. 641.

Accepting an indemnity against a partnership guaranty is a ratification of it. *Clark v. Hyman*, 55 Iowa 14.

Where prior authority in a partner grows out of holding such partner out to the world as such, it must appear that such holding out was known and relied upon by the parties with whom he dealt. *Wilson v. Brown*, 6 Ont. App. 411.

A custom to allow debts due by one partner to be set-off against claims of the firm will be given effect only with respect to demands that could be legally collected against the firm. *Evernghim v. Ensworth*, 7 Wend. (N. Y.) 326.

1. See *Brayley v. Hedges*, 52 Iowa 623; *Stroh v. Hinchman*, 37 Mich. 490; *Webb v. Allington*, 27 Mo. App. 559; *Mercein v. Andrus*, 10 Wend. (N. Y.) 461; *Early v. Reed*, 6 Hill (N. Y.)

12; *McGuire v. Blanton*, 5 Humph. (Tenn.) 361; *U. S. v. Astley*, 2 Wash. (U. S.) 508; *Hatheway's Appeal*, 52 Mich. 112; *Guice v. Thornton*, 76 Ala. 466.

In *Adams' Bank v. Jones*, 10 Pick. (Mass.) 574, it is held that both partners must assent to the issue, as well as to the signing of a note, to constitute it a firm note. But see to the contrary *Chenango Bank v. Hyde*, 4 Cow. (N. Y.) 567.

The non-liability of one member of a firm on single bills executed without authority in the firm's name by his partner is not affected by his subsequent acknowledgment of liability on the open account to secure which the bills were given. *Sibley v. Young*, 26 S. Car. 415.

A custom between the partners to charge the account of a partner owing a debt and assume the indebtedness, is not broad enough to authorize such partner to use joint property to pay his debt. *Forney v. Adams*, 74 Mo. 138.

2. See *Jones v. Booth*, 10 Vt. 268; *Butler v. Stocking*, 8 N. Y. 408; *Wheeler v. Rice*, 8 Cush. (Mass.) 205; *Flagg v. Upham*, 10 Pick. (Mass.) 147; *Paul v. Stevens* (Supreme Ct.), 10 N. Y. Supp. 442; *Rice v. Barry*, 2 Cranch (C. C.) 447.

3. *Taylor v. Hillyer*, 3 Blackf. (Ind.) 433; 26 Am. Dec. 430; *Wagnore v. Clay*, 1 A. K. Marsh. (Ky.) 257. But the contrary is held in *McGill v. Dowdle*, 33 Ark. 311; *Marsh v. Gold*, 2 Pick. (Mass.) 285; *Jones v. Booth*, 10 Vt. 268. And see *Greenleaf v. Burbank*, 13 N. H. 454; *Rice v. Barry*, 2 Cranch (C. C.) 447; *Succession of Arick*, 22 La. Ann. 501; *Stearns v. Burnham*, 4 Me. 84.

A contract for the purchase of goods by a firm upon the agreement that the price may be credited upon the debt of one partner, is an original contract designating the mode of payment and consequently valid, though oral. *Rhodes v. McKean*, 55 Iowa 547.

partner made at the time of the performance of the unauthorized act are not admissible to bind his co-partners.¹ Usually, a subsequent ratification is as effectual as prior assent or authority.²

Any act done by an agent which could have been done by one partner may be ratified by him,³ acting in his capacity as a partner and for the firm.⁴ If it is desired to ratify, the unauthorized contract must be adopted as made: it cannot be modified or ratified in part;⁵ and no new consideration moving to the firm or to the other partners is necessary to the validity of such a ratification.⁶

XVI. DUTIES AND LIABILITIES OF PARTNERS—1. As Between Themselves.—In their dealings with each other partners occupy a position of trust, and are required to exercise toward each other the

An oral promise to pay the debts of an old firm, made by one partner of the new firm consisting of the members of the old firm, with an incoming partner is not binding. *Paradise v. Gerson*, 32 La. Ann. 532. See to the contrary, *Wilson v. Dosier*, 58 Ga. 602.

If prior authority is shown, a guaranty signed in the firm by one partner, is good as to the others under the Statute of Frauds. See *Princeton etc. Turnpike Co. v. Gulick*, 16 N. J. L. 161; *Cockroft v. Claflin*, 64 Barb. (N. Y.) 464; *Butler v. Stocking*, 8 N. Y. 408; *Moran v. Prather*, 23 Wall. (U. S.) 492; *Duncan v. Lowndes*, 3 Camp. 478.

As a firm is not a person apart from its members, the Statute of Frauds does not apply to permission to charge to the firm supplies furnished to one partner, such sale to one partner being in fact a sale to the firm, though for the benefit of one partner. *Davis v. Dodge*, 30 Mich. 267.

1. *Heffron v. Hanaford*, 40 Mich. 305; *Kaiser v. Fendrick*, 98 Pa. St. 528.

A prior agreement to guaranty signed by the partner who subsequently gave the guaranty, is not evidence to bind the firm. *Osborne v. Stone*, 30 Minn. 25.

On the contrary, conversations and transactions between the partners, upon dissolution, in an attempt at settlement of the firm's affairs showing that the innocent partner did not know that the paper issued by the guilty one was outstanding, are competent in his own favor to rebut any inference of assent drawn from such appearance. *Gale v. Miller*, 54 N. Y. 536.

2. *Noble v. Medcalf*, 20 Mo. App. 360. And see *Conley v. Wood*, 73 Mich. 203.

An assent after a change of condition, as an assignment by the firm for the benefit of creditors, is too late and will not relate back. *Clark v. Sparhawk*, 2 W. N. C. (Pa.) 115.

Where the unauthorized executory contract of one partner has been ratified but is not performed, the other contracting party can recover from the ratifying partners the payments made by him, though the money was received by the one alone who had made the contract. *Lawrence v. Taylor*, 5 Hill (N. Y.) 107.

A written ratification by one partner, of the act of another, showing that the ratifying partner supposed the ratification was to bind all or none, but which is not binding upon a third partner, does not, therefore, render him individually liable, all not being bound. *Robert's Appeal*, 92 Pa. St. 407.

3. *Lyell v. Sanbourn*, 2 Mich. 109. And see *Odiorne v. Marcy*, 15 Mass. 39.

4. See *Bank of Montreal v. Page*, 98 Ill. 109; *Miller v. House*, 67 Iowa 737.

5. *Frye v. Sanders*, 21 Kan. 26; 30 Am. Rep. 421.

6. *Foster v. Fifield*, 29 Me. 136; *Wilson v. Dargan*, 4 Rich. (S. Car.) 544; *Commercial Bank v. Warren*, 15 N. Y. 577.

Payment by one partner of his private debt out of the assets of the firm, when the firm is a creditor to him of a larger amount than he pays out, if he acts in good faith and there are no other outstanding debts of the partnership, will usually be sustained as the other partners suffer no injury. *Corwin v. Suydam*, 24 Ohio St. 209; *Sloan v. McDowell*, 71 N. Car. 356. But see to the contrary *Stewart v. M'Intosh*, 4 Har. & J. (Md.) 233.

most scrupulous good faith.¹ Nor is this requirement of perfect good faith confined to persons who are actually copartners, or to the period during which the co-partnership actually exists, but it extends also to persons negotiating for a partnership not yet formed,² as well as to persons who have dissolved a partnership formerly existing between them, who are engaged in the winding up and settlement of the partnership affairs.³ Such obligation of one toward another exists when the partnership is formed for a single enterprise only as well as when it is general,⁴ and is removed only by the abandonment of the partnership enterprise by one co-partner leaving the others to bear the burdens alone,⁵ in which case his own inequitable conduct may have been such as to estop him from complaining that his co-partners have retained to themselves the benefits of advantageous transactions.⁶

1. *Platt v. Platt*, 2 N. Y. Super. Ct. 39. And see *Todd v. Rafferty*, 30 N. J. Eq. 254; *Love v. Carpenter*, 30 Ind. 284; *Soloman v. Soloman*, 2 Ga. 18; *Gray v. Portland Bank*, 3 Mass. 264; *Lockwood v. Beckwith*, 6 Mich. 168; *Anderson v. Whitlock*, 2 Bush (Ky.) 398; *Lowry v. Cobb*, 9 La. Ann. 592; *Stoughton v. Lynch*, 1 Johns. Ch. (N. Y.) 467; *Herrick v. Ames*, 8 Bosw. (N. Y.) 115; *Eason v. Cherry*, 6 Jones (N. Car.) Eq. 261; *Peters v. Horbach*, 4 Pa. St. 134; *Coursin's Appeal*, 79 Pa. St. 220; *Bates' Appeal*, 70 Pa. St. 301; *Scruggs v. Russell*, *McCahon* (Kan.) 39; *Mathewson v. Allen*, 10 R. I. 156.

2. *Lindley on Part.* 569, *citing* *Hichens v. Congreve*, 1 R. & M. 150; *Fawcett v. Whitehouse*, 1 R. & M. 132.

While partners are bargaining with each other for the formation of a partnership, the rule of *caveat emptor* applies, and each can obtain as large a share of advantages in the contemplated firm as he justly can. *Uhler v. Semple*, 20 N. J. Eq. 288. But in buying from third persons, the land or other stock which the proposed partnership is designed to manage, one can retain no secret advantage over another. *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43.

One who, as a member of a firm, has contracted with another for the performance of a certain thing, is not prevented thereby from making a verbal promise, as an individual, concerning the same matter. *Pond v. Starkweather*, 90 N. Y. 411.

3. *Lindley on Part.* 569, *citing* *Lees v. Laforest*, 14 Beav. 250; *Clegg v. Fishwick*, 1 Mac. & G. 294; *Perens v. Johnson*, 3 Sm. & G. 419; *Clements v. Hall*, 2 DeG. & J. 173. And see *Steph-*

ens v. Orman, 10 Fla. 9; *Pierce v. McClellan*, 93 Ill. 245; *Reed v. Wessel*, 7 Mich. 139; *Mathewson v. Allen*, 10 R. I. 156; *Bray v. Morse*, 41 Wis. 343; *Warren v. Schainwald*, 62 Cal. 56; *Jones v. Dexter*, 130 Mass. 380; 39 Am. Rep. 459; *Beam v. Macomber*, 33 Mich. 127; *Betts v. June*, 51 N. Y. 274; *Wells v. McGeoch*, 71 Wis. 196.

A member of an insolvent firm, while acting as agent for the creditors, in the settlement of the partnership affairs, assisted another party to purchase from the creditors their claims, together with their rights to certain pledged assets of the firm. *Held*, that the purchase did not inure to the benefit of the firm, and that the transaction did not come within the operation of the general rule of equity, that a trustee cannot buy trust property for himself, or act as agent in buying it for another person. *Westcott v. Tyson*, 38 Pa. St. 389.

4. *Hulett v. Fairbanks*, 40 Ohio St. 233; *Yeoman v. Lasley*, 40 Ohio St. 190.

5. *Reilly v. Walsh*, 11 Irish Eq. 22; *McLure v. Ripley*, 2 Macn. & G. 274.

Where one of two partners engaged in a cotton storage business, declined to supply other warehouses for an increase in the business, and the other partner put up buildings at his own expense and received cotton in store in them, upon his individual account, without neglecting the partnership stores and business, it was held that this was not a breach of good faith nor was his co-partner entitled to a share in the profits of the individual store. *Parnell v. Robinson*, 58 Ga. 26.

6. See *Lowry v. Cobb*, 9 La. Ann. 592; *Rhea v. Tatham*, 1 Jones Eq. (N.

This rule extends to the prohibition of any selling or buying or other dealing by a partner, to or for the firm, to or from himself or another firm in which he has an interest, without the consent of his copartners,¹ and requires that precise and accurate accounts of the business and transactions of the firm be kept ready for inspection and free of access at all times,² at the place of business of the firm.³ Bad faith, however, will not be presumed without proof.⁴

So, unless the contrary is provided in the articles of co-partnership, or by special agreement between the partners, it is the duty of each partner to devote his full time and his best endeavors to

Car.) 290; *Stevenson v. Dunlap*, 7 T. B. Mon. (Ky.) 134; *Miller v. Chambers*, 73 Iowa 236.

1. *Comstock v. Buchanan*, 57 Barb. (N. Y.) 127; *Nelson v. Hayner*, 66 Ill. 487; *Kimball v. Lincoln*, 5 Ill. App. 316; *Lockwood v. Beckwith*, 6 Mich. 168; *Shopshire v. Russell*, 2 La. Ann. 961; *Iddings v. Bruen*, 4 Sandf. Ch. (N. Y.) 223; *Goodwin v. Einstein*, 51 How. Pr. (N. Y.) 9; *Whitman v. Bowden*, 27 S. Car. 53.

Where a firm has an auction sale of damaged goods, and one partner purchases them, it will be deemed to be a purchase on joint account and he must account for the profits. *Zimmerman v. Huber*, 29 Ala. 379.

If a partner who is employed to buy goods for the firm, buys for them his own goods at the market price, he must account to them for his profits. *Bentley v. Craven*, 18 Beav. 75.

But where a bill is filed by a partner against his co-partner for an account, and one of the partners is appointed receiver and uses the money received as such by him on which he makes a profit, the other partner is not entitled to a share of such profits, the money not being held by him as partner, but as receiver. *Whitesides v. Lafferty*, 3 Humph. (Tenn.) 150.

Where a member of one firm sold coal belonging to the firm to another firm, of which he was a member with notice to his partner and at the full market value, it was held that he was not liable to account for profits received by him as partner in the purchasing firm, although the latter firm took the coal to build contracts for delivery at a larger price than they paid for it. *Freck v. Blakiston*, 83 Pa. St. 474.

A member of a firm may contract with the firm openly and fairly. *Whitman v. Bowden*, 27 S. Car. 53.

2. See *Godfrey v. White*, 43 Mich. 171; *Fitzsimons v. Foley*, 80 Mich. 518; *Chandler v. Sherman*, 16 Fla. 99; *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Rowe v. Wood*, 2 Jac. & W. 553; *Ex parte Yonge*, 3 Ves. & B. 31; *Turner v. Bayley*, 30 Beav. 105; *Freeman v. Fairlie*, 3 Mer. 24.

Where the court cannot do justice between the parties because of the want of proper accounts, it will dismiss the bill and divide the costs rather than to attempt to establish claims on mere contingencies and possibilities. *Hall v. Claggett*, 48 Md. 222; *Vermilion v. Bailey*, 27 Ill. 230.

Where no particular partner has charge of the accounts, but each keeps the memoranda of his own transactions, each will be held to the strictest account for the non-performance of his duty. *Pierce v. Scott*, 37 Ark. 308.

If a partner keeps the accounts of the firm in a private book of his own, though he transfers them into the partnership books for inspection, he cannot withhold his private book from the inspection of his partners. *Tolmin v. Copland*, 3 Y. & E. Ex. 625.

3. The removal of the partnership books of account from the place of business of the firm without the consent of all the co-partners is a ground for injunction. *Charlton v. Poulter*, 19 Ves. 149, note; *Greatrex v. Greatrex*, 1 DeG. & S. 692; *Taylor v. Davis*, 3 Beav. 388, note. But it is not a ground for a dissolution and a receiver. *Goodman v. Whitcomb*, 1 Jac. & W. 589.

Where a firm has more than one place of business the books should be kept at the principal place. *Pollock on Part.* 72.

4. *Jenkins v. Peckinpau*gh, 40 Ind. 133; *Pierce v. Jackson*, 21 Cal. 636.

the business and interests of the partnership without compensation, and without regard to the relative value of the services of the several partners,¹ though a partner may become entitled to compensation as a matter of right when extra work is thrown upon him by the willful neglect or inattention to business of another partner,² as well as by agreement therefor, either express

1. *Glover v. Hembree*, 82 Ala. 324; *Zimmerman v. Huber*, 28 Ala. 379; *Shelton v. Knight*, 69 Ala. 598; *Haller v. Willamowicz*, 23 Ark. 566; *Pierce v. Scott*, 37 Ark. 308; *Griggs v. Clark*, 23 Cal. 427; *Tillotson v. Tillotson*, 34 Conn. 335; *Reybold v. Dodd*, 1 Harr. (Del.) 401; *Ligare v. Peacock*, 109 Ill. 94; *Askew v. Springer*, 111 Ill. 662; *Roach v. Perry*, 16 Ill. 37; *Lewis v. Moffett*, 11 Ill. 392; *Hanks v. Baber*, 53 Ill. 292; *Strattan v. Tabb*, 8 Ill. App. 225; *Burgess v. Badger*, 124 Ill. 288; *McBride v. Stradley*, 103 Ind. 465; *Boardman v. Coad*, 44 Iowa 428; *Starr v. Case*, 59 Iowa 491; *Lee v. Lashbrooke*, 8 Dana (Ky.) 214; *Hill v. Matta*, 12 La. Ann. 179; *Mills v. Fellows*, 30 La. Ann. 824; *Bevans v. Sullivan*, 4 Gill (Md.) 383; *Duff v. Maguire*, 107 Mass. 87; *Heath v. Waters*, 40 Mich. 457; *Godfrey v. White*, 43 Mich. 171; *Loomis v. Armstrong*, 49 Mich. 521; *Frank v. Webb*, 67 Miss. 462; *Randle v. Richardson*, 53 Miss. 176; *Berry v. Folkes*, 60 Miss. 576; *Inglis v. Floyd*, 33 Mo. App. 565; *Bennett v. Russell*, 34 Mo. 524; *Stegman v. Berryhill*, 72 Mo. 307; *Henry v. Bassett*, 75 Mo. 89; *Scudder v. Ames*, 89 Mo. 496; *Younglove v. Liebhardt*, 13 Neb. 557; *Bradford v. Kimberly*, 3 Johns. Ch. (N. Y.) 431; *Paine v. Thacher*, 25 Wend. (N. Y.) 450; *Caldwell v. Leiber*, 7 Paige (N. Y.) 483; *Dougherty v. Van Nostrand*, Hoffm. Ch. (N. Y.) 68; *Coursen v. Hamlin*, 2 Duer (N. Y.) 513; *Gilhooly v. Hart*, 8 Daly (N. Y.) 176; *Coddington v. Idell*, 29 N. J. Eq. 504; *Buford v. Neely*, 2 Dev. Eq. (N. Car.) 481; *Anderson v. Taylor*, 2 Ired. Eq. (N. Car.) 420; *Philips v. Turner*, 2 Dev. & B. Eq. (N. Car.) 123; *Butner v. Lemley*, 5 Jones Eq. (N. Car.) 148; *Stidger v. Reynolds*, 10 Ohio 351; *Scott v. Clark*, 1 Ohio St. 382; *Cameron v. Francisco*, 26 Ohio St. 190; *Mann v. Flanagan*, 9 Oregon 425; *Lindsey v. Stranahan*, 129 Pa. St. 635; *Brown's Appeal*, 89 Pa. St. 139; *Gyger's Appeal*, 62 Pa. St. 73; 1 Am. Rep. 382; *Marsh's Appeal*, 69 Pa. St. 30; 8 Am. Rep. 206; *Cunliff v. Dyer-ville Mfg. Co.*, 7 R. I. 325; *Lane v.*

Roche, Riley Eq. (S. Car.) 215; *Cothran v. Knox*, 13 (S. Car.) 496; *Piper v. Smith*, 1 Head (Tenn.) 93; *Berry v. Jones*, 11 Heisk. (Tenn.) 206; *Griffey v. Northcutt*, 5 Heisk. (Tenn.) 746; *Stebbins v. Willard*, 53 Vt. 665; *Pierce v. Daniels*, 25 Vt. 624; *Forrer v. Forrer*, 29 Gratt. (Va.) 134; *Frazier v. Frazier*, 77 Va. 775; *Roots v. Mason City & M. S. Co.*, 27 W. Va. 483; *Denver v. Roane*, 99 U. S. 355; *Lyman v. Lyman*, 2 Paine (U. S.) 11; *Jardine v. Hope*, 19 Grant's Ch. (Up. Can.) 76; *Thornton v. Proctor*, 1 Anstr. 94; *Holmes v. Higgins*, 1 B. & C. 74; *Robinson v. Anderson*, 20 Beav. 98; *Webster v. Bray*, 7 Hare 179; *Whittle v. McFarland*, 1 Knapp 311; *Robinson v. Davison*, 6 Ex. 269; *Boast v. Firth*, L. R., 4 C. P. 1; *Hutcheson v. Smith*, 5 Irish Eq. 117.

Even though one partner has worked continuously at the partnership business for many years, while the others have given it little or no attention, he cannot claim compensation for his services. See *Thornton v. Proctor*, 1 Anstr. 94; *Strattan v. Tabb*, 8 Ill. App. 225; *Forrer v. Forrer*, 29 Gratt. (Va.) 134.

The managing partner who has sole superintendence of the business is not entitled to compensation in the absence of agreement therefor. *Pierce v. Scott*, 37 Ark. 308; *Randle v. Richardson*, 53 Miss. 176; *Phillips v. Turner*, 2 Dev. & B. Eq. (N. Car.) 123; *Hutcheson v. Smith*, 5 Irish Eq. 117.

Personal expenses while engaged in the business of the firm are not, in the absence of agreement, a proper charge against it. *Glover v. Hembree*, 82 Ala. 324. But a partner is entitled to charge the partnership with sums *bona fide* expended in conducting the firm business. *Inglis v. Floyd*, 33 Mo. App. 565.

2. *Airey v. Borham*, 29 Beav. 620; *Gray v. Hamil*, 82 Ga. 375; *Zell's Appeal*, 126 Pa. St. 329. And see *Rohr v. Pearson*, 16 Oregon 325.

Where one partner goes out of the country leaving the other to wind up the affairs of the partnership, the lat-

or implied from their acts, and the conduct of the business.¹

a. COMPETITION WITH THE FIRM.—If one partner carries on another business in competition with that of the firm, thus depriving it of the benefit of his time, skill and fidelity, he is accountable to his co-partners for any profits that may accrue to him,² and he is liable to them for any damages which such act may occasion.³ Equity will enjoin a partner who has stipulated to exert himself for the benefit of the firm from engaging in the same trade, either by himself or with others;⁴ and if he has undertaken to superintend and manage the partnership business, he will be enjoined from carrying on the same business for his own benefit, even though there be no express covenant restraining him from so doing.⁵ Mere ownership in a similar business, however, where active assistance is not required, is not inconsistent with the duties of a partner.⁶ And a partner may traffic outside of the scope of the business of the firm for his own benefit, in a manner consistent with his duties as a partner.⁷

b. OBTAINING BENEFITS WHICH SHOULD EQUITABLY BELONG TO THE FIRM.—A partner cannot be permitted to secure for himself that which it is his duty to obtain if at all for the firm or company to which he belongs.⁸ Thus, the purchase or acquisition by one partner of an outstanding adverse title to or an interest in the property of the partnership, without the consent of his co-

ter is entitled to a reasonable allowance for his services. *Clement v. Ditterline* (Ky. 1889), 11 S. W. Rep. 658.

1. See *Scudder v. Ames*, 89 Mo. 493; *Gaston v. Kellogg*, 91 Mo. 104; *Godfrey v. Templeton*, 86 Tenn. 161; *Caldwell v. Leiber*, 7 Paige (N. Y.) 483; *Emerson v. Durand*, 64 Wis. 111; 54 Am. Rep. 593; *Cramer v. Bachman*, 68 Mo. 310; *Bradford v. Kimberly*, 3 Johns. (N. Y.) Ch. 431; *Marsh's Appeal*, 69 Pa. St. 30; *Gaston v. Kellogg*, 91 Mo. 104; *Pollock on Part.* 69.

An agreement fixing the amount to be withdrawn by the managing partner is not an agreement to allow him that sum as a salary. *Baltzell v. Trump*, 1 Md. Ch. 517.

Where, in an agreement of co-partnership between two, U and W, "U bargains and agrees to give W \$450 to manage the business," it must be paid out of the co-partnership funds. *Weaver v. Upton*, 7 Ired. (N. Car.) 458.

2. *Lockwood v. Beckwith*, 6 Mich. 168; *Todd v. Rafferty*, 30 N. J. Eq. 254; *Bast's Appeal*, 70 Pa. St. 301; *McMahon v. McClernan*, 10 W. Va. 419; *Fletcher v. Ingram*, 46 Wis. 191.

The assent of the other partners, to the transaction of a separate business

by a co-partner, cannot be inferred from slight circumstances, but must be clearly proven. *Todd v. Rafferty*, 30 N. J. Eq. 254. It will not be inferred, even from several years' delay, if they had reasonable grounds for expecting that he might ultimately account. *Bast's Appeal*, 70 Pa. St. 301.

3. *Pollock on Part.* 79; *Hellman v. Reis*, 1 Cin. Sup. Ct. Rep. (Ohio) 30.

4. *Kemble v. Kean*, 6 Sim. 333; *Dean v. MacDowell*, 8 Ch. D. 345; *Lowry v. Cobb*, 9 La. Ann. 592. See *Glassington v. Thwaites*, 1 Sim. & S. 124.

5. *Marshall v. Johnson*, 33 Ga. 500.

6. As to a dormant or silent partnership, see *Pierce v. Daniels*, 25 Vt. 624.

As to a partnership in different newspapers, see *Glassington v. Thwaites*, 1 Sim. & S. 124.

7. *Wheeler v. Sage*, 1 Wall. (U. S.) 518. And see *Dean v. McDowell*, 8 Ch. D. 245; *Belcher v. Whittemore*, 134 Mass. 330.

8. *Lindley on Part.*, 573; *Coursin's Appeal*, 79 Pa. St. 220; *Kilbourn v. Latta*, 5 Mackey (D. C.) 304; 60 Am. Rep. 373; *Lockwood v. Beckwith*, 6 Mich. 168; 72 Am. Dec. 69; *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202; 100 Am. Dec. 628; *Pollock on*

partners, will accrue to the benefit of the firm;¹ and a partner who clandestinely obtains a renewal of the lease of the premises upon which the firm transacts its business, in his own name, will be deemed to hold it for the benefit and use of the partnership.² And even though the lease contains no provisions relative to renewal, the probability or opportunity of renewal will nevertheless be treated as an asset, the appropriation of which by one partner is to be regarded as the assumption of a trust for the benefit of the firm.³

Part. 77; *Filbrun v. Ivers*, 92 Mo. 388. And see *White v. White*, 55 N. Y. Super. Ct. 417.

1. See *Crosswell v. Lehman*, 54 Ala. 363; 25 Am. Rep. 684; *Gillett v. Gaffney*, 3 Colo. 351; *Eakin v. Shumaker*, 12 Tex. 51; *Forrer v. Forrer*, 29 Gratt. (Va.) 134; *Kinsman v. Parkhurst*, 18 How. (U. S.) 289; *Weston v. Ketcham*, 39 N. Y. Super. Ct. 54; *Washburn v. Washburn*, 23 Vt. 576; *Burn v. Strong*, 14 Grant's Ch. (Up. Can.) 651; *Easton v. Strother*, 57 Iowa 506; *Laffan v. Naglee*, 9 Cal. 662; *Anderson v. Lemon*, 8 N. Y. 236; *Burr v. De La Vergne*, 102 N. Y. 415.

But where two members of a mining partnership, bought out a third partner with their own money, it was held that they were under no obligation to permit a fourth partner to share in the profits of the transaction. *Bissell v. Foss*, 14 U. S. 252.

Where partnership funds were used in purchasing a mere possessory right in real estate, the partners taking no steps to acquire the fee, but the survivor, upon the death of his co-partner, acquiring the fee and having purchased the possessory interest of the deceased partner from the administrator of the estate, the surviving partner does not come within the rule of a tenant acquiring an outstanding title, which he must be considered as holding in trust for his co-tenants. *Blatchley v. Coles*, 6 Colo. 349.

Plaintiff, defendant, and two others, being each the owner of an undivided one-fourth interest in a tract of land, formed a partnership for mining purposes, putting in the land as capital stock, and agreeing to contribute a specific sum as working capital. Plaintiff and two others executed mortgages on their interest to secure their individual debts, for which neither defendant nor the firm was liable, under which the land was sold, and bought by defendant, who sold it again at a large profit. *Held*, in an

action to recover a share of such profit, that the sale being for the individual debts of the partners, defendant's purchase did not inure to the benefit of the firm, and that he was not liable to plaintiff for such profit. *Rouquette v. Ryan* (Ky. 1888), 8 S. W. Rep. 702.

2. *Sneed v. Deal*, 53 Ark. 152; *Struthers v. Pearce*, 51 N. Y. 357; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Alder v. Fouracre*, 3 Swanst. 489; *Clegg v. Fishwick*, 1 Macn. & G. 294; *Clements v. Hall*, 2 De G. & J. 173; *Johnson's Appeal*, 115 Pa. St. 129; 2 Am. St. Rep. 539. And see *Leach v. Leach*, 18 Pick. (Mass.) 68.

Even though the partnership is at will and the renewing partner notifies his co-partners of his intention to renew in his own name before end of term, it will yet inure to their benefit. *Clegg v. Edmondson*, 4 De G. M. & G. 787.

Where the renewal by one partner is to begin at the expiration of the partnership, if the partnership has made improvements and enhanced the value of the premises by creating a good will, even though the lessor might have refused to grant a new lease to the firm or to the other partners, the renewal must be considered to be for the benefit of all. *Mitchell v. Read*, 61 N. Y. 123; 19 Am. Rep. 352.

Where, from the lapse of time, specific relief cannot be given to plaintiff, he can recover of defendants for any repairs he had made in the building in contemplation of occupancy. *Sneed v. Deal*, 53 Ark. 152.

Renewal of Firm Agency.—Where one member of a firm, doing business as insurance agents, procured a renewal of the agencies for himself, they will be considered as having been renewed for the benefit of the firm, although the other partners designed going out of the business. *Read v. Nevitt* 41 Wis. 348.

3. *Spies v. Rosswogg*, 63 How. Pr.

The same rules apply to the renewal of a lease by a surviving partner in his own name before the winding up and severance of his relations with the estate of his deceased partner.¹ Where the partnership is dissolved and the firm's lease has expired, however, and there is no element of underhand or secret dealing in the case, a lease or purchase of partnership property by one partner for his own use will be upheld.²

So, a purchase of property by one partner with partnership funds, though made in his own name, is held to be for the benefit of the firm;³ and any reward or commissions secretly obtained by one co-partner from third persons for inducing his firm to make particular purchases or sales, or to enter into particular transactions, must be accounted for to the firm.⁴ Sales may be effected by a firm through a firm of commission merchants in an

(N. Y.) 401; Johnson's Appeal, 115 Pa. St. 129; 2 Am. St. Rep. 539.

Where one partner, after the dissolution of the firm, and prior to the expiration of the lease held by it, which contained no provision for renewal, obtains a renewal of the same without the consent of his co-partner, he must account to the latter for the value of the expectancy of renewal which pertained to the old lease. Johnson's Appeal, 115 Pa. St. 129.

1. Leach v. Leach, 18 Pick. (Mass.) 68; Bettes v. June, 51 N. Y. 274; Clements v. Hall, 2 De G. & J. 173; Clegg v. Fishwick, 1 Macn. & G. 294; Johnson's Appeal, 115 Pa. St. 129; 2 Am. St. Rep. 539.

2. See Chittenden v. Whitbeck, 50 Mich. 401; Kayser v. Mangham, 8 Colo. 232; American Bank Note Co. v. Edson, 56 Barb. (N. Y.) 84.

Where a firm has a possessory title only, and the surviving partner purchases the interest of his deceased co-partner from the administrator, his subsequent purchase of the fee will not be deemed for the benefit of the heirs. Blatchley v. Coles, 6 Colo. 349.

After the dissolution of a firm by death of the partner and the closing up of the partnership affairs, the surviving partner may take a renewal of the lease of the partnership premises for his own benefit, even though a representative of the estate is willing to join as partner in continuing the business. Chittenden v. Witbeck, 50 Mich. 401.

If the property interest in a lease is in one partner, and not in the firm, he may renew for his own benefit. Phillips v. Reader, 18 N. J. L. 95.

3. Evans v. Gibson, 29 Mo. 223;

Smith v. Ramsey, 6 Ill. 373; Catron v. Shepherd, 8 Neb. 308; Swift v. Dean, 6 Johns. (N. Y.) 522; Coder v. Huling, 27 Pa. St. 84; Phillips v. Crammond, 2 Wash. (U. S.) 441; Rogers v. Riessner, 30 Fed. Rep. 525. And see also *infra*, this title, *Power to Purchase Property*.

The rule is the same even though the purchasing partner takes the title in the name of his wife. Partridge v. Wells, 30 N. J. Eq. 176.

Where one member of a firm invests a large amount of currency belonging to the firm, but supposed to be worthless, in the purchase and shipment of cotton, the partners are entitled to share in the profits realized from the adventure. Anderson v. Whitlock, 2 Bush (Ky.) 298; 92 Am. Dec. 489.

A partner, cannot, by purchase, become the owner of an outstanding note against the partnership; and if, in an attempted compromise of a firm note by one partner, there was a mutual mistake as to the amount due, the payment was good only for the amount paid, and not as full satisfaction of the note. Easton v. Strother, 57 Iowa 506.

4. Faulds v. Yates, 57 Ill. 416; Emery v. Parrott, 107 Mass. 95; Hodge v. Twitchell, 33 Minn. 389; Dunlop v. Richards, 2 E. D. Smith (N. Y.) 181; Densmore Oil Co. v. Densmore, 64 Pa. St. 43; Short v. Stramson, 63 Pa. St. 95; Grant v. Hardy, 33 Wis. 668; Delmonico v. Roundebush, 2 McCrary (U. S.) 18; Faucett v. Whitehouse, 1 Russ. & M. 131.

The fact that the guilty partner was to divide his commissions with a third person, and therefore does not realize

open and honest manner, where the two firms have a common partner, without rendering him accountable to the former firm for his share of the commissions received by the latter.¹

c. PURCHASE OF A PARTNER'S INTEREST.—While one partner may purchase the interest of another, even though it is without the knowledge of the other co-partners, provided he thereby obtains no secret benefit for himself at their expense,² any deception of any kind, or any non-disclosure of material facts, will vitiate the sale;³ or if the interest sold has passed into the hands of *bona fide* purchasers, will entitle the innocent partner to share in

the whole, will not relieve him from accounting for all; it is his own loss. *Grant v. Hardy*, 33 Wis. 668. And see *Bast's Appeal*, 70 Pa. St. 301.

A person who enters into a partnership with the guilty partner, and assists in effecting the scheme, is liable jointly and severally with the partner to their associates, if he has cognizance of the improper conduct. *Emory v. Parrott*, 107 Mass. 95.

Secretly receiving commissions or inducing the firm to purchase of third parties, is a sufficient ground for the withdrawal of the innocent partners, and they can recover their capital if they so elect. *Short v. Stevenson*, 63 Pa. St. 95.

1. *Freck v. Blackiston*, 83 Pa. St. 474.

Where one person is a member of two different firms, he cannot bind one firm, without the consent of his co-partners, by an agreement to extend to the other firm a continuous credit of five years. *Schnelby v. Culter*, 22 Ill. App. 87.

2. *Bissell v. Foss*, 114 U. S. 252; *First Nat. Bank v. Bissell*, 4 Fed. Rep. 694; *Bradbury v. Barnes*, 19 Cal. 120; *Cassels v. Stewart*, L. R., 6 App. Cas. 64. And see *Baylock's Appeal*, 73 Pa. St. 146; *Eakin v. Fenton*, 15 Ind. 59.

If partners, who desire to sell out, get their price, it makes no difference that it is secretly purchased for the other partners, where there is no misrepresentation, even though in fact the relations of the partners are not amicable, and the seller would have charged more, had he known that the purchase was for his co-partners. *Gedde's Appeal*, 80 Pa. St. 442.

A firm being insolvent, one of its members P, prevailed on B to buy up the creditors' claims, and arranged with him to buy out his partner, W, for a sum of money and give him a partnership. He told W of the arrangement

which was concluded. Thereafter W filed his bill, charging that P had made a better arrangement for himself than for his partner, and asking that his release of his interest in the firm assets be rescinded. *Held* demurrable for failure to show injury to W. *Watts v. Patton*, 66 Miss. 54.

3. See *White v. Cox*, 3 Hayw. (Tenn.) 79; *Warren v. Schainwald*, 62 Cal. 56; *Caldwell v. Davis*, 10 Colo. 481; *Jennings v. Rickard*, 10 Colo. 395; *Stephens v. Orman*, 10 Fla. 9; *Hopkins v. Watt*, 13 Ill. 298; *Brigham v. Dana*, 29 Vt. 1; *Sexton v. Sexton*, 9 Gratt. (Va.) 204; *Pomeroy v. Benton*, 57 Mo. 531; 14 Am. Law Reg. N. S. 306; *Catron v. Shepherd*, 8 Neb. 308; *Wells v. McLeod*, 71 Wis. 106; *Smith v. Smith*, 30 Vt. 139; *O'Connor v. Naughton*, 13 Grant's Ch. (Up. Can.) 428; *Maddeford v. Anstwick*, 1 Sim. 80; *Perens v. Johnson*, 3 Sm. & G. 419.

The same rule applies to the refusal of a surviving partner to furnish information to enable the representatives of the deceased partner to determine whether to sell. *Clements v. Hall*, 2 De G. & J. 173.

Where one partner having funds of the firm, held them back, so as to force a forfeiture of a contract to buy land, in order to buy up the forfeit of rights himself, it is held that the purchase inures to the benefit of the firm. *Hullett v. Fairbanks*, 40 Ohio St. 233.

If in the course of negotiations between two partners, pending an offer by one to sell out his interest to the other, a third partner, having better opportunities than either of them to form a correct opinion of the value of the interest in question, voluntarily expresses a pretended opinion, misrepresenting his real belief, both of the others believing him sincere when he is not, neither of these will be responsible for his want of candor, and however much his pretended opinion (acquiesced

the profits of the transaction.¹ A concealment to have this effect, however, must have been of a material fact.²

One partner can become a purchaser at an execution sale of the firm's property only in trust for the partnership, particularly if the forced sale was in any way promoted by the collusion or procurement of the purchasing partner;³ and a purchaser from him with notice occupies the same position.⁴

2. As to Third Parties⁵—*a. LIABILITY ON CONTRACTS.*—Partnership contracts are to be considered during the lifetime of the partners as joint and not joint and several;⁶ and each partner is,

in by both) may influence either in the final transaction, the sale will not, on that account, be set aside. *Dortic v. Dugas*, 55 Ga. 484.

1. See *Jones v. Dexter*, 130 Mass. 380; 39 Am. Rep. 459; *Dunne v. English*, 18 Eq. 524; *Imp. M. Credit Assoc. v. Coleman*, L. R., 6 H. L. 189.

2. *Nicholson v. Janeway*, 16 N. J. Eq. 285.

A partner purchased the interest of his co-partner at a price based on erroneous figures in the partnership books by which the interest of the selling partner in the firm assets appeared to be much larger than it really was. Neither partner was aware of the mistake, and no laches was attributable to either in respect to its discovery. *Held*, that whether, after it was too late for a rescission, the correction of the mistake could be made by refunding a part of the purchase price, and, if so, how much ought to be refunded, were questions of fact which might be submitted for the determination of a jury. *Branch v. Cooper*, 82 Ga. 512.

3. See *Renton v. Chaplin*, 9 N. J. Eq. 62; *Reed v. Wessel*, 7 Mich. 139; *Pierce v. Daniels*, 25 Vt. 624; *Evans v. Gibson*, 29 Mo. 223; *Buford v. Ashcroft*, 72 Tex. 104; *Bradbury v. Barnes*, 19 Cal. 120. But see *Wilson v. Bell*, 17 Minn. 61; *Rouquette v. Ryan* (Ky. 1888), 8 S. W. Rep. 702.

The bankruptcy of one partner will not dissolve the firm, if brought about by the other partner for that purpose. *Amsinck v. Bean*, 22 Wall. (U. S.) 395.

But it was held in *Gedde's Appeal*, 80 Pa. St. 442, that where a selling partner neglected to examine the books, although requested to do so, and sells his share to a person who was secretly buying for the other partner for \$28,000 when it was worth \$34,000, the inadequacy was not so great as to lead the court to set the transaction aside after six years' delay.

To sustain a purchase by a managing partner from a co-partner, who is ignorant of the state of the business, the price must have been adequate and all information possessed by him necessary to enable the seller to form a sound judgment must have been communicated. *Brooks v. Martin*, 2 Wall. (U. S.) 70; *Heath v. Waters*, 40 Mich. 457.

In *Bradbury v. Barnes*, 19 Cal. 120, however, it was held that a partner may purchase with his own funds and on his own account, the interest of his co-partner in real estate, at a sheriff's sale, if there be no circumstances of fraud or of trust, apart from the partnership relation, and hold the property so purchased as a stranger could hold it. And see *McKenzie v. Dickerson*, 43 Cal. 119.

4. See *Lamar v. Hale*, 79 Va. 147; *Farmer v. Samuel*, 4 Litt. (Ky.) 187; 14 Am. Dec. 106; *Evans v. Gibson*, 29 Mo. 223.

A purchase by a partner and payment by check upon the firm's deposit will be set aside and will not even amount to a dissolution. *Helmores v. Smith*, 35 Ch. D. 436.

Where one partner sold out to the other and by mistake of the book-keeper of which the buying partner was innocent, the latter appeared as a creditor of the firm, when in reality he was a debtor, he was required to account to the seller. *Kintrea v. Charles*, 12 Grant's Ch. (Up. Can.) 117.

5. A deception practised by one partner on another, has no effect upon their obligations to third person's who are not privy to it. *Seawell v. Payne*, 5 La. Ann. 255. And see *Dowdall v. Lenox*, 2 Edw. Ch. (N. Y.) 267; *McGovern v. Mattison* (N. Y. 1889), 22 N. E. Rep. 398.

6. See *Harrison v. McCormick*, 69 Cal. 616; *Currey v. Warrington*, 5

therefore, liable in full for all of the debts of the firm, irrespective of the ability of his co-partners to contribute, and regardless of the proportion of his interest in the firm,¹ provisions in the articles or elsewhere restricting the liability of certain partners being of no effect as to creditors having no notice of such provisions at the time the indebtedness was incurred.² These principles apply not only to actual known and ostensible partners, but also to secret and dormant or silent partners as well as to persons held out as

Harr. (Del.) 147; Thornton v. Bussey, 27 Ga. 302; Wiley v. Sledge, 8 Ga. 532; Boorum v. Ray, 72 Ind. 151; Crosby v. Jerolman, 37 Ind. 264; Williams v. Rogers, 14 Bush (Ky.) 776; Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416; Irby v. Graham, 46 Miss. 425; Bowen v. Crow, 16 Neb. 556; Tinkum v. O'Neale, 5 Nev. 93; Curtis v. Hollingshead, 14 N. J. L. 402; Marvin v. Wilber, 52 N. Y. 270; Weil v. Guerin, 42 Ohio St. 299; Cowden v. Hurford, 4 Ohio 132; Kamm v. Harker, 3 Oregon 208; Wiesenfeld v. Byrd, 17 S. Car. 106; Davis v. Willis, 47 Tex. 154; Washburne v. Bank of Bellows Falls, 19 Vt. 278; Strong v. Niles, 45 Conn. 52; Harris v. Schultz, 40 Barb. (N. Y.) 315.

A and B, partners, executed a bond as follows: "We A and B, now trading under the firm of A and Co., are held and bound, etc., for payment whereof we bind ourselves, and each and every of our heirs, executors, and administrators, jointly and severally." Held, that whether the bond was binding on the partnership or not, it was the separate debt of each of the partners, and that the obligee was not bound to resort to the partnership in the first instance. Pennan v. Tunno, Riley Eq. (S. Car.) 181.

Partnerships between attorneys are subject to the incidents to mercantile partnerships; and one partner is liable upon the contracts made by the other within the scope of the partnership business, and for his negligence in respect to a partnership transaction. Livingston v. Cox, 6 Pa. St. 360. And see Dyer v. Drew, 14 La. Ann. 667; Jones v. Caperton, 15 La. Ann. 475.

1. Medberry v. Soper, 17 Kan. 369; Collins v. Charlestown Mut. F. Ins. Co., 10 Gray (Mass.) 155; Hanson v. Paige, 3 Gray (Mass.) 239; Morrell v. Trenton Mut. L. & F. Ins. Co., 10 Cush. (Mass.) 282; 57 Am. Dec. 92; Benchley v. Chapin, 10 Cush. (Mass.) 173; Nebraska R. Co. v. Lett, 8 Neb. 251;

Judd Linseed & Sperm Oil Co. v. Hubbell, 76 N. Y. 543; Allen v. Owens, 2 Spears (S. Car.) 170; Waugh v. Carver, 2 H. Bl. 235.

One member of a firm was appointed assignee of a third party. Among the assets of the estate was a note made by the firm to the assignor; the assignee sold the note at auction and it was purchased for half its amount; he charged himself with the proceeds in his account. He was held chargeable with the whole amount. As partner in the firm, he was liable in full for its debts, and it was therefore his own debt, the person to whom it was sold being entitled to collect the whole of it. Benchley v. Chapin, 10 Cush. (Mass.) 173.

In Louisiana, partners in commercial partnerships are jointly liable for all indebtedness of the partnership. Villa v. Jonte, 17 La. Ann. 9; Gumbel v. Abrams, 20 La. Ann. 568. But in ordinary partnerships each is liable only for his share. Payne v. James, 36 La. Ann. 476; Hardeman v. Tabler, 36 La. Ann. 555; Hyans v. Rogers, 24 La. Ann. 230; Jones v. Caperton, 15 La. Ann. 475. But a partner may become liable in full for all the debts, by special contract. Payne v. James, 36 La. Ann. 476.

A creditor of a firm has an insurable interest in the life of one of the partners, even though the other partner is solvent. Morrell v. Trenton Mut. L. & F. Ins. Co., 10 Cush. (Mass.) 282; 57 Am. Dec. 92.

2. Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Phillips v. Nash, 47 Ga. 218; Williams v. Rogers, 14 Bush (Ky.) 776; Saufly v. Howard, 7 Dana (Ky.) 367; Lynch v. Thompson, 61 Miss. 354; Perry v. Randolph, 6 Smed. & M. (Miss.) 335; Coleman v. Bellhouse, 9 Up. Can., C. P. 31; Waugh v. Carver, 2 H. Bl. 235.

That the partner, whose liability was attempted to be limited, is a dormant partner does not relieve him.

partners, upon the faith of which holding out the indebtedness was incurred.¹

Statutory provisions applicable to partnerships have been adopted in a number of the States, however, changing joint debts into joint and several ones.² It is often said that in equity partnership liability is joint and several,³ and it is so, at least, to the extent that on the death of a partner his estate remains liable to the creditors of the firm;⁴ and it is also several at law to the extent that a recovery may be had against any number less than all

See *Phillips v. Nash*, 47 Ga. 218; *Winslow v. U. S. Bank*, 5 Pet. (U. S.) 529.

A stipulation limiting the liability of a partner, is valid as between the partners, and if the partner whose liability is limited is forced to share loss, he may require the other partners to reimburse him. *Geddes v. Wallace*, 2 Bligh's Rep. 270; *Gillian v. Morrison*, 1 De G. & S. 421.

A creditor may agree with a partner not to hold him liable, and the burden of proof to establish notice of a restricted liability rests with the partner alleging it. *Battie v. McCundie*, 3 C. & P. 203; *Cannop v. Levy*, 11 Q. B. 769. And see *Hart's Case*, 1 Ch. D. 307.

1. See *infra*, this title, *Actual and Ostensible Partners, Dormant Partners, and Partnership as to Third Persons*.

2. See *Hall v. Cook*, 69 Ala. 87; *Pearce v. Shorter*, 50 Ala. 318; *Travis v. Tartt*, 8 Ala. 574; *Conklin v. Harris*, 5 Ala. 213; *Kent v. Wells*, 21 Ark. 411; *Burgen v. Dwinall*, 11 Ark. 314; *Hamilton v. Buxton*, 6 Ark. 24; *Connon v. Dunlap*, 64 Ga. 680; *Williams v. Mutherbaugh*, 29 Kan. 730; *Williams v. Rogers*, 14 Bush (Ky.) 776; *Wright v. Swayne*, 5 B. Mon. (Ky.) 441; *Wilson v. Horne*, 37 Miss. 477; *Miller v. Northern Bank*, 34 Miss. 412; *Nutt v. Hunt*, 4 Smed. & M. (Miss.) 702; *Gates v. Watson*, 54 Mo. 585; *Putnam v. Ross*, 55 Mo. 116; *Griffin v. Samuel*, 6 Mo. 50; *Simpson v. Schulte*, 21 Mo. App. 639; *Logan v. Willis*, 76 N. Car. 416; *Gratz v. Stump*, *Cooke (Tenn.)* 493.

Statutes providing that contracts by several persons shall be considered as joint and several does not apply to partnerships. *Currey v. Warrington*, 5 Harr. (Del.) 147; *Kamm v. Harker*, 3 Oregon 208.

Under a statute changing a joint into a joint and several debt, an action on a foreign judgment rendered against

partners need not be brought against them all. *Belleville Sav. Bank v. Winslow*, 30 Fed. Rep. 488.

Statutes changing joint debts into joint and several ones have been enacted in *Alabama, Arkansas, Colorado, Georgia, Iowa, Illinois, Kansas, Kentucky, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Carolina, and Tennessee*. The *Illinois* statute has been held to be inapplicable to partnerships. *Coates v. Preston*, 105 Ill. 470.

3. *Bates' Law of Part.*, § 454, citing *Kendall v. Hamilton*, L. R., 4 App. Cas. 504; 3 C. P. D. 403; *Bensford v. Browning*, L. R., 20 Eq. 564.

4. *Waldron v. Simmons* 28 Ala. 629; *Storer v. Hinkley*, Kirby (Conn.) 147; *Pendleton v. Phelps*, 4 Day (Conn.) 476; *Filley v. Phelps*, 18 Conn. 294; *Pullen v. Whitfield*, 55 Ga. 174; *Anderson v. Pollard*, 62 Ga. 46; *Mason v. Tiffany*, 45 Ill. 392; *Silverman v. Chase*, 90 Ill. 37; *Vance v. Cowing*, 13 Ind. 460; *McGill v. McGill*, 2 Metc. (Ky.) 258; *Southard v. Lewis*, 4 Dana (Ky.) 148; *McCulloh v. Dashiell*, 1 Har. & G. (Md.) 96; *Allen v. Wells*, 22 Pick. (Mass.) 453; *Dahlgren v. Duncan*, 7 Smed. & M. (Miss.) 280; *Buckingham v. Ludlum*, 37 N. J. Eq. 137; *Wilder v. Keeler*, 3 Paige (N. Y.) 167; *Jenkins v. De Groot*, 1 Cai. Cas. (N. Y.) 122; *Grant v. Shurter*, 1 Wend. (N. Y.) 148; *Hamersley v. Lambert*, 2 Johns. Ch. (N. Y.) 508; *Slatter v. Carroll*, 2 Sandf. Ch. (N. Y.) 573; *Copcutt v. Merchant*, 4 Bradf. (N. Y.) 18; *Stahl v. Stahl*, 2 Lans. (N. Y.) 60; *First Nat. Bank v. Morgan*, 73 N. Y. 593; *Voorhis v. Child*, 17 N. Y. 354; *Richter v. Poppenhausen*, 42 N. Y. 373; *Pope v. Cole*, 55 N. Y. 124; 14 Am. Rep. 198; 6 Hun (N. Y.) 346; *Horsey v. Heath*, 5 Ohio 353; *Lang v. Keppele*, 1 Bin. (Pa.) 123; *Cope v. Warner*, 13 S. & R. (Pa.) 411; *Caldwell v. Stileman*, 1 Rawle, (Pa.) 212; *Pearce v.*

the partners if the non-joinder of the others is not pleaded.¹ As between the partners themselves, the balance due from debtor to creditor partners on final accounting is a several indebtedness,² though surviving partners who have divided up the assets among themselves are jointly liable to the executor for the decedent's share.³ The liability of a partner for the acts of his co-partners done in behalf of the firm, however, cannot be held to extend to illegal contracts, as obtaining a loan at a usurious rate of interest.⁴

b. LIABILITY FOR TORTS.—Each partner being the agent of the firm for the purpose of carrying on its business in the usual way, the partnership is liable in damages for torts or wrongs committed by any of the partners within the proper scope of their agency,⁵

Cooke, 13 R. I. 184; Wardlaw v. Gray, Dudley, Eq. (S. Car.) 85; Fisher v. Tucker, 1 McCord Eq. (S. Car.) 169; Linney v. Dare, 2 Leigh (Va.) 588; Sale v. Dishman, 3 Leigh (Va.) 548; Hubble v. Perrin, 3 Ohio 287; Lane v. Williams, 2 Vernon 292; *Ex parte* Kendall, 17 Ves. 514; Vulliamy v. Noble, 4 My. & Cr. 109; 3 Mer. 619; Holme v. Hammond, L. R., 7 Ex. 218; Burn v. Burn, 3 Ves. 573; Bishop v. Church, 2 Ves. Sr. 100, 371; Simpson v. Vaughn, 2 Atk. 31; Orr v. Chase, 1 Mer. 729; Thomas v. Frazer, 3 Ves. 399.

1. Mason v. Eldred, 6 Wall. (U. S.) 231; Barry v. Foyles, 1 Pet. (U. S.) 311; Woodworth v. Spafford, 2 McLean, (U. S.) 168; Rice v. Shute, 5 Burr. 2611.

2. Starr v. Case, 59 Iowa 491; Rhin-er v. Sweet, 2 Lans. (N. Y.) 386; Raiguel's Appeal, 80 Pa. St. 234; Portsmouth v. Donaldson, 32 Pa. St. 202. And see Bloomfield v. Buchanan, 14 Oregon, 181; Allison v. Davidson, 2 Dev. Eq. (N. Car.) 79; Wentworth v. Raiguel, 9 Phila. (Pa.) 275; Raiguel's Appeal, 80 Pa. St. 234. See to the contrary Beresford v. Browning, 1 Ch. D. 30.

Where two partners buy out the interest of a third, signing in their individual capacities, each is liable severally for half and not jointly for the whole. Lusk v. Graham, 21 La. Ann. 159.

But where, in the agreement for dissolution, the continuing partners jointly covenant with the retiring one, and the retiring partner stands upon the covenant, he can hold them jointly liable. Wilmer v. Curry, 2 DeG. & Sm. 347.

3. Birdsall v. Bemiss, 2 La. Ann. 449; Bundy v. Youmans, 44 Mich. 376.

4. Hutchins v. Turner, 8 Humph. (Tenn.) 415.

But where one of two partners sells whiskey in fraud of the revenue, without the knowledge of the other, the latter cannot recover his share of the purchase price. Curran v. Dorrus, 7 Mo. App. 329.

5. Lindley on Part. 298; Parsons on Part. 150; Gerhardt v. Swaty, 57 Wis. 24; Lucas v. Bruce, 4 Am. Law. Reg., N. S. 95; Wolf v. Mills, 56 Ill. 360; Locke v. Stearns, 1 Met. (Mass.) 560; 35 Am. Dec. 383; Henry Mfg. Co. v. Perkins, 78 Mich. 1; Heim v. McCaughan, 32 Miss. 17; 56 Am. Dec. 589; Hall v. Younts, 87 N. Car. 285; Moorehead v. Gilmore, 77 Pa. St. 118, 18 Am. Rep. 435; Champion v. Bostwick, 18 Wend. (N. Y.) 175; 31 Am. Dec. 376; Witcher v. Brewer, 49 Ala. 119; Myers v. Gilbert, 18 Ala. 467; Fletcher v. Ingram, 46 Wis. 191; Brewing v. Berryman, 15 N. B. 515; Tucker v. Cole, 54 Wis. 539; Moreton v. Hardern, 4 B. & C. 223; 6 Dow. & Ry. 275. And see the rest of the cases cited in this subdivision.

If, however, a partner goes out of his way to commit a tort, whether willful or not, the other partners are not liable for it. Pollock's Dig. of Part., art. 24.

Where one member of a firm of apothecaries negligently permitted a customer to help himself to a dose of medicine without paying for it, and by mistake he took poison instead, it was held that giving away medicines was not a part of the firm's business, and that, therefore, the innocent co-partner was not liable. Gwynn v. Duffield, 66 Iowa 708.

Where one firm sued a railroad company for neglect to receive and carry their grain, the fact that another firm having a common partner had, by its neglect to receive its grain, blockaded the railroad, is no defense. Cobb v. I. C. R. Co., 38 Iowa, 601.

as well as for those of an agent or servant acting within the scope of his employment,¹ the general doctrine of the joint and several liability of joint principals for torts applying to partnerships.² The test as to the liability of the firm for the tort of a partner is the question of agency; and generally the firm is liable if it would have been liable had the same act been committed by an agent intrusted with the management of the business.³ Thus, each partner is the agent for the firm for the purpose of effecting the collection of its debts, and any fraud or misrepresentation in a compromise effected by a partner avoids it as to the whole firm,⁴ and a tort committed or authorized by a partner in effecting the collection of debts by the usual and ordinary methods is the tort of the firm,⁵ though the innocent partners would not be held responsible for

Holding Out.—In *Stables v. Eley*, 1 C. & P. 614, a retired partner whose name remained on a wagon belonging to the firm which was driven over a third person, by an employe of the continuing partner, was held liable. This case was criticised, however, by Bates, in his *Law of Partnership*, § 470, on the ground that a person is liable, by holding out only upon the ground of estoppel; that the only estoppel apparent in this case is, that the injured party was induced to sue the retired partner supposing him to be a member of the firm which is not sufficient. See also *infra*, this title, *Partnership as to Third Persons*.

1. *Hall v. Younts*, 87 N. Car. 285; *White v. Smith*, 12 Rich. (S. Car.) 595; *Wood v. Luscomb*, 23 Wis. 287; *Bowas v. Pioneer Tow Line*, 2 Sawy. (U. S.) 21; *Stables v. Eley*, 1 C. & P. 614; *Linton v. Hurley*, 14 Gray (Mass.) 191.

A firm is liable for the torts of its servant committed within the scope of his employment, even though the servant was employed and paid exclusively by one partner who had sole charge of the branch of the partnership business in which the servant was engaged. *Champion v. Bostwick*, 18 Wend. (N. Y.) 175; 31 Am. Dec. 376. And see *Laugher v. Pointer*, 5 B. & C. 547.

2. *Stockton v. Frey*, 4 Gill (Md.) 406; *McCrillis v. Hawes*, 38 Me. 566; *Head v. Goodwin*, 37 Me. 181; *Howe v. Shaw*, 56 Me. 291; *Roberts v. Johnson*, 58 N. Y. 613; *Morgan v. Skidmore*, 55 Barb. (N. Y.) 263; *Moe v. Penland*, 93 N. Car. 292; *White v. Smith*, 12 Rich. (S. Car.) 595; *Wood v. Luscomb*, 23 Wis. 287; *Brewing v. Berryman*, 15 N. B. 515; *Sadler v.*

Lee, 6 Beav. 324; *Edmonson v. Davis*, 4 Esp. 14.

A partnership may be sued for a tort, and, if one of the partners dies pending such suit, judgment may be rendered against the survivor, there being no question of debt or of the rights of creditors of the partnership involved. *Bucki v. Cone*, 25 Fla. 1.

3. *Bates' Law of Part.*, § 464; *Lothrop v. Adams*, 133 Mass. 471; 43 Am. Rep. 528; *Hall v. Younts*, 87 N. Car. 285.

Partners may be sued in trover, although there was no joint conversion in fact. A joint conversion may be implied in law from consent of a partner to the act of his co-partners. *Bane v. Detrick*, 52 Ill. 191.

4. *Doremus v. McCormick*, 7 Gill (Md.) 49; *Pierce v. Wood*, 23 N. H. 519.

5. See *Loomis v. Barker*, 69 Ill. 360; *Chambers v. Clearwater*, 1 Keys (N. Y.) 310; 1 Abb. App. Dec. (N. Y.) 341; *Rolfe v. Dudley*, 58 Mich. 208; *Kuhn v. Weil*, 73 Mo. 213; *Gurler v. Wood*, 16 N. H. 539; *McClure v. Hill*, 36 Ark. 268.

Where one partner acts for a firm in demanding and collecting illegal charges, every member of the firm is liable for the damage. *Lockwood v. Bartlett* (Supreme Ct.), 7 N. Y. Supp. 481.

Where an execution in favor of the firm is levied by direction of one partner, upon property upon which a third person had chattel mortgages, in disregard of and with knowledge of the mortgages, it was held, that as the firm was desirous of getting the benefit of the act of the sheriff it was liable for it and could not repudiate it if tortious. *Harvey v. McAdams*, 52 Mich. 472.

the adoption by a copartner of unusual and extortionate methods.¹

While the willful and malicious torts of a member of a firm are not usually within the scope of his employment, and consequently do not render his co-partners liable,² yet if such an act is committed clearly and plainly for the benefit of all, and in the usual and ordinary prosecution of the business of the partnership, all are liable, notwithstanding the malicious motives of the partner committing the act.³ And, in a proper case, all may be held liable in exemplary or punitive damages for the tort of one member of the firm;⁴ but the innocent partner is not subject to arrest in a civil action for fraud,⁵ nor can he be found guilty of actual fraud.⁶

An act which is contrary to a statute will not be regarded as within the scope of the business by construction of law because

But in *Taylor v. Jones*, 42 N. H. 25, where the sheriff levied upon goods marked with the debtor's name, but in fact belonging to a third person who demanded them of one partner, it was held that such partner's refusal to give them up did not make his co-partner liable merely because he was a partner, but that the question whether he was acting in the proper scope and business of the partnership is one for the jury. And where one partner caused the property of another person to be seized for a debt due the firm, and his surety was obliged to pay, it was held, that his surety could not recover from the firm. *Durant v. Rogers*, 71 Ill. 121.

1. *Woodling v. Knickerbocker*, 31 Minn. 268. But see *Robinson v. Goings*, 63 Miss. 500; *Vanderburg v. Bassett*, 4 Minn. 242.

Where one party maliciously arrests and imprisons a debtor of the firm, without the consent or knowledge of his co-partner, it was held, that as no benefit had accrued to the firm, the innocent co-partner was not liable. *Rosenkrans v. Barker*, 115 Ill. 331.

2. See *Rosenkrans v. Barker*, 115 Ill. 331; *Woodling v. Knickerbocker*, 31 Minn. 268; *Arbuckle v. Taylor*, 3 Dowl. 160; *Petrie v. Lamont*, 1 Car. & M. 93; *Grund v. Van Vleck*, 69 Ill. 478; *Abraham v. Hall*, 59 Ala. 386.

Where the postoffice was kept in the store of a partnership by one of the firm's clerks, for the absent postmaster, it was held that one partner was not liable for the other's appropriation of the postoffice money. *Crumless v. Sturgess*, 6 Heisk. (Tenn.) 190.

3. *Baldy v. Brackenridge*, 37 La. Ann.

660; *Lothrop v. Adams*, 133 Mass. 471; 43 Am. Rep. 528; *Robinson v. Goings*, 63 Miss. 500.

Partners are jointly liable for statements made by one in derogation of a competitor and in aid of their own business. *Haney Mfg. Co. v. Perkins*, 78 Mich. 1.

A purchase by one partner with the fraudulent intention of not paying for the goods, renders the other partner who was ignorant of the intent liable on contract only, and not for the fraud. *Stewart v. Levy*, 36 Cal. 159.

In *McIlory v. Adams*, 32 Ark. 315, where a note made by a third person was transferred to a member of a firm of brokers, and he sued the maker in the firm name without the knowledge of his co-partners, and by swearing that the firm owned the note deprived the maker of a good defense available to him against the real owner, and levied execution upon the maker's property, seriously injuring it, it was held that the innocent partner was liable for the injury caused by such unauthorized act.

4. See *Robinson v. Goings*, 63 Miss. 500; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100. To the contrary see *Rosenkrans v. Barker*, 115 Ill. 331.

5. *National Bank v. Temple*, 37 How. Pr. (N. Y.) 432; *McNeely v. Haynes*, 76 N. Car. 122. But see *Townsend v. Bogart*, 11 Abb. Pr. (N. Y.) 355.

6. *Stewart v. Levy*, 36 Cal. 159.

An attorney is not liable for a penalty and to disbarment for his partner's failure to pay their collections, nor is he subject to summary application to pay money appropriated by his co-partner. *Porter v. Vance*, 14 Lea (Tenn.) 627; *Ex parte Flood*, 23 N. B. 86.

it is illegal, merely for the purpose of charging the other partners, without proof of authorization or ratification,¹ though a firm is held liable for the damages and penalties incurred by a breach of the revenue laws committed by one partner in the prosecution of the partnership business, as an indemnity to government.²

The general principle of the law of torts, that "he that agreeth to a trespass after it is done is no trespasser, unless the trespass was done to his use or for his benefit, and thus his agreement subsequent amounteth to a commandment,"³ applies to the torts of a co-partner. The subsequent approval of a co-partner, therefore, of a tort committed outside of the scope of the business of the firm, and of no benefit to it, is not such a ratification as will render him liable.⁴

(1) *Fraud and Misrepresentation.*—A fraud committed or a misrepresentation made by one partner in the conduct of the business of the firm, is as binding upon the partnership as though it were the act of all the partners, if such act would have been binding in the absence of fraud or untruth.⁵ Thus a firm is bound by the fraud or misrepresentation of a partner in the disposition of part-

1. See *Schreiber v. Sharpless*, 6 Fed. Rep. 175; *Graham v. Meyer*, 4 Blatchf. (U. S.) 129.

2. *Stockwell v. U. S.*, 13 Wall. (U. S.) 531; *United States v. Thomasson*, 4 Biss. (U. S.) 99; *Attorney General v. Strangforth*, Bunb. 97; *Attorney General v. Weekes*, Bunb. 223; *Attorney General v. Burgess*, Bunb. 223; *Rex v. Manning*, Comyns. 616; *Graham v. Pocock*, L. R., 3 P. C. 345.

Partners are jointly and severally liable for the circulation of change bills by their clerk, in violation of the Ala. Rev. Code, § 3643, although they did not know when the bills were emitted. *Barnett v. State*, 54 Ala. 579.

3. 4 Coke Inst. 317. And see *Beveridge v. Rawson*, 51 Ill. 504; *Grund v. Van Vleck*, 69 Ill. 479; *Harrison v. Mitchell*, 13 La. Ann. 260; *Collins v. Waggoner*, 1 Ill. 51; *Allred v. Bray*, 41 Mo. 484; *Brainerd v. Dunning*, 30 N. Y. 211; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479; *Eastern Counties R. Co. v. Broom*, 6 Exch. 314; *Hull v. Pickersgill*, 1 B. & B. 282; *Wilson v. Turnman*, 6 M. & Gr. 236.

Where one partner of a firm acting as agent for the owner of the demised property, committed a trespass in expelling the tenant and removing his goods from the premises, it was held that the other partner who took no part in the act and knew nothing of it at the time and neither advised nor directed it, could not be rendered liable on the

mere ground of his subsequent approval and sanctioning of the act after its commission. *Grund v. Van Vleck*, 69 Ill. 478.

4. *Rosenkrans v. Barker*, 115 Ill. 331; *Grund v. Van Vleck*, 69 Ill. 478; *Wilson v. Turnman*, 6 M. & G. 236.

In *Durant v. Rogers*, 87 Ill. 508, it was held that where one partner causes the seizure of the property of another person for a debt due the firm, and the firm received and appropriated the avails of the property, thereby increasing its assets, the other partners were liable.

5. *Griswold v. Haven*, 25 N. Y. 595; 82 Am. Dec. 380; *Wickham v. Wickham*, 2 Kay & J. 478; *Coleman v. Pearce*, 26 Minn. 123; *Rapp v. Latham*, 2 B. & Ald. 795.

Where the plaintiffs gave four notes as an accommodation to the firm of S & H, and afterwards S, without H's knowledge, falsely represented to the plaintiffs that they had been unable to negotiate the notes because payable at the office of S & H, and requested other notes in their place; and, in reliance upon which the plaintiffs sent other notes, and H & S procured their discount and put the avails of all the notes into the firm's business, it was held that the fraud was in the course of the business of the firm, and that H was liable. *Strang v. Bradner*, 114 U. S. 555.

A broker who was employed to sell

nership property held for sale,¹ or in the substitution of inferior or other articles for those for which a purchaser contracted;² and a debt contracted upon the representation that it is for the benefit of the firm, renders the firm liable, whether true or false, if the transaction is within the scope of the partnership business.³ This rule is not applicable, however, to representations by a partner as to the extent of his authority to bind the firm,⁴ nor to a fraud by a partner in the sale of his individual interest, the sale of the individual property of a partner not being within the scope of the partnership business.⁵

(2) *Money or Property Wrongfully Obtained.*—Where one partner wrongfully obtains money, either for the use of the firm, or which is afterwards devoted to its use, though without the knowledge or assent of his copartners, the whole firm is liable for money had and received,⁶ but the innocent partners are not liable *ex de-*

a house negotiated with another broker to divide the commissions if the latter procured a purchaser. The second broker got the owner to name a price by assuring him that no other broker had anything to do with the trade, and the sale was effected. It was held that the fraud defeated the innocent partner's action, for commissions, prosecuted for the joint benefit. *Thwing v. Clifford*, 136 Mass. 482.

1. *Chester v. Dickerson*, 54 N. Y. 1; 13 Am. Rep. 550; *Griswold v. Haven*, 25 N. Y. 595; *Sweet v. Bradley*, 24 Barb. (N. Y.) 549; *Cook v. Castner*, 9 Cush. (Mass.) 266; *Hawkins v. Appleby*, 2 Sandf. (N. Y.) 421. And see *Reynolds v. Waller*, 1 Wash. (Va.) 164; *Story on Part.*, § 108; *Collyer on Part.*, § 445.

The representations of a partner to third persons about the purchase notes made by the firm, as to their validity is binding upon the firm. *French v. Rowe*, 15 Iowa 563; *McKee v. Hamilton*, 33 Ohio St. 7. But the rule would be different, if the partner making the representations did not know at the time that the inquiry was made with a view to purchase. *In re Schuchardt*, 15 Nat. Bankr. Reg. 161.

The members of a partnership are answerable for a false warranty made by one of such members on a sale of partnership property within the scope of his authority. *Morehouse v. Northrop*, 33 Conn. 380; 89 Am. Dec. 211.

2. *Wolf v. Mills*, 56 Ill. 360; *Locke*

v. Stearns, 1 Met. (Mass.) 560; 35 Am. Dec. 382.

3. *Stockwell v. Dillingham*, 50 Me. 442; 79 Am. Dec. 621.

Where money was fraudulently obtained by a partner, in the name of the firm, and in business transactions such as the firm was engaged in, the firm might be liable therefor, although the transactions were unknown to the other partner; but if the person dealing with such partner knew that the latter was acting in violation of his duty to the firm, the latter would not be liable. 1876, *Alexander v. State*, 56 Ga. 478.

4. *Ex parte Agace*, 2 Cox 312.

5. *Schwabacker v. Riddle*, 84 Ill. 517; *Chamberlin v. Prior*, 2 Keyes (N. Y.) 539; 1 Abb. App. Dec. 338.

But partners selling out their interest in the firm to third persons are liable for fraudulent representations of their co-partner as to the extent of the assets and liabilities of the firm. *Lindmeier v. Monahan*, 64 Iowa 24.

6. *Manufacturers etc. Bank v. Gore*, 15 Mass. 75; 8 Am. Dec. 83; *Wallace v. James*, 5 Grant's Ch. (Up. Can.) 163; *Rapp v. Latham*, 2 B. & Ald. 795; *Palmer v. Scott*, 68 Ala. 380.

In *Manufacturers & Mechanics' Bank v. Gore*, 15 Mass. 15; 8 Am. Dec. 83, which was a case of a partner obtaining money upon a note with the name of three persons, as indorsers, forged upon it, the proceeds of which were used for the benefit of the firm, it was held that the lender can immediately sue both partners for money had and received, although one was

licito,¹ and where property has thus been wrongfully appropriated or procured by fraud, and placed among the assets of the firm, thereby increasing them, the whole firm becomes liable,² either upon the theory that, as no title to the property was thus obtained, it was a conversion to their use,³ or that they had received the benefit and should bear the burdens of the fraudulent act of a co-partner.⁴

(3) *Misapplication of Moneys or Property*.—The appropriation or misapplication by one partner of moneys or other property in the custody of the firm, within the scope of its business, or in the custody of such partner as a representative of the firm, renders each partner liable to the true owner for such conversion;⁵ and when thus in the custody of one partner it is immaterial whether the other partners knew anything about it or not.⁶ Where money

innocent, without waiting for the maturity of the note.

1. Bates' Law of Part., § 478.

2. *Durant v. Rogers*, 87 Ill. 508; *Kerr v. Sharp*, 83 Ill. 199; *Blight v. Tobin*, 7 T. B. Mon. (Ky.) 612, 18 Am. Dec. 219; *Olmsted v. Hotaling*, 1 Hill (N. Y.) 317; *Royer v. Aydelotte*, 1 Cin. Sup. Ct. Rep. (Ohio) 80.

Where a firm of brokers purchased cotton for T & Co., and paid for it with T & Co's check, received by them from T, and delivered T the warrants for the cotton, which T deposited as security and absconded, and the check was dishonored, in an action of trover for the cotton, it was held that if it was received with the preconceived design of not paying for it, the firm was liable for its receipt. *Kilbee v. Wilson, Ry. & M.* 178.

A horse was borrowed by a partner for the use of the firm, but was lost through his neglect or wrongdoing, it was held that the owner of the horse could recover for his loss against the partnership. *Witcher v. Brewer*, 49 Ala. 119.

3. See *Miller v. Manice*, 6 Hill (N. Y.) 114; Bates' Law of Part., § 478.

Where property was purchased by a partner with the intention of not paying for it, an action for deceit can be maintained against the guilty party only. *Stewart v. Levy*, 36 Cal. 159.

4. *Doremus v. McCormick*, 7 Gill (Md.) 49; *Fripp v. Williams*, 14 S. Car. 502; *Gerhardt v. Swaty*, 57 Wis. 24; *Gray v. Cropper*, 1 Allen (Mass.) 337; *In re Ketchum*, 1 Fed. Rep. 815; *Strang v. Bradner*, 114 U. S. 555; *Castle v. Bullard*, 23 How. (U. S.) 172; *Sadler v. Lee*, 6 Beav. 324; *Devaynes v. Noble*, 1 Mer. 575 (Clayton's case);

Devaynes v. Noble, 1 Mer. 611 (Barling's case).

5. *Nisbet v. Patton*, 4 Rawle (Pa.) 120; 26 Am. Dec. 122; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Castle v. Bullard*, 23 How. (U. S.) 172; *Jackson v. Todd*, 56 Ind. 406; *Hammond v. Heward*, 11 Up. Can. C. P. 261; *Ex parte Biddulph*, 3 De G. & Sm. 587; *Sadler v. Lee*, 6 Beav. 324; *Plumer v. Gregory*, L. R. 18 Eq. 621; *St. Aubyn v. Smart*, L. R., 3 Ch. App. 646; *Blair v. Bromley*, 2 Ph. 354; 5 Hare 542. And see *Stone v. Marsh Ry. & M.* 364; *Keating v. Marsh*, 1 Mont. & A. 582. *Ex parte Bolland* Mont. & M. 315; *Hume v. Bolland, Ry. & M.* 370. But see *Hammond v. Heward*, 20 Up. Can., Q. B. 36.

Where one of a firm of attorneys doing a collection business collects money for a client and absconds with it, his partner is liable. *McFarland v. Crary*, 8 Cow. (N. Y.) 253; *Dwight v. Simon*, 4 La. Ann. 490.

If a part of the business of a firm is the investment of money for others, and money is received to be invested in a mortgage, and one of the partners forges a mortgage without the other's knowledge and keeps the money, the other is liable. *Willett v. Chambers*, Cow. 814.

In *Alexander v. Georgia*, 56 Ga. 478, the active partner in a firm engaged in making sales to a railroad for which it received its pay from the State, by duplicate bills and bogus accounts, defrauded the State out of a large sum; the innocent partner was held liable. See also *Royer v. Aydolett*, 1 Cin. Super. Ct. (Ohio) 80.

6. *Brydges v. Branfill*, 12 Sim. 369; *Willets v. Chambers*, Cowp. 814. And see *Todd v. Studholme*, 3 K. & J. 24;

or property comes into the hands of a partner, however, in the course of some transaction unconnected with the business of the firm, his appropriation or misapplication does not affect the innocent co-partners,¹ even though had he not been connected with the firm he would not have been in a position to commit the fraud.²

(4) *Trust Funds Used by a Partner for the Firm.*—That a partner who is a trustee, executor, guardian, or the like, improperly employs the money of his *cestui que trust* in the partnership business, or in the payment of partnership debts, is not alone sufficient to entitle the *cestui que trust* to reimbursement by the firm.³ But if the other partners have knowledge of the nature of the funds at the time of the misapplication, they are placed with the misappropriating partner, at the election of the *cestui que trust*, in the position of trustees of the fund, having connived at the violation of the trust;⁴ and if they know that the fund belongs to an estate they are bound to inquire upon what terms it is held—notice of

Devaynes v. Noble, 1 Mer. 575 (Clayton's case).

"One can hardly see what the knowledge or means of knowledge has to do with it, if covered by the scope of the business." Pollock Dig. Part., art. 24, note.

1. *Harman v. Johnson*, 2 E. & B. 61; *Plumer v. Gregory*, L. R. 18 Eq. 621; *Cleather v. Twisden*, 24 Ch. D. 731. And see *Dounce v. Parsons*, 45 N. Y. 180; *Adams v. Sturges*, 55 Ill. 468; *Toof v. Duncan*, 45 Miss. 48.

Where a person, being indebted to a firm, handed a note owned by him to one of the partners to collect for him, and either hand him the proceeds or apply it on the debt, but the partner did not account for the proceeds, it was held that the firm was not liable. *Linn v. Ross*, 16 N. J. L. 55.

2. *Ex parte Eyre*, 1 Ph. 227. And see *Pierce v. Jackson*, 6 Mass. 242; *Bishop v. Countess of Jersey*, 2 Drew 143; *Coomer v. Bromley*, 5 De G. & Sm. 532. But see *Locke v. Stearns*, 1 Met. (Mass.) 564; 35 Am. Dec. 383.

3. *Jaque v. Marquand*, 6 Cow. (N. Y.) 497; *Hollenback v. More*, 44 N. Y. Super. Ct. 107; *Logan v. Bond*, 13 Ga. 192; *Talmadge v. Penoyer*, 35 Barb. (N. Y.) 120; *Willett v. Stringer*, 17 Abb. Pr. (N. Y.) 153; *Guillou v. Peterson*, 7 W. N. C. (Pa.) 268; *Evans v. Bidleman*, 3 Cal. 435; *Ex parte Heaton*, Buck 386; *Ex parte Aspey*, 3 Bro. C. C. 265; *Ex parte White*, L. R., 6 Ch. D. 397; *Harper v. Lamping*, 33 Cal. 641; *Edwards v. Parker*, 88 Ala. 356.

Where the misuse of the trust fund

had taken place before the admission of a partner into the firm, he is not liable, not being a participator in the misuse. *Twyford v. Trail*, 7 Sim. 92.

Where the co-partners were innocent of the violation of the trust, but the guilty partner subsequently gave the note of the firm to the owner of the fund for the amount, the firm was held liable upon the note. *Palmer v. Scott*, 68 Ala. 380; *Richardson v. French*, 4 Met. (Mass.) 577.

4. *Trull v. Trull*, 13 Allen (Mass.) 407; *Wharton v. Clements*, 3 Del. Ch. 209; *Price v. Mulford*, 36 Hun (N. Y.) 247; *Colt v. Lasnier*, 9 Cow. (N. Y.) 320; *Hutchinson v. Smith*, 7 Paige (N. Y.) 26; *Davis v. Gelhaus*, 44 Ohio St. 69; *Stoddard v. Smith*, 11 Ohio St. 581; *Emerson v. Durant*, 64 Wis. 111; *Guillou v. Peterson*, 89 Pa. St. 163; *In re Jordan*, 2 Fed. Rep. 319; *Travis v. Milne*, 9 Hare 141.

Those partners only who are cognizant of the misapplication of the trust fund are chargeable, the ground of the liability being that they are joint wrongdoers. *Bryse v. Foster*, L. R., 7 H. L. 318.

An incoming partner having contradicted the testimony of another witness that such partner had admitted that he knew that the trust funds of certain wards were used in the partnership business by his partner, who was their guardian, and his testimony that if they were so used he had no knowledge thereof being corroborated by the guardian's testimony and the circumstances, the wards cannot share

the powers of the trustee partner being imputable to them whether they had actual notice or not;¹ though some cases have adopted the rule that liability is incurred by the receipt of the benefits, irrespective of the question of knowledge or notice.²

The liability, when incurred, is a joint and several one.³ When the moneys are devoted to the use of the firm with the knowledge and consent of the *cestui que trust*, the rights of a creditor are conferred upon him, it being in effect a loan by him to the firm.⁴ Although the firm is not liable for trust money misapplied by a partner to its use unless implicated in the breach of trust, the *cestui que trust* can, if it remains intact, follow it into their hands and recover it, upon showing that the firm is not a purchaser for value without notice;⁵ but persons who borrow trust money from ex-

in the assets of the firm as its creditors. *Englar v. Offutt*, 70 Md. 78.

1. See *Houser v. Riley*, 45 Ga. 126; *In re Ketchum*, 1 Fed. Rep. 815; *Travis v. Milne*, 9 Hare 141.

The knowledge of the guilty partner is not within the scope of the business, and, therefore, not the knowledge of the firm, and the same rule applies where one of the other partners knew and agreed to the improper misapplication of the trust fund. *Evans v. Bidleman*, 3 Cal. 435. And see *Ex parte Heaton*, Buck 317.

2. *Palmer v. Scott*, 68 Ala. 380; *Welker v. Wallace*, 31 Ga. 362.

The firm is not bound by the application of trust funds in the hands of a partner to its use after dissolution, the power of a partner to create new liabilities ceasing with the dissolution. *Dunlop v. Limes*, 49 Iowa 177.

3. *In re Jordan*, 2 Fed. Rep. 319; *Flocton v. Bunning*, L. R., 8 Ch. App. 223; *Imperial Mercantile Credit Assoc. v. Coleman*, L. R., 6 H. L. 189; *Devaynes v. Noble*, 1 Mer. 563 (*Sluch's case*); *Sadler v. Lee*, 6 Beav. 324; *Brydges v. Branfill*, 12 Sim. 369; *Blair v. Bromley*, 2 Ph. 359.

4. *Whitaker v. Brown*, 16 Wend. (N. Y.) 505.

Where a new representative of the trust is appointed, he can sue the firm as for a debt. *Bush v. Bush*, 33 Kan. 556. And he can prove the claim in bankruptcy against the joint estate of the firm, and the separate estate of the trustee partner. *In re Jordan*, 2 Fed. Rep. 319.

Where goods were delivered to a factor for sale, and afterwards came into the possession of a co-partnership of which he was a partner, and were sold and the proceeds received by the

partnership, it was held, that this was sufficient evidence, *prima facie*, to entitle the owner to recover the avails of the partnership. *Martin v. Moulton*, 8 N. H. 504.

5. See *Carter v. Lepsey*, 70 Ga. 417; *Stoddard v. Smith*, 11 Ohio St. 581; *Vanderwick v. Summerl*, 2 Wash. (U. S.) 41; *Scott v. Surman*, Willes 400; *Taylor v. Plumer*, 3 M. & S. 562; *Small v. Atwood*, Young 507; *Pennell v. DeFill*, 4 De G. M. & G. 372; *Shaler v. Trowbridge*, 28 N. J. Eq. 595; *Renfrow v. Pearce*, 68 Ill. 125.

The contribution of trust funds, to the capital stock of a partnership, at the time of its formation by a trustee, as his own property, without notice to the other co-partners of the fact of its being trust property, is closely analogous to its sale and purchase. In such a case the trust fund cannot be followed and only such portion as the trustee could claim in the partnership assets could be recovered. *Hollemback v. Moore*, 44 N. Y. Super. Ct. 107.

The rule that trust property may be followed into whatsoever hands it goes, with notice of the trust, does not apply in cases where an officer of a bank, being a member of the partnership, lends to his firm, funds of the bank, without proper security, which become mingled with the other partnership property. *Case v. Beauregard*, 1 Wood (U. S.) 125.

So with funds of a married woman held in trust (under the *Alabama* code) by her husband, mingled by him with the funds of the partnership, of which he is a member; the partnership funds are not charged with the trust funds, either during the life of the husband or after his death. *Dent v. Slough*, 40 Ala. 518.

ecutors or trustees are only liable to repay it with interest,¹ though the trustee himself is bound, at the election of the *cestui que trust*, to replace the fund, either with interest or with the accrued profits, to be measured by the proper proportion to which the trustee is entitled in the partnership.² Repayment by the other partners to the trustee, if he has not been deprived of power to receive it, will exonerate them;³ but a mere turning over of the assets upon dissolution to the trustee partner upon his agreement to pay the debts is not a sufficient repayment.⁴

(5) *Contribution Between Partners*—(See also CONTRIBUTION, vol. 4, p. 1.)—When a wrong consists of a mere breach of a conventional duty resting upon the partnership as an entity, and not upon its members as individuals, the association must necessarily share the consequent loss in proportion to their respective interests.⁵ The rule that wrong-doers cannot have redress or contribution against each other being confined to cases in which the person seeking redress must be presumed to have known that he was doing an unlawful act.⁶

Though if the partner or other joint wrong-doer knew that the act was illegal, or if the circumstances were such as to render ignorance of the illegality inexcusable, he will be left by the law

1. Lindley on Part. 313, citing *Stroud v. Gwyer*, 28 Beav. 130. And see *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea (Tenn.) 398.

If the trustee partner takes security from his firm, consisting of a note and mortgage, payable to his *cestui que trust*, delivery to him is good; he receives them as trustee and not as partner. *Tucker v. Bradley*, 33 Vt. 324.

Where one partner procured money by selling forged paper and put the money into his firm and absconded, and the other partners assigned for the benefit of the creditors, it was held that the person from whom the money was obtained is entitled to be paid in full out of the assets. *Wallace v. James*, 7 Grant's Ch. (Up. Can.) 163.

An agreement by a new firm, to be liable for all debts for goods, includes a claim for public money applied to pay for goods by one partner, who is also county treasurer. *Hutchinson v. Smith*, 7 Paige (N. Y.) 26.

2. *Long v. Majestre*, 1 Johns. Ch. (N. Y.) 305; *Seguin's Appeal*, 103 Pa. St. 139; *Vyse v. Foster*, L. R., 7 H. L., 318; *Palmer v. Mitchel*, 2 M. & K. 672; *Laird v. Chisholm*, 30 Scottish Jurist 582; *Jones v. Foxall*, 15 Beav. 388.

3. *Sherburne v. Goodwin*, 44 N. H. 271.

The partner who appropriates trust funds in his hands and applies them to the use of his firm, is in his capacity as executor, a creditor of the firm. *McCracken v. Milhous*, 7 Ill. App. 169.

4. See *Davis v. Gelhaus*, 44 Ohio St. 69; *Smith v. Jameson*, 5 T. R. 601; *Dickenson v. Lockyer*, 4 Ves. 36.

5. See *Cooley on Torts* 150; *Worley v. Balte*, 2 Car. & P. 417; *Harbach v. Elder*, 18 Pa. St. 33.

6. *Adamson v. Jarvis*, 4 Bing. 66. And see *Avery v. Halsey*, 14 Pick. (Mass.) 174; *Acheson v. Miller*, 2 Ohio St. 203; *Grund v. Van Vleck*, 69 Ill. 479; *Bryan v. Landon*, 5 Thomp. & C. (N. Y.) 594; *Ives v. Jones*, 3 Ired. (N. Car.) 538; *Betts v. Gibbons*, 2 Ad. & E. 57; *Humphreys v. Pratt*, 2 Dow. & C. 288.

In *Davis v. Gelhaus*, 44 Ohio St. 69, contribution was denied upon the ground that the misappropriation was made a criminal one by statute.

Where one party performs acts at the instance of another that are legal in themselves, but prove in the end to be in violation of the rights of third parties, and he is, in consequence, made liable in damages, the law will imply a promise of indemnity in the absence of a direct agreement. *Betts v. Gibbons*, 2 A. & C. 57; *Humphrey v. Prall*, 2 Dow. & C. 288; *Burgess v. Hills*, 26 Beav. 244.

where his wrongful action has placed him.¹ If an individual partner is made responsible for a tort committed in the service of his firm, his right to indemnity is governed by the rules which prevail in the relation of principal and agent and master and servant.²

c. CRIMINAL LIABILITY.—Mutual agency to violate penal laws is not implied; a partner is not, therefore, liable to criminal prosecution for the crimes of his co-partner, unless he has participated in them,³ though one partner has been made criminally responsible for the acts of another by statute in some instances, as for the illegal sale of intoxicating liquor.⁴ They may be jointly indicted, however, if their act is joint,⁵ but the partnership cannot be indicted in the firm name; the indictment must run against the partners as individuals, and thus only can they be convicted.⁶

XVII. MATTERS RELATING TO THE CONDUCT OF THE BUSINESS—1. Contracts, Acts and Admissions of One Partner—(See also, *infra*, this title, POWERS AND RIGHTS OF PARTNERS).—Contracts and transactions entered into by a partner, either in fact for the firm or within the scope of its business, though the fact of partnership is unknown, are deemed to be partnership transactions. Thus a sale to a partner of goods for the firm is presumptively a sale to the firm;⁷ and a sale of the goods of the firm by a partner is presumptively a sale by the firm.⁸ So, the employment of one partner within the scope of his partnership business is the employment of the firm,⁹ and a contract by a partner with reference to a matter pertaining

1. Cooley on Torts, 148, citing *Spalding v. Oakes*, 42 Vt. 343; *Cumpston v. Lambert*, 18 Ohio 81. And see *Merryweather v. Nixon*, 8 T. R. 186.

2. Cooley on Torts, 150. And see *Waller v. Martin*, 17 B. Mon. (Ky.) 181; *Foster v. Essex Bank*, 17 Mass. 479. See also *infra*, this title, *Distribution and Winding Up*. And see further, AGENCY, vol. 1, p. 331; MASTER AND SERVANT, vol. 14, p. 740.

3. *Acree v. Com.*, 13 Bush (Ky.) 353; *State v. Coleman, Dudley* (S. Car.) 32; *State v. Bierman*, 1 Strobb. (S. Car.) 256.

As Between Themselves.—A partner who forcibly ejects a co-partner and threatens him if he ever enters again, may be bound over to keep the peace. *Queen v. Mallinson*, 16 Q. B. 367.

4. *Whitton v. State*, 37 Miss. 379; *State v. Neal*, 27 N. H. 131.

An officer of a national bank who allows his firm to overdraw with intent to defraud the bank, is guilty of a misapplication of its funds under § 5209 of the Revised Statutes of the United States. *United States v. Fish*, 24 Fed. Rep. 585.

5. *Lemons v. State*, 50 Ala. 130; *U. S. v. McGinnis*, 1 Abb. (U. S.) 120.

6. *Allen v. State*, 34 Tex. 230; *Peterson v. State*, 32 Tex. 477. And see also INDICTMENT, vol. 1, p. 450.

7. *Horton v. Miller*, 84 Ala. 537; *Dougal v. Cowles*, 5 Day (Conn.) 511; *Mills v. Barber*, 4 Day (Conn.) 428; *Booe v. Caldwell*, 12 Ind. 12; *Augusta Wine Co. v. Weippert*, 14 Mo. App. 483; *Walden v. Sherburne*, 15 Johns. (N. Y.) 422; *Burnley v. Rice*, 18 Tex. 481. And see *Sherwood v. Snow*, 46 Iowa 481; 26 Am. Rep. 155.

Where a partnership note is renewed after dissolution of the firm by a note signed by the individual names of the partners, there will be no change of liability unless specially so intended, and both partners will remain liable. *Maynard v. Fellows*, 43 N. H. 225.

8. *Thornton v. Lambeth*, 103 N. Car. 86; *Badger v. D'Aenieke*, 56 Wis. 678; *Lambert's Case*, Godbolt 244.

9. *Williams v. More*, 63 Cal. 50; *Harris v. Pearce*, 5 Ill. App. 622; *Eggleston v. Boardman*, 37 Mich. 17; *Jackson v. Bohrman*, 59 Wis. 422.

If a client contracts with a firm for the personal services of a particular partner, and he fails to perform the services, it is a breach of contract, though the damages for such breach will be but

to the business of the firm, is the contract of the firm,¹ such contracts being uniformly required to be enforced in the names of all the partners.²

If the partnership is a dormant or an undisclosed one, and its existence is unknown to the other contracting party, he is presumed to have contracted in reliance upon the credit any responsibility of all who composed it, whether known or unknown.³

That the firm receives the benefits accruing from a contract entered into by one of its members, is not alone sufficient to render it liable upon the contract, if it was not in fact made as the firm's agent; as in case of obtaining a loan or making a purchase for use

nominal, if another partner performed the duty with due professional skill and without injury to the client. *Smith v. Hill*, 13 Ark. 173.

1. *Clement v. British Am. Assur. Co.*, 141 Mass. 298; *Anon v. Layfield*, 1 Salk. 291; *De Tastet v. Carrol*, 1 Stark. 88.

Where a person is employed to work for a firm and continues to work under the direction of the partners, or one of them, supposing himself to be engaged during the whole time in the services of the firm; the fact that a part of his labor was employed in the preparation of materials belonging to one partner, some of which were not ultimately used for partnership purposes, will not relieve the firm from liability to him for the whole of such labor, nor prevent his having a lien on the building for the whole amount. *Spruhen v. Stout*, 52 Wis. 517.

2. See *Gage v. Rollins*, 10 Met. (Mass.) 348; *Jackson v. Bohrman*, 59 Wis. 422; *White v. Williams*, Willin W. & H. 52. But see *Hopkinson v. Smith*, 1 Bing. 13.

In *Mills v. Kerr*, 32 Up. Can. C. P. 68, the payee of a note signed in the firm name, declared that he looked only to the partner who executed it, and refused to deal with the firm. It was held that he could not rank with creditors of the partnership on distribution.

3. *Everitt v. Chapman*, 6 Conn. 347; *McDonald v. Clough*, 10 Colo. 59; *Bisel v. Hobbs*, 6 Blackf. (Ind.) 479; *Morse v. Richmond*, 67 Ill. 303; 6 Ill. App. 166; *Kennedy v. Bohannon*, 11 B. Mon. (Ky.) 118; *Richardson v. Farmer*, 36 Mo. 35; *Davidson v. Kelly*, 1 Md. 492; *Smith v. Smith*, 27 N. H. 244; *Tucker v. Peaslee*, 36 N. H. 167; *Farr v. Wheeler*, 20 N. H. 569; *Hersom v. Henderson*, 23 N. H. 498; *Baxter v. Clark*, 4 Ired. (N. Car.) 127; *Poole v. Lewis*, 75

N. Car. 417; *Reynolds v. Cleveland*, 4 Cow. (N. Y.) 282; 15 Am. Dec. 369; *Howells v. Adams*, 68 N. Y. 314; *Poillon v. Secor*, 61 N. Y. 456; *Ontario Bank v. Hennessey*, 48 N. Y. 545; *Crocker v. Colwell*, 46 N. Y. 212; *Graeff v. Hitchman*, 5 Watts (Pa.) 454; *Miffin v. Smith*, 17 S. & R. (Pa.) 165; *McNair v. Rewey*, 62 Wis. 167; *Holmes v. Burton*, 9 Vt. 252; 31 Am. Dec. 621; *Strauss v. Jones*, 37 Tex. 313; *Bank v. Case*, 8 B. & C. 427; *Vere v. Ashby*, 10 B. & C. 288; *Wintle v. Crowther*, 1 Cr. & J. 316; *In re Warren*, 1 Dav. (U. S.) 322; *Palmer v. Elliot*, 1 Cliff. (U. S.) 63; *Ex parte Law*, 3 Deac. 541; *Bigelow v. Elliot*, 1 Cliff. (U. S.) 28. But see *Williams v. Gillies*, 75 N. Y. 197.

In *Poole v. Lewis*, 75 N. Car. 417, one firm was a member of another; this firm purchased goods to be placed in the other and the vendor charged them to the former firm. The latter partnership not having been disclosed, it was held that, in order to charge the former firm, the vendor must have been proved to have known of the partnership and to have elected to look to the buyer alone, as he will not be supposed to have taken less security than he was entitled to.

In *Manufacturers' Bank v. Winship*, 5 Pick. (Mass.) 11; 16 Am. Dec. 369, it was held, that an obligation given by a person in whose name the partnership is carried on, although in the hands of a purchaser without notice, does not *prima facie* bind his co-partners, and that the burden of proving that the obligation was given for the use of the co-partnership, is upon the holder. See also *Buckner v. Lee*, 8 Ga. 285.

In *Tyler v. Waddingham*, 58 Conn. 375, it was held that the plaintiff, not having known at the time of the transaction with K that defendant and K

in one's business and afterwards taking in a partner,¹ or of borrowing money or procuring goods to contribute as one's agreed share of the capital stock;² and though the purchase is made in the name of the expected firm, if unauthorized, the rule is the same.³ As between the co-partners, if the benefit is received by the firm, it is regarded as an advancement made to it by the partner whose sole credit has been pledged.⁴

were partners, cannot be considered to have given exclusive credit to K by taking his individual note secured by mortgage, though understanding that defendant was in some way interested in the transaction.

1. *Watt v. Kirby*, 15 Ill. 200; *Smith v. Hood*, 4 Ill. App. 360; *Duncan v. Lewis*, 1 Duv. (Ky.) 183; *National Bank v. Meader*, 40 Minn. 325; *Ketchum v. Durkee*, Hoffm. Ch. (N. Y.) 538; *Donnally v. Ryan*, 41 Pa. St. 306; *Brooke v. Evans*, 5 Watts (Pa.) 196; *Bank v. Gray*, 12 Lea (Tenn.) 459; *Taggart v. Phelps*, 10 Vt. 318; *Atwood v. Lockhart*, 4 McLean (U. S.) 350; *Floyd v. Wallace*, 31 Ga. 688; *Young v. Hunter*, 4 Taunt. 582; *Howell v. Sewing Mach. Co.*, 12 Neb. 177.

The *Louisiana* rule seems to be that the firm is liable if it has received the benefit. See *Logan v. Cragin*, 27 La. Ann. 352; *Penn v. Kearny*, 21 La. Ann. 21; *Roth v. Moore*, 19 La. Ann. 86.

Where a firm consisting of two partners rents a furnished hotel from the father of one of the partners, and during the lease the father gives his son various sums of money, which the latter expends in repairing the building and renewing the furniture, such money cannot, on an accounting between the partners, be considered as a loan to the firm, in the absence of any claim made therefor against the firm by the father. *Moore's Appeal* (Pa. 1890), 19 Atl. Rep. 753.

But in *Watt v. Kirby*, 15 Ill. 200, it is held that this principle does not apply where the delivery of the goods was made to the firm and on its credit. Where a person pays money at the request of a member of a firm, for what appears to be a firm obligation as upon a note signed in the firm name, he can hold the firm, unless he knew that it was an individual matter, or that the note was forgery. See also *Blinn v. Evans*, 24 Ill. 317.

2. *Logan v. Bond*, 13 Ga. 192; *Evans v. Winston*, 74 Ala. 349; *Wittram v. Van Wormer*, 44 Ill. 525; *Pollock v.*

Williams, 42 Miss. 88; *Burns v. Mason*, 11 Mo. 469; *Matlock v. James*, 13 N. J. Eq. 126; *Ferson v. Monroe*, 21 N. H. 462; *Elliot v. Stevens*, 38 N. H. 311; *Norwalk Nat. Bank v. Sawyer*, 38 Ohio St. 339; *Valentine v. Hickie*, 39 Ohio St. 19; *McNaughton's Appeal*, 101 Pa. St. 550; *Foster v. Barnes*, 81 Pa. St. 377; *Donnally v. Ryan*, 41 Pa. St. 306; *Morlitzer v. Bernard*, 10 Heisk. (Tenn.) 361; *Stebbins v. Willard*, 53 Vt. 665; *McLenden v. Wentworth*, 51 Wis. 170; *Robertson v. Jones*, 20 N. B. 267. And see *Barton v. Hanson*, 2 Taunt. 49.

The mere fact that the other partners knew that the money was to be borrowed, or the contract was to be made, does not make the borrower an agent of the firm in the matter. *Farmers' Bank v. Bayliss*, 41 Mo. 274.

The burden is on the creditor to show an agreement by the firm to assume such liability. *Morlitzer v. Bernard*, 10 Heisk. (Tenn.) 361.

A partner cannot, by borrowing money on his own account, make the firm liable, even though he states to the lender that the money is to be used in the business of the firm. *Ah Lep v. Long Choy*, 13 Oregon 205.

3. *Gauss v. Hobbs*, 18 Kan. 500. And see *Evans v. Winston*, 74 Ala. 349.

In *Rutledge v. Squires*, 23 Iowa 53, it was held that if the contract is with relation to matter not connected with the business of the firm, it is presumptively a personal contract with the individual partner, though made in the firm name.

4. *Green v. Tanner*, 8 Met. (Mass.) 411; *Farmers' Bank v. Bayliss*, 41 Mo. 274; *Sprague v. Ainsworth*, 40 Vt. 47; *Dewey v. Dewey*, 35 Vt. 559. And see *Moore v. Stevens*, 60 Miss. 809; *Asbury v. Flesher*, 11 Mo. 610; *Tom v. O'Goodrich*, 2 Johns. (N. Y.) 213; *Peterson v. Roach*, 32 Ohio St. 374; 30 Am. Rep. 607; *Kraft v. Creighton*, 3 Rich. (S. Car.) 273.

Where a partner borrows money upon his individual notes, and used it for the benefit of the firm, giving the firm note as security for his notes, it was

The question whether a contract is on behalf of the firm or on behalf of the contracting partner only, is one of fact for the jury.¹ The rule is universal that the acts, admissions and declarations of a partner during the existence of a partnership, while engaged in the transaction of its business or relating to matters within its scope, are evidence against the firm,² the fact that the declarant is a dormant partner not affecting the applicability of

held that no recovery could be had on the firm note as against the firm. *McCord v. Field*, 27 Up. Can. C. P. 391. And see *Guice v. Thornton*, 76 Ala. 466. But see *Union Bank v. Eaton*, 5 Humph. (Tenn.) 501. *Hurd v. Haggerty*, 24 Ill. 173; *Davidson v. Kelly*, 1 Md. 492; *Meador v. Malcolm*, 78 Mo. 550.

Sureties for One Partner.—Where a partner gives his individual note for the indebtedness of the firm, though the firm is not bound by the note, yet, the surety who pays the note can hold the firm. *Burns v. Parish*, 3 B. Mon. (Ky.) 8; *Weaver v. Tapscott*, 9 Leigh (Va.) 424. And see *McKee v. Hamilton*, 33 Ohio St. 7.

But a mere statement by a contracting partner; that the firm wanted money for its business, made to induce a third party to become surety, is not sufficient to establish the partnership character of the request. *Uhler v. Browning*, 28 N. J. L. 79.

In *Waldron v. Sherburne*, 15 Johns. (N. Y.) 423, it was held that if the debt of the partner is a statute obligation for custom duties, given by him individually on account of the absence of his co-partner, although a surety might have recovered from the firm if he had paid, yet, if he furnishes the partner with money to pay it, he cannot hold the firm for the loan.

Assumption by Firm.—Money was obtained on the personal credit of a member of a firm, but was used solely for partnership purposes. Held, that this was a good consideration for a subsequent promise of the firm to pay the debt. *Siegel v. Chidsey*, 28 Pa. St. 279.

1. *Smith v. Collins*, 115 Mass. 388; *Stecker v. Smith*, 46 Mich. 14; *Browne v. Thompson*, 1 N. J. L. 2; *Poole v. Lewis*, 75 N. Car. 417; *Benninger v. Hess*, 41 Ohio St. 64; *Athens Bank v. Green*, 40 Ohio St. 431; *Le Roy v. Johnson*, 2 Pet. (U. S.) 186. And see *Conely v. Wood*, 73 Mich. 203.

Though a bond on which judgment

is recovered against the individual members of a firm is not expressed to be a partnership bond, yet where it appears that the money was loaned to the partnership, and was used in the partnership business, the debt represented by it is a partnership debt. *Green v. Walker*, 5 Del. Ch. 26.

2. *Fail v. McArthur*, 31 Ala. 26; *Smithe v. Cureton*, 31 Ala. 652; *Jemison v. Minor*, 34 Ala. 33; *Talbot v. Wilkins*, 31 Ark. 411; *Munson v. Wickwire*, 21 Conn. 513; *McCutchin v. Banston*, 2 Ga. 244; *Dennis v. Ray*, 9 Ga. 449; *Clayton v. Thompson*, 13 Ga. 296; *Drumright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 738; *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. 15; *Hurd v. Haggerty*, 24 Ill. 171; *Vannoy v. Klein*, 122 Ind. 416; *Boor v. Lowrey*, 103 Ind. 468; *First Nat. Bank v. Carpenter*, 34 Iowa 433; *Wiley v. Griswold*, 41 Iowa 375; *Spears v. Toland*, 1 A. K. Marsh. (Ky.) 203; *Boyce v. Watson*, 3 J. J. Marsh. (Ky.) 498; *Phillips v. Purington*, 15 Me. 425; *Gilmore v. Patterson*, 36 Me. 544; *Fickett v. Swift*, 41 Me. 65; *Doremus v. McCormick*, 7 Gill (Md.) 49; *Harryman v. Roberts*, 52 Md. 64; 20 Am. Law Reg., N. S. 373; *Odiorne v. Maxcy*, 15 Mass. 39; *Collett v. Smith*, 143 Mass. 473; *Burgan v. Lyell*, 2 Mich. 102; 55 Am. Dec. 53; *Milwaukee Harvester Co. v. Finnegan*, 43 Minn. 183; *Faler v. Jordan*, 44 Miss. 283; *Cunningham v. Sublette*, 4 Mo. 224; *Cady v. Kyle*, 47 Mo. 346; *Henslee v. Cannefax*, 49 Mo. 295; *Jones v. O'Farrell*, 1 Nev. 354; *Gulick v. Gulick*, 14 N. J. L. 578; *Ruckman v. Decker*, 23 N. J. Eq. 283; *Hoboken Bank v. Beckman*, 36 N. J. Eq. 83; 37 N. J. Eq. 331; *Brake v. Kimball*, 5 Sandf. (N. Y.) 237; *Davis v. Newkirk*, 5 Den. (N. Y.) 92; *Fogerty v. Jordan*, 2 Robt. (N. Y.) 319; *Hilton v. McDowell*, 87 N. Car. 364; *Crossgrove v. Himmelrich*, 54 Pa. St. 203; *Allen v. Owens*, 2 Spears (S. Car.) 170; *Fisk v. Copeland*, 1 Overt. (Tenn.) 383; *Adams v. Brownson*, 1 Tyler (Vt.) 452; *Western Assur. Co. v. Towle*, 65 Wis. 247; *Corps*

the rule,¹ and the question as to whether the admission was honestly or dishonestly intended, or in hostility to the other partners or not, affects its credibility only and not its admissibility.² The declarations of the contracting partner, therefore, that the money or goods were obtained for the use of the firm, made at the time of procuring them, are competent and cogent evidence that credit was given to the firm.³ The manner in which a matter is entered upon the books of either debtor or creditor is evidence, though not conclusive, as to whom credit was given; thus, that the firm has charged the debt as a partnership liability is not conclusive to bind them, and that the creditor has charged the account against the contracting partner is not conclusive to

v. Robinson, 2 Wash. (U. S.) 388; *Wood v. Braddick*, 1 Taunt. 104; *Thwaites v. Richardson*, 1 Peake 23; *Nichols v. Dowding*, 1 Stark. 81; *Sangster v. Mazarredo*, 1 Stark. 161; *Wright v. Court*, 2 C. & P. 232; *Wickham v. Wickham*, 2 K. & J. 478; *Rapp v. Latham*, 2 B. & Ald. 795.

Where the admissions of one of two co-partners, who were plaintiffs in the suit, had been given in evidence, it is incompetent for the adverse party to show, for the purpose of diminishing the weight of such admissions, that the person making them had previously assigned his interest in the subject of the suit to his co-partner, and was a bankrupt. *Bulkley v. Landon*, 3 Conn. 76.

When and Where Made.—An admission made in a garnishee process is competent. *Anderson v. Wanzer*, 5 How. (Miss.) 587. Or one made in the answer of one partner in chancery. *Hutchins v. Childress*, 4 Stew. & P. (Ala.) 34; *Clayton v. Thompson*, 13 Ga. 206; *Dennis v. Ray*, 9 Ga. 449; *Williams v. Hodgson*, 4 Har. & J. (Md.) 474; *Chapin v. Coleman*, 11 Pick. (Mass.) 331. Though in such case the other must have been alive to be able to contradict it. *Parker v. Morrell*, 2 Ph. 453; *Dale v. Hamilton*, 5 Hare 369. But where a judgment creditor of one partner files a bill to reach the creditor's interest in the firm, and the debtor answers, claiming that a large balance is coming to him from the firm, this is not an admission which is competent as against his co-partner. *Lewis v. Allen*, 17 Ga. 300.

The order in which evidence is introduced is immaterial; the admission may be received and the existence of the partnership established afterwards. *Lea v. Guice*, 13 Smed. & M. (Miss.)

656; *Fogerty v. Jordan*, 2 Robt. (N. Y.) 319. The question as to the order of proof is within the discretion of the judge, and not subject to review. *Hilton v. McDowell*, 87 N. Car. 364.

In a suit by a partnership, the declarations of one partner, made before he became a member of the firm, will be received to contradict the allegations in the bill as to him. *McIntyre v. Union College*, 6 Paige (N. Y.) 239.

Where the owner of rice which had been burned at a mill, went to a partner, who was not cognizant of the state of the business, and demanded a given quantity of rice, to which he replied, that "it was nothing more than he expected;" this was held to be no admission as to the quantity. *Ashe v. De Rosset*, 8 Jones (N. Car.) 240.

1. *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. 15; *Weed v. Kellogg*, 6 McLean (U. S.) 44. And see *Shepard v. Ward*, 8 Wend. (N. Y.) 542.

Where the same person is a member of two firms, his acts, done in the name of one of the firms, cannot be proven in an action against the other firm, the same persons not comprising both firms. *Kratzer v. Lyon*, 5 Pa. St. 174.

2. *Webster v. Stearns*, 44 N. H. 498; *Western Assur. Co. v. Towle*, 65 Wis. 247.

If, after the dissolution of a co-partnership, one of the co-partners has assigned to the other his interest in a co-partnership claim against the defendant, in a suit upon such claim brought in the name of both co-partners for the benefit of the assignee, the defendant cannot prove declarations made by the assignor subsequently to the assignment. *Gillighan v. Tebbetts*, 33 Me. 360.

3. *Stockwell v. Dillingham*, 50 Me. 442; *Smith v. Collins*, 115 Mass. 388;

exonerate them,¹ and beyond this it may be generally stated that any evidence is competent and admissible which tends to show the manner in which the matter was treated, either as a firm debt or as an individual one,² though admissions or declarations not within the scope of the partnership business, or relating to matters outside of its scope are not competent either as evidence of such matters, or to show that they constituted a part of the business of the firm.³

Generally, any statement of account made by one partner during the existence of the partnership will be regarded as an account stated by the firm, and therefore as competent evidence as against

Klopfert v. Levi, 33 Mo. App. 322; *Tremper v. Conklin*, 44 N. Y. 58; *Crocker v. Colwell*, 46 N. Y. 212; *Peterson v. Roach*, 32 Ohio St. 374; 30 Am. Rep. 607; *Benninger v. Hess*, 41 Ohio St. 64; *Maffet v. Lenckel*, 93 Pa. St. 468.

The statement of a borrower, at the time of the loan, that the money is to be used in the business of his firm, is not conclusive that credit was given to it; and if it was given to the individual, the firm cannot be held liable. *Fisher v. Hume*, 6 Mackey D. C. 9.

1. See *Richardson v. Humphreys*, Minor (Ala.) 383; *Baring v. Crafts*, 9 Met. (Mass.) 380; *Gates v. Watson*, 54 Mo. 585; *Braches v. Anderson*, 14 Mo. 441; *Bracken v. March*, 4 Mo. 74; *Tucker v. Peaslee*, 36 N. H. 167; *Strong v. Baker*, 25 Minn. 442; *Scott v. Shepherd*, 3 Vt. 104; *Willis v. Bremner*, 60 Wis. 622.

The books of the firm are competent evidence to show that no entry of the transaction was made upon them of any kind, and, in their absence from the State, secondary evidence may be admitted to establish it. *Fosdick v. Van Horn*, 40 Ohio St. 459.

2. See *Tucker v. Peaslee*, 36 N. H. 167; *Browne v. Thompson*, 1 N. J. L. 2. Evidence of the payment of similar prior partnership indorsements is competent. See *Bank of Com. v. Mudgett*, 44 N. Y. 514.

The stub of a check upon which the book-keeper had written, at the time that it was drawn, payable to the firm, is evidence of the fact that credit was extended to the firm. *Stark v. Corey*, 45 Ill. 431.

Where the borrowing partner gave the firm's acceptance of another draft as security, it was held to be evidence that the loan was made for the firm. *Saltmarsh v. Bower*, 22 Ala. 221.

A firm note given in renewal of the note of one partner does not have the appearance of being the act of the firm, and it will rest with the creditor to show that it was authorized. *Gansevoort v. Williams*, 14 Wend. (N. Y.) 133.

The fact that letters are addressed to the managing partner alone does not show the note to be his individual transaction, as letters would, in all probability, be addressed to him with reference to the firm's business. *Stark v. Corey*, 45 Ill. 431.

In *Benniger v. Hess*, 41 Ohio St. 64, it was held, that a note bearing evidence upon its face that it was given for individual loan, is not conclusive of notice when delivered after the loan was actually made.

In *Ostrom v. Jacobs*, 9 Met. (Mass.) 454, it was held that evidence that one of the other partners recognized the individual note of one partner as a firm debt, and tried to borrow money to pay it, was not admissible as against a third partner, unless his consent was first shown.

3. *Boor v. Lowrey*, 103 Ind. 468; *Stockton v. Johnson*, 6 B. Mon. (Ky.) 408; *Wells v. Turner*, 16 Md. 133; *Hefron v. Hanaford*, 40 Mich. 305; *McLeod v. Lee*, 17 Nev. 103; *Jones v. O'Farrel*, 1 Nev. 354; *Oakley v. Aspinwall*, 2 Sandf. (N. Y.) 7; *McLeod v. Bullard*, 84 N. Car. 515.

The opinion of one of two physicians who were employed to treat a patient, expressed after the conclusion of the employment, in regard to the propriety of the treatment, is not competent against the other. *Boor v. Lowrey*, 103 Ind. 468.

An admission by one partner is not competent to establish the extent of his own powers. *Ex parte Agace*, 2 Cox 312.

the other as to the correctness of the balance;¹ and an admission by one partner of an amount due is admissible as an admission by the firm.² Without the clearest proof that a transaction in the name of one partner was in behalf of the firm, so as to entitle it to any accruing profits, it cannot be held for losses.³

2. Notice to or Knowledge of One Partner.—As notice to a principal is usually notice to an agent, and notice to an agent of matters connected with his agency is notice to his principal, notice to one member of a partnership of any matter relating to the business of the firm is, as a general rule, notice to all the others.⁴ The same rule applies to the knowledge of one partner in matters relating to the partnership business,⁵ and on the same principle a de-

1. *Burgan v. Lyell*, 2 Mich. 102; 55 Am. Dec. 53; *Cady v. Kyle*, 47 Mo. 346; *Ferguson v. Fyffe*, 8 Cl. & Fin. 121.

A declaration by one of a firm after the death of an intestate that the firm owed the deceased a certain sum is evidence of an account stated with him in his lifetime. *Cunningham v. Sublette*, 4 Mo. 224.

2. *Phillips v. Purington*, 15 Me. 425; *Gulick v. Gulick*, 14 N. J. L. 578; *Wickham v. Wickham*, 2 K. & J. 491.

An admission by one partner that an indebtedness to his firm has been paid is competent as against the firm. *Munson v. Wickwire*, 21 Conn. 513.

3. *Gruner v. Stucken*, 39 La. Ann. 1076.

4. See *Manwaring v. Griffing*, 5 Day (Conn.) 561; *Sanders v. Ruddle*, 2 T. B. Mon. (Ky.) 139; *Howland v. Davis*, 40 Mich. 546; *Fitch v. Stamps*, 6 How. (Miss.) 487; *Herbert v. Odlin*, 40 N. H. 267; *Smith v. Hall*, 5 Bosw. (N. Y.) 319; *Barney v. Currier*, 1 D. Chip. (Vt.) 315; *Cox v. Cox*, 2 Port. (Ala.) 533; *Spaulding v. Ludlow Woolen Mills*, 36 Vt. 150; *Haywood v. Harmon*, 17 Ill. 477; *New Haven Co. Bank v. Mitchell*, 15 Conn. 206; *Alderson v. Pope*, 1 Camp. 404; *Porthouse v. Parker*, 1 Camp. 82; *Bignold v. Waterhouse*, 1 M. & S. 259; *Salmons v. Nissen*, 2 T. R. 697.

When it is said that notice to one partner, is notice to all, what is meant is: first, that a firm cannot, in its character of principal, set up the ignorance of some of its members against the knowledge of others of whose acts it claims the benefit, or by whose acts it is bound; and, second, that when it is necessary to prove that a firm had notice, all that need be done is to show that notice was given to one of its

members as the agent and on behalf of the firm. *Lindley on Part.* 288.

Notice to one of a firm of factors to sell is notice to all. *Howland v. Davis*, 40 Mich. 545.

Service of the notice of appeal on one partner is service upon all. *Miller v. Perrine*, 1 Hun (N. Y.) 620.

The service of a notice to determine an estate at will, in a shop occupied by the tenant with a partner, is sufficient, if on the day of its date the notice was delivered at the shop to the partner, and read by him, who the tenant had left in charge of his business, while he and his whole family were out of the State. *Walker v. Sharpe*, 103 Mass. 154.

A tender by one partner is a tender by the firm. *Douglas v. Patrick*, 3 Tr. Rep. 683.

Torts.—In an action for personal injuries caused by the defective condition of a wharf, proof that one of the defendants, who was a member of the firm having control of the wharf, and who died before trial, was expressly notified of the defect before the accident, is admissible as against the surviving partners. *Newall v. Bartlett*, 114 N. Y. 399.

Under the English practice in an action against joint makers who suffer judgment by default, service of a rule nisi upon one of the defendants to compute principal and interest, is service upon all. *Collyer on Partnership*, § 443, citing *Figgins v. Ward*, 2 Cr. & M. 424; *Carter v. Southall*, 5 M. & W. 128.

Statutes making partnership contracts joint and several do not alter the rule that notice to one is notice to all; such statutes affecting the remedy only. *Dabney v. Stidger*, 4 Smed. & M. (Miss.) 749.

5. *Burritt v. Dickson*, 8 Cal. 113;

mand upon one partner with relation to such matters is a demand upon the firm.¹ Thus, notice to or the knowledge of one partner of defects in or defenses to commercial paper coming into the possession of the firm is notice to or the knowledge of all.² So, presentation to and demand of payment of one partner of a firm of makers or acceptors is sufficient to charge an indorser;³ and notice of non-payment or of protest to one partner of an indorsing firm is binding upon all.⁴ Notice to or demand of one being sufficient, one may waive demand and notice,⁵ or stipulate with the holder as to the particular manner

Bigelow v. Henniger, 33 Kan. 362; *Baugh v. Duphorn*, 9 Gill (Md.) 314; *Hubbardston Lumber Co. v. Bates*, 31 Mich. 158; *Snarr v. Small*, 13 Up. Can., Q. B. 125.

Where one partner was a trustee for a married woman, for the purpose of the management of a fund to be kept free from her husband's control, and he loaned the trust money to his firm, and payments were made on the note to the husband, without the wife's authority, it was held, that the knowledge of the trustee of the husband's disability to control her property was the knowledge of the firm. *Tucker v. Bradley*, 33 Vt. 324.

1. *McFarland v. Crary*, 8 Cow. (N. Y.) 253; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169; *Mitchell v. Williams*, 4 Hill (N. Y.) 13; *Nisbet v. Patton*, 4 Rawle (Pa.) 120.

If one partner refuse to pay a claim on demand of the creditor, it is a refusal of the firm, even though the firm had previously tendered the amount to the creditor. *Pierse v. Bowles*, 1 Stark. 523.

A request to one mortgagee to cancel a mortgage belonging to partners is such a request to all as will render them liable to a statutory penalty for the refusal. *Renfro v. Adams*, 62 Ala. 302.

2. *Quinn v. Fuller*, 7 Cush. (Mass.) 224; *Powell v. Waters*, 8 Cow. (N. Y.) 669; *Sparrow v. Chisman*, 9 B. & C. 241.

Where a note is made to one partner and transferred by him to the other, or to the firm, the latter is not a *bona fide* holder without notice. *Otis v. Adams*, 41 Me. 258; *McClurken v. Byers*, 74 Pa. St. 405; *Stockdale v. Keyes*, 79 Pa. St. 251; *Hubbard v. Galusha*, 23 Wis. 398; *Pease v. McClelland*, 2 Bond (U. S.) 42.

Where the factor of a firm collusively

procures the firm's signature to an accommodation note, and the note is discounted by a banking partnership in which he was a member, his knowledge was held to be theirs, the bank not being an innocent holder. *Stockdale v. Keyes*, 79 Pa. St. 251.

Where the burden of proof rests upon the partners to show that they took commercial paper in good faith, they must establish that all the partners were ignorant of any defense between the maker and the payee, as the ignorance of one cannot be the ignorance of all. *Frank v. Blake*, 58 Iowa 750.

3. *Mt. Pleasant Bank v. McLeran*, 26 Iowa 306; *Shed v. Brett*, 1 Pick. (Mass.) 401; *Hunter v. Hempstead*, 1 Mo. 48; 13 Am. Dec. 468; *Erwin v. Downs*, 15 N. Y. 575; *Porthouse v. Parker*, 1 Camp. 82.

In *Hunter v. Hempstead*, 1 Mo. 67; 13 Am. Dec. 468, the court by McGIRK, C. J., said: "How it can be that the refusal of one partner to pay is not a refusal of the company as to the holder, this court cannot discover."

4. *Hume v. Watt*, 5 Kan. 34; *Magee v. Dunbar*, 10 La. 456; *Nott v. Downing*, 6 La. 684; *Dabney v. Stidger*, 4 Smed. & M. (Miss.) 749; *Bouldin v. Page*, 24 Mo. 594; *Miser v. Trovinger*, 7 Ohio St. 281; *Burnet v. Howell*, 8 Phila. (Pa.) 531.

But where one partner lives where the note is protested, and the other is abroad, it is not due diligence to send notice to the absent partner only, and the one at home is not bound by it. *Hume v. Watt*, 5 Kan. 34.

Service upon the home partners, however, is binding upon them. *Bouldin v. Page*, 24 Mo. 594.

5. *Star Wagon Co. v. Swezey*, 52 Iowa 394; *Darling v. March*, 22 Me. 184; *Farmers' & Merchants' Bank v. Lonergan*, 21 Mo. 46; *Windham*

of making it.¹ No notice of dishonor is necessary to bind the drawer where a partner draws upon his firm, as the knowledge of the firm is the knowledge of the partner;² or where a firm draws upon a partner, as his knowledge is that of the firm,³ and none is necessary on a draft drawn by one firm and accepted by another, the two firms having a common partner.⁴

So, in case of a purchase of property by a partnership the knowledge of or notice to one of the partners of a lien, claim or incumbrance upon it, is notice to all, and it will take the property charged with the incumbrance.⁵

A firm can be affected by notice to one partner, however, when it is given with reference to transactions within the scope of its business only,⁶ and knowledge acquired by a partner while acting

County Bank *v.* Kendall, 7 R. I. 77.

1. Nutt *v.* Hunt, 4 Smed. & M. (Miss.) 702; Windham County Bank *v.* Kendall, 7 R. I. 77.

2. Fuller *v.* Hooper, 3 Gray (Mass.) 334; Gowan *v.* Jackson, 20 Johns. (N. Y.) 176; West Branch Bank *v.* Fulmer, 3 Pa. St. 399; Harwood *v.* Jarvis, 5 Sneed (Tenn.) 375; Rhett *v.* Poe, 2 How. (U. S.) 457; Porthouse *v.* Parker, 1 Camp. 82.

But where a note is made by one partner to the order of his firm, and indorsed by it, and it becomes due and remains unpaid but was not protested, knowledge of the maker does not bind his co-partners, as his promise as maker is distinct and separate from their liability as a firm, and the release of the firm by the failure to protest, does not release him as the original promisor. Coon *v.* Pruden, 25 Minn. 105.

That the indorser was a member of the maker firm, does not excuse want of protest, even though the firm was insolvent and the indorser knew that the note was not paid. *Re* Grant, 6 L. R. 158.

3. New York etc. Contrac. Co. *v.* Meyer, 51 Ala. 325; Porthouse *v.* Parker, 1 Camp. 82.

So, where a claim is assigned to a third person by a firm which afterwards becomes bankrupt, and the assignee in bankruptcy assigns the claim to a member of the firm, such member is estopped to say that the first assignment is void as in fraud to the firm's creditors. Crawford *v.* Halsey, 124 U. S. 648.

4. New York etc. Contrac. Co. *v.* Meyer, 51 Ala. 325; 23 Am. Rep. 552; Woodbury *v.* Sackrider, 2 Abb. (N.

Y.) Pr. 402; West Branch Bank *v.* Fulmer, 3 Pa. St. 399; Taylor *v.* Young, 3 Watts (Pa.) 339.

But where one firm makes a note to another firm having a common partner, the latter firm is not liable as an indorser, unless there has been due demand and notice. Dwight *v.* Scovil, 2 Conn. 654; Foland *v.* Boyd, 23 Pa. St. 476. And the same rule applies to a note, the maker and indorser of which are, or formerly have been partners, the note being for a partnership debt. Morris *v.* Husson, 4 Sandf. (N. Y.) 93.

5. Watson *v.* Wells, 5 Conn. 468; Sanders *v.* Buddle, 2 T. B. Mon. (Ky.) 139; Herbert *v.* Odlin, 40 N. H. 267; Marietta etc. R. Co. *v.* Mowry, 28 Hun (N. Y.) 79; Barney *v.* Currier, 1 D. Chip. (Vt.) 315; 6 Am. Dec. 739.

6. See Coon *v.* Pruden, 25 Minn. 105; Evans *v.* Bidleman, 3 Cal. 435; Moore *v.* Gano, 12 Ohio 300; Lacey *v.* Hill, 4 Ch. D. 537; Bignold *v.* Waterhouse, 1 M. & S. 255; Steele *v.* Stuart, L. R., 2 Eq. 84.

Notice to a firm cannot affect one of the partners in his individual rights or interests disconnected with those of the firm. Bolling *v.* Anderson, 4 Baxt. (Tenn.) 551.

Where one partner makes false representations in the sale of his individual interest in the partnership property, and receives a note in payment and transfers the note to his co-partners, the co-partners will be innocent holders, if they had no notice of the misrepresentations; as the sale was of an individual interest, it was not, therefore, within the scope of the business, and consequently the seller's knowledge was not that of his co-partners. Liddell *v.* Crain, 53 Tex. 549.

in a different capacity cannot be regarded as that of the firm.¹ While a notice which is good as against the firm may be also binding upon an incoming partner,² a notice to one before the formation of the firm is of no avail,³ and the knowledge of an absent partner cannot be considered as that of the firm, when no duty rests upon him to communicate it to his co-partners.⁴

3. The Firm as an Agent.—A partnership as an entity is competent to act as an agent under appointment of an outside party as principal, and when such an agency is within the scope of the business of the partnership, the act of one partner is as binding upon the common principal as that of all,⁵ though if

Where, in an action against partners, the complainant charges them with notice, the default of one partner is not an admission of notice against co-partners who deny the allegation. See *Petty v. Hannum*, 2 *Humph.* (Tenn.) 102; *Pengnet v. McKenzie*, 6 *Up. Can. C. P.* 308.

1. See *Atlantic State Bank v. Savery*, 82 *N. Y.* 291; *Duncklee v. Greenfield Steam Mill Co.*, 23 *N. H.* 245; *Aultman etc. Co. v. Webber*, 4 *Ill. App.* 427.

Where A and B are partners, and A is agent for C, in a matter not connected with the partnership business, B is not chargeable with notice received by A in matters pertaining to his agency. *Hardenbergh v. Bacon*, 32 *Cal.* 356.

But a person who holds the office of director or vice-president of a bank, and at the same time has private and personal dealings with the bank, is conclusively presumed to know, so far as the same affects his personal dealings, the general condition and management of his bank, and to know everything of importance that occurs therein, either at the time of its occurrence or within a reasonable time thereafter. *German Sav. Bank v. Wulfekuhler*, 19 *Kan.* 60. And see *Merchants' Bank v. Rudolf*, 5 *Neb.* 527.

When a transfer is made by an insurance company having no power to make it to a firm, one of the members of which is a trustee of the insurance company, the firm has constructive notice of the non-existence of the power to transfer. *Smith v. Hall*, 5 *Bosw. (N. Y.)* 319.

2. See *Holton v. McPike*, 27 *Kan.* 286; *Ruckman v. Decker*, 23 *N. J. Eq.* 283.

3. See *Herbert v. Odline*, 40 *N. H.*

267; *Duffiel v. Goodwin*, 23 *Grant's Ch. (Up. Can.)* 431.

4. See *Baldwin v. Leonard*, 39 *Vt.* 260.

If an agent after communicating information of his agency to one partner, buys goods in the absence of that partner, and without any participation on his part in the transaction of another member of the firm, who is unaware of the agency, such agent will be personally liable to the firm, unless he discloses his agency to the partner with whom he trades. *Baldwin v. Leonard*, 39 *Vt.* 260.

5. As to the acts of one of a firm of insurance agents, see *Purinton v. Security L. Ins. Co.*, 72 *Me.* 22; *Gordon v. Buchanan*, 5 *Yerg. (Tenn.)* 71; *Kenebec Co. v. Augusta Ins. etc. Co.*, 6 *Gray (Mass.)* 204; *Newman v. Springfield, F. & M. Ins. Co.*, 17 *Minn.* 123. As to the acts of one of a firm of attorneys, see *Jeffries v. Mutual L. Ins. Co.*, 110 *U. S.* 305; *Beck v. Martin*, 2 *McMull. (S. Car.)* 260.

Where, under the by-laws of an insurance company, providing that certificates of stock should be transferred only at the office of the company by the holder personally, or by his attorney, an assignment of some of the shares was made to two co-partners with a power to both of them to transfer the same on the books of the company, and one of the partners called at the office, exhibited the assignment and power of attorney, and demanded that the shares should be transferred and certificates issued to himself and his co-partner, it was held to be a sufficient demand, and that it was the duty of the company to issue such certificates. *Sargent v. Franklin Ins. Co.*, 8 *Pick. (Mass.)* 90.

Where a person engaged as an agent forms a partnership with his

the agency is created for the prosecution of some enterprise or the performance of some act not within such scope, all must act.¹ That a member of one firm is also a member of another does not make either firm the agent of the other, nor render the acts of one firm binding upon the other.²

4. Insurance of Partnership Property.—(See also FIRE INSURANCE, vol. 7, p. 1002).—One partner may procure the insurance of the entire partnership property for the benefit of the firm,³ and he has an insurable interest in the whole to the extent of his interest, but cannot insure the entire partnership interest in his own name,⁴ such an insurance covering the interest of the insurer and no more.⁵ When one partner takes out a policy in his own name intending thereby to protect the interests of the other partners who subsequently ratify it, he stands as a trustee for them as to the amount in excess of his own interest.⁶

As to the effect of a transfer of interest from one partner to another it may be laid down as a general rule that unless the language of the policy is such as clearly to prohibit a sale of the interest of one joint owner to another, or if the policy can be

principal, and the firm continues the business, it will effect the continuance of the agency not only to sell, but also to collect for articles previously sold for the principal, and such money when collected, over and above the commissions, belongs to the principal or original owner, and does not become the property of the partnership. *Commercial Nat. Bank v. Proctor*, 98 Ill. 558.

1. See *Cummings v. Parish*, 39 Miss. 412.

2. See *Wright v. Ames*, 2 Keyes (N. Y.) 221; 4 Abb. App. Dec. (N. Y.) 644.

3. *Pennsylvania Ins. Co. v. Murphy*, 5 Minn. 36; *Graves v. Boston M. Ins. Co.*, 2 Cranch. (U. S.) 419; *Hooper v. Lusby*, 4 Camp. 66; *Armitage v. Winterbottom*, 1 M. & G. 130. And see *Clement v. British Am. Assur. Co.*, 141 Mass. 298; *Robinson v. Gleadow*, 2 Bing. N. Cas. 156.

Where a person permits another to use his name in buying and selling goods, a policy taken out in the name of both will be good, although the property, in fact, belongs to the one purchasing it. *Gould v. York Co. etc. Ins. Co.*, 47 Me. 403.

4. *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202.

An insurance of the whole by one partner in his own name may be subsequently ratified by the other partners. See *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 212.

In *Millaudon v. Atlantic Ins. Co.*, 8 La. 557, the court held that when the partner making the insurance has made advances to the firm, which, by agreement, are to constitute a lien upon the goods insured, he may insure the whole in his own name.

5. *Graves v. Boston M. Ins. Co.*, 2 Cranch (U. S.) 419; *Finney v. Bedford Com. Ins. Co.*, 8 Met. (Mass.) 348; *Finney v. Warren Ins. Co.*, 1 Met. (Mass.) 16; *Pearson v. Lord*, 6 Mass. 81; 2 Duer on Ins., §§ 20, 24; 1 Phil. on Ins. 219, § 331; 3 Kent's Com. 258.

If the agent of the insurer knew that the insured intended to cover the interest of the firm, and issued the policy in the name of one partner alone, a recovery may be had for the whole interest, if the policy is ratified by the other partners. *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227. But in order to have this effect, it must appear that the insured intended to cover the interest of the other partners, rather than the whole interest for his own benefit. *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202. And that the contract was for such a policy, but by mistake or the fraud of the agent, or the insurers, it was made simply to cover his own interest. *Keath v. Globe Ins. Co.*, 52 Ill. 518; 4 Am. Rep. 624; *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227.

6. *Murray v. Columbian Ins. Co.*, 11 Johns. (N. Y.) 302; *Graves v. Boston M. Ins. Co.*, 2 Cranch (U. S.) 419;

fairly upheld in the face of such a prohibition, or if there is any doubt as to whether it was intended to apply to such a sale, no effect will be given to a prohibition against transfers;¹ a prohibition of any "sale, transfer or conveyance" being held to refer only to a sale or transfer of the whole property,² though a stipulation prohibiting any transfer or change of title in the property insured or of any individual interest therein, applies to prohibit a transfer of interest between partners.³ A sale to a third person under such a prohibition would, of course, avoid the policy.⁴ In case of a sale of the property in such cases, the mere delivery of the policy operates as an equitable assignment of all the selling partner's interest in the insurance.⁵ When a firm is dissolved and the

Manhattan Ins. Co. v. Webster, 59 Pa. St. 227; *Page v. Fry*, 2 B. & P. 200.

A surviving partner may enforce a policy issued to protect the entire interest in the property. *Oakman v. Dorchester Ins. Co.*, 98 Mass. 57.

1. *Wood on Fire Ins.* (2nd ed.) 745, citing *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *Burnett v. Eufaula Home Ins. Co.*, 46 Ala. 11; *Pierce v. Nashua Ins. Co.*, 50 N. H. 297; *West v. Citizens' Ins. Co.*, 27 Ohio 1; *Cowan v. Iowa State Ins. Co.*, 40 Iowa 551; 20 Am. Rep. 583.

In *Burnett v. Eufaula Home Ins. Co.*, 46 Ala. 11, the court held that the interest of each partner in the case being *per my et per tout*, and the language used in the policy being susceptible to different interpretations, that interpretation which is most favorable to the assured must be placed upon it in order to uphold the contract.

A mere change of interest among partners where no stranger is introduced, and no addition made to the number of the assured, and when there is no change in the condition of the property or risk, is obviously not within the principle or motives on which the condition is founded. *Pierce v. Nashua Ins. Co.*, 50 N. H. 297. And see *Niblo v. North American Ins. Co.*, 1 Sandf. (N. Y.) 551; *Tillou v. Kingston Mut. Ins. Co.*, 7 Barb. (N. Y.) 570; *Wilson v. Genesee Mut. Ins. Co.*, 16 Barb. (N. Y.) 512; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *West v. Citizens' Ins. Co.*, 27 Ohio St. 1.

2. *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *Wilson v. Genesee Mut. Ins. Co.*, 16 Barb. (N. Y.) 511; *Manley v. Ins. Co. of North America*, 1 Lans. (N. Y.) 20; *Powers v. Guardian F. & L. Ins. Co.*, 136 Mass. 108; 50 Am. Rep. 20; *Lockwood v. Middlesex Mut. Assur.*

Co., 47 Conn. 553; *Cowan v. Iowa Ins. Co.*, 40 Iowa 551; *Pierce v. Nashua Ins. Co.*, 50 N. H. 297; *Savage v. Howard Ins. Co.*, 52 N. Y. 502; *Dermani v. Home Mut. Ins. Co.*, 26 La. Ann. 69; *West v. Citizens' Ins. Co.*, 27 Ohio St. 1; *Scanlon v. Union F. Ins. Co.*, 4 Biss. (U. S.) 511.

3. *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Hartford F. Ins. Co. v. Ross*, 23 Ind. 179; *Dreher v. Aetna Ins. Co.*, 18 Mo. 128; *Tillou v. Kingston etc. Ins. Co.*, 5 N. Y. 405; *Keeler v. Niagara F. Ins. Co.*, 16 Wis. 523; *Barnes v. Union Ins. Co.*, 51 Me. 110.

Where the policy stipulates that any alienation by sale or otherwise shall void it, it has been held that a sale by one partner to a co-partner was within the prohibition. *Finley v. Lycoming Ins. Co.*, 31 Pa. St. 311; *Buckley v. Garrett*, 48 Pa. St. 304; *Biggs v. North Carolina Home Ins. Co.*, 88 N. Car. 141; *Hathaway v. State Ins. Co.*, 64 Iowa 229; 50 Am. Rep. 22, note; *Texas Bank Ins. Co. v. Cohen*, 47 Tex. 406.

4. *Drennen v. London Assurance Co.*, 20 Fed. Rep. 657; 50 Am. Rep. 24, note.

5. *Pierce v. Nashua Ins. Co.*, 50 N. H. 297; *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 243; *Shepherd v. Insurance Company*, 38 N. H. 237; *Thompson v. Emery*, 27 N. H. 269.

Action on Assigned Policy.—After an assignment, if there has been no new promises on the part of the insurer to pay the insurance to the assignee, suit must be brought in the name of the assignor. *Pierce v. Nashua F. Ins. Co.*, 50 N. H. 297; *Foster v. Equitable Mut. F. Ins. Co.*, 2 Gray (Mass.) 216; *Hobbs v. Memphis Ins. Co.*, 1 Sneed (Tenn.) 444; *Wood v. Rutland etc. Ins. Co.*, 31 Vt. 552; *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 243. But after a promise

property is divided among the partners,¹ or where it is placed in the hands of a receiver under a decree directing a dissolution and a sale of the property,² the insurer is discharged under a policy prohibiting a "transfer or change of title." One partner can settle a loss,³ or bind his co-partners by his consent to the cancellation of a policy.⁴

5. Application of Payments—(See also PAYMENT).—The general rules relative to the application of payments are applicable to transactions in which partnerships are involved either as creditor or as debtor.⁵ Thus a payment made by a debtor partner whose firm is also indebted to the same creditor may be applied by the creditor to either debt;⁶ but where the firm and also one of the partners are creditors of the same person, the duty to exercise good faith toward his co-partners, requires the creditor partner to apply a general payment made to him upon the firm account.⁷ Payments made by a debtor partner when his firm is also indebted to the same person, with partnership funds must be credited on the partnership debt,⁸ under the general rule that a payment made by a person owing debts in different capaci-

ties to pay the insurance to the assignee, or after a renewal of the policy, a new contract arises giving the assignee a right to maintain an action in his own name. See *Goodall v. New England Mut. F. Ins. Co.*, 25 N. H. 169; *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 243; *Pierce v. Nashua F. Ins. Co.*, 50 N. H. 297; *Ryan v. Rand*, 26 N. H. 151.

1. *Drehrer v. Aetna Ins. Co.*, 18 Mo. 128.

2. *Keeney v. Home Ins. Co.*, 3 Thomp. & C. (N. Y.) 478.

3. *Brown v. Hartford F. Ins. Co.*, 117 Mass. 479; *Brink v. New Amsterdam F. Ins. Co.*, 5 Robt. (N. Y.) 104.

One partner has power to give notice of abandonment in behalf of his firm. *Hunt v. Royal Exchange Assur. Co.*, 5 M. & S. 47.

4. *Hillock v. Traders' Ins. Co.*, 54 Mich. 531.

5. See *Lindley on Part.* 419-423; *Munger on Application of Paymts.* 160.

6. *Brown v. Brahham*, 3 Ohio 275; *Logan v. Mason*, 6 W. & S. (Pa.) 9.

After Dissolution.—If one partner continues to deal with a creditor of the firm and makes payments generally, the creditor may apply them to the individual debt. *Sneed v. Weister*, 2 A. K. Marsh. (Ky.) 277; *Fitch v. McCrimmin*, 30 Up. Can. C. P. 183.

Where B was a partner in two firms, both of which were indebted to the

same creditor, and B, in part payment, gives his individual notes to the creditor, if such creditor proves the note against B's administrator, thus claiming no particular application he does not waive his claim against either firm. *Youmans v. Hearst*, 34 Mich. 397.

7. See *Eaton v. Whitcomb*, 17 Vt. 641; *Scott v. Trent*, 1 Wash. (Va.) 77; *Wilkins v. Boyce*, 3 Watts (Pa.) 39; *Russel v. Green*, 10 Conn. 269; *Simsen v. Ingham*, 2 B. & C. 65; *Lindley on Part.* 432.

A surviving partner paid a creditor of the firm and also of himself from the firm assets, without stating on which indebtedness he wished the payment applied. *Held*, that the creditor was bound to apply it to the firm indebtedness. *Wiesenfeld v. Byrd*, 17 S. Car. 106.

In *Codman v. Armstrong*, 28 Me. 91, however, the court implied by its language that the application of a payment by a creditor to one partner to whom he was indebted, and to whose firm he was also indebted, to the individual indebtedness of the partner, was permissible.

Where the creditor partner assigns his claim to his firm, which is also a creditor, payments by the debtor generally to such partner may be applied on either account. *Badger v. Daenieke*, 56 Wis. 678.

8. See *Campbell v. Mathews*, 6 Wend. (N. Y.) 551; *Downing v. Linn-*

ties must be credited upon the debt in the capacity in which the money is held,¹ the rule being apparently the same whether the creditor knew the source from which the money was obtained or not.² Payments by a debtor whose firm is also a debtor are presumptively on private account when no circumstances exist repelling or qualifying the presumption.³

In case of a change of membership in the debtor firm, general payments by the new firm should not be credited upon the account of the old,⁴ but where the change is in the creditor firm, and further indebtedness to the new firm is incurred, payments will be

ville, 3 Bush (Ky.) 472; *Davis v. Smith*, 27 Minn. 390; *Cornells v. Stanhope*, 14 R. I. 97.

When one owes an individual and a partnership account, and makes general payments amounting to more than the individual account, without protestation against further liability, the law will apply the balance on the partnership account, although the creditor, without definite knowledge of the standing of the two accounts gave the debtor credit for all the payments on his individual account. *Robie v. Briggs*, 59 Vt. 443.

The division of a debt between two partners, each assuming half, entitles each to have payments subsequently made with partnership assets credited equally to each. *Moore v. Riddell*, 11 Grant's Ch. (Up. Can.) 69.

1. See PAYMENT.

2. See *St. Louis Type Foundry Co. v. Wisdom*, 4 Lea (Tenn.) 695; *Wiesenfeld v. Byrd*, 17 S. Car. 106; *McClellan v. Miller*, 2 Cranch (C. C.) 620; *Fitch v. McCrummon*, 30 Up. Can. C. P. 183; *Thompson v. Brown*, 1 M. & M. 40; *Johnson v. Boone*, 2 Harr. (Del.) 172.

3. *Gass v. Stinson*, 3 Sumn. (U. S.) 98. And see *Baker v. Stackpoole*, 9 Cow. (N. Y.) 420; *Sneed v. Weister*, 2 A. K. Marsh. (Ky.) 277; *Fowke v. Bowie*, 4 Har. & J. (Md.) 566; *Scott v. Ray*, 18 Pick. (Mass.) 360; *Sawyer v. Tappan*, 14 N. H. 352; *Johnson v. Boone*, 2 Harr. (Del.) 172; *Pardee v. Markle*, 111 Pa. St. 548; 56 Am. Rep. 299.

Where no application of payments has been made by the parties, they will be applied where it would be just and equitable, in discharge of such part of the plaintiff's account as can be recovered in the suit. *Young v. Woodward*, 44 N. H. 250.

Where a partner gives security to

pay both his individual debt and the firm debt, the proceeds derived from the security should be first applied to discharge his individual debt. *Lee v. Fontaine*, 10 Ala. 755; 44 Am. Dec. 505.

Even though no appropriation has been made and nothing appears to indicate that the payment was designed to be applied upon the firm's indebtedness, it will not be applied to individual debts not due at the time of payment. *Miles v. Ogden*, 54 Wis. 573; *Baker v. Stackpoole*, 9 Cow. (N. Y.) 420; 18 Am. Dec. 508.

4. *Allen v. Frument Min. etc. Co.*, 73 Mo. 688; *Scott v. Kent*, 54 N. Y. Super. Ct. 257; *Whitwell v. Warner*, 20 Vt. 425. And see *Burland v. Nash*, 2 F. & F. 687; *Beal v. Chaddeek*, 2 H. & N. 326.

But where a partner retires and the remaining partner continues the business, making purchases from an old customer, the accounts being blended in an unbroken series, payment will be credited on the firm's debt. *Allcott v. Strong*, 9 Cush. (Mass.) 323; *Birkett v. McGuire*, 31 Up. Can., C. P. 420; *Fitch v. McCrimmin*, 30 Up. Can. C. P. 183; *Smith v. Wigley*, 3 Moo. & S. 174; *Hooper v. Keay*, 1 Q. B. D. 178; *City Discount Co. v. McLean*, L. R., 9 C. P. 692.

Where, upon the death of a person, his account with a creditor was balanced and placed as the first item of a new account with his widow, who continued the business, payments by her go to discharge the estate of the decedent. *Sterndale v. Hankinson*, 1 Sim. 392.

Where a continuing partner assumes the debts of the old firm, a payment by a debtor whose account has been continued, will be appropriated upon the old debts. *Baker v. Stackpoole*, 9 Cow. (N. Y.) 420; 18 Am. Dec. 508.

credited upon the account as it existed at the time of the change.¹ If the account does not appear to be continuous, however, so that there are two distinct and separate accounts, the new firm is entitled to appropriate general payments,² and, though they are continuous, the creditor has the right to refuse to continue the account in its former shape, but may close it and open a new account as to transactions taking place after the change.³

6. Novation of Partnership Obligations—See NOVATION, vol. 16, p. 862.

7. Merger of Partnership Indebtedness—(See also MERGER, vol. 15, p. 336).—The doctrine of the merger of simple contract and other indebtedness in a higher security applies to partnership liabilities, the rule being nearly universal that a judgment obtained upon a partnership debt, though against one or a less number than all the partners, will merge and extinguish the original indebtedness, and discharge such of the co-partners as were not proceeded against;⁴ and that the partners who were not made parties were

1. *Starr v. Case*, 59 Iowa 491; *Morgan v. Tarbell*, 28 Vt. 498; *Bradley v. Richardson*, 23 Vt. 720; *Pemberton v. Oakes*, 4 Russ. 454; *Bodenham v. Purchas*, 2 B. & Ald. 39. And see *Newmarch v. Clay*, 14 East 239; *Brooke v. Enderby*, 2 Brod. & B. 70; *Scott v. Beale*, 6 Jur. (U. S.) 559; *Toulmin v. Copeland*, 2 Cl. & Fin. 681; *Simson v. Cooke*, 1 Bing. 452. *Burns v. Pillsbury*, 17 N. H. 66.

In *Devaynes v. Noble*, 1 Mer. 529 (Sleech's case), Miss Sleech had continued to deal with the new firm, after its dissolution by the death of Devaynes, by drawing out but not depositing. No appropriation of these payments having been made at the time of the dissolution, it was held to be too late to make them, and they were applied to extinguish the balance as it stood at the time of Devaynes's death.

2 See *Taylor v. Post*, 30 Hun (N. Y.) 446; *Jones v. Maund*, 3 Young & C. 347.

3. *Simson v. Ingham*, 2 B. & C. 65. And see *Botsford v. Kleinhaus*, 29 Mich. 332; *Morgan v. Tarbell*, 28 Vt. 498; *Burns v. Pillsbury*, 17 N. H. 66; *Rutherford v. Schottman* (Supreme Ct.), 1 N. Y. Supp. 741.

A firm having been dissolved in good faith, one of the partners agreed to pay all the partnership debts, and took, as his share, partnership property sufficient to pay them. He continued the business alone for a time, added other goods to his stock, and then executed to his creditors a mortgage on

all his stock, as it then existed, to secure both his individual debts and those of the firm. Held, that a creditor, in the absence of any stipulation or application by the debtor, can apply a payment made to him to the individual debt rather than to the indebtedness of the firm, although the individual debt was contracted after the dissolution of the firm. *King v. Sutton*, 42 Kan. 600.

In *Burns v. Pillsbury*, 17 N. H. 66, a distinction was drawn between the case of a person, who had made consignments to a firm and was its creditor on account of the consignments and continued to consign after the dissolution of the firm to the continuing partner, and banking houses which are often continued through generations, and it was held that the consignor was not compelled to credit remittances to the old account, unless proved to be the money of the old firm.

4. *Filley v. Phelps*, 18 Conn. 294; *Suydam v. Cannon*, 1 Houst. (Del.) 431; *Nicklaus v. Roach*, 3 Ind. 78; *Crosby v. Jeroloman*, 37 Ind. 264; *Barnett v. Juday*, 38 Ind. 86; *Holman v. Langtree*, 40 Ind. 349; *Lingenfelter v. Simon*, 49 Ind. 82; *North v. Mudge*, 13 Iowa 496; *Wann v. McNulty*, 7 Ill. 355; 43 Am. Dec. 58; *Thompson v. Emmert*, 15 Ill. 415; *Scott v. Colmesnil*, 7 J. J. Marsh. (Ky.) 416; *Moale v. Hollins*, 11 Gill & J. (Md.) 11; *Loney v. Bailey*, 43 Md. 10; *Ward v. Johnson*, 13 Mass. 148; *Tinkum v. O'Neale*,

secret or dormant ones does not affect the applicability of the rule.¹ A judgment against a part of the partners, where the liability is several as well as joint, however, merges the joint liability, only leaving the several liability still subsisting.² And it has been held that if one partner is outside of the jurisdiction of the court, a judgment against the others will not merge the original claim as against the absent partner.³ Some of the States have statutes providing that partnership indebtedness shall be regarded as joint and several, or that a judgment against a part of joint debtors shall not operate as a bar to an action against the rest.⁴ As proceedings cannot be taken against a surviving partner and the estate of a deceased partner jointly, the doctrine of merger

5 Nev. 93; *Stevenson v. Mann*, 13 Nev. 268; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Robertson v. Smith*, 18 Johns. (N. Y.) 459; *Penny v. Martin*, 4 Johns. Ch. (N. Y.) 566; *Peters v. Sanford*, 1 Den. (N. Y.) 224; *Averill v. Loucks*, 6 Barb. (N. Y.) 19; *Olmstead v. Webster*, 8 N. Y. 413; *Suydam v. Barber*, 18 N. Y. 468; *Sloo v. Lea*, 18 Ohio 279; *Anderson v. Levan*, 1 W. & S. (Pa.) 334; *Smith v. Black*, 9 S. & R. (Pa.) 142; 11 Am. Dec. 686; *Nichols v. Anguera*, 2 Miles (Pa.) 290; *Gaut v. Reed*, 24 Tex. 46; *How v. Kane*, 2 Pin. (Wis.) 531; 2 Chand. (Wis.) 222; 54 Am. Dec. 152; *Mason v. Eldred*, 6 Wall. (U. S.) 231; 7 Am. Law Reg., N. S. 402; *Woodworth v. Spaffords*, 2 McLean (U. S.) 168; *Sedam v. Williams*, 4 McLean (U. S.) 51; *In re Herrick*, 13 Nat. Bankr. Reg. 312; *Brown v. Wooton*, Cro. Jac. 73; *Kendall v. Hamilton*, 4 App. Cas. 504; *Ex parte Higgins*, 3 De G. & J. 33; *Cambefort v. Chapman*, 19 Q. B. D. 229. See to the contrary, *Sherley v. Mandeville*, 6 Cranch (U. S.) 254 (overruled); *Union Bank v. Hodges*, 11 Rich. (S. Car.) 480; *Watson v. Owens*, 1 Rich. (S. Car.) 111.

In *Doniphan v. Gill*, 1 B. Mon. (Ky.) 199, it was held that a joint judgment against all the partners bars an action on a note given by one or more of them for the same debt.

In *Olmstead v. Webster*, 8 N. Y. 413, it was held that the vacation of a judgment, obtained against one partner, upon a partnership claim by mutual agreement between the plaintiff and the defendant partner, could not revive the cause of action against the other partner.

1. *Lingenfelter v. Simon*, 49 Ind. 82; *Scott v. Colmesnil*, 7 J. J. Marsh. (Ky.) 416; *Moale v. Hollins*, 11 Gill & J.

(Md.) 11; *Olmstead v. Webster*, 8 N. Y. 413; *Robertson v. Smith*, 18 Johns. (N. Y.) 459; *Penny v. Martin*, 4 Johns. Ch. (N. Y.) 566; *Smith v. Black*, 9 S. & R. (Pa.) 142; 11 Am. Dec. 686; *Nichols v. Anguera*, 2 Miles (Pa.) 290; *Anderson v. Levan*, 1 W. & S. (Pa.) 334; *How v. Kane*, 2 Pin. (Wis.) 531; 54 Am. Dec. 152; *Mason v. Eldred*, 6 Wall. (U. S.) 231; 7 Am. Law Reg., N. S. 402; *Kendall v. Hamilton*, 4 App. Cas. 504. But see to the contrary *Union Bank v. Hodges*, 11 Rich. (S. Car.) 480; *Watson v. Owens*, 1 Rich. (S. Car.) 111.

2. *Sherman v. Christy*, 17 Iowa 322; *Gilman v. Foote*, 22 Iowa 560; *Pierce v. Kearney*, 5 Hill (N. Y.) 82; *Trapton v. United States*, 3 Story (U. S.) 646; *King v. Hoare*, 13 M. & W. 495. But see *Smith v. Exchange Bank*, 26 Ohio St. 141.

A recovery of a judgment upon a promissory note executed by a firm and also by an individual member thereof against the latter as a several maker, is not a bar to a subsequent action against the firm, unless there be an actual satisfaction of such judgment. An entry of satisfaction which is afterwards set aside cannot avail as a defense. *Gilman v. Foote*, 22 Iowa 560.

3. See *Ells v. Bone*, 71 Ga. 466; *Yoho v. McGovern*, 42 Ohio St. 11.

In *Suydam v. Barber*, 8 N. Y. 468, it was held that, as a judgment in *Missouri* against one partner would not merge the original indebtedness as against the others, the same effect would be given such a judgment in *New York*. See also *Reed v. Girty*, 6 Bosw. (N. Y.) 567; *Mason v. Eldred*, 6 Wall. (U. S.) 231; 7 Am. Law Reg., N. S. 402.

4. See *Williams v. Rogers*, 14 Bush

does not apply after the death of a member of the debtor firm.¹

A judgment on a note made by a new firm or by one partner after dissolution, or on a note taken as collateral security, has no other or greater effect than the note itself had, and is not, therefore, a discharge of the original indebtedness.²

8. Assignments for the Benefit of Creditors.—(See also ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 845).—Assignments may be made by co-partners of the partnership property for the payment of partnership debts.³ Such an assignment should, as a general rule, be executed and acknowledged by all the members of the firm the same as a deed of real estate.⁴ An assignment of partnership property, which is valid in other respects, is not invalid because the individual property of the

(Ky.) 776; *Loney v. Bailey*, 43 Md. 10; *Hyman v. Stadler*, 63 Miss. 362; *Bryant v. Hawkins*, 47 Mo. 410; *Suydam v. Barber*, 18 N. Y. 468; *Bennett v. Cadwell*, 70 Pa. St. 253; *Nichols v. Cheairs*, 4 Sneed (Tenn.) 229; *Lowry v. Hardwick*, 4 Humph. (Tenn.) 188; *Mason v. Eldred*, 6 Wall. (U. S.) 231; 7 Am. Law Reg., N. S. 402. And see statutes of *Alabama, Arkansas, Colorado, Delaware, Iowa, Kansas, Kentucky, Maryland, Mississippi, Missouri, Montana, New Jersey, Pennsylvania, New Mexico, Tennessee and Vermont*.

1. See *First Nat. Bank v. Morgan*, 73 N. Y. 593; *In re Hodgson*, 31 Ch. D. 177.

But in *Philson v. Bampffield*, 1 Brev. (S. Car.) 202, it was held that a judgment against a surviving partner bars proceedings at law against the estate of the decedent, leaving a remedy in equity only.

2. *Offutt v. Scott*, 47 Ala. 104; *Brozee v. Poyntz*, 3 B. Mon. (Ky.) 178; *Hawks v. Hinchliff*, 17 Barb. (N. Y.) 492; *First Nat. Bank v. Morgan*, 73 N. Y. 593; *Davis v. Anable*, 2 Hill (N. Y.) 339; *Kaufman v. Fisher*, 3 Grant's Cas. (Pa.) 302; *Bigelow v. Lehr*, 4 Watts (Pa.) 378; *Haslett v. Wotherpoon*, 2 Rich. (S. Car.) Eq. 395; *Watson v. Owens*, 1 Rich. (S. Car.) 111; *Carruthers v. Ardagh*, 20 Grant's Ch. (Up. Can.) 579. But see *Thurber v. Jenkins*, 36 How. Pr. (N. Y.) 66; *Thurber v. Corbin*, 51 Barb. (N. Y.) 215.

3. *Burrell on Assignments* 274. See also on this subject *infra*, this title, *Conversion of Joint Into Separate Property*.

Partners who have made an assignment for the benefit of creditors cannot

claim that any part of the partnership property be set apart to them as exempt from execution. *Ex parte Hopkins*, 104 Ind. 157.

Where the partners of an insolvent firm, by an instrument under seal, assign and convey all the partnership property and assets to a creditor as agent of and in trust for all other creditors whose names are or shall be signed to an agreement thereto annexed, accepting the property in full satisfaction of their respective debts, the conveyance, in the absence of fraud, is to be regarded as an ordinary sale upon a valuable consideration, and not as an assignment, and will be upheld as against the subsequent process of a creditor not accepting its provisions. *Kenefick v. Perry*, 61 N. H. 362.

4. *Smith v. Tim*, 14 Abb. N. Cas. (N. Y.) 447; *In re Lawrence*, 5 Fed. Rep. 149.

It is not necessary for a partner who has withdrawn from the firm to join in an assignment by the firm. *First Nat. Bank v. Frost*, 61 Wis. 335.

Where an assignment is made in another State, if it is valid there it is valid everywhere. *In re Paige etc. Lumber Co.*, 31 Minn. 136.

A partner's signature to an assignment does not preclude him from showing that he did not assent to the payment of his partner's debt with firm assets, when it appears that that debt was concealed from him by the other parties to the transaction. *Newell v. Martin* (Iowa 1890), 46 N. W. Rep. 1120.

Ratification.—A partner who has not joined in an assignment of the firm assets may thereafter ratify the same, and a creditor may not question its

partners is not also disposed of.¹ So the individual members of a firm may each or any of them assign all their interests in the co-partnership for the benefit of their creditors.² Such a conveyance, however, can operate only upon the ascertained balance due the partner after the winding up and settlement of the affairs of the concern, a transfer of firm property to pay the separate debts of a partner being a voluntary conveyance and void if the firm is insolvent.³ When both firm and individual property is assigned for the payment of both firm and individual debts, respect is had to the several equities of the creditors of the firm and its individual members, respectively, and the co-partnership assets are in the

validity because of his non-joinder. *Adee v. Cornell*, 93 N. Y. 572.

Record of Assignment.—A and B, being alone partners in one firm, and also members of the firm of B, C & Co., assigned their property for the benefit of the creditors of A and B. *Held*, that creditors of B, C and Co. might take advantage of the want of record of the assignment. *Wharton v. Grant*, 5 Pa. St. 39.

1. *Auley v. Osterman*, 65 Wis. 118.

Nor is it invalid because it includes the individual property of the assigning partner. *Haynes v. Brooks*, 116 N. Y. 487.

2. *Burrill on Assignments* 274; *Wilson v. Bowden*, 8 Rich. (S. Car.) 9; *Norris v. Vernon*, 8 Rich. (S. Car.) 13; *Cunningham v. Ward*, 30 W. Va. 572.

One partner cannot by a conveyance in trust for the payment of his individual and partnership debts, defeat the lien of the other partner on the partnership funds, and this lien inures to the benefit of the partnership creditors. *Bank of Kentucky v. Herndon*, 1 Bush (Ky.) 359.

An assignment of individual property for the payment of partnership debts, reserving the surplus to the grantors, without any provision for the individual creditors where there are such, is fraudulent and void as against an individual creditor. *Collomb v. Caldwell*, 16 N. Y. 484.

Debts provided for in an assignment of individual property must be those for which the debtor is liable jointly with the others, or severally and alone. If he is liable, the appropriation cannot be fraudulent. *Fox v. Heath*, 16 Abb. Pr. (N. Y.) 163; *O'Neil v. Salmon*, 25 How. Pr. (N. Y.) 246; *Eyre v. Beebe*, 28 How. Pr. (N. Y.) 333; *Kirby v. Schoonmaker*, 3 Barb. Ch. (N. Y.) 46; *Van Rossum v. Walker*, 11 Barb. (N.

Y.) 237; *Newman v. Bagley*, 16 Pick. (Mass.) 570; *French v. Lovejoy*, 12 N. H. 458; *Gadsden v. Carson*, 9 Rich. Eq. (S. Car.) 252; *Jackson v. Cornell*, 1 Sandf. Ch. (N. Y.) 348.

Neither the other partner nor partnership creditors can enjoin the sale by the trustee under a deed of trust, as the purchaser would hold the land subject to their prior equities, appearing on the face of the deeds under which such purchaser would claim the land. *Cunningham v. Ward*, 30 W. Va. 572.

A partnership made an assignment for the benefit of creditors, and subsequently one of the members made an assignment for the benefit of his individual creditors, providing that, after paying certain debts, the assignee should pay all the other debts of the assignor in proportion, according to the amount of assets. *Held*, that the latter assignment was intended for the payment of those debts of the firm only for which the assignor would remain individually liable, after the firm assets were exhausted, and that there was no double payment directed. *Smith v. Perine* (Supreme Ct.), 1 N. Y. Supp. 495.

3. *Geortner v. Canajoharie*, 2 Barb. (N. Y.) 625; *Burtus v. Tisdall*, 4 Barb. (N. Y.) 571; *Dart v. Farmers' Bank*, 27 Barb. (N. Y.) 327; *Walsh v. Kelly*, 42 Barb. (N. Y.) 98; 27 How. Pr. (N. Y.) 359; *Elliot v. Stevens*, 38 N. H. 311; *Ferson v. Monroe*, 21 N. H. 462; *Wilson v. Robertson*, 21 N. Y. 587; *Hartley v. White*, 94 Pa. St. 31. But see *Schaeffer v. Fithian*, 17 Ind. 463; *McDonald v. Beach*, 2 Blackf. (Ind.) 55; *Schmidlapp v. Currie*, 55 Miss. 597; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Sigler v. Knox Co. Bank*, 8 Ohio St. 511. And see *infra*, this title, *The Interest of the Partners*.

A conveyance from two co-partners in trade of "all and singular the stock of goods, machinery, book-accounts,

first place applied to the payment of the firm debts, and the individual funds of the several co-partners to the payment of their respective individual debts.¹ Thus a preference of individual creditors in an assignment including firm property is a fraud upon co-partnership creditors, and therefore void,² though partnership

owing to" the grantors "of whatsoever consisting" in trust for such creditors as shall discharge them "from all their liabilities, individual as well as co-partnership," conveys all their property, separate as well as joint. *Malcolm v. Hodges*, 8 Md. 418.

To show that a particular debt was included in an assignment of assets made by partners on the dissolution of their firm, it is admissible to prove by a witness that it was included, and was specified in the inventory prepared for the purpose, without producing the inventory. *Platt v. Thorn*, 8 Bosw. (N. Y.) 574.

1. *O'Neil v. Salmon*, 25 How. (N. Y.) Pr. 251; *Evans v. Winston*, 74 Ala. 349; *Bank of Mobile v. Dunn*, 67 Ala. 381; *Collier v. Hanna*, 71 Md. 253; *Burhans v. Kelly* (Supreme Ct.) 2 N. Y. Supp. 175. *Parsons on Part.* 347, 480. And see *infra*, this title, *Winding Up and Distribution*.

The reservation of a right to determine the preferences at some future time renders an assignment void. *Averill v. Loucks*, 6 Barb. (N. Y.) 470.

A direction that property shall be distributed among creditors according to their respective equities is good. *Heckman v. Messinger*, 49 Pa. St. 465.

Whether the conveyance is of individual as well as firm property will depend upon the intention of the parties as shown by the terms employed by them in the instrument. Thus, where the assignment was by W A & E A P of all their property, this was held broad enough to include the separate property of each of the partners as well as the common property of both. *Coggill v. Botsford*, 29 Conn. 439.

2. *Wilson v. Robertson*, 21 N. Y. 592; 19 How. Pr. (N. Y.) 350; *Hulbert v. Dean*, 2 Abb. App. Dec. (N. Y.) 432; *Knauth v. Bassett*, 34 Barb. (N. Y.) 31; *Cox v. Platt*, 32 Barb. (N. Y.) 126; 19 How. Pr. (N. Y.) 121; *Keith v. Fink*, 47 Ill. 272; *Heye v. Bolles*, 33 How. Pr. (N. Y.) 266; 2 Daly (N. Y.) 231; *Kirby v. Schoonmaker*, 3 Barb. Ch. (N. Y.) 46; *Lester v. Abbott*, 28 How. Pr. (N. Y.) 488; 3 Robt. (N. Y.) 691;

Henderson v. Haddon, 12 Rich. Eq. (S. Car.) 393; *French v. Lovejoy*, 12 N. H. 458; *Jackson v. Cornell*, 1 Sandf. Ch. (N. Y.) 348; *Smith v. Howard*, 20 How. Pr. (N. Y.) 121; *Importers etc. Nat. Bank v. Burger* (Supreme Ct.) 6 N. Y. Supp. 189; *Newell v. Martin* (Iowa 1890), 46 N. W. Rep. 1120; *Sewall v. Russell*, 2 Paige (N. Y.) 175.

An attempt to assign partnership property for the purpose of paying private debts of one of the partners, when the firm is insolvent is conclusive of an actual fraudulent design. *Keith v. Fink*, 47 Ill. 272; *French v. Lovejoy*, 12 N. H. 458; *Hulbert v. Dean*, 2 Abb. App. Dec. (N. Y.) 428; *Kirby v. Schoonmaker*, 3 Ch. Barb. (N. Y.) 46; *Cox v. Platt*, 32 Barb. (N. Y.) 126; *Knauth v. Bassett*, 34 Barb. (N. Y.) 31; *Ruhl v. Phillips*, 2 Daly (N. Y.) 45; *Lester v. Abbott*, 28 How. Pr. (N. Y.) 488; *Heye v. Bolles*, 33 How. Pr. (N. Y.) 266; *Wilson v. Robertson*, 21 N. Y. 587; *Henderson v. Haddon*, 12 Rich. Eq. (S. Car.) 393.

It has been held, however, that the assignment is valid though the appropriation is void. *Read v. Baylies*, 18 Pick. (Mass.) 497; *Nye v. Van Husan*, 6 Mich. 329; *Kemp v. Carnley*, 3 Duer (N. Y.) 1; *Nicholson v. Leavitt*, 4 Sandf. (N. Y.) 252; 6 N. Y. 510; 10 N. Y. 591; *Lasell v. Tucker*, 5 Sneed (Tenn.) 1; *McCullough v. Somerville*, 8 Leigh (Va.) 415; *Newell v. Martin* (Iowa, 1890), 46 N. W. Rep. 1120.

A chattel mortgage of partnership property executed by a partner in the firm name to a trustee, to secure firm creditors, specifying the particular claim secured, is not rendered void as to the firm creditors by the insertion of an individual claim of the partner. *Walker v. White*, 60 Mich. 427.

Where separate property assigned by each partner exceeds the amount of his separate debts, a direction that the separate debts shall be paid out of the partnership property will not vitiate the assignment. *Hollister v. Loud*, 2 Mich. 309.

An appropriation of the firm property to pay individual debts, is not, it

property may be applied to the payment of non-partnership debts, but for the payment of which all the partners are bound.¹

The firm, however, is in no sense liable for individual debts of the partners, and individual creditors have no equitable lien upon the individual assets; an application of individual property primarily to the payment of partnership debts, therefore, being for the payment of debts for which the individual is liable has been regarded as valid,² though the contrary doctrine, that partnership creditors cannot be preferred to individual ones in assignments of individual property, has been repeatedly urged.³

An assignment, either by an insolvent firm for the benefit of its creditors or by an individual partner of his interest for the benefit of his individual creditors, or of both partnership and individual creditors, necessarily effects the dissolution of the partnership, if no provision is made for the continuance of its business.⁴

XVIII. DISSOLUTION.—The dissolution of a partnership consists in the annulling of or putting an end to it.⁵ This is effected not only by winding up its affairs and putting an end to its business, but also by any change of membership; and however numerous such changes may have been, though without break in the continuity of the business, at each change an existing firm is dissolved and a new one is formed.⁶ The causes for which a dissolution

seems, a ground for setting aside the assignment at the instance of an individual creditor, as he cannot in any manner be affected by it. *Morrison v. Atwell*, 9 Bosw. (N. Y.) 503; *Haynes v. Brooks*, 116 N. Y. 487.

1. *Smith v. Howard*, 20 How. (N. Y.) Pr. 121. And see *Calkins v. Lockwood*, 16 Conn. 276; *Gardner v. Webster*, 17 Pick. (Mass.) 407; *Goddard v. Sawyer*, 91 Mass. 78; *U. S. v. Hooe*, 3 Cranch (U. S.) 73.

2. *Fox v. Heath*, 16 Abb. Pr. (N. Y.) 168; *Scott v. Guthrie*, 25 How. Pr. (N. Y.) 512; *Collomb v. Caldwell*, 16 N. Y. 484; *Wilson v. Robertson*, 21 N. Y. 587; *Ralph v. Bricknell* (Supreme Ct.), 7 N. Y. Supp. 825. And see *Whiteley v. May*, U. S. Law Mag. 442; *Kirby v. Schoonmaker*, 3 Barb. Ch. (N. Y.) 46; *Newman v. Bagley*, 16 Pick. (Mass.) 570.

After a partnership creditor has exhausted the firm assets he is entitled to come in equally with separate creditors under an assignment by one partner. *Gadsden v. Carson*, 9 Rich. Eq. (S. Car.) 252; *Black's Appeal*, 44 Pa. St. 503.

3. *Jackson v. Cornell*, 1 Sandf. Ch. (N. Y.) 348; *Smith v. Howard*, 20 How. Pr. (N. Y.) 121. And see *Wilder v. Keeler*, 3 Paige (N. Y.) 167; *Egberts v. Wood*, 3 Paige (N. Y.) 517; *Payne*

v. Matthews, 6 Paige (N. Y.) 19; *Hutchinson v. Smith*, 7 Paige (N. Y.) 26; *Story's Eq. Jur.*, § 625.

A general assignment by a firm of all partnership and individual property, for the benefit of all firm creditors accepting it, is not void, as against creditors of the individual members of the firm, as they can, though not named in the assignment, enforce their rights by suit against the assignee without having the assignment declared void. *Moody v. Carroll*, 71 Tex. 143.

4. See *Brown v. Agnew*, 6 W. & S. (Pa.) 238; *Gordon v. Freeman*, 11 Ill. 14; *McKelry v. Blair*, 6 Am. L. T. 65; *Horton's Appeal*, 13 Pa. St. 67; *Armstrong v. Fahnestock*, 19 Md. 59; *Power v. Kirk*, 1 Pitts. (Pa.) 510; *Clark v. Wilson*, 19 Pa. St. 414; *Parsons on Part.* 400.

5. See *Bouv. Law Dict.*, tit. Dissolution.

In order to effect a dissolution of a partnership it is not necessary that there be a distinct agreement between all the members at the same time that a dissolution shall take place at a certain time; an explicit notice from one member to the others fixing the time for such dissolution is sufficient. *Green v. Waco State Bank*, 72 Tex. 2.

6. See *Ross v. Cornell*, 45 Cal. 133;

may be had, or which will of themselves effect a dissolution, may be enumerated to be the mutual consent of all the partners, the will of any partner, death, the transfer of a partner's interest, fraud vitiating the original contract, the insanity or insolvency of a partner, the hopeless state of the partnership business, the occurrence of some event which renders the continuance of the partnership illegal, the misconduct of a partner, or the destruction of mutual confidence,¹ the question as to whether the facts of a case amount to a dissolution, when it arises in a court of law, being one of fact for the jury.² Though the agreement for

McCall v. Moss, 112 Ill. 493; Waller v. Davis, 59 Iowa 103; Abat v. Penny, 19 La. Ann. 289; White v. White, 5 Gill (Md.) 359; Mudd v. Bast, 34 Mo. 465; Morss v. Gleason, 64 N. Y. 204; Griswold v. Waddington, 16 Johns. (N. Y.) 438; Clark v. Wilson, 19 Pa. St. 414; Horton's Appeal, 13 Pa. St. 67; Roach v. Ivey, 7 S. Car. 434; Bank of Mobile v. Andrews, 2 Sneed. (Tenn.) 535; Peters v. M'Williams, 78 Va. 567; Heath v. Sawson, 4 B. & Ad. 172.

In Gossett v. Weatherby, 5 Jones Eq. (N. Car.) 46, however, the withdrawal of one of three partners by consent, was spoken of as a partial dissolution only, and held to furnish no inference of a dissolution as to the other two partners.

A mere change of name without a change in partnership, although accompanied by removal of the place of business, is not a dissolution and the formation of a new firm. Mellinger v. Parsons, 51 Iowa 58. And see Billingsley v. Dawson, 27 Iowa 210; Gill v. Ferris, 82 Mo. 156.

In White v. White, 5 Gill (Md.) 359, several partners successively retired, at intervals of a few years, and one of them remaining, filed a bill against all the others for an accounting. It was held that the bill was multifarious, and that as each firm must be separately wound up, the defendants who had retired earlier were not to be burdened with the cost or trouble of the transactions of the later firm.

The continuance of the business of a firm by the managing partner with the partnership assets under the old name and upon the same premises, is not a dissolution, and profits earned during such continuance must be divided as before. Parsons v. Haywood, 4 De G. F. & J. 494.

The formation of a corporation by the members of a firm, for the purpose of carrying on the business, is not nec-

essarily a dissolution of the partnership for all purposes. Wausau Bank v. Conway, 67 Wis. 210.

A notice by one partner to the other that the firm was dissolved, is not a dissolution without the assent of the other, unless acted upon. Sanderson v. Milton Stage Co., 18 Vt. 107.

A notice of dissolution given by one partner to another, is not a continuing offer to dissolve, and will not be deemed to have been accepted by allegations in the other partner's answer subsequently filed declaring himself to be desirous of dissolving. Smith v. Mulock, 1 Robt. (N. Y.) 569; 1 Abb. Pr. (N. Y.) 374. See also Wood v. Fox, 1 A. K. Marsh. (Ky.) 451.

1. Lindley on Part. 220; 3 Kent's Com. 53.

The causes for the dissolution of a partnership are enumerated and classified by Bates in his Law of Partnership, § 579, as follows:

"I. Events which *per se* amount to a dissolution, are divided into (a) dissolution by operation of law, as death, lunacy, war, bankruptcy or declared insolvency, sale on execution of the share of a partner; (b) dissolution as a necessary consequence of the act of one or all of the partners, as sale of the entire interest of one partner, marriage of a *feme sole* partner, abandonment by all.

"II. Events or acts which are grounds of dissolution; (a) those for which an injured or innocent partner may elect to consider the firm dissolved, as, for example, the absconding of a partner or abandonment by him; (b) those for which a dissolution may be decreed by a court of equity on the application of a partner, as fraud and misconduct; impracticability of continuing from impossibility of succeeding, and from impossibility of getting along together peaceably."

2. Roache v. Pendergast, 3 Harr. & J. (Md.) 33; Gulick v. Gulick, 14 N. J.

the formation of the partnership be in writing or under seal, the dissolution may be proved by parol.¹ So, the date of the dissolution is also a question of fact, the time of the consummation of notice of dissolution given to the other co-partners being the date in case of a partnership at will.² In partnerships for a fixed period, the date of the decree is, as to third parties at least, the date of dissolution,³ and the same date controls in partnerships for the completion of a particular enterprise.⁴ If necessary, in order to effect justice between the parties, however, the court may make the decree as of such a date as will best subserve the equities of all the parties concerned.⁵

1. Partnerships at Will.—A partnership at will may be dissolved at any time by the withdrawal of any partner, whenever he so elects, without incurring any liability to his co-partners for such

L. 578. And see *Comey v. Andrews*, 14 Daly (N. Y.) 437.

1. *Wood v. Gault*, 2 Md. Ch. 433; *Gardiner v. Bataille*, 5 La. Ann. 597; *Dickinson v. Bold*, 3 Desaus. (S. Car.) 501; *Truesdell v. Baker*, 2 Rich. (S. Car.) 351. And see *Dor v. Miles*, 4 Camp. 373. But see *Hutchinson v. Whitfield*, *Hayes* (Irish) 78.

Though there be a written agreement of dissolution and a publication of the fact, the dissolution may be established by parol evidence as to an earlier date. *Emerson v. Parsons*, 46 N. Y. 560.

Proof of delay to an extent which would in itself act as a dissolution, is competent to establish the fact. *Harris v. Hillegass*, 54 Cal. 463.

A resolution by the members of a partnership appointing one of their number to take charge for the purpose of winding up, establishes a dissolution. *Bank of Montreal v. Page*, 98 Ill. 109.

A writing by one partner to another, in effect a bill of sale of the latter's interest, is admissible to prove dissolution as a part of the transaction. *Emerson v. Parsons*, 46 N. Y. 560.

Letters showing mutual dissatisfaction and a wish to close together with a discontinuance of the business, are competent evidence of dissolution. *Dickinson v. Bold*, 3 Desaus. (S. Car.) 501; *Pearce v. Lindsay*, 3 De G. J. & S. 139.

A notice of dissolution published on January 19th, dated January 1st, is competent evidence of a dissolution on January 1st; not as in itself a dissolution but as one of the circumstances. *Boyd v. McCann*, 10 Md. 118.

2. *Phillips v. Nash*, 47 Ga. 218;

Abrahams v. Meyers, 40 Md. 499; *Shepherd v. Allen*, 33 Beav. 577; *Mellush v. Keene*, 27 Beav. 577; *Heath v. Sanson*, 4 B. & Ad. 172. And see *Brinson v. Berry* (Miss. 1890), 7 So. Rep. 322.

3. *Abrahams v. Myers*, 40 Md. 499; *Whitman v. Robinson*, 21 Md. 30; *Besch v. Frolich*, 1 Phill. 172; *Lyon v. Twedell*, L. R., 17 Ch. Div. 529.

Where the dissolution is by agreement, of the parties, in which it is provided that certain conditions shall be performed, the dissolution is deemed effectual from the date of the actual retirement of the one partner and delivery of possession to the continuing partner, although the conditions have not been fulfilled. *Bachia v. Ritchie*, 51 N. Y. 679; *Waterman v. Johnson*, 49 Mo. 410. But not until actual retirement. *Magitt v. Murrie*, 5 B. Mon. (Ky.) 168.

4. *Abrahams v. Myers*, 40 Md. 499; *Berry v. Folkes*, 60 Miss. 576.

5. *Durbin v. Barber*, 14 Ohio 311. And see *Dumont v. Ruepprecht*, 38 Ala. 175; *Fogg v. Johnson*, 27 Ala. 432; 62 Am. Dec. 771.

A partnership was formed for the manufacture of plows, to continue during the life of a patent issued to one of the partners, unless sooner dissolved by mutual consent. The firm ceased doing business before the patent expired, and the partners made a division of the assets. The patent-right, never having been assigned to the firm, and being then considered worthless, was not included in the division. *Held*, that these facts showed a dissolution of the firm, though one of the partners disputed the correctness of the settlement. *Richardson v. Gregory*, 27 Ill. App. 621; affirmed, 126 Ill. 166.

withdrawal,¹ though if the right is exercised in bad faith with a view to the appropriation of expected profits or to obtain some other unfair advantage, the court will interfere to effect an equal adjustment between them.² A partnership formed for a particular enterprise or for effecting a particular purpose the articles of which specifies no period of duration, however, is a partnership for the completion of its purposes, and not at will under the above rules,³ and an indefinite continuance of a partnership for

1. *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376; *Lawrence v. Robinson*, 4 Colo. 567; *Carlton v. Cummins*, 51 Ind. 478; *Whiting v. Leakin*, 66 Md. 255; *Fletcher v. Reed*, 131 Mass. 312; *Berry v. Folkes*, 60 Miss. 576; *McElvey v. Lewis*, 76 N. Y. 373; *Pine v. Ormsbee*, 2 Abb. Pr., N. S. (N. Y.) 375; *Skinner v. Tinker*, 34 Barb. (N. Y.) 333; *Collins v. Dickenson*, 1 Hayw. (N. Car.) 240; *McMahon v. McClerman*, 10 W. Va. 419.

The right of a partner to dissolve a partnership at will is not affected by the fact that he exercises it at an unreasonable time. *Collins v. Dickenson*, 1 Hayw. (N. Car.) 240; *McMahon v. McClerman*, 10 W. Va. 419. But see to the contrary, *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376.

The right to dissolve may be exercised even though the other partner had paid a bonus for the privilege of entering the firm. *Carlton v. Cummins*, 51 Ind. 478.

Plaintiff and defendant entered into a partnership for the practice of medicine; a bonus of \$3,100 being paid by plaintiff to defendant. The contract of partnership stipulated that "the partnership shall continue for the term of 10 years from this date, unless sooner terminated by mutual consent, or by notice, which shall be in writing, and delivered sixty days before taking effect." Held, that defendant had a right to terminate the partnership without cause, at any time, on giving the required notice. *Swift v. Ward*, 80 Iowa 700.

The unreasonableness of the time of the dissolution will not, in itself, defeat the right to dissolve, nor warrant damages therefor. *Gaty v. Tyler*, 33 Mo. App. 494.

2. *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376; *McMahon v. McClerman*, 10 W. Va. 419; *Featherstonhaugh v. Fenwick*, 17 Ves. 298. And see *Walker v. Whipple*, 58 Mich. 476.

Two persons agreed to form a plant-

ing partnership with a third, and, for that purpose, to sell him, for his portion of the capital, one-third of a plantation, the price to be paid out of his share of the profits. Held, that the joint ownership was not to be treated as if acquired from different vendors, but as a subsidiary to a partnership to the terms of which it was subject; and by those terms the vendee could not take his capital out of the partnership until payment of the price, neither he, his creditors, nor his representatives could take his third interest until the other partners were fully reimbursed. *Thompson v. Mylne*, 6 La. Ann. 80.

3. *Richards v. Baurman*, 65 N. Car. 162; *Halliday v. Elliott*, 8 Oregon 84; *Pearce v. Ham*, 113 U. S. 585; *Cole v. Moxley*, 12 W. Va. 730. And see *Morris v. Peckham*, 51 Conn. 128; *Walker v. Whipple*, 58 Mich. 476.

The right to obtain and operate a patent, which proves successful, was regarded as a partnership to endure during the life of the patent, in *Gates v. Frasier*, 6 Ill. App. 229.

Where the employees were to be paid by a share in the profits in lieu of salary, and they were engaged for a year by all the partners and furnished with transportation for that time, it was held that the partnership was necessarily intended to continue at least for that year. *Potter v. Moses*, 1 R. I. 430.

In *Berry v. Folkes*, 60 Miss. 570, however, it was held that a partnership to buy a plantation on credit, and to operate it and make the profits pay for the land and outlay, and to divide the land when paid for, was too uncertain to sustain a claim that it was indissoluble until the accomplishment of the object.

So the purchase of a leasehold interest, or taking a lease of property, to run for a definite term, is not evidence of an agreement of partnership to endure during the time for which the lease was to run. *Crawshay v. Maule*, 1 Swanst. 495; *Burdon v. Bartis*, 4

the purpose of the completion of an enterprise, carries it over until that object is accomplished.¹

There can be no dissolution of a partnership at will until notice is given of the intention to dissolve or the fact of withdrawal,² and such notice to be effectual must be explicit, and be communicated to all the partners,³ though notice may be implied from circumstances and be as effectual to terminate the partnership as a formal declaration or an express notice;⁴ the dissolution being effectual from the time of the communication of such notice.⁵

A notice once given cannot be withdrawn without the mutual consent of all the co-partners.⁶

2. Partnership for a Fixed Term.—While many courts and judges have denied and doubted the power of a partner to withdraw from or voluntarily do any act which will effect the dissolution of a partnership for a fixed term,⁷ the prevalent doctrine would seem to be that there is no such thing as an indissoluble partnership and that the power given by one partner to another to make joint contracts in behalf of both is not only revocable, but one which he cannot divest himself of the capacity to revoke.⁸ But, however,

De G. F. & J. 42; Featherstonhaugh v. Penwick, 17 Ves. 298.

1. See Abraham v. Myers, 40 Md. 499.

2. Eagle v. Bucher, 6 Ohio St. 295; Van Sandan v. Moore, 1 Russ. 464; Wheeler v. Van Wart, 9 Sim. 193.

Where a partnership is for no definite term, it may be dissolved by any member at his pleasure, upon notice to his partners, and where a partner abandons the business and property of the firm, and writes to his partners, refusing to join in a settlement of the partnership business, and telling them to settle as they please, and they form a new firm, and transfer the property of the old firm to the new, the dissolution is complete. Blake v. Sweeting, 121 Ill. 67.

3. Van Sandan v. Moore, 1 Russ. 464; Wheeler v. Van Wart, 9 Sim. 193; Parsons v. Hayward, 31 Beav. 199.

An invalid notice of expulsion under one clause of the articles of co-partnership cannot be treated as a valid notice or intent to dissolve under another clause. Smith v. Mules, 9 Hare 556; Clarke v. Clarke, 6 H. L. Cas. 633.

4. Abbot v. Johnson, 32 N. H. 9; Whitman v. Robinson, 21 Md. 30.

Where certain members of a firm formed a new partnership and immediately opened an account against one of the others whose name ceased to appear on the books after the settlement of their accounts and he never afterwards

claimed any interest in the partnership, the court will presume a dissolution and that he had retired from the firm. Gover v. Hall, 3 Har. & J. (Md.) 43.

5. Melbush v. Keen, 27 Beav. 236; Jones v. Lloyd, L. R., 18 Eq. 265.

Where the articles provide for a dissolution upon notice, a notice to a partner will be effectual even though he has become a lunatic or is blind and deaf. Robertson v. Lockie, 15 Sim. 285.

A notice of discontinuance of the firm of A & B, and of a new firm of A, B & Co., tends to prove a dissolution. Southwick v. Allen, 11 Vt. 75.

6. Jones v. Lloyd, L. R., 18 Eq. 265.

7. See Johnston v. Dutton, 27 Ala. 245; Howell v. Harvey, 5 Ark. 270; 39 Am. Dec. 376; Berry v. Folkes, 60 Miss. 576; Sieghortner v. Weissenborn, 20 N. J. Eq. 172; Hartman v. Woehr, 18 N. J. Eq. 383; Van Kuren v. Trenton Locomotive etc. Mfg. Co., 13 N. J. Eq. 302; Ferrero v. Buhlmeier, 34 How. Pr. (N. Y.) 33; Bishop v. Breckles, Hoffm. Ch. (N. Y.) 534; Durbin v. Barber, 14 Ohio 311; Kinlock v. Hamlin, 2 Hill Eq. (S. Car.) 19; 27 Am. Dec. 441; Cole v. Moxley, 12 W. Va. 430; Pearpont v. Graham, 4 Wash. (U. S.) 232. See also 23 Am. Law Reg., N. S. 689.

8. Skinner v. Dayton, 19 Johns. (N. Y.) 513; Solomon v. Kirkwood, 55 Mich. 256; Slemmer's Appeal, 58 Pa. St. 155; Mason v. Connell, 1 Whart. (Pa.) 381; Blake v. Dorgan, 1 Greene

that question may be regarded, it is in either event clear that the delinquent partner is responsible in damages for his breach of covenant in so doing,¹ which damages may be allowed as an item against him in the accounting after dissolution is decreed.²

a. **MUTUAL CONSENT.**—As partnerships are formed by the mutual agreement of all the partners, so may they be altered, modified or dissolved by like agreement.³

b. **DEATH.**—In the absence of provisions for continuance after death, the death of a partner dissolves the firm at once and for all purposes, whether it was a partnership at will or for a fixed term, and whatever may have been the circumstances.⁴

This rule is dependent entirely upon the *delectus personarum*, however; and where that does not exist, as in case of a mining

(Iowa) 537; Cape Sable Co's Case, 3 Bland (Md.) 606. And see Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Monroe v. Hamilton, 60 Ala. 226; Miller v. Bingham, 50 Cal. 615; Fourth Nat. Bank v. New Orleans etc. Co., 11 Wall. (U. S.) 624, and see also the cases hereinafter cited in this section.

1. Howell v. Harvey, 5 Ark. 270; 39 Am. Dec. 376; Blake v. Dorgan, 1 Greene (Iowa) 537; Solomon v. Kirkwood, 55 Mich. 256; Kinloch v. Hamlin, 2 Hill Eq. (S. Car.) 19; 27 Am. Dec. 441; Doupe v. Stewart, 13 Grant's Ch. (Up. Can.) 637.

Demands recoverable by one partner for his copartner's wrongful dissolution of the copartnership, include anticipated profits for the residue of the term as fixed by the articles, and evidence of profits realized during the continuance of the partnership may be received as aiding to establish profits which would have been realized thereafter had the firm been continued. Bagley v. Smith, 10 N. Y. 489; 61 Am. Dec. 756.

2. Howell v. Harvey, 5 Ark. 270; 39 Am. Dec. 376; Doupe v. Stewart, 13 Grant's Ch. (Up. Can.) 637.

If part of the capital of an agreed partner has been paid in, accepted and used, and the business has been commenced in the name of the firm, he is an actual partner until the partnership is legally dissolved; and a mere exclusion of such person by the others from the business of the firm, by illegal acts on their part, is not a legal dissolution, but is a ground for an application to a court of equity for a dissolution upon his part; and until such dissolution is had, he is entitled, on accounting, to his share of the profits. Hartman v. Woehr, 18 N. J. Eq. 383.

3. See Master v. Kirton, 3 Ves. 74; 3 Kent's Com. 53. And see further on this subject *infra*, this tit., *Dissolution by Contract*.

A written agreement for the dissolution of a partnership, supersedes all prior and contemporaneous agreements respecting the same matters. Bragg v. Geddes, 93 Ill. 39.

4. Sims v. McEwen, 27 Ala. 184; Pitkin v. Pitkin, 7 Conn. 307; 18 Am. Dec. 111; Cobble v. Tomlinson, 50 Ind. 550; Goodburn v. Stevens, 5 Gill (Md.) 1; Washburn v. Goodman, 17 Pick. (Mass.) 519; Marlett v. Jackman, 3 Allen (Mass.) 287; Roberts v. Kelsey, 38 Mich. 602; Hoard v. Clum, 31 Minn. 186; Egberts v. Wood, 3 Paige (N. Y.) 517; McNaughton v. Moore, 1 Hayw. (N. Car.) 189; Smith's Estate, 11 Phila. (Pa.) 131; Jones v. McMichael, 12 Rich. (S. Car.) 176; Alexander v. Lewis, 47 Tex. 481; Fulton v. Thompson, 18 Tex. 278; Vilas v. Farwell, 9 Wis. 460; Burwell v. Cawood, 2 How. (U. S.) 560; Scholefield v. Eichelberger, 7 Pet. (U. S.) 586; Frank v. Beswick, 44 Up. Can., Q. B. 1; Chapman v. Beckinton, 3 Q. B. 703.

In Duffield v. Brainerd, 45 Conn. 424, however, where the business was continued several years by the surviving partners, upon request of the distributees, it was held, upon an accounting, that the partnership must be deemed to have continued and not to have been dissolved by death.

In Butler v. American Toy Co., 46 Conn. 136, where two firms had united to form a third firm and one of the partners of one of the firms died, and the widow and children and surviving partner continued the business, acting as a member of the common firm, and became incorporated for the

partnership¹ or unincorporated joint stock companies with transferable shares,² death neither dissolves the firm nor provides a cause for dissolution.

c. SALE OF A PARTNER'S INTEREST.—A transfer of his interest by a partner to a third person effects the dissolution not only of a partnership at will, but also, as a general rule, of a partnership for a fixed period of time; or at any rate such a transfer may be treated as such by the remaining partners at their election,³ and a sale under execution against one of the partners,⁴ or an assignment or transfer by one partner to another, would have the same effect.⁵ Though the transfer of an interest may be considered

purpose of acting as a member of such firm, the court regarded the former firm as not being dissolved by the death of the partner.

1. Jones v. Clark, 42 Cal. 180.

2. Machinists' Nat. Bank v. Dean, 124 Mass. 81; McNeish v. Hulless Oat Co., 57 Vt. 316; Walker v. Wait, 50 Vt. 668; Tenney v. New England Protective Union, 37 Vt. 64. See also *infra*, this title, *Mining Partnerships*; and MINES AND MINING CLAIMS, vol. 15, p. 499.

3. See Monroe v. Hamilton, 60 Ala. 226; Miller v. Brigham, 50 Cal. 615; Elder v. Hood, 38 Ill. 333; Barkley v. Tapp, 87 Ind. 25; Gordon v. Freeman, 11 Ill. 14; Buckingham v. Hanna, 20 Ind. 110; Reece v. Hoyt, 4 Ind. 169; Blaker v. Sands, 29 Kan. 551; Whitman v. Leonard, 3 Pick. (Mass.) 177; McCall v. Moss, 112 Mass. 493; Mechanics' Bank v. Godwin, 5 N. J. Eq. 334; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Merrich v. Brainard, 38 Barb. (N. Y.) 574; Buford v. Neely, 2 Dev. Eq. (N. Car.) 481; Horton's Appeal, 13 Pa. St. 67; Cochran v. Perry, 8 W. & S. (Pa.) 262; Ayer v. Ayer, 41 Vt. 346; Ballard v. Callison, 4 W. Va. 326; Potter v. Moses, 1 R. I. 430; Mudd v. Bast, 34 Mo. 465; Bank of Mobile v. Andrews, 2 Sneed (Tenn.) 535; Fourth Nat. Bank v. New Orleans etc. R. Co., 11 Wall. (U. S.) 624; Fox v. Rose, 10 Up. Can., Q. B. 16; Heath v. Sanson, 4 B. & Ad. 175; Johnson v. Ames, 11 Pick. (Mass.) 173; Parkhurst v. Kinsman, 1 Blatchf. (U. S.) 488. But see to the contrary, Ferrero v. Buhlmeier, 34 How. Pr. (N. Y.) 33; Brown v. Beecher (Pa. 1888), 15 Atl. Rep. 608; Moore v. Steele, 67 Tex. 435.

"By the civil law, such dissolution is proper on the ground that it would be

useless and mischievous to hold reluctant partners together. 1 Parsons on Cont. 195, citing Vinnius in Ins. 3, 26, 4; Ferriere in id. tome 5, 156; Dig. 17, 2, 14; Domat, b. 1, tit. 8, § 5, art. 1-8, by Strahan."

In *England* the weight of authority is decidedly opposed to such dissolution, as a breach of contract. Peacock v. Peacock, 16 Ves. 56; Crawshaw v. Maule, 1 Swanst. 495.

A lease by one partner to another, of the former's interest in coal mines, in the operation of which consisted in the business of the firm, is a dissolution; or if the other partners assented, it is a suspension of business, a continuance being incompatible with the rights and responsibilities of the lessor as a partner. McAdam v. Hawes, 9 Bush (Ky.) 15. See also Moody v. Rathbun, 7 Minn. 89.

The true doctrine, it is submitted, is, that if the partnership is at will, the assignment dissolves it; and if it is not at will, the other members are entitled to treat the assignment as a cause of dissolution. Lindley on Part. 698.

That the alienation of the interest of the partner effects the dissolution of the firm, cannot be affirmed of a voluntary transfer with any certainty, except where the power to dissolve a partnership for a term in violation of the contract be also conceded. Bates' Law of Part. 585.

4. Renton v. Chaplain, 9 N. J. Eq. 62; Morrison v. Blodgett, 8 N. H. 238; Davis v. Grove, 2 Robt. (N. Y.) 136. And see *infra*, this title, *Insolvency*.

5. Monroe v. Hamilton, 60 Ala. 226; Wiggin v. Goodwin, 63 Me. 389; Carroll v. Evans, 2 Tex. 262; Sistare v. Cushing, 4 Hun (N. Y.) 503. And see Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Edens v. Williams,

merely as evidence of a dissolution, if the necessary effect is to require a settlement of the partnership affairs to determine the value of the interest sold, the evidence is conclusive,¹ but if no retirement is contemplated, and the transfer is but the result of change in the internal regulations of the concern, it would be no dissolution.² The rule as to the effect of the transfer of an interest, like that as to the effect of death, is based upon the *delectus personarum*, and when that does not exist, the sale of an interest is not a dissolution.³

The mere assignment of a part of an interest, or an interest as collateral security, however, does not effect a dissolution, no new member being thereby introduced, so long as the assignor retains a part of, or an interest in, his interest,⁴ as in case of the admission by one partner of a third person to a sub-partnership in his share.⁵

(1) *Sale of the Whole Property*.—A sale of all the property of a partnership, the management or operation of, or the dealing in or

36 Ill. 252; *Rogers v. Nichols*, 20 Tex. 719.

1. See *Monroe v. Hamilton*, 60 Ala. 226; *Waller v. Davis*, 59 Iowa, 103; *Lesure v. Norris*, 11 Cush. (Mass.) 328; *Taft v. Buffum*, 14 Pick. (Mass.) 322; *Moody v. Rathbun*, 7 Minn. 89; *Spaunhorst v. Link*, 46 Mo. 197; *Clark v. Wilson*, 19 Pa. St. 414; *Horton's Appeal*, 13 Pa. St. 67; *Power v. Kirk*, 1 Pitts. (Pa.) 510; *Armstrong v. Fahnestock*, 19 Md. 59; *Heath v. Sanson*, 4 B. & Ad. 172.

If the assignee insists upon his right to have the business close and his share paid over, a dissolution is effected. *Bark v. Fowle*, 4 Jones Eq. (N. Car.) 8.

2. *Taft v. Buffum*, 14 Pick. (Mass.) 322; *Russell v. Leland*, 12 Allen (Mass.) 349; *Buford v. Neely*, 2 Dev. Eq. (N. Car.) 481.

An agreement between a partner and a third person that the third person should buy the partner's interest, paying a certain amount per month, title to pass when payment in full should be made, does not work a dissolution of the firm. *Russell v. White*, 63 Mich. 409.

Where one partner sells all his interest in the stock of goods of the firm, but not in the accounts, notes, and other assets, and formed a new firm, and the old firm never afterwards sold goods, it was held that a dissolution *per se* was not shown and that the old firm might still be liable on a note subsequently

given for the payment of a debt. *Cody v. Cody*, 31 Ga. 619.

3. *Taylor v. Castle*, 42 Cal. 367; *Settembre v. Putnam*, 30 Cal. 490; *Duryea v. Burt*, 28 Cal. 569; *Skillman v. Lachman*, 23 Cal. 199; *Kahn v. Central Smelting Co.*, 102 U. S. 641.

4. *Monroe v. Hamilton*, 60 Ala. 226; *State v. Quick*, 101 Iowa, 451; *Foster v. Fifield*, 29 Me. 136; *Inges v. Floyd*, 33 Mo. App. 565; *Mechanic's Bank v. Godwin*, 5 N. J. Eq. 334; *Wilcox v. Pratt*, 52 Hun (N. Y.) 340; *Bank v. Fowle*, 4 Jones (N. Car.) Eq. 8; *Moore v. Knott*, 12 Oregon 260; *Bently v. Bates*, 4 You. & C. 182.

Plaintiff borrowed money of defendant, and conveyed to him plaintiff's interest in the property of the partnership in form absolutely, but intended as security. The borrowed money was intended to be and was used by plaintiff to pay creditors, and the conveyance appeared to have been made in good faith. *Held*, that defendant could not set up the subsequent conduct of plaintiff in respect to the conveyance, fraudulent as to creditors, as a bar to plaintiff's equity of redemption, or as a defense to a claim for an accounting of the affairs of the partnership, which defendant alleged was dissolved by the conveyance. *Townsend v. Petersen*, 12 Colo. 491.

5. *Burnett v. Snyder*, 76 N. Y. 344.

with reference to which constituted its sole business, effects its dissolution,¹ as does also its total destruction.²

d. FRAUD VITIATING THE PARTNERSHIP CONTRACT.—While fraudulent misrepresentations and deceit whereby a person is induced to enter a partnership is a ground for its dissolution, a court of equity may in such a case treat the articles as a nullity in consequence of the fraud, and declare them void *ab initio*,³ but in order to avail himself of his right to disaffirm, the injured partner must announce and act upon his determination to rescind within a reasonable time after the discovery of the fraud.⁴ The relief afforded in such cases is the repayment of all sums advanced or expended, together with compensation for the damages suffered, the complainant having a lien upon the assets for what

1. Wells v. Ellis, 68 Cal. 243; Blaker v. Sands, 29 Kan. 551; Whitton v. Smith, 1 Freem. (Miss.) 231; Wilson v. Davis, 1 Mont. 183; Kennedy v. Porter, 109 N. Y. 526; Thompson v. Bowman, 6 Wall. (U. S.) 316.

A mortgage of the entire concern by one partner, putting the mortgagee into actual possession, is a dissolution. Smith v. Vandenburgh, 46 Ill. 34.

In Simmons v. Curtis, 41 Me. 373, the court suggested that in case of a sale of all the property of the partnership by collusion or fraud, on the part of the buyer, which was afterwards discovered, that the partners might afterwards procure a rescission and restoration of the property and continue as the original firm, and not as a new one.

2. Theriot v. Michel, 28 La. Ann. 107; Claiborne v. Creditors, 18 La. 501. And see Jackson v. Deese, 35 Ga. 84.

3. Fogg v. Johnson, 27 Ala. 432; 62 Am. Dec. 771; Howell v. Harvey, 5 Ark. 270; 39 Am. Dec. 376; Richards v. Todd, 127 Mass. 167; Rosenstein v. Burns, 41 Fed. Rep. 841; Tattershall v. Groote, 2 Bos. & P. 135; Newbigging v. Adam, 34 Ch. Div. 582; Mycock v. Beatson, 13 Ch. Div. 384; Jones v. Yates, 9 B. & C. 438; *Ex parte* Broome; Rose 69; Hamilton v. Stokes, 4 Price 161; Oldaker v. Lavender, 6 Sim. 239; Green v. Barrett, 1 Sim. 45; Colt v. Wallaston, 2 P. Wms. 184. And see Slaughter v. Huling, 4 Dana (Ky.) 424; Rawlins v. Wickham, 3 De G. & J. 304; Stainbank v. Furnley, 9 Sim. 556.

The injured partner can plead in the alternative for a cancellation, or for a dissolution, accounting, and injunction. Bagot v. Easton, 9 Ch. Div. 1. But a partnership agreement may be rescinded for fraud, even though the misrepresent-

ations were not such as would have been sufficient to maintain an action for deceit. Newbigging v. Adam, 34 Ch. Div. 582.

The fact that one partner was induced, by false representations, to purchase, however, does not invalidate the contract as to the other partners in the selling firm, if they were innocent. Kimmins v. Wilson, 8 W. Va. 584.

So painting the prospects of an enterprise in glowing and exaggerated colors, is not a sufficient misrepresentation upon which to rescind. Jennings v. Broughton, 17 Beav. 234.

In Girard v. Gateau, 84 Ill. 121; 25 Am. Rep. 438, where the defendant had exaggerated the value of property which he had put into the firm as capital, and the plaintiff had full opportunity to examine into its value, it was held that there were no grounds for declaring a partnership void, or for dissolving it.

4. Evans v. Montgomery, 50 Iowa, 325; Richards v. Todd, 127 Mass. 167.

A rescission of the contract of partnership for fraud, may be asked for by cross bill in a suit by the guilty partner, brought to obtain a dissolution for misconduct. Richards v. Todd, 127 Mass. 167. And see More v. Rand, 60 N. Y. 208.

Evidence.—It is not competent to prove that others were induced to join the partnership without such representations, in order to rebut the imputation of misrepresentations. Bruce v. Nickerson, 141 Mass. 403.

Evidence that the guilty partner had acted fraudulently toward a former partner is not competent. Andrews v. Garstrin, 2 C. B. N. S. 444.

In Van Gilder v. Jack, 61 Iowa 756, the evidence upon the question of fraudulent misrepresentation being evenly

he has paid in;¹ but though all losses must be borne by the offending partners, as between themselves, the rights of creditors who trusted the firm must be protected as against the whole firm.²

c. INSANITY.—The permanent insanity of a partner, at least of an active partner, is a ground for decreeing a dissolution, though it does not of itself dissolve the partnership,³ nor authorize the other partners to terminate it by their own acts.⁴ But a mere temporary insanity,⁵ or a diminution of capacity to attend to business,⁶ is not sufficient to warrant a decree of dissolution, and the question as to its incurable or temporary character will be referred to a master, if not already determined by an inquisition.⁷ The dissolution dates from the decree and not from the lunacy,⁸ and until that time, therefore, the lunatic partner is entitled to share in the profits, and must bear his share of the losses of the

balanced, the case was dismissed. But the opposite step was taken in *Dunn v. McNaught*, 38 Ga. 179.

1. *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376; *Hynes v. Stewart*, 10 B. Mon. (Ky.) 429; *Smith v. Everett*, 126 Mass. 304; *Richards v. Todd*, 127 Mass. 167; *Perry v. Hale*, 143 Mass. 540; *Davidson v. Thirkell*, 3 Grant's Ch. (Up. Can.) 330; *Newbigging v. Adam*, 34 Ch. Div. 582; *Mycok v. Beatson*, 13 Ch. Div. 384; *Rawlins v. Wickham*, 3 De G. & J. 304; *Charlesworth v. Jennings*, 34 Beav. 96; *Pillans v. Harkness*, Colles 442.

A return of a part of the capital stock paid in, may be ordered in a proper case. *Jauncey v. Knowles*, 29 L. J. Ch. 95; *Hamil v. Stokes*, 4 Price 161.

Defendants were partners in a bank with capital stock divided into shares, and, when the partnership was hopelessly insolvent, fraudulently represented that it was in a prosperous condition, declared large dividends, increased the nominal stock, and sold complainants shares of such new stock. *Held*, that a bill in equity is the proper remedy to recover their stock payments, the money they had on deposit at the time of the bank's failure, and the money they had been compelled to contribute as partners to pay its debts. *Andriessen's Appeal*, 123 Pa. St. 303.

2. See *Hynes v. Stewart*, 10 B. Mon. (Ky.) 429; *Ex parte Browne*, 1 Rose 69; *Bury v. Allen*, 1 Coll. 589.

3. *Reynolds v. Austin*, 4 Del. Ch. 24; *Raymond v. Vaughan*, 17 Ill. App. 144; *Sayer v. Bennett*, 1 Cox 107; *Pearce v. Chamberlain*, 2 Ves. Sr. 33; *Helmores v. Smith*, 35 Ch. Div. 436; *Rowland v. Evans*, 30 Beav. 202; *Sadler v. Lea*, 6 Beav. 324; *Wrexham v.*

Huddleston, 1 Swanst. 504, note; *Leaf v. Coles*, 1 De G. M. & G. 171; *Jones v. Lloyd*, L. R., 18 Eq. 265; *Jones v. Noy*, 2 Myl. & K. 1251.

It has been held in a number of cases, however, that an inquisition finding a partner to be a lunatic is *ipso facto* a dissolution. See *The Cape Sable Co's case*, 3 Bland. (Md.) 606; *Davis v. Lane*, 10 N. H. 161; *Griswold v. Waddington*, 15 Johns. (N. Y.) 57; *Isler v. Baker*, 6 Humph. (Tenn.) 85.

A decree of dissolution upon the grounds of lunacy may be had as well upon the application of the lunatic as upon that of the sane partner. *Jones v. Floyd*, L. R., 18 Eq. 265; *Sayer v. Bennett*, 1 Cox 106; *Anonymous*, 2 K. & J. 441.

4. *Waters v. Taylor*, 2 V. & B. 299.

When one member of a firm is adjudged insane, and his co-partner, without notice to third parties, continues to carry on the business as before, there is no dissolution of the co-partnership, and the managing partner must account to the insane partner for his share of the profits. *Raymond v. Vaughn*, 128 Ill. 256.

5. See *Raymond v. Vaughan*, 17 Ill. App. 144; *Kirby v. Carr*, 3 Young & C. Ex. 184; *Sayer v. Bennett*, 1 Cox 107; *Whitwell v. Arthur*, 35 Beav. 140.

The burden of proving a recovery and sanity rests upon the party asserting it. *Anonymous*, 2 K. & J. 441.

6. *Sadler v. Lea*, 6 Beav. 324.

7. *Sayer v. Bennett*, 1 Cox 107; *Kirby v. Carr*, 3 Young & C. Ex. 184; *Milne v. Bartlett*, 3 Jur. 358; *Besch v. Frolich*, 1 Phill. Ch. 172. And see *Griswold v. Waddington*, 15 Johns. (N. Y.) 57.

8. *Besch v. Frolich*, 1 Phill. Ch. 172.

business,¹ though if it is a partnership at will.² or if it is one dissolvable on notice,³ the date of notice is the date of dissolution.

So any other infirmity or disability not temporary in its nature, which totally incapacitates a partner from performing his partnership duties, is a sufficient cause for a decree of dissolution.⁴

f. INSOLVENCY.—The bankruptcy of a partner effects the immediate dissolution of the partnership, his acts thereafter being void.⁵ An assignment for the benefit of creditors by one partner has the same effect,⁶ though his mere insolvency, when he has not assigned, does not dissolve the firm,⁷ nor will the mere insolvency of the firm have that effect.⁸ So an assignment for the benefit of creditors by the firm, or by all the partners, effects a dissolution.⁹

1. *Sadler v. Lee*, 6 Beav. 324; *Raymond v. Vaughan*, 17 Ill. App. 144; *Jones v. Noy*, 2 M. & K. 125; *Besch v. Frolich*, 1 Phill. Ch. 172; *Sander v. Sander*, 2 Coll. 276.

2. *Mellersh v. Keen*, 27 Beav. 236.

3. *Robertson v. Lockie*, 15 Sim. 285; 10 Jur. 533.

4. *Whitwell v. Arthur*, 35 Beav. 140; *Leaf v. Coles*, 1 De Gex. M. & G. 174; 12 Eng. L. & Eq. 117; *Sayer v. Bennett*, 1 Cox, C. C. 107; *Anon.*, Kay & J. 441.

Where one partner is bound to attend personally to the business of the firm, and afterwards becomes infirm in mind by reason of intemperance, a court of equity will not be authorized to set aside an agreement then made for the dissolution of the concern on the ground of fraud and imposition, when that is to be inferred only from the fact that profits have been realized, when loss was anticipated. *Atwood v. Smith*, 11 Ala. 894.

5. *McNutt v. King*, 59 Ala. 597; *Talcott v. Dudley*, 5 Ill. 427; *Halsey v. Norton*, 45 Miss. 703; 7 Am. Rep. 745; *Marquand v. New York Mfg. Co.*, 17 Johns. (N. Y.) 525; *Matter of Norcross*, 1 N. Y. Leg. Obs. 100; *Blackwell v. Claywell*, 75 N. Car. 213; *Wilkins v. Davis*, 15 Nat. Bankr. Reg. 60; *Fox v. Hanbury*, Cowp. 445; *Hague v. Rolleston*, 4 Burr. 2174; *Wilson v. Greenwood*, 1 Swanst. 471; *Morgan v. Marquis*, 9 Ex. 145.

After a dissolution by bankruptcy the estate of the bankrupt is entitled to profits on unfinished contracts. *King v. Leighton*, 100 N. Y. 386.

The bankruptcy of a partner, however, does not dissolve the partnership if the adjudication was obtained for that purpose only and was not required

for any other. *Amsinck v. Bean*, 22 Wall. (U. S.) 395.

6. *Arnold v. Brown*, 24 Pick. (Mass.) 89; 35 Am. Dec. 296; *Moody v. Rathbun*, 7 Minn. 89; *Dearborn v. Keith*, 5 Cush. (Mass.) 224; *Ogden v. Arnot*, 29 Hun (N. Y.) 146; *Hubbard v. Guild*, 1 Duer (N. Y.) 662; *Conrad v. Buck*, 21 W. Va. 396. And see *Saloy v. Albrecht*, 17 La. Ann. 75; *Marquand v. New York Mfg. Co.*, 17 Johns. (N. Y.) 525.

An irregular assignment which is subsequently set aside does not effect a dissolution. *Helmere v. Smith*, 35 Chan. Div. 436.

A void assignment or an unexecuted attempt to assign is not a dissolution. *Simmons v. Curtis*, 41 Me. 373.

7. *Arnold v. Brown*, 24 Pick. (Mass.) 89; 35 Am. Dec. 291; *Mechanics' Bank v. Hildreth*, 9 Cush. (Mass.) 356.

8. *Siegel v. Chidsey*, 28 Pa. St. 279.

When a partner mismanages the partnership business to the injury of the partnership, and becomes insolvent the other partner is entitled to a decree of dissolution and a receiver. *Boyce v. Burchard*, 21 Ga. 74.

9. *Wells v. Ellis*, 68 Cal. 243; *Gordon v. Freeman*, 11 Ill. 14; *Simmons v. Curtis*, 41 Me. 373; *Havens v. Hussey*, 5 Paige (N. Y.) 30; *Welles v. March*, 30 N. Y. 344; *McKelvy's Appeal*, 72 Pa. St. 409; *Moddewell v. Keever*, 8 W. & S. (Pa.) 63; *Brown v. Agnew*, 6 W. & S. (Pa.) 238; *Dana v. Lull*, 17 Vt. 391; *Allen v. Woonsocket Co.*, 11 R. I. 288; *Pearpont v. Graham*, 4 Wash. (U. S.) 232; *Pleasant v. Meng*, 1 Dall. (U. S.) 380; *Cameron v. Stevenson*, 12 Up. Can. C. P. 389.

In *Pleasant v. Meng*, 1 Dall. (U. S.) 380, it was doubted whether an assignment of all the assets of the part-

On the same principle, a levy of execution upon the interest of a partner and its sale thereunder dissolves the firm,¹ and while a mere attachment on mesne process is not a dissolution,² it may furnish grounds for an application for dissolution and a receiver by the other partners, if insolvency will probably result.³

g. **HOPELESSNESS OF SUCCESS.**—If, after everything has been done that was agreed to be done, certain loss can be the only result of going on, any partner is entitled to have the partnership dissolved, though it was formed for a definite period not yet expired.⁴ The same rule applies where the enterprise for the prosecution of which the partnership was formed proves to be visionary,⁵ and while mere difference of opinion, dissatisfaction and bad temper between the partners is not a sufficient ground of dissolu-

nership was a dissolution. Such assignment was said to be merely evidence of a dissolution. See also *Deckard v. Case*, 5 Watts (Pa.) 22; 30 Am. Dec. 287; *Anderson v. Tompkins*, 1 Brock. (U. S.) 456.

1. *Sanders v. Young*, 31 Miss. 111; *Renton v. Chaplain*, 9 N. J. Eq. 62; *Carter v. Roland*, 53 Tex. 540; *Aspinwall v. London & N. W. Ry. Co.*, 11 Hare 325; *Haberton v. Blurton*, 1 De G. & Sm. 121; *Skipp v. Harwood*, 2 Swanst. 586.

The sale of a partner's interest under execution does not dissolve the partnership if it was obtained by collusion between the partner and the purchaser. *Renton v. Chaplain*, 9 N. J. Eq. 62.

A mere levy without sale is not a dissolution. *Choppin v. Wilson*, 27 La. Ann. 444. Though it may be if a greater part or all of the property is seized. *Hershfield v. Clafin*, 25 Kan. 166; 37 Am. Rep. 237.

In *Barber v. Barnes*, 52 Cal. 650, it was held that a levy and sale is not necessarily a dissolution, even though no business is afterwards done; and suits brought to collect debts by all the partners, after such sale, rebuts the presumption of dissolution.

The delivery by the assignee to the assignors of a part of the property which was exempt from execution does not revive the partnership in it. *Wells v. Ellis*, 68 Cal. 243.

2. *Arnold v. Brown*, 24 Pick. (Mass.) 89; 35 Am. Dec. 296; *Foster v. Hall*, 4 Humph. (Tenn.) 346.

While a levy of an attachment or an execution on the partnership property against the firm is not a dissolution, it is so as to the property actually sold under the levy. *Hershfield v. Clafin*, 25

Kan. 166; 37 Am. Rep. 237; *Nixon v. Nash*, 12 Ohio St. 647.

3. *Crocker v. Crocker*, 46 Me. 250.

4. *Jennings v. Baddeley*, 3 K. & J. 78; *Vanness v. Fisher*, 5 Lans. (N. Y.) 236; *Wilson v. Wilson*, 1 Bland (Md.) 418; *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172; *Moies v. O'Neill*, 23 N. J. Eq. 207; *Brown v. Hicks*, 8 Fed. Rep. 155; *Rosenstein v. Burns*, 41 Fed. Rep. 841; *Bailey v. Ford*, 13 Sim. 495; *Baring v. Dix*, 1 Cox 213. And see *Brien v. Harriman*, 1 Tenn. Ch. 467.

In *Bailey v. Ford*, 13 Sim. 495, a dissolution was granted because the firm was insolvent and was constantly becoming more so.

Where the partnership premises were destroyed by fire, and a large part of its property carried away by an invading army, and the partners were so impoverished that it was impossible to carry on the business and render it profitable, a dissolution was decreed. *Jackson v. Deese*, 35 Ga. 84.

Where a partnership was formed for the purpose of taking a contract to construct a railroad, payable in bonds of the railroad corporation, but the bonds proved to be unsalable on account of the doubtful validity of the incorporation of the company, and no money could be obtained for the prosecution of the work, a dissolution was decreed. *Holladay v. Elliot*, 8 Oregon 84.

5. See *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376; *Lafond v. Deems*, 81 N. Y. 507; 52 How. Pr. (N. Y.) 41.

Where the articles of a farming partnership expressly limited the amount of the contributions of each

tion,¹ continued quarreling and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation justifies and calls for such action,² and the court will not inquire who was the original author of the difficulties between the parties, nor who was most in the wrong unless there is a necessary connection between the wrong first committed and those for which the dissolution is asked.³

h. WAR.—A declaration of war effects an immediate and total dissolution of a partnership existing between residents of the hostile states, commercial intercourse between the antagonistic states being interdicted,⁴ and that the object of the partnership was to prosecute an internal or neutral business, and not to engage in commerce as between the two countries, does not affect the operation of the rule.⁵ The duty to account to each other and to pay

partner, and that amount turned out to be below what was absolutely necessary to success, the partnership was dissolved owing to the absolute impossibility of proceeding under such a provision. *Bryan v. Harriman*, 1 Tenn. Ch. 467.

1. *Loomis v. McKenzie*, 31 Iowa 425; *Lafond v. Deems*, 81 N. Y. 507; 52 How. Pr. (N. Y.) 41; *Fischer v. Raab*, 57 How. Pr. (N. Y.) 87; *Henn v. Walsh*, 2 Edw. Ch. (N. Y.) 129; *Sloan v. Moore*, 37 Pa. St. 217.

2. *Meaher v. Cox*, 37 Ala. 201; 1 Ala. Sel. Cas. 156; *Dumont v. Ruepprecht*, 38 Ala. 175; *Blake v. Dorgan*, 1 Greene (Iowa) 537; *Whitman v. Robinson*, 21 Md. 30; *Lafond v. Deems*, 81 N. Y. 507; 52 How. Pr. (N. Y.) 41; *Bishop v. Breckles*, Hooffm. Ch. (N. Y.) 537; *Singer v. Heller*, 40 Wis. 544; *Baxter v. West*, 1 Drew & Sm. 173; *Atwood v. Maule*, L. R., 3 Ch. App. 369; *Leary v. Shont*, 33 Beav. 582; *Watney v. Wells*, 30 Beav. 56. But see *Gerard v. Gateau*, 84 Ill. 121; 25 Am. Rep. 438.

A dissolution may be granted on the ground of dissensions among the partners, even though the articles contain a clause providing for the submission of disputes to arbitration. *Meaher v. Cox*, 37 Ala. 201; 1 Ala. Sel. Cas. 156.

But in *Kennedy v. Kennedy*, 3 Dana (Ky.) 239, where the articles of partnership provided no regulations for the operations of the farm, leaving them to be controlled by the will of a majority, it was held that dissatisfaction and disagreement as to such matters were no grounds for the interference of a court of equity.

3. *Blake v. Dorgan*, 1 Greene (Iowa) 537; *Atwood v. Maule*, L. R., 3 Ch. App. 369. And see *Bury v. Allen*, 1 Coll. 589.

But in *Girard v. Gateau*, 84 Ill. 121; 25 Am. Rep. 438, where one partner was not required to go to the place of business at all, the other being the manager and possessed of the requisite skill, and where the offensive bearing of the latter toward the former and toward the customers was due to infirmity of temper and the re-employment of an employee discharged by him, a dissolution was refused.

4. *McAdam v. Hawes*, 9 Bush (Ky.) 15; *Mutual Ben. L. Ins. Co. v. Hilliard*, 31 N. J. L. 444; *Griswold v. Waddington*, 15 Johns. (N. Y.) 57; *Seaman v. Waddington*, 16 Johns. (N. Y.) 510; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137; 10 Am. Dec. 200; *Bank of New Orleans v. Matthews*, 49 N. Y. 12; *Woods v. Wilder*, 43 N. Y. 164; 3 Am. Rep. 684; *Booker v. Kirkpatrick*, 26 Gratt. (Va.) 145; *Taylor v. Hutchinson*, 25 Gratt. (Va.) 536; 18 Am. Rep. 699; *Matthews v. McStea*, 91 U. S. 7; *Hanger v. Abbott*, 6 Wall. (U. S.) 532. And see *Douglass v. U. S.*, 14 Ct. of Cl. 1; *The William Bagaley*, 5 Wall. (U. S.) 377; *Prize Cases*, 2 Black (U. S.) 635.

War effects the dissolution of a partnership, even though the tendency of its continuance would be not to assist or strengthen residents in the hostile territory, but rather to withdraw funds from it. *Woods v. Wilder*, 43 N. Y. 164; 3 Am. Rep. 684.

5. *Griswold v. Waddington*, 15 Johns. (N. Y.) 57. And see *Bank of New Orleans v. Matthews*, 49 N. Y. 12.

over any balance of profits earned before the commencement of war, however, is not removed or terminated.¹

i. MARRIAGE.—The marriage of a female partner was formerly held to effect the dissolution of the partnership, upon the ground that the marriage was in effect an alienation of her interest and the substitution of a new proprietor;² but in as far as statutes have reduced or removed the incapacity of married women, its consequences upon the partnership contract must necessarily be modified; though it would seem that if the other partners thus lose an active partner, it must always be a ground for a dissolution.³ A partnership between a man and a woman is instantly dissolved by their intermarriage.⁴

j. MISCONDUCT.—That a partner so grossly misconducts himself as to affect the beneficial continuance of the partnership, and as to render it impossible for his co-partners to continue to act with him, is a ground for dissolution by the court upon application.⁵ But a partnership will not be dissolved for minor misconduct and grievances which can be stopped by injunction; there must be a clear case of positive and meditated abuse.⁶ The misconduct must have been such as to destroy the mutual confidence which must subsist between partners if they are to continue to carry on business together;⁷ affecting their business not merely by shaking its credit in the eyes of the world, but by rendering it

1. *Douglas v. U. S.*, 14 Ct. of Cl. 1.

2. *Brown v. Chancellor*, 61 Tex. 437; *Nerot v. Burnard*, 4 Russ. 247; *Pollock Dig. of Part.*, art. 48.

3. *Bates' Law of Part.*, § 588.

In *Ferrero v. Buhlmeier*, 34 How. Pr. (N. Y.) 33, the court, by JONES, J., said: "It is probable that the marriage of a defendant would no longer operate as a dissolution, since under the existing law a married woman may carry on business separate from her husband."

4. *Bassett v. Shepardson*, 52 Mich. 3.

5. See *Page v. Vankirk*, 1 Brewst. (Pa.) 282; 6 Phila. (Pa.) 264; *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376; *Kennedy v. Kennedy*, 3 Dana (Ky.) 239; *Holladay v. Elliott*, 3 Oregon 340; *Wilson v. Davis*, 1 Mont. 183; *Cheesman v. Price*, 35 Beav. 142; *Smith v. Jeyes*, 4 Beav. 502; *Watts v. Taylor*, 2 V. & B. 299; *Charlton v. Poulter*, 19 Ves. 148, note.

Misrepresentation as to one's skill and capacity made prior to the formation of the partnership, and operating as an inducement to its formation, is good cause for dissolution. *Fogg v. Johnson*, 27 Ala. 432; 62 Am. Dec. 771.

In determining whether a partner has failed in his partnership duty, a court may look at both the express and the

implied contract, and partnership duties and obligations may be inferred from the practice of the parties. *Smith v. Jeyes*, 4 Beav. 502.

By articles of agreement for a partnership between A and B, it was provided that if B became dissipated and neglected the business, then A might terminate the partnership because of B's conduct, he could not appropriate all the partnership property to his own use, but must account to B for his share. *Krigbaum v. Vindquest*, 10 Neb. 435.

6. *Bates' Law of Part.*, § 592, citing *Howell v. Harvey*, 5 Ark. 270, 279; 39 Am. Dec. 376; *Cash v. Earnshaw*, 66 Ill. 402. And see also *Anderson v. Anderson*, 25 Beav. 190.

In *Page v. Vankirk*, 1 Brewst. (Pa.) 282; 6 Phila. (Pa.) 264, it was held that while the use of the firm credit for private purposes is to be condemned, it is not such misconduct as will authorize a dissolution if the firm capital or credit is not thereby impaired.

7. *Lindley on Part.*, 227, citing *Smith v. Jeyes*, 4 Beav. 502; *Harrison v. Tennant*, 21 Beav. 482; *Liardet v. Adams*, Mont., pt. 112. And see also *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172; *Griswold v. Hill*, 1 Paine (U. S.) 483; *Maher v. Bull*, 44 Ill. 97.

impossible for the partners to conduct their business together according to the agreement into which they have entered.¹ Thus a total exclusion of a partner from participation in the business,² or keeping erroneous accounts or the exclusion of a partner from access to the books of the firm,³ or a misappropriation of partnership property,⁴ or a diversion of the partnership business into improper channels,⁵ is cause for dissolution. But mere sales and credits, resulting in losses, and other errors of judgment or instances of slight misconduct which involve no permanent mischief, and not of a willful character are not sufficient grounds.⁶

In *Watney v. Wells*, 30 Beav. 56, a dissolution was decreed where it appeared that the defendant had conceived the idea that plaintiff had cast some imputation on his honor and integrity, and refused to go on without an apology; and even after the apology and reconciliation, continued in the same state of mind, and made derogatory entries concerning plaintiff in the partnership books.

1. *Lindley on Part.* 227, citing *Anonymous*, 2 K. & J. 441. And see also *Meaher v. Cox*, 37 Ala. 201; 1 Ala. Sel. Cas. 156; *Turnipseed v. Goodwin*, 9 Ala. 372; *Abbott v. Johnson*, 32 N. H. 9.

In *Sutro v. Wagner*, 23 N. J. Eq. 388, it was held that the fact that the defendant had voluntarily transferred his individual property and committed other acts showing an intention to break up the firm and leave the complainant to pay the losses, was sufficient upon which to obtain a dissolution and an injunction and a receiver.

2. *Smith v. Fagan*, 17 Cal. 178; *Kennedy v. Kennedy*, 3 Dana (Ky.) 239; *Groth v. Payment*, 79 Mich. 290. *Wilcox v. Pratt*, 52 Hun (N. Y.) 340; *Page v. Vankirk*, 1 Brewst. (Pa.) 282; 6 Phila. 264; *Warner v. Leisen*, 31 Wis. 169; *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Berry v. Allen*, 1 Coll. 589; *Wilson v. Greenwood*, 1 Swanst. 471; *Berry v. Cross*, 3 Sandf. Ch. (N. Y.) 1; *Hartman v. Woehr*, 18 N. J. Eq. 383; *Wood v. Beath*, 23 Wis. 254; *Ambler v. Whipple*, 20 Wall. (U. S.) 546; *Newton v. Doran*, 1 Grant's Ch. (Up. Can.) 590; *Cheesman v. Price*, 35 Beav. 142; *Wray v. Hutchinson*, 2 M. & K. 235; *Roberts v. Everhardt*, Kay 148.

In *Story v. Moon*, 3 Dana (Ky.) 331, a dissolution was granted where one partner excluded the others from the store and retained possession, retailing the goods on his own account.

And in *Marshall v. Colman*, 2 Jac. &

W. 266, a dissolution was decreed where certain partners refused to use the style of firm name agreed upon, and used one which excluded the name of the complainant contrary to agreement.

Voluntary mutual associations are so far partnerships, that dissolution may be decreed for improperly excluding a member from voting. *Gorman v. Russell*, 14 Cal. 531.

Failure to pay in a part of his agreed share of the capital, does not justify the exclusion of a partner from participation in the business of the firm, but such a failure is a good ground for an application for dissolution. *Hartman v. Woehr*, 18 N. J. Eq. 383.

3. *Gowan v. Jeffries*, 2 Ashm. (Pa.) 296; *Cottle v. Leitch*, 35 Cal. 434; *Goodman v. Whitcomb*, 1 Jac. & W. 592; *Cheesman v. Price*, 35 Beav. 142.

The fact that one partner has made false entries and been guilty of fraud in a former partnership between the same partners, is no ground for a dissolution of a subsequent partnership upon the discovery of such fraud. *Ingraham v. Foster*, 31 Ala. 123.

4. *Reiter v. Morton*, 96 Pa. St. 229; *Maher v. Bull*, 44 Ill. 97; *Kennedy v. Kennedy*, 3 Dana (Ky.) 239; *Smith v. Jeyes*, 4 Beav. 502; *Essell v. Hayward*, 30 Beav. 158; *Dumont v. Ruepprecht*, 38 Ala. 175; *Flammer v. Green*, 47 N. Y. Super. Ct. 538.

In *Dumont v. Ruepprecht*, 38 Ala. 175, the loan of firm moneys contrary to the partnership articles was held a good ground for dissolution.

5. *Abbott v. Johnson*, 32 N. H. 9. And see *Waters v. Taylor*, 2 Ves. & B. 299.

6. *Cash v. Earnshaw*, 66 Ill. 402. And see *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376; *Gerard v. Gateau*, 84 Ill. 121; 25 Am. Rep. 435; *Anderson v. Anderson*, 25 Beav. 190; *Goodman v. Whitcomb*, 1 Jac. & W. 589.

A dissolution for misconduct can be granted only upon application of the innocent party. The court will not permit a partner, by misconducting himself and rendering it impossible for his copartners to act in harmony with him, to obtain a dissolution on account of his own wrong.¹

(1) *Abandonment*.—While the fact that a partner has absconded or otherwise abandoned the partnership enterprise does not of itself dissolve the firm so as to make the partners tenants in common,² such an abandonment or a refusal by a partner to perform his partnership duties may be a ground upon which his copartners may elect to consider the partnership as dissolved,³ and in such a case if the other partners successfully continue the enterprise, the abandoning partner cannot claim a share of the profits subsequently earned,⁴ but if his labor or capital has con-

It is not considered to be the duty of the court to enter into partnership squabbles. *Lindley on Part.* 227.

1. *Gerard v. Gateau*, 84 Ill. 121; 25 Am. Rep. 438; *Fairthorne v. Weston*, 3 Hare 387; *Harrison v. Tenant*, 21 Beav. 493.

Where it appears that both partners are in the wrong, and that mutual confidence has been destroyed and that the continuance of the business would prove unprofitable, the court will not undertake to decree a personal reconciliation and restoration of mutual confidence, but will decree a dissolution without inquiring as to which was most in the wrong. *Boyd v. Mynatt*, 4 Ala. 79; *Blake v. Dorgan*, 1 Greene, (Iowa) 537; *Ferrero v. Buhlmeier*, 34 How. Pr. (N. Y.) 33. And see *infra*, this title, *Hopelessness of Success*.

2. See *Hamill v. Hamill*, 27 Md. 679; *Arnold v. Brown*, 24 Pick. (Mass.) 89; 35 Am. Dec. 296; *Ayer v. Ayer*, 41 Vt. 346.

Where one partner reserves the right to absent himself from the business of the firm, his retirement from such business is not an abandonment of the partnership. *McFerran v. Gilbert*, 102 Pa. St. 73.

Where two physicians entered into a partnership under an agreement that one might be absent six months in the year, and the other when he pleased, neither receiving the income during his absence, and that if the first should withdraw altogether from the town, the other would pay him a certain sum. Immediately after the articles were executed, the first absented himself and the other immediately wrote to him dissolving the partnership. This was held not to prevent him from with-

drawing from the town and thereby becoming entitled to the sum agreed upon. *Frothingham v. Seymour*, 121 Mass. 409.

The neglect or refusal of a partner to perform the duties devolving on him as such, under oral articles of agreement, cannot, on the execution of written articles afterwards, embodying the terms of the oral contract, be construed as an abandonment of the contract. *Burgess v. Badger*, 124 Ill. 288.

3. *Beaver v. Lewis*, 14 Ark. 138; *Quinn v. Quinn*, 81 Cal. 14; *Gregg v. Hord*, 129 Ill. 613; *Smith v. Vanderburg*, 46 Ill. 34; *Bryant v. Proctor*, 14 B. Mon. (Ky.) 362; *Rhea v. Vannoy*, 1 Jones' Eq. (N. Car.) 282; *Durbin v. Barber*, 14 Ohio 311; *Denver v. Roane*, 99 U. S. 355.

A refusal to meet, deal or correspond with his co-partners on the business matters of the firm, is a good ground for dissolution. *Meaher v. Cox*, 37 Ala. 201; 1 Ala. Sel. Cas. 156; *DeBenger v. Hanel*, 2 Jarm. 25.

Where certain transactions between partners led to a violent outbreak, and one of them refused to hold personal communication or to deal with the other, except by writing, it was held a sufficient cause for dissolution. *Leary v. Shout*, 33 Beav. 582. And see *Bishop v. Breckles*, *Hoffm. Ch.* (N. Y.) 534.

Where personal property belongs to the members of a voluntary unincorporated association, especially for public, and not for private purposes, if a member abandon the association, he thereby abandons his interest in such property, and those who remain are entitled to such interest. *Curtiss v. Hoyt*, 19 Conn. 154.

4. *Bryant v. Proctor*, 14 B. Mon.

tributed to the earning of the profits, mere absence or delay or even refusal to make further contribution will not raise a presumption of abandonment.¹ Mere neglect, however, if there is no positive refusal to act, is not an abandonment.² The innocent partners may compel those who abandoned the partnership enterprise to account for profits thereafter made from the use of partnership funds even though such abandonment effected a dissolution.³

k. ABANDONMENT OF THE ENTERPRISE.—The winding up of the whole partnership business and the abandonment of the enterprise is sufficient evidence of dissolution, though there was no formal agreement.⁴

l. COMPLETION OF THE ENTERPRISE.—The completion of the enterprise for which the partnership was formed at once terminates and dissolves the firm,⁵ as does also the expiration of its agreed period of duration, unless continued by agreement either express or implied from the conduct of its members.⁶

3. Dissolution by Contract—*a.* PURCHASE BY ONE PARTNER OF THE INTEREST OF ANOTHER.—A sale by one partner to another of his entire interest including all the assets, accounts, credits, etc., being merely a sale of the balance after all debts are paid, extinguishes all accounts standing upon the books against the seller,⁷ as well

(Ky.) 362; *Rhea v. Tathem*, 1 Jones' Eq. (N. Car.) 290; *Denver v. Roane*, 99 U. S. 355. And see *Jennings v. Richard*, 10 Colo. 390.

1. *Waring v. Crow*, 11 Cal. 366; *Burn v. Strong*, 18 Grant's Ch. (Up. Can.) 651.

In *Beaver v. Lewis*, 14 Ark. 138, where one co-partner elected to consider the partnership as terminated on account of the abandonment of the other, the delinquent was granted an account for such work and labor as he had done.

2. *Henry v. Bassett*, 75 Mo. 89; *Amblor v. Whipple*, 20 Wall. (U. S.) 546; *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376.

3. *Eagle v. Bucher*, 6 Ohio St. 295.

4. *Ligare v. Peacock*, 109 Ill. 94; *Spurck v. Leonard*, 9 Ill. App. 174. And see *Barber v. Barnes*, 52 Cal. 650; *Harris v. Hillegass*, 54 Cal. 463.

The organization of an existing partnership into a corporation is strong evidence of the dissolution of the partnership but not absolute proof. See *Shorb v. Beandry*, 56 Cal. 446; *Godard v. Pratt*, 16 Pick. (Mass.) 412.

5. *Bohrer v. Drake*, 33 Minn. 408; *Sims v. Smith*, 11 Rich. (S. Car.) 565.

6. See *Phillips v. Reeder*, 18 N. J. Eq. 95.

7. *Beckley v. Munson*, 22 Conn. 299; *Brewster v. Mott*, 5 Ill. 378; *Ciffing v. Taylor*, 16 Ill. 457; *Norman v. Hudleston*, 64 Ill. 11; *Thompson v. Lowe*, 111 Ind. 272; *Headley v. Shelton*, 51 Ind. 388; *Hasselman v. Douglass*, 52 Ind. 252; *Over v. Hetherington*, 66 Ind. 365; *Carl v. Knott*, 16 Iowa 379; *Murdock v. Mehlhop*, 26 Iowa 213; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411; *Conwell v. Sandidge*, 5 Dana (Ky.) 210; *Conwell v. Sandidge*, 8 Dana (Ky.) 273; *Wiggin v. Goodwin*, 63 Me. 389; *Farnsworth v. Whitney*, 74 Me. 370; *Trump v. Baltzell*, 3 Md. 295; *Lesure v. Norris*, 11 Cush. (Mass.) 328; *Stoddard v. Wood*, 9 Gray (Mass.) 90; *Farnsworth v. Boardman*, 131 Mass. 115; *Gardiner v. Fargo*, 58 Mich. 72; *Pierce v. Ten Eyck*, 9 Mont. 349; *Sweet v. McConnel*, 2 Neb. 1; *Van Scoter v. Lefferts*, 11 Barb. (N. Y.) 140; *Baldwin v. Ball*, 48 N. Y. 673; *Albright v. Voorhies*, 36 Hun (N. Y.) 437; *Patterson v. Martin*, 6 Ired. (N. Car.) 111; *Klase v. Bright*, 71 Pa. St. 186; *Laucks v. Martin* (Pa. 1887), 9 Atl. Rep. 279; *Woodward v. Winfrey*, 1 Cold. (Tenn.) 478. See *Finley v. Fay*, 96 N. Y. 663; *Moore v. Steele*, 67 Tex. 435; *Wright v. Troop*, 70 Me. 346; *Murdock v. Mehlhop*, 26 Iowa 213; *Wiggin v. Goodwin*, 63 Me. 389. To

as all claims in his favor against the firm;¹ but individual indebtedness between the co-partners remains unaffected.² Such a transfer or settlement, however, must be deemed to have been made upon the supposition that the books were correct, if the selling partner has improperly balanced a charge against him by an erroneous credit, therefore, the buyer is entitled to recover the amount.³

the contrary see *Jones v. Bliss*, 45 Ill. 143.

If one partner bequeathes his whole interest in the firm to his co-partner, the latter cannot collect from his estate a debt due by him to the firm, if there are sufficient assets in the estate to pay it. *Painter v. Painter*, 68 Cal. 395.

Where one partner sells all his interest in the partnership to his co-partner, and afterwards the title to a part of the property entirely fails, as one partner's knowledge of the title is the same as the other, there is no failure of consideration in the agreement of the purchase. *Klase v. Bright*, 71 Pa. St. 186.

If one of three persons purchase the interest of one of the others, however, the third partner's right against the share sold is not affected, and if he had paid a debt of the firm he is entitled to a credit of two-thirds of it against the buying partner upon settlement of the concern. *Kendrick v. Tarbell*, 27 Vt. 512. And a sale of a retiring partner, to a third person, does not extinguish the debt of such third person to the firm, and the continuing partner's lien on the entire assets is prior to the buyer's purchase-money mortgage to the selling partner. *Conwell v. Sandidge*, 8 Dana (Ky.) 273.

1. *Kimball v. Walker*, 30 Ill. 482; *Drake v. Williams*, 18 Kan. 98; *Wright v. Troop*, 70 Me. 346; *Lambert v. Griffith*, 50 Mich. 286; *Gibbs v. Bates*, 43 N. Y. 192; *Patterson v. Martin*, 6 Ired. (N. Car.) 111. But see to the contrary, *Hobart v. Howard*, 9 Mass. 304; *Woodward v. Francis*, 19 Vt. 434.

A purchase by a partner of his co-partner's interest for a sum certain without any reservation of demands, relinquishes a claim for a sum paid in by the purchaser in excess of his share, which it had been agreed should be first deducted from the assets on dissolution; the agreement not contemplating a dissolution by purchase by one of the partners of the other's interest. *Pierce v. Ten Eyck*, 9 Mont. 349.

2. *Merrill v. Green*, 55 N. Y. 270; *Pierce v. Ten Eyck*, 9 Mont. 349. And see *Durham v. Hartlett*, 32 Ga. 22; *Chaffin v. Chaffin*, 2 Dev. & B. Eq. (N. Car.) 255; *Woodward v. Francis*, 19 Vt. 434; *Fisher v. Vaughn*, 75 Wis. 609.

In an action against assignees of an insolvent firm in trust to pay partnership debts, upon an agreement to indemnify, from the partnership effects, one of the firm against all suits pending against him, parol evidence is admissible to show what suits were so pending, and in which of them the creditors of the firm were interested, but not to show that the agreement was intended to cover suits in which such partner was solely interested. *Bell v. Holford*, 1 Duer (N. Y.) 58.

3. See *Brewster v. Mott*, 5 Ill. 378; *Tomlinson v. Hammond*, 8 Iowa 40; *Trump v. Baltzell*, 3 Md. 295; *Case v. Cushman*, 3 W. & S. (Pa.) 544; *McLucas v. Durham*, 20 S. Car. 302; *Baldwin v. Ball*, 48 N. Y. 673; *Kintrea v. Charles*, 12 Grant's Ch. (Up. Can.) 117.

In *Farnsworth v. Whitney*, 74 Me. 370, it was held that the buyer cannot recover from the seller a debt not charged on the books, but that his remedy is to rescind the sale.

But though the purchasing partner was misled by the way the retiring partner kept the books, and by the latter's failure to give him proper credits, and paid a larger sum than he would have done if he had known the condition of the books, he cannot recover the excess if he had been negligent in not examining the books. *Pierce v. Ten Eyck*, 9 Mont. 349. Or if he knew at the time of assuming the debts that there were others not appearing on the books. *Grundy v. Pine Hill Coal Co.* (Ky. 1888), 9 S. W. Rep. 414.

Where a transfer expressly includes an assumption of all liabilities, a debt of the firm from the selling partner not on the books will be extinguished in

Whether a sale covers the whole interest in a partnership or a partner's interest in specific articles, is governed by the intent as manifested by the contract of sale.¹

b. ASSUMPTION OF DEBTS BY PURCHASING PARTNER.—A purchase by one partner of the interest of another and an assumption of the indebtedness of the firm is not within the statute of frauds and need not be in writing, the promise not being a collateral one to pay the debts of another, but a direct one to pay the obligations of the promisor,² and though goods were purchased by one partner on his own account if the firm takes them the statute does not apply to the assumption of the indebtedness for

the absence of fraud or warranty. *Haselman v. Douglass*, 52 Ind. 252.

1. By the terms of a contract dissolving a partnership, one partner sold the other all his right, title and interest in the store, with all the notes and accounts due the buyer, assuming payment of all debts and claims against the firm. It was held that the contract raised a presumption that the parties intended a complete settlement of all partnership affairs, and that a balance standing to the credit of the firm in bank was embraced in the expression "accounts due the firm." *Burress v. Blair*, 61 Mo. 133.

A sale by one partner to another of all his interest in the property and effects of the firm, and other valuable thing or things belonging to the firm of every name and kind, passes the seller's interest in a sum of money deposited in the bank to the credit of the firm, although the existence of such deposit was unknown to the parties at the time of the sale. *Cram v. Union Bank*, 4 Keyes (N. Y.) 458; 42 Barb. (N. Y.) 426.

A sale by one partner to another, of his undivided one-half interest, in all the stock of finished and unfinished goods, raw material, machinery, tools and fixtures of, and belonging to the company, together with all and every thing, right and interest that pertains to, or is in any way a part of, or belonging to the said business, passes a deposit of moneys arising from the firm business, as well as outstanding collectible debts. *Albright v. Voorhies*, 36 Hun (N. Y.) 437.

A sale by one partner to another, however, of all his interest in the brewery business in which the partnership was engaged, consisting of stock on hand, personal property, real estate, etc., does not dispose of moneys on hand or on

deposit belonging to the partnership, or of bills receivable or accounts in favor of the firm. *Garnier v. Gebhard*, 33 Ind. 225.

On dissolution of a partnership, it was agreed that an inventory should be taken of the stock by arbitrators, who were to immediately offer it for sale, and sell it to the partner who should offer the largest per cent. on the invoice price. Held, that the setting aside of the award did not set aside a sale made to defendant, and that he was properly charged with the price paid by him on such sale, rather than the actual value of the stock. *Brownell v. Steere*, 29 Ill. App. 358; affirmed, 128 Ill. 209.

2. *Lee v. Fontaine*, 10 Ala. 755; 44 Am. Dec. 505; *Conger v. Cotton*, 37 Ark. 286; *Vanness v. Dubois*, 64 Ind. 338; *Haggarty v. Johnston*, 48 Ind. 41; *Hopkins v. Carr*, 31 Ind. 260; *Hunt v. Rogers*, 7 Allen (Mass.) 469; *Davis v. Dodge*, 30 Mich. 267; *Townsend v. Long*, 77 Pa. St. 143; *Brazee v. Woods*, 35 Tex. 302. And see *Mette v. Feldman*, 45 Mich. 25; *Schindler v. Euell*, 45 How. Pr. (N. Y.) 33. And see *Weatherly v. Hardnow*, 68 Ga. 592.

An agreement by a partner that goods purchased of the firm may be applied in payment of the individual debt of his co-partner to the purchaser, is not within the statute of frauds, and may be established by parol. *Rhodes v. McKean*, 55 Iowa 547.

What Is an Assumption.—A promise by a partner of an old firm in the name of a new firm of which he is also a member, that the new firm should pay the old firm's indebtedness, will not bind the new firm. *Scott v. Kent*, 54 N. Y. Super. Ct. 257.

An agreement between one partner and a third person, by which the latter took all the interest of the former in the firm and assumed all his liabilities, the

the purchase price;¹ but if the debts assumed are claims for which the assuming co-partner is not liable, his oral promise is not enforceable.² A mere retirement of or sale by one partner to another, however, without any direct assumption of the debts, impliedly binds the continuing partner to save harmless the retiring one to the extent of the assets received.³

If the contract of the buyer is to pay the debts, it is broken by mere non-payment, and the seller can maintain an action for the breach, though he has not been called upon to pay them,⁴ the requirement being that they be paid within a reasonable time after

agreement reciting that the other partner had consented to the change, together with the fact that the firm as thus composed continued to carry on the business of the old firm in the same place and manner, and executed a note for interest due a creditor of the old firm, justify a finding that the new firm assumed the payment of the debts of the old firm. *Goodrich v. Clute* (Supreme Ct.), 3 N. Y. Supp. Rep. 102.

1. See *McCreary v. Van Hook*, 35 Tex. 631; *Hotchkiss v. Ladd*, 36 Vt. 593; 43 Vt. 345.

Where a credit to another is entered on the books of a co-partnership to satisfy a debt due from one of the co-partners, leaving an excess due to the creditor of the co-partners, he may recover such excess from the firm, if the transaction has been ratified by the co-partners without any writing in compliance with the Statute of Frauds. *Corbin v. McChesney*, 26 Ill. 232.

2. See *Conger v. Cotton*, 37 Ark. 286; *Taylor v. Hillyer*, 3 Blackf. (Ind.) 433; 26 Am. Dec. 430.

3. *Hobbs v. Wilson*, 1 W. Va. 50; *Peyton v. Lewis*, 12 B. Mon. (Ky.) 356. And see *Lee v. Fontaine*, 10 Ala. 755; 44 Am. Dec. 505; *Smith v. Millard*, 77 Cal. 440; *Strobridge Lithographing Co. v. Randall*, 78 Mich. 195.

Where all of the partners have given a note to one partner, and one of the debtor partners retires from the firm, the others, including the payee, giving him a bond to pay all debts, it will be no defense to an action upon the note brought by a *bona fide* assignee, but as between the parties it would probably be given effect as a release to avoid circuity of action, the contract amounting merely to a covenant not to sue. *Richards v. Fisher*, 2 Allen (Mass.) 527.

4. *Clark v. Clark*, 4 Port. (Ala.) 9; *Hogan v. Calvert*, 21 Ala. 194; *Peacey v. Peacey*, 27 Ala. 683; *Faust v. Burgevin*, 25 Ark. 170; *Clayton v. May*,

67 Ga. 769; *Mullendore v. Scott*, 45 Ind. 113; *Hinkle v. Reid*, 43 Ind. 390; *Dorsey v. Dashiell*, 1 Md. 198; *Brewer v. Worthington*, 10 Allen (Mass.) 329; *Hunt v. Rogers*, 7 Allen (Mass.) 469; *Farnsworth v. Boardman*, 131 Mass. 115; *Olson v. Morrison*, 29 Mich. 395; *Ham v. Hill*, 29 Mo. 275; *In re Negus*, 7 Wend. (N. Y.) 499; *Sinsheimer v. Tobias*, 53 N. Y. Super. Ct. 508; *Clough v. Hoffman*, 5 Wend. (N. Y.) 499; *Gray v. Williams*, 9 Humph. (Tenn.) 503; *Hood v. Spencer*, 4 McLean (U. S.) 168; *Hupp v. Hupp*, 6 Gratt. (Va.) 310; *Hobbs v. Wilson*, 1 W. Va. 50; *Jewell v. Ketchum*, 63 Wis. 628; *Miller v. Bailey* (Oregon, 1890), 25 Pac. Rep. 27. And see *Vanness v. Dubois*, 64 Ind. 338; *Meyers v. Smith*, 15 Iowa 181; *Peyton v. Lewis*, 12 B. Mon. (Ky.) 356; *Pierce v. Plumb*, 74 Ill. 326; *Gilbert v. Wiman*, 1 N. Y. 550; *Kohler v. Mattlage*, 42 N. Y. Super. Ct. 247. To the contrary, see *Gray v. McMillan*, 22 Up. Can., Q. B. 456.

The retiring partner is at liberty to pay the demands of a creditor voluntarily or on demand, without compulsion, upon non-payment by the continuing ones. *Hunt v. Rogers*, 7 Allen (Mass.) 469; *Nichols v. Prince*, 8 Allen (Mass.) 404.

Under an agreement dissolving a partnership, some of its members taking its assets subject to payment by them of the firm's debts, "amounting to [a fixed sum]," they cannot be required to pay more than that amount, though a debt was accidentally omitted from the calculation. *Miles v. Everson*, 123 Pa. St. 292.

The obligation of the continuing partner under a covenant to pay all debts, is not confined to obligations of which he had knowledge, but includes those as well of which he ought to have had knowledge. *Farrington v. Woodward*, 82 Pa. St. 259.

As an agreement to pay all the firm

their maturity.¹ And if the covenant be to pay the debts and to indemnify or save harmless, the one stipulation is not merged by the other, but the covenantee may rely upon either, and maintain an action for failure to pay, though he has not actually paid,² the damages being usually held to be the amount of the debt unpaid, and to be recoverable in an action at law,³ though where equity powers have been conferred upon courts of law, the creditors may be made parties so as to allow the covenantors to pay them off, or otherwise secure the proper application of the fund.⁴

debts is only binding on the parties to it, and leaves the retiring partner still liable to the firm's creditors, the latter is entitled to contest the application of payments made by the continuing partner for the purpose of discharging his own debt. *Skinner v. Hitt*, 32 Mo. App. 402.

Covenant by Third Person.—Where a third person bought the interest of a partner and gave him a bond conditioned for the payment of the debts, not to exceed \$6,000 and indemnify the seller therefrom, it was held, that a payment of debts to the extent of \$6,000 made by the buyer in conjunction with the remaining partners is sufficient to satisfy the bond, the source of the funds and the state of the accounts between the partners of the new firm not being involved. *Perry v. Spencer*, 23 Mich. 89.

1. *Peacey v. Peacey*, 27 Ala. 683; *Faust v. Burgivin*, 25 Ark. 170; *Carter v. Adamson*, 21 Ark. 287; *Lathrop v. Atwood*, 21 Conn. 117; *Berry v. McLean*, 11 Md. 92; *Dorsey v. Dashiell*, 1 Md. 198; *Sinsheimer v. Tobias*, 53 N. Y. Super. Ct. 508.

The Statute of Limitations begins to run against a covenant to pay all debts, upon the expiration of a reasonable time after the debts become due. *Dorsey v. Dashiell*, 1 Md. 198. And see *Carter v. Adamson*, 21 Ark. 287; *Rowsey v. Lynch*, 61 Mo. 560.

2. *Carter v. Adamson*, 21 Ark. 287; *Faust v. Burgevin*, 25 Ark. 170; *Lathrop v. Atwood*, 21 Conn. 117; *Farnsworth v. Boardman*, 131 Mass. 115; *Brewer v. Worthington*, 10 Allen (Mass.) 329; *Ham v. Hill*, 29 Mo. 275; *Miller v. Bailey* (Oregon, 1890), 25 Pac. Rep. 27; *Gray v. Williams*, 9 Humph. (Tenn.) 503; *Hood v. Spencer*, 4 McLean (U. S.) 168. And see *Warriner v. Mitchell* (Pa.), 24 W. N. C. 470. To the contrary, see *Hough v. Perkins*, 2 How. (Miss.) 724.

Where a partner gives indemnity to

his firm for its undertaking to protect his individual liabilities, a subsequent sale of his interest in the firm to a third person, "without any reserve or recourse whatever," and with the consent of the other partners, does not release him from his contract of indemnity. *Sibley v. Starkweather* (Supreme Ct.), 6 N. Y. Supp. 81.

3. See *Hogan v. Calvert*, 21 Ala. 194; *Lathrop v. Atwood*, 21 Conn. 117; *Peacey v. Peacey*, 27 Ala. 683; *Olson v. Morrison*, 29 Mich. 395; *Ham v. Hill*, 29 Mo. 275; *Clark v. Clark*, 4 Port. (Ala.) 9.

If the amount of a bond to pay debts exceeds that for which the retiring partner is made liable, it will be treated as a penalty and not as liquidated damages. *Johnson v. Coffee*, 1 Ashm. (Pa.) 96.

In *Musson v. May*, 3 Ves. & B. 194, it was held, that inasmuch as the damages are unliquidated, an account should be had in chancery between the partners.

4. *Ham v. Hill*, 29 Mo. 275; *Wilson v. Stilwell*, 9 Ohio St. 467; 14 Ohio St. 464.

And see *Devol v. McIntosh*, 23 Ind. 529; *Hood v. Spencer*, 4 McLean (U. S.) 168.

In *Smith v. Teer*, 21 Up. Can., Q. B. 412, it was held, that an obligor who is compelled to respond to an obligee, who has not paid the debts, may apply to a court of chancery to prevent the obligee from making a wrong use of the money.

If the buying partner who has covenanted to pay all debts attempts to settle the judgment obtained against him by the selling partner for a small amount, leaving the creditors unpaid, the settlement can be set aside and the amount paid credited upon the indebtedness. *Wilson v. Stilwell*, 14 Ohio St. 464.

In *Hough v. Perkins*, 2 How. (Miss.) 724, and in *Gray v. McMillen*, 22 Up.

As the only way in which a retiring partner can be released is by payment, or release by the creditor, a covenant to release amounts to an obligation to pay or procure a release within a reasonable time,¹ and a covenant against payments and actions is a covenant to protect, and therefore, to pay, upon which an action may be maintained without having first paid.²

No action can be maintained on a covenant to indemnify or save harmless, however, unless the seller has paid the debt or otherwise suffered damage.³ And the same rule applies to covenants to assume the debts, such covenants being mere contracts of indemnity,⁴ though covenants to indemnify and save harmless from

Can., Q. B. 456, it was held that there could be no recovery except for debts which had been actually paid by the retiring partner.

1. *Griffith v. Buck*, 13 Md. 102; *Dorsey v. Dashiell*, 1 Md. 198. And see *Nichols v. Prince*, 8 Allen (Mass.) 404.

A covenant against liability for damages is broken by a judgment against the covenantee, as that is a liability, and he can therefore sue immediately without payment. *Chace v. Hinman*, 8 Wend. (N. Y.) 452.

It is unnecessary to allege notice of the debt, or of the suit for payment, to the defendant in an action against the continuing partner, who had entered into a covenant to pay the debt. *Clough v. Hoffman*, 5 Wend. (N. Y.) 499; *Chace v. Hinman*, 8 Wend. (N. Y.) 452; *Fish v. Dana*, 10 Mass. 46.

2. *Carr v. Roberts*, 5 B. & Ad. 78; *Warwick v. Richardson*, 10 M. & W. 284; *Smith v. Howell*, 6 Ex. 730.

A covenant to become solely responsible is something more than a contract to indemnify, and requires payment within a reasonable time, as the only way in which the responsibility of the retiring partner can be removed is by payment. *Peacey v. Peacey*, 27 Ala. 683.

3. *Carter v. Adamson*, 21 Ark. 287; *Lathrop v. Atwood*, 21 Conn. 117; *Griffin v. Orman*, 9 Fla. 22; *Gilbert v. Wiman*, 1 N. Y. 550.

The Statute of Limitations begins to run against the covenant to save harmless at the time of actual payment, by the selling partner. *Carter v. Adamson*, 21 Ark. 287; *Rousey v. Lynch*, 61 Mo. 560.

Where the retiring partner had pledged his individual property for a debt of the firm, permitting such property to be sold, is a breach of a covenant to indemnify and hold harmless

by the continuing partner. *Fay v. Finley*, 14 Phila. (Pa.) 206.

Where a bond is given by a part of the partners to another partner to save him harmless from all loss in consideration of his omission to apply for an injunction against their mismanagement, he still remaining in the firm, the bond will be construed as a contract of settlement of existing liabilities, and not as an indemnity against subsequent charges. *Ackerman v. King*, 29 Tex. 291.

A partner who assumes all the liabilities giving a written statement purporting to contain them, but saying nothing of taxes, interest or insurance, is, nevertheless, liable to the selling partner who has been compelled to pay them. *Wheat v. Hamilton*, 53 Ind. 256.

Payment by note is sufficient under a breach of such covenant to sustain the right to recover. *Gray v. Williams*, 9 Humph. (Tenn.) 503.

Is a Joint Obligation.—Where two partners buy out a third, agreeing by the deed of dissolution to indemnify him against debts, and to pay him three hundred pounds in three installments, it was held that the covenants in the deed were joint and that a survivor and the executrix could be joined as defendants. *Wilmer v. Curry*, 2 De G. & Sm. 347.

4. *Meredith v. Ewing*, 85 Ind. 410; *Coleman v. Lansing*, 65 Barb. (N. Y.) 54; *Brazee v. Woods*, 35 Tex. 302. *In re Phelps*, 17 Nat. Bankr. Reg. 144.

A provision in articles of co-partnership by which, in case of the death or retirement of the partner, the continuing partners are to pay his capital as ascertained by the last stock taking, payable out of the business, the liability of the continuing partners is joint and several, it being a mere contract for the

ctions and from debts has been held to be broken by the recovery of a judgment against the covenantee, though the judgment as not been paid.¹ A covenant to apply the assets to the debts, not being an agreement to pay all debts irrespective of the amount of the assets, does not render the promising partner liable on an action for reimbursement by the promisee who has been compelled to pay a debt until after final settlement.²

(1) *What Debts Are Included.*—The only general proposition that can be laid down is that a covenant to pay or assume debts or to indemnify and save harmless, includes all debts upon which judgment against the partnership could be recovered.³ The covenant itself, however, may have been so worded as to include

purpose of the share of a deceased partner postponing payments, but not intended to be an agreement to look to the assets only. *Beresford v. Browning*, 1 N. H. Div. 30.

In *Scovill v. Kinsley*, 13 Gray (Mass.), it was held that in case of the breach of a covenant to assume the debts, the covenantee may resort to chancery without having paid the debt.

1. *Fish v. Dana*, 10 Mass. 46; *Chace v. Hinman*, 8 Wend. (N. Y.) 452; *Pope v. Hays*, 19 Tex. 375; *Bennett v. Cadwell*, 70 Pa. St. 253; *Smith v. Teer*, 21 Jp. Can., Q. B. 412; *Warwick v. Richardson*, 10 M. & W. 284; *Smith v. Howell*, 6 Ex. 730; *Carr v. Roberts*, 5 L. & Ad. 78. But see *Gray v. McMillan*, 22 Up. Can., Q. B. 456.

The validity of a judgment against the covenantee cannot be inquired into in an action against the covenantor for breach of the covenant. *Bennett v. Cadwell*, 70 Pa. St. 253. And see, *Valentine v. Farnsworth*, 21 Pick. (Mass.) 76.

2. *Topliff v. Jackson*, 12 Gray (Mass.) 65; *Shattuck v. Lawson*, 10 Gray (Mass.) 405.

In *Marsh v. Bennett*, 5 McLean, (U. S.) 117, it was held that a covenant to apply the assets to the debts constitutes the buying partner a trustee.

A covenant to pay the debts out of the assets will, in order to avoid circuity of action, be controlled by a subsequent purchase by the covenantee from the covenantor, of the latter's interest with a covenant to pay debts and indemnify, and will be similarly controlled by a sale of the effects of both partners to a third person, or by an agreement on the part of the covenantee by which the covenantor no longer holds the effects out of which the debts are to be paid. *Austin v. Cummings*, 10 Vt. 26,

3. See cases cited *infra*, this title, *Assumption of Debts by Purchasing Partner*. And see *Childs v. Walker*, 2 Allen (Mass.) 259; *Sizer v. Ray*, 87 N. Y. 220.

Where, on an agreement of dissolution of the firm of C & Y, by which C takes all of the real estate and assumes certain debts, and all other debts are to be paid out of collections afterwards to be made, taxes on the real estate are to be paid out of the partnership funds. *Young v. Clute*, 12 Nev. 31.

A partner, who, on dissolution of the firm, assumes its debts, is liable for goods furnished the firm by his co-partner with his knowledge and consent. *Thropp v. Richardson*, 132 Pa. St. 399.

A continuing partner gave a bond to the retiring one to save him harmless from all liabilities; the transfer included real estate. It was held that a condition of the bond was broken, where a third person proclaiming an outstanding title in the land, sued in partition, judgment for a certain sum with cost was rendered in his favor, and paid by the retiring partner. *Bunton v. Dunn*, 54 Me. 152.

A parol agreement that a mortgage shall cover the indebtedness for goods acquired afterwards, will not also cover the debts of a partnership subsequently entered into; a written agreement is necessary. *Parkes v. Carter*, 57 Mich. 57.

Where, in an action for goods sold and delivered to R & Co., it appeared that one W, before the delivery of part of the goods, purchased the interest of R in the firm business, and assumed his share of the debts, as part of the price, W, as a member of the new firm, is liable for such account. *Rickards v. Hene*, (Neb., 1890), 46 N. W. Rep. 477.

certain specified debts only,¹ and it does not cover indebtedness withheld from the books and concealed by the assignor, and, therefore, unknown to the assignee at the time of making the covenant,² or claims for damages caused by the improper conduct of the covenantor and unknown to the covenantor at the time of the covenant.³

c. TAKING IN A NEW PARTNER.—Where an existing firm takes in a new partner and sells him an interest in the partnership the whole amount of the purchase money must be credited to the original partners,⁴ and where the new firm has not assumed the debts of the old, but the original partners use its assets to pay the old debts, they are jointly and severally liable to the incoming partner for so doing.⁵ The new partner purchasing an interest takes things as he finds them, his interest being subject to the conditions of contracts and to the lien of incumbrances, entered into or incurred before his purchase.⁶ An incoming partner is

1. *Holmes v. Hubbard*, 60 N. Y. 183. In this case a bond was given to save harmless from all and singular the debts and liabilities as per schedule of indebtedness hereto annexed. It was held that the obligors were not liable for a partnership debt not mentioned in the schedule. And see *Smith v. Millard*, 77 Cal. 440.

2. *Case v. Cushman*, 3 W. & S. (Pa.) 544; 39 Am. Dec. 47; *White v. Magann*, 65 Wis. 86.

Where one partner sells to another, the buying partner takes a mortgage against the property of the selling partner's wife in part consideration for the sale, and afterwards, upon payment, surrenders the mortgage, and it appears that the sale had been induced by the misrepresentation of the seller as to how much he had withdrawn from the firm, the mortgage was ordered to stand good for the difference between the represented and the actual amount. *Reed v. King*, 23 Iowa 500.

Where the selling partner had received cash and credits which he had not accounted for on the books, and which were unknown to the buyer who had assumed all debts, a recovery of the whole will be measured by the entire amount of such receipts and credits, and not by one-half the amount. *Tomlinson v. Hammond*, 8 Iowa 40.

3. *Kintrea v. Chartes*, 12 Grant's Ch. (Up. Can.) 123. And see *Valentine v. Farnsworth*, 21 Pick. (Mass.) 176.

4. *Evans v. Hanson*, 42 Ill. 234; *Ball v. Farley*, 81 Ala. 288. See also *Idings v. Bruen*, 4 Sandf. Ch. (N. Y.) 223.

Where a firm is dissolved by the addition of a new partner, and afterwards the new firm is dissolved, an amount decreed to be due from the new firm to one of the original partners cannot be reached by bill by another original partner in behalf of the old creditors. *Coffin v. McCullough*, 30 Ala. 107.

Where the guardian of minor heirs conveys, under proper legislative authority, their interest in the property of a partnership to a corporation, which assumes all the debts of the partnership, the business of which it was organized, to continue a debt due the minors from the partnership, becomes a general debt of the corporation and does not continue to be a lien upon the property. *Francklyn v. Sprague*, 121 U. S. 215.

5. *Wentworth v. Raignel*, 9 Phila. (Pa.) 275.

Where a new firm is formed by an old one taking in a new partner, and the new firm assumes and agrees to pay the debts, and does so, with the capital brought in by the new partner, he has no right of action for a breach of the agreement where the failure was not attributable to their misappropriation of his capital. *Childs v. Seabury*, 35 Hun (N. Y.) 548.

6. See *King v. Barber*, 61 Iowa 674; *Allen v. Atchison*, 26 Tex. 616; *Mayer v. Taylor*, 69 Ala. 402; *Giddings v. Seevers*, 24 Md. 363; *Kearney v. Snodgrass*, 12 Oregon 311; *Rogers v. Reissner*, 30 Fed. Rep. 525; *Buchanan v. Cheeseborough*, 5 Duer (N. Y.) 238; *Logan v. McNaugher*, 88 Pa. St. 103.

Where a mortgagor takes in a new partner, a mortgage upon his stock

not liable for the previous debts of the concern unless he makes himself so by express agreement or by such conduct as will raise a presumption of a special promise,¹ though the liability of the retiring partner remains unaffected.²

4. Notice of Dissolution.—Notice of the dissolution of a partnership is necessary to terminate the agency of each partner, and, consequently, his powers and liabilities as a member of the firm,³ the rights of customers or creditors or other persons having dealings with the firm, or of persons who may deal with it on the supposition of the continuance of the partnership, not being affected by a dissolution or a change in the firm until due notice has been given or knowledge of the fact has been brought home

does not attach to subsequent purchases of the firm, even though there is a statute providing that a mortgage on a stock of goods shall attach to subsequent additions to the extent of replacing sales of the original stock. *Anderson v. Howard*, 49 Ga. 315.

In *Illinois* where the doctrine of a *bona fide* purchase of personal property is recognized it was held, where a party stored grain in the cribs of one buying grain for himself, but simply for storage, such grain not being mixed with other grain of the bailee, and the bailee afterwards, upon entering into partnership with others in the grain business, receives credit for the grain so stored as so much capital, that the title to the corn will not pass to them; as in case of a purchase from a warehouseman, where the corn stored is commingled with other grain, but the firm will sustain the same relation to the bailor as the original bailee, and on a sale of such corn by the firm, its members will be liable to the bailor for the proceeds. *Rankin v. Shepherdson*, 89 Ill. 445.

1. *Ringo v. Wing*, 49 Ark. 457; *Cross v. Burlington Nat. Bank*, 17 Kan. 336. And see *Fagely v. Bellas*, 17 Pa. St. 67; *Wheat v. Hamilton*, 53 Ind. 256; *Cooper v. Frierson*, 48 Miss. 300. *Goodrich v. Clute* (Supreme Ct.), 3 N. Y. Supp. 102.

An assignment of assets for the benefit of creditors, made by a defunct partnership to a member of the firm succeeding to its business, does not make the latter firm liable to the former for the value of any of its assets, or amenable to a garnishment by any creditor thereof. *Bancker v. Harrington*, 40 La. Ann., pt. 1, 136.

Such obligation to pay in common with the old firms will not arise from

entries on books to which such new partner had no access, and to which he objected as soon as he had notice thereof. Mere proof of means of access is not conclusive of the fact of notice. *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea (Tenn.) 358.

The assignee of a share incurs no personal liability for a deficit in case the share will not pay debts and balances, and no personal judgment can be awarded against him, unless he has agreed to assume that burden. *Hunt v. Smith*, 3 Rich. Eq. (S. Car.) 465.

The mere recital in a contract of sale or transfer of a business, or an interest in it, that the consideration is the vendee's assumption of debts or other expression of intention that they shall pay the debts, may amount to a covenant to assume them. *Saltoun v. Houstoun*, 1 Bing. 433.

2. *Nixdorff v. Smith*, 16 Pet. (U. S.) 132.

3. *Howell v. Adams*, 68 N. Y. 314; *Dundas v. Gallagher*, 4 Pa. St. 205; *Dickinson v. Dickinson*, 25 Gratt. (Va.) 321; *Southern v. Grum*, 67 Ill. 106; *Stoddard Mfg. Co. v. Kranse*, 27 Neb. 83; *Shamburg v. Ruggles*, 83 Pa. St. 148; *Woodruff v. King*, 47 Wis. 261; *Reid v. Frazer*, 37 Minn. 473; *Rooth v. Quinn*, 7 Price 193; *Galway v. Mathew*, 1 Camp. 402; *Mulford v. Guffin*, 1 Fos. & Fin. 145; *Faldo v. Griffin*, 1 Fos. & Fin. 147; *Vice v. Flemming*, 1 Y. & J. 227; *Willis v. Dyson*, 1 Stark 164.

To create a legal obligation as a partner, it is not necessary in fact or in law, that the partnership should be still continuing; the legal obligation may arise from the acts of the party at one date and his forbearance at another. *ABBOTT, C. J.*, in *Goode v. Harrison*, 5 B. & A. 157.

Where one partner in a firm pur-

to them,¹ the burden of proof to establish notice resting with the partner claiming it, and if the evidence is conflicting the benefit of the doubt will be given to the creditor.²

a. WHEN NECESSARY.—Dissolution by operation of law is of a public and not of a private nature, and is presumed to be taken

chased a herd of cattle from the firm, and afterwards another partner sold the same herd in the firm name to one who had formerly dealt with the firm, and did not know of the other partner's purchase, it was held that the outside purchaser had the better title, and that the law of partnership, and not of sale, applied, the sale to the partner being a dissolution of the firm as to such herd. *Birks v. French*, 21 Kan. 238.

1. *Grady v. Robison*, 28 Ala. 289; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280; *Parker v. Canfield*, 37 Conn. 250; 9 Am. Rep. 317; *Bradley v. Camp Kirby* (Conn.) 77; *Holland v. Long*, 57 Ga. 37; *Ewing v. Trippe*, 73 Ga. 776; *St. Louis Electric Lamp Co. v. Marshall*, 78 Ga. 168; *Southern v. Grim*, 67 Ill. 106; *Hodgen v. Kief*, 63 Ill. 146; *Carmichael v. Grier*, 55 Ga. 116; *Hunt v. Hall*, 8 Ind. 215; *Stall v. Cassady*, 57 Ind. 284; *Iddings v. Pier-son*, 100 Ind. 418; *Southwick v. McGovern*, 28 Iowa 533; *Price v. Towsey*, 3 Litt. (Ky.) 423; *Merritt v. Pollys*, 16 B. Mon. (Ky.) 355; *Kennedy v. Bohannan*, 11 B. Mon. (Ky.) 118; *Schorten v. Davis*, 21 La. Ann. 173; *Long v. Story*, 10 Mo. 636; *Bernard v. Torrance*, 5 Gill & J. (Md.) 383; *Ackley v. Winklemeyer*, 56 Mo. 562; *Thurston v. Perkins*, 7 Mo. 29; *Burgan v. Lyell*, 2 Mich. 102; 55 Am. Dec. 53; *Holt v. Simmons*, 16 Mo. App. 97; *Hervy v. Van Pelt*, 4 Bosw. (N. Y.) 60; *Howell v. Adams*, 68 N. Y. 314; *National Bank v. Norton*, 1 Hill (N. Y.) 572; *Buffalo City Bank v. Howard*, 35 N. Y. 500; *Newcomet v. Brotzman*, 69 Pa. St. 185; *Lamb v. Singleton*, 2 Brev. (S. Car.) 490; *Long v. Garnett*, 59 Tex. 229; *Sanderson v. Milton Stage Co.*, 18 Vt. 107; *Anndown v. Osgood*, 24 Vt. 278; *Dickinson v. Dickinson*, 25 Gratt. (Va.) 321; *Woodruff v. King*, 47 Wis. 261; *Le Roy v. Johnson*, 2 Pet. (U. S.) 186; *Moline Wagon Co. v. Rummell*, 12 Fed. Rep. 658; 2 McCrary (U. S.) 307; 14 Fed. Rep. 155; *Tabb v. Gist*, 1 Brock. (U. S.) 33; *Booth v. Quinn*, 7 Price 193; *Benjamin v. Covert*, 47 Wis. 375; *Ketcham v. Clarke*, 6 Johns. (N. Y.) 144; *Spears v. Toland*, 1 A. K. Marsh. (Ky.) 203;

Princeton etc. Turnpike Co. v. Gulick, 16 N. J. L. 161; *Clement v. Clement*, 69 Wis. 599; 2 Am. St. Rep. 760; *Block v. Price*, 32 Fed. Rep. 562.

If a partner on his retirement from a partnership neglected to notify its dissolution to the world, he is guilty of a delusion, and, as he thereby induces strangers to believe that the partnership is continuing, he must abide by the consequences resulting solely from his own negligent imprudence. *Gow on Partnership* 305.

Where an order is given by a firm and a partner retires before the delivery and without notice to the person to whom the order was given, he can hold the entire firm. *Kenney v. Altwater*, 77 Pa. St. 34. But if a person giving an order to a firm learns of a dissolution while the goods are still within his reach, he cannot recover from the retiring partner if the retirement took place before the contract was complete. *Brishan v. Boyd*, 4 Paige (N. Y.) 17.

It has been held that notice is not necessary where the creditor did not know of the existence of the firm. *Kennedy v. Bohannon*, 11 B. Mon. (Ky.) 119; *Carter v. Whalley*, 1 B. & Ad. 13.

Some of the cases confine this rule to new contracts, and hold that paper given after dissolution for an old debt does not bind the retired partner, even though no notice was given. See *Morrison v. Perry*, 11 Hun (N. Y.) 33; *Brisban v. Boyd*, 4 Paige (N. Y.) 17.

How Pleaded.—Proof of dissolution and publication of the fact is admissible under the general issue; it is not a matter of confession and avoidance. *Whitesides v. Lee*, 2 Ill. 548; *Kettelle v. Wardell*, 2 Ill. 592; *Washburne v. Walworth*, 133 Mass. 499. And see *Jansen v. Grimshaw*, 26 Ill. App. 287.

The holder of a firm note, who renewed it without notice that one partner had retired, may declare against all the original partners, either on the new note or the old, or both, and a general finding in her favor is sufficient. *Jansen v. Grimshaw*, 26 Ill. App. 287.

2. *Southern v. Grim*, 67 Ill. 106;

notice of by everyone, and hence no notice is necessary.¹ Thus, upon the death of a partner, his estate at once ceases to be liable for the future contracts of his co-partners; the death is notice to all the world of the dissolution.² So, a dissolution caused by a declaration of war between the countries in which the partners respectively reside, thus prohibiting intercourse, is in itself notice to the world;³ and the same reasons render notice of a dissolution caused by bankruptcy unnecessary.⁴

As no credit is given upon the faith of the liability of a dormant or secret partner so long as his connection with the firm is unknown, no notice of the change in the firm caused by his withdrawal is necessary;⁵ his immunity from liability for the acts of

Newcomet v. Brotzman, 69 Pa. St. 185; *Carmichael v. Grier*, 55 Ga. 116; *Kenney v. Altvater*, 77 Pa. St. 34.

1. *Bates' Law of Part.*, § 610.

2. *Lyon v. Johnson*, 28 Conn. 1; *Williams v. Rogers*, 14 Bush (Ky.) 776; *Price v. Matthews*, 14 La. Ann. 11; *Marlett v. Jackman*, 3 Allen (Mass.) 287; *Caldwell v. Stilleman*, 1 Rawle (Pa.) 212; *Dickinson v. Dickinson*, 25 Gratt. (Va.) 321; *Durgin v. Coledge*, 3 Allen (Mass.) 555; *Devaynes v. Noble*, 1 Mer. 616 (*Holten's case*); *Devaynes v. Noble*, 1 Mer. 620 (*Johnes' case*); *Devaynes v. Noble*, 1 Mer. 620 (*Brice's case*); *Vulliamy v. Noble*, 3 Mer. 592; *Webster v. Webster*, 3 Swanst. 490.

3. *Marlett v. Jackman*, 3 Allen (Mass.) 287; *Griswold v. Waddington*, 16 Johns. (N. Y.) 438.

4. *Eustis v. Bolles*, 146 Mass. 413; *Lyon v. Johnson*, 28 Conn. 1; *Dickinson v. Dickinson*, 25 Gratt. (Va.) 321; *Fox v. Hanbury*, Cowp. 445; *Morgan v. Marquis*, 9 Exch. 145; *Thomason v. Frere*, 10 East 418.

When a firm becomes bankrupt, the authority of each member to act for the firm at once terminates; if one partner only becomes bankrupt, his authority is at an end, and his estate cannot be made liable for the subsequent acts of his co-partners. At the same time if, notwithstanding the bankruptcy of one partner, the others hold themselves out as still in the partnership with him, they will be liable for his acts the same as if he and they were partners; and although the estate of a bankrupt partner does not incur liability for the acts of the other partners, done since the bankruptcy, yet the solvent partners have power to bring the partnership transaction to an end and to dispose of the partnership property. *Lindley on*

Partnership 405; *citing Lacy v. Wolcott*, 2 Dowl. & Ry. 458; *Fox v. Hanbury*, Cowp. 445; *Morgan v. Marquis*, 9 Ex. 145.

5. *Park v. Wooten*, 35 Ala. 242; *Phillips v. Nash*, 47 Ga. 218; *Holland v. Long*, 57 Ga. 36; *Nussbaumer v. Becker*, 87 Ill. 281; 29 Am. Rep. 53; *Warren v. Ball*, 37 Ill. 81; *Cregler v. Durham*, 9 Ind. 375; *Scott v. Colmesnil*, 7 J. J. Marsh. (Ky.) 416; *Magill v. Merrie*, 5 B. Mon. (Ky.) 168; *Kennedy v. Bohannon*, 11 B. Mon. (Ky.) 118; *Edwards v. McFall*, 5 La. Ann. 167; *Grosvenor v. Lloyd*, 1 Met. (Mass.) 19; *Goddard v. Pratt*, 16 Pick. (Mass.) 412; *Boyd v. Ricketts*, 60 Miss. 62; *Bernard v. Torrance*, 5 Gill & J. (Md.) 383; *Block v. Price*, 24 Mo. App. 14; *Deering v. Flanders*, 49 N. H. 225; *Kelley v. Hurlburt*, 5 Cow. (N. Y.) 534; *Holdane v. Butterworth*, 5 Bosw. (N. Y.) 1; *Ayrault v. Chamberlin*, 26 Barb. (N. Y.) 89; *Davis v. Allen*, 3 N. Y. 168; *Howell v. Adams*, 68 N. Y. 314; *Armstrong v. Hussey*, 12 S. & R. (Pa.) 315; *Vaccaro v. Toof*, 9 Heisk. (Tenn.) 194; *Whitworth v. Patterson*, 6 Lea (Tenn.) 119; *Benton v. Chamberlain*, 23 Vt. 13; *Benjamin v. Covert*, 47 Wis. 375; *Gilchrist v. Brande*, 58 Wis. 184; *Bigelow v. Elliot*, 1 Cliff. (U. S.) 28; *Le Roy v. Johnson*, 2 Pet. (U. S.) 186; *Evans v. Drummond*, 4 Esp. 89; *Newmarch v. Clay*, 14 East 239; *Carter v. Whalley*, 1 B. & Ad. 11; *Heath v. Sansom*, 4 B. & Ad. 172.

In *Carter v. Whalley*, 1 B. & Ad. 11. it was held that where a firm does business under a name which gives no information as to who are the persons who compose it, and one of the partners who had never appeared publicly, or been known as such, retires without publication of the fact, he is not liable to a person taking a subsequent obliga-

his former co-partners, however, is absolutely dependent upon the secrecy of his connection with the firm, notice to any one who knows of it being as necessary as in case of an ostensible partner, however the knowledge of his connection may have been acquired,¹ the burden of proof resting with the person seeking to hold the dormant partner to establish his knowledge of and reliance upon such partner's connection with the firm²—the prevailing rule being that any partner who was not known to the person seeking to hold him responsible, previous to his retirement, is, as to such person, a dormant partner, and not liable on subsequent contracts, although he gave no notice of his withdrawal,³ though it has been held that the fact that he was unknown to the creditor does not relieve him from the consequences of a failure to give notice unless he is actually dormant.⁴

In all cases other than a dissolution by operation of law or by the withdrawal of a dormant partner, notice of dissolution is essential to terminate the agency of the partners for each other as to third persons.⁵ Even though a partnership be dissolved by

tion in the firm name, to whom he had never represented himself to be a partner. See also *Bernard v. Torrance*, 5 Gill & J. (Md.) 383.

Where the words "& Co." appear in the firm name, the persons with whom they deal are thereby notified that there are other partners, and partners unknown to them, who retire without notice, are not dormant partners. *Goddard v. Pratt*, 16 Pick. (Mass.) 412; *Shamburg v. Ruggles*, 83 Pa. St. 148.

1. *Park v. Wooten*, 35 Ala. 242; *Phillips v. Nash*, 47 Ga. 218; *Holland v. Long*, 57 Ga. 36; *Ewing v. Trippe*, 73 Ga. 776; *Nussbaumer v. Becker*, 87 Ill. 281; 29 Am. Rep. 53; *Ellis v. Brownson*, 40 Ill. 455; *Southwick v. McGovern*, 28 Iowa 533; *Edwards v. McFall*, 5 La. Ann. 167; *Boyd v. Ricketts*, 60 Miss. 62; *Deering v. Flanders*, 49 N. H. 225; *Benton v. Chamberlain*, 23 Vt. 711; *Benjamin v. Covert*, 47 Wis. 375; *Kelley v. Hurlburt*, 5 Cow. (N. Y.) 534; *Davis v. Allen*, 3 N. Y. 168; *U. S. v. Binney*, 5 Mason (U. S.) 176; *Farrar v. Defiance*, 1 Car. & K. 580; *Evans v. Drummond*, 4 Esp. 89; *Carter v. Whalley*, 1 B. & Ad. 14.

A dormant partner is liable for goods sold the firm subsequent to his withdrawal from it, if the seller had no notice of his withdrawal, and believed him to be still a member; and an instruction that he is not liable unless the seller extended credit to the firm because of such belief is erroneous. *Leib v. Craddock*, 87 Ky. 525.

2. *Edwards v. McFall*, 5 La. Ann. 167; *Farrar v. Definne*, 1 Car. & K. 580; *Carter v. Whalley*, 1 B. & Ad. 11; *Evans v. Drummond*, 4 Esp. 89; *Kelley v. Hurlburt*, 5 Cow. (N. Y.) 534; *Benton v. Chamberlain*, 23 Vt. 711.

3. *Warren v. Ball*, 37 Ill. 76; *Bank of Montreal v. Page*, 98 Ill. 109; *Chamberlain v. Dow*, 10 Mich. 319; *Dowzelot v. Rawlings*, 58 Mo. 75; *Benton v. Chamberlain*, 23 Vt. 711; *Pratt v. Page*, 32 Vt. 13; *Waite v. Dodge*, 34 Vt. 181; *Benjamin v. Covert*, 47 Wis. 375; *Darling v. Magman*, 12 Up. Can., Q. B. 471; *Evans v. Drummond*, 4 Esp. 89; *Newsome v. Coles*, 2 Camp. 617.

The test question as to the liability of a dormant partner is, whether he was a member of the firm at the time the liability was incurred, or, if he was not then a partner in fact, whether his conduct was such in regard to the transaction that the creditor was authorized to charge him as a partner. *Cook v. Penrhyn Slate Co.*, 36 Ohio St. 135.

4. *Princeton etc. Turnpike Co. v. Gulick*, 16 N. J. L. 161; *Howell v. Adams*, 68 N. Y. 314.

5. See cases cited under Notice of Dissolution.

That there has been no time to give notice does not excuse the want of it. *Martin v. Searles*, 28 Conn. 43; *Mechanics' Bank v. Livingston*, 33 Barb. (N. Y.) 458; *Bristol v. Sprague*, 8 Wend. (N. Y.) 423; *Wardwell v. Haight*, 2 Barb. (N. Y.) 552.

the expiration of the period for which it was formed,¹ or by its transformation into a corporation,² yet notice is necessary if it continues to deal in the old way.

Actual knowledge of the dissolution, however it may have been obtained, dispenses with the necessity for notice of it.³ The burden of establishing such knowledge on the part of a person seeking to take advantage of a failure to give notice, rests with the co-partners,⁴ but it may be established by parol, or inferred from circumstances;⁵ but, that the creditor by the use of reason-

If an infant is a partner and acts as one, upon coming of age if he desires to disaffirm the partnership, he must give proper notice of dissolution. *Goode v. Harrison*, 5 B. & Ald. 187. But see *King v. Barbour*, 70 Ind. 35.

Where a contract of partnership was entered into, but abandoned because of the inability of the firm to buy goods on credit, notice of dissolution by publication is necessary. *Thurston v. Perkins*, 7 Mo. 29.

When, after the death of a member of a firm of millers, without new articles of partnership, his son entered actively in the business under the old style, and a promissory note, executed in the firm name, was given a party in the regular course of the business of the mill, such son is liable as a partner on the note in the hands of a *bona fide* holder, without notice, even though another person has meanwhile taken his place in the business, and given a bond to indemnify him against claims against the old firm. *Swift v. Mead*, 62 Mich. 313.

But a partner who retired before the day upon which taxes were assessed is not liable for taxes by reason of not having given notice of dissolution, the taxes not being a contract and no credit having been given to any particular person in levying them. *Washburn v. Walworth*, 133 Mass. 499.

1. *Holt v. Simmons*, 16 Mo. App. 97; *Ketcham v. Clark*, 6 Johns. (N. Y.) 144.

But in *Schlater v. Winpenny*, 75 Pa. St. 321, it was held that if the dealer knows when the partnership is to expire, he has such notice as ought to put him on inquiry, and cannot, therefore, bind the firm after such time, if it is then dissolved.

2. *Goddard v. Pratt*, 16 Pick. (Mass.) 412; *Willey v. Thompson*, 9 Met. (Mass.) 329; *Martin v. Fewell*, 79 Mo. 401; *McGowan v. American Bank Co.*, 121 U. S. 575.

3. *Gathright v. Burke*, 101 Ind. 590; *Ketcham v. Clark*, 6 Johns. (N. Y.) 144; *Schlater v. Winpenny*, 75 Pa. St. 321.

Knowledge that the partnership was for a single transaction, and of completion of such transaction, is sufficient knowledge of dissolution. *Williams v. Connor*, 14 S. Car. 621.

No presumption of knowledge arises from having formerly discounted paper on which the firm name appeared. *Bank of Montreal v. Page*, 98 Ill. 189.

In *James v. Pope*, 19 N. Y. 324, a partnership occupied leased premises. Two of the partners retired without notice to the owner of the premises, and the continuing partners formed a new firm with other persons and continued to occupy for a year after the original term had expired, it was held that the retired partners were not liable for the rent on the ground that the plaintiff was bound to know who occupied his premises.

4. *Uhl v. Bingaman*, 78 Ired. 365.

Shifting the Burden.—Where the plaintiff knew of an intention of the partners to dissolve, which was in the course of execution, it was held in an action, founded upon a supposed subsequent partnership transaction, that the plaintiff must show that the intention to dissolve was abandoned. *Patterson v. Jacharia*, 1 Stark N. P. C. 58.

5. *Maudlin v. Branch Bank*, 2 Ala. 502; *Pope v. Risley*, 23 Mo. 185; *Caddington v. Hunt*, 6 Hill (N. Y.) 595; *Irby v. Vining*, 2 McCord (S. Car.) 379; *Martin v. Walton*, 1 McCord (S. Car.) 16; *Laird v. Ivans*, 45 Tex. 621; *Dickinson v. Dickinson*, 25 Gratt. (Va.) 321; *Gilchrist v. Brande*, 58 Wis. 184. And see *Holtgreve v. Wintker*, 85 Ill. 470; *Davis v. Keyes*, 38 N. Y. 94.

When it is established that the creditor saw the published notice of dissolution, the court will infer that he read it. *Prentiss v. Sinclair*, 5 Vt. 149; 26 Am. Dec. 288. See also *Galliot v. Planters'*

able diligence would have ascertained is not sufficient in the absence of circumstances such as to put him upon inquiry.¹

One who derives actual knowledge of a dissolution from public notoriety is sufficiently notified.²

No notice is necessary to relieve a partner from liability for the acts and contracts of a former co-partner when such acts are not within the usual scope of the business of the firm,³ or are beyond the power of a partner to perform or enter into,⁴ or where credit has been exclusively given to the contracting partner and not to the firm.⁵

b. HOW GIVEN.—(1) Former Dealers or Customers.—With respect to former dealers with or customers of the firm, actual and express notice must be given, or such facts must be made to appear as will warrant a jury in believing that the creditor had actual

etc. Bank, 1 McMull. (S. Car.) 209; 36 Am. Dec. 256.

Intimacy between the families of the creditor of the continuing partner is a circumstance to be considered on the question of knowledge. *Hixon v. Pixley*, 15 Nev. 475.

Bills and accounts rendered by the creditor to the continuing partners alone is strong evidence of knowledge. *Hall v. Long*, 56 Ala. 493; *Smith v. Jackman* 135 Mass. 143.

A verified proof of claim in bankruptcy, made by the creditor against the continuing partner, is strong evidence of his knowledge of the dissolution. *Roberts v. Spencer*, 123 Mass. 397.

Where an attorney employed by a firm brought a suit for them, describing one of the plaintiffs as "late of the firm, etc.," it is evidence that he knew of the dissolution. *Cahoon v. Hobart*, 38 Vt. 244.

In *Pitcher v. Barrows*, 17 Pick. (Mass.) 361, it was held that a deed of assignment constituting a dissolution, and placed upon the record, is not notice of the dissolution.

1. *Zollar v. Zanvrin*, 47 N. H. 324.

Registration of a mortgage or deed from the continuing to the retiring partner on partnership property does not put the creditor upon inquiry as a matter of law. *Zollar v. Janvrin*, 47 N. H. 324; *Pitcher v. Barrows*, 17 Pick. (Mass.) 361; 28 Am. Dec. 306; *Spaulding v. Ludlow Woolen Mill*, 36 Vt. 150.

The question of notice is one of fact, and the knowledge of the creditor that the partners had ceased business, closed the store, and that one had moved away, will not necessarily, and as a matter of law, charge him with notice of dissolu-

tion. *Dickinson v. Dickinson*, 25 Gratt. (Va.) 321. And see *Holt v. Simmons*, 16 Mo. App. 97.

Where one knows of certain conditions agreed to work a dissolution of a partnership, on their happening, he is put on inquiry, and should inform himself as to the happening of the conditions before he advances credit to the firm. *Smith v. Vandenburg*, 46 Ill. 34.

2. *Solomon v. Kirkwood*, 55 Mich. 256; *Hart v. Alexander*, 2 M. & W. 484; 7 C. & P. 746; *Lovejoy v. Spafford*, 93 U. S. 430. And see *Hixon v. Pixley*, 15 Nev. 475; *Shaffer v. Snyder*, 7 S. & R. (Pa.) 503.

It matters not how or through what channel notice is given so that it reaches the party to be affected by it. *Hicks v. Russel*, 72 Ill. 230; *Southern v. Grimm*, 67 Ill. 106.

In *Coddington v. Hunt*, 6 Hill (N. Y.) 595, knowledge on the part of other business acquaintances was permitted to be considered.

In *Martin v. Searles*, 28 Conn. 43, some degree of notoriety was held to make no difference, unless it is shown that the plaintiff had some knowledge of it.

Neighborhood notoriety will not, of course, affect a non-resident of the State with notice. *Southwick v. Allen*, 11 Vt. 75.

In *Goddard v. Pratt*, 16 Pick. (Mass.) 412, it was held that notoriety is not admissible as a substitute for publication. And see *Pitcher v. Barrows*, 17 Pick. (Mass.) 361; 28 Am. Dec. 306.

3. *Hicks v. Russell*, 72 Ill. 230; *Whitman v. Leonard*, 3 Pick. (Mass.) 177.

4. See *Spruck v. Leonard*, 9 Ill. App. 174.

5. *Dowzelot v. Rawlings*, 58 Mo. 75; *Taylor v. Young*, 3 Watts (Pa.) 339;

knowledge of the dissolution.¹ Notice to an agent is not notice to his principal unless the agent was authorized to represent the principal in such matters,² but notice to one member of a creditor firm, is sufficient.³

Pratt v. Page, 32 Vt. 13; *Le Roy v. Johnson*, 2 Pet. (U. S.) 186.

1. *Nicholson v. Moog*, 65 Ala. 471; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280; *Williams v. Bowers*, 15 Cal. 321; *Lyon v. Johnson*, 28 Conn. 1; *Martin v. Searles*, 28 Conn. 46; *Ennis v. Williams*, 30 Ga. 691; *Ransom v. Loyless*, 49 Ga. 471; *Carmichael v. Grier*, 55 Ga. 116; *Hodgen v. Kief*, 63 Ill. 146; *Stall v. Cassaday*, 57 Ind. 284; *Strecker v. Conn*, 90 Ind. 469; *Price v. Towsey*, 3 Litt. (Ky.) 423; *Merritt v. Williams*, 17 Kan. 287; *Mitchum v. Bank of Kentucky*, 9 Dana (Ky.) 166; *Magill v. Merrie*, 5 B. Mon. (Ky.) 168; *Kennedy v. Bohannon*, 11 B. Mon. (Ky.) 118; *Gaar v. Huggins*, 12 Bush (Ky.) 259; *Nott v. Douming*, 6 La. 680; *Lowe v. Renny*, 7 La. Ann. 356; *Reilly v. Smith*, 16 La. Ann. 31; *Schorten v. Davis*, 21 La. Ann. 173; *Denman v. Dosson*, 19 La. Ann. 9; *Pecker v. Hall*, 14 Allen (Mass.) 532; *Pope v. Rislev*, 23 Mo. 187; *Burgan v. Lyell*, 2 Mich. 102; 55 Am. Dec. 53; *Wardwell v. Haight*, 2 Barb. (N. Y.) 552; *Graves v. Merry*, 6 Cow. (N. Y.) 701; 16 Am. Dec. 471; *Van Epsy v. Dillaye*, 6 Barb. (N. Y.) 244; *Ketcham v. Clark*, 6 Johns. (N. Y.) 144; *Walton v. Tomlin*, 1 Ired. (N. Car.) 593; *Walkinson v. Bank of Pennsylvania*, 4 Whart. (Pa.) 484; *Hammond v. Aiken*, 3 Rich. Eq. (S. Car.) 119; *White v. Murphy*, 3 Rich. (S. Car.) 369; *Kirkman v. Snodgrass*, 3 Head (Tenn.) 371; *Haynes v. Carter*, 12 Heisk. (Tenn.) 7; *House v. Thomson*, 3 Head (Tenn.) 512; *Davis v. Willis*, 47 Tex. 154; *Dickinson v. Dickinson*, 25 Gratt. (Va.) 321; *Simmonds v. Strong*, 24 Vt. 642; *Scarf v. Jardine*, L. R. 7 App. Cas. 345; *Osborne v. Harper*, 5 East 225; *Lane v. Tyler*, 49 Me. 252; *Taylor v. Hill*, 36 Md. 494; *In re Kreuger*, 2 Low. (U. S.) 66; *Austin v. Holland*, 69 N. Y. 571; 25 Am. Rep. 246; *Simmonds v. Strong*, 24 Vt. 642; *Treadwell v. Wells*, 4 Cal. 260; *Stoddard Mfg. Co. v. Krause*, 27 Neb. 83; *Williamson v. Fox*, 38 Pa. St. 214.

To render a retiring partner liable on transactions occurring after dissolution, because of want of notice thereof, the customer must have been either a regu-

lar or a recent customer. *Bloch v. Price*, 24 Mo. App. 14.

Evidence of the notoriety of the dissolution of a firm is inadmissible to show notice on the part of one having previous dealings with the firm. *Central Nat. Bank v. Frye*, 148 Mass. 498.

Whether or not notice was actually received is a question for the jury. *Whitesides v. Lee*, 2 Ill. 550; *Treadwell v. Wells*, 4 Cal. 260; *Rabe v. Wells*, 3 Cal. 148; *Ketcham v. Clark*, 6 Johns. (N. Y.) 147; *Tudor v. White*, 27 Tex. 584; *Laird v. Ivins*, 45 Tex. 622; *Jenkins v. Blizzard*, 1 Stark. 418; *Rooth v. Quin*, 3 Ex. 18.

Where one partner retires without notice, and the remaining partner takes in a new one, forming a new firm, and a former dealer sells to the new firm, he must elect which firm to pursue; he cannot hold both. *Scarf v. Jardine*, L. R., 7 App. Cas. 345.

That other dealers had not received notice, is not competent evidence in favor of a former dealer to rebut proof of actual notice of dissolution, as such evidence does not tend to show want of notice on his part. *Howe v. Thayer*, 17 Pick. (Mass.) 91; *Coggsell v. Davis*, 65 Wis. 191.

2. *Stewart v. Sonneborn*, 49 Ala. 178; *National Bank v. Norton*, 1 Hill (N. Y.) 572; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280. And see *President etc. v. Cornen*, 37 N. Y. 320.

While notice to a director of a bank is not usually deemed to be notice to the bank, it is so if it actually reached the management and was acted upon. *Bank of U. S. v. Davis*, 2 Hill (N. Y.) 451.

A notice to plaintiff's book-keeper, however, who had always made his deposits, of the addition of new partners in the banking firm, was held to be such a notice as to uphold a plea of non-joinder of the new partners in *Page v. Brant*, 18 Ill. 37.

3. *Bates' Law of Part.*, § 625.

Notice of dissolution to the president of a bank is notice to the bank. *Eastern v. Farmers' Nat. Bank*, 57 Ill. 216.

Notice to the principal is sufficient, without notice to the agent who dealt

The fact that the customer is a regular subscriber of the paper in which the dissolution was published does not amount to actual notice, though it is a circumstance from which, together with other evidence, knowledge may be inferred;¹ nor is mailing a letter or circular actual notice,² but if it is not *prima facie* sufficient to establish it, but slight corroborative proof would be necessary to justify a verdict finding actual notice.³

As to who is a former dealer with or customer of a firm within the rules above laid down, it may be said that a person or concern who has discounted commercial paper for it,⁴ or who has loaned

with the firm. *Richardson v. Snider*, 72 Ind. 425; 37 Am. Rep. 168.

Change in Firm.—Where a partnership is a customer and one of its members retires, the rest continuing without a change of name, business, or location, they are former dealers notwithstanding the change and entitled to actual notice of dissolution. *Deering v. Flanders*, 49 N. H. 225. But a new firm formed by the retiring partner with third parties is not a former dealer. *Gaar v. Huggins*, 12 Bush (Ky.) 259.

1. *Rabe v. Wells*, 3 Cal. 148; *Treadwell v. Wells*, 4 Cal. 260; *Reilly v. Smith*, 16 La. Ann. 31; *Smith v. Jackman*, 138 Mass. 143; *Roberts v. Spencer*, 123 Mass. 397; *Zollar v. Janvrin*, 47 N. H. 324; *Vernon v. Manhattan Co.*, 22 Wend. (N. Y.) 183; *Watkinson v. Bank of Pennsylvania*, 4 Whart. (Pa.) 482; 34 Am. Dec. 521; *Hart v. Alexander*, 2 Mo. W. 484.

It was held equivalent to express notice in *Bank of S. Car. v. Humphreys*, 1 McCord (S. Car.) 388.

The fact that the publication of dissolution was inserted in a newspaper next to the plaintiff's advertisement, is a circumstance to be considered. *Lyon v. Johnson*, 28 Conn. 1.

Evidence that notice of a dissolution was published in a daily newspaper is competent on the issue of whether a certain person knew of the dissolution. *Smith v. Jackman*, 138 Mass. 143.

If a former dealer did not take or read the paper in which the notice was published, it is inadmissible as evidence of notice. *Boyd v. McCann*, 10 Md. 118.

But other papers not taken by the creditor may be given in evidence by way of establishing the publicity of the notice and raising the presumption of actual knowledge of the fact. *Treadwell v. Wells*, 4 Cal. 260; *Reilly v. Smith*, 16 La. Ann. 31.

In *Hart v. Alexander*, 2 M. & W. 484; 7 C. & P. 746, several were partners in Calcutta, one of them retired and came to England and became a candidate for a seat in the Directory of the East India Company, publishing addresses in 13 different newspapers to stockholders, that his connection with mercantile concerns in India had ceased. The creditor was an investor in Indian securities. LORD ABBOTT held that the probability that the creditor would take an interest in Indian affairs, and that the retirement of the partner in an extensive firm would be known to investors in Indian securities, was evidence of knowledge of the dissolution.

But though there is a mark around the published notice, the fact that a customer of a firm was a regular subscriber to the paper in which it appeared does not amount to actual notice without proof that he actually saw it. *Haynes v. Carter*, 12 Heisk. (Tenn.) 7.

2. *Carmichael v. Grier*, 55 Ga. 116; *Meyer v. Rrohn*, 114 Ill. 574; *National Shoe etc. Bank v. Heez*, 89 N. Y. 629; *Kenney v. Altvater*, 77 Pa. St. 34; *Haynes v. Carter*, 12 Heisk. (Tenn.) 7. But see *Hutchins v. Bank of Tennessee*, 8 Humph. (Tenn.) 418.

Proof that a letter was sent and that it was not returned from the dead letter office, is not sufficient to establish its receipt by the customer. *Kenny v. Altvater*, 77 Pa. St. 34.

A practice by both the old and the new firm of sending out monthly statements to customers does not tend to show notice of the change in a firm. *Hall v. Long*, 56 Ala. 493.

3. See *Kenny v. Altvater*, 77 Pa. St. 34; *Meyer v. Krohn*, 114 Ill. 574; *Eckerly v. Alcorn*, 62 Miss. 228; *Austin v. Holland*, 69 N. Y. 571; *Hart v. Alexander*, 7 C. & P. 746.

4. *Rose v. Coffield*, 53 Md. 18;

money to it,¹ or who has sold it goods on credit,² or who has indorsed accommodation paper for it,³ or a consignee or factor who has been in the habit of making advancements on their consignments,⁴ or an agent of the firm who credits it with services instead of goods or money,⁵ is such a dealer or customer. One who sells to the firm for cash only, however, is not a dealer within the rule,⁶ nor is one who merely dealt in paper for which the firm was responsible not procured from it or at its request;⁷ and such former dealing must have been within the scope of the agency of the partner with whom it was had in order to confer any rights upon either party.⁸ The fact that the former dealing consisted

36 Am. Rep. 389; *Taylor v. Hill*, 36 Md. 494; *Bank of Com. v. Mudgett*, 44 N. Y. 514; *National Shoe etc. Bank v. Heez*, 89 N. Y. 629; *National Bank v. Norton*, 1 Hill (N. Y.) 572; *Mechanics' Bank v. Livingston*, 33 Barb. (N. Y.) 458; *Dundas v. Gallagher*, 4 Pa. St. 205.

The rule does not extend to requiring actual notice to the successor in business of a person with whom the firm has had former dealings. *Richardson v. Snyder*, 20 Am. Law. Reg. 293.

1. *Jansen v. Grimshaw*, 26 Ill. App. 287; *Buffalo City Bank v. Howard*, 35 N. Y. 500.

A depositor with a banking partnership is a former dealer, and as such entitled to actual notice of dissolution. *Howell v. Adams*, 68 N. Y. 314.

Where a bank has never had any account with a firm, but has had an account with another firm whose members are also members of the first firm, it is not entitled to notice of the dissolution of the first firm, though the bank has loaned money to the other firm knowing that it was to be used by the first firm. *Green v. Waco State Bank*, 78 Tex. 2.

2. *Bates' Law of Part.*, § 613.

If credit was extended to the firm it is sufficient; no express contract for such credit is necessary. *Clapp v. Rogers*, 12 N. Y. 283.

Where one member of a firm retired on April 1st, and on April 28th the plaintiff for the first time sold them a bill of goods without knowledge of the withdrawal, and on April 29th the fact of dissolution was published, and in October the plaintiff, still ignorant of the withdrawal of the partner, sold the firm a second bill of goods, it was held that the plaintiff was a former dealer and entitled to actual

notice. *Amidown v. Osgood*, 24 Vt. 287; 58 Am. Dec. 171.

3. *Hutchins v. Sims*, 8 Humph. (Tenn.) 423; *Hutchins v. Hudson*, 8 Humph. (Tenn.) 426.

Where a firm signed and indorsed notes on condition for the payee, knowing he would procure a third party to discount them, a mere publication of dissolution is not sufficient as to such third party. *Vernon v. Manhattan Co.*, 22 Wend. (N. Y.) 183. And see *Rose v. Coffield*, 53 Md. 18; 36 Am. Rep. 389.

4. *Williams v. Birch*, 6 Bosw. (N. Y.) 299.

5. *Austin v. Holland*, 69 N. Y. 571. And see *Daily v. Blake*, 35 N. H. 29. But see to the contrary, *Costello v. Nixdorff*, 9 Mo. App. 501, that an employee of a firm is in the same category as those who dealt with it for cash.

One who had been in the employ of a firm from which certain of the partners withdrew, gave credit to those continuing the business under the old firm name. *Held*, that he could not hold the retiring partners because of a failure to give him actual notice of the dissolution. *Costello v. Nixdorff*, 9 Mo. App. 501.

6. *Clapp v. Rogers*, 12 N. Y. 283. And see *Merritt v. Williams*, 17 Kan. 287.

In *Clapp v. Rogers*, 12 N. Y. 283, *HAND, J.*, expressed the opinion that it might be questionable whether one who has made extensive cash sales is not entitled to notice, and that credit might mean confidence in the solvency of the firm and not merely an agreement by forbearance.

7. *Vernon v. Manhattan Co.*, 22 Wend. (N. Y.) 183; *City Bank v. McChesney*, 20 N. Y. 240; *Hutchins v. Bank of Tenn.* 8 Humph. (Tenn.) 418.

8. See *Hicks v. Russell*, 72 Ill. 230;

of a single transaction,¹ or that the credits consisted of exceedingly small amounts,² does not affect the question.

(2) *Non-dealers*.—As to strangers and non-dealers, that is persons who have not given credit to the firm, a general notice of dissolution given by publication in a newspaper at the place where the business was carried on is almost universally held to be sufficient,³ some of the cases appearing to regard that method as essential.⁴ As a general rule, however, publication by advertise-

Spurck *v.* Leonard, 9 Ill. App. 174; Pomeroy *v.* Coons, 20 Mo. 597; Princeton etc. Turnpike Co. *v.* Gulick, 16 N. J. L. 161.

1. Lyon *v.* Johnson, 28 Conn. 1. And see Williams *v.* Bowers, 15 Cal. 321; Rose *v.* Coffield, 53 Md. 18; 36 Am. Rep. 389; National Bank *v.* Norton, 1 Hill (N. Y.) 572; Amidonn *v.* Osgood, 24 Vt. 278.

In Wardwell *v.* Haight, 2 Barb. (N. Y.) 549, it was held that two previous transactions were sufficient to constitute one of a former dealer.

2. Clapp *v.* Rogers, 12 N. Y. 283.

3. Mauldin *v.* Branch Bank, 2 Ala. 502; Stewart *v.* Sonneborn, 49 Ala. 178; Nicholson *v.* Moog, 65 Ala. 471; Lyon *v.* Johnson, 28 Conn. 1; Mowatt *v.* Howland, 3 Day (Conn.) 353; Martin *v.* Searles, 28 Conn. 43; Ellis *v.* Bronson, 40 Ill. 455; Solomon *v.* Kirkwood, 55 Mich. 356; Green *v.* Merchants' Ins. Co., 10 Pick. (Mass.) 402; Polk *v.* Oliver, 56 Miss. 566; Deering *v.* Flanders, 49 N. H. 225; Austin *v.* Holland, 69 N. Y. 571; Lansing *v.* Gaine, 2 Johns. (N. Y.) 300; 3 Am. Dec. 422; Ketchum *v.* Clark, 6 Johns. (N. Y.) 144; Walton *v.* Tomlin, 1 Ired. (N. Car.) 593; Speer *v.* Bishop, 24 Ohio St. 598; Palmer *v.* Dodge, 4 Ohio St. 21; 62 Am. Dec. 271; Watkinson *v.* Bank of Pennsylvania, 4 Whart. (Pa.) 482; 34 Am. Dec. 521; Martin *v.* Walton, 1 McCord (S. Car.) 16; Haynes *v.* Carter, 12 Heisk. (Tenn.) 7; Prentiss *v.* Sinclair, 5 Vt. 149; 26 Am. Dec. 288; Shurlds *v.* Tilson, 2 McLean (U. S.) 458; Preston *v.* Foelinger, 24 Fed. Rep. 680; Darling *v.* Magnan, 12 Up. Can. Q. B. 471; Reilly *v.* Smith, 16 La. Ann. 31; Simonds *v.* Strong, 24 Vt. 642; Gaar *v.* Huggins, 12 Bush (Ky.) 259; Whitesides *v.* Lee, 2 Ill. 550.

Notice by the retiring partner to all the old customers and a general knowledge of the dissolution among business men of the locality, is evidence of due publication. Lovejoy *v.* Spafford, 93 U. S. 430.

A valid notice of dissolution may have been given by an agent of the firm, if the firm adopts the notice. Stewart *v.* Sonneborn, 51 Ala. 126.

The English Rule.—Public notice given by advertisement in the Gazette is sufficient not only against all who can be shown to have seen it, but also as against all who had no dealings with the old firm, whether they saw it or not, but an advertisement in any other paper is no evidence against any one who cannot be shown to have seen it. Lindley on Part. 415, citing Godfrey *v.* Turnbull, 1 Esp. 371; Wrightson *v.* Pullan, 1 Stark. 375; Godfrey *v.* Macauley, 1 Peake (N. P.) 309; Newsome *v.* Coles, 2 Camp. 617; Lesson *v.* Holt, 1 Stark 186; Boydell *v.* Drummond, 11 East 144, n.

A notice in a paper which the party was in the habit of taking, however, is equivalent to a notice in the Gazette. Jarm. on Conv. 89; though advertisement in a common newspaper is not regarded as equal to one in the Gazette. Rooth *v.* Quin, 7 Price 193; Hendry *v.* Turner, 32 Ch. Div. 355.

In Graham *v.* Hope, Peake 155, LORD KENYON, J., said: "The Gazette was not of itself sufficient notice to the plaintiff of the dissolution of the partnership. I do not say this for the purpose of this cause merely; I mean to lay it down as a general rule to govern the conduct of all men. Many people there are in this kingdom who never see a Gazette to the day of their deaths, and very mischievous would be the consequences if they were bound by a notice inserted in it." See also Kirwan *v.* Kirwan, 4 Tyrw. 491.

Proof of Publication.—A certificate of the publisher of a newspaper is not competent evidence of publication. Boyd *v.* McCann, 10 Md. 118.

4. See Podrasnik *v.* Martin, 25 Ill. App. 300; Southwick *v.* McGovern, 28 Iowa 533; City Bank *v.* McChesney, 20 N. Y. 240; Simonds *v.* Strong, 24 Vt. 642. Lovejoy *v.* Spafford, 93 U. S. 430.

ment is not regarded as indispensable, but may be effected by other means whereby the public is sufficiently advised of the dissolution, the sufficiency of the notice being a question of fact for the jury,¹ though it must consist of a publication or of a public notice of some kind, in order to exonerate the parties from liability for each other's acts after dissolution.²

No particular form of notice is required. Any expression which plainly indicates a dissolution, as distinguished from a mere change in the mode of doing business, is sufficient,³ though it should be of such a character, and should be published in such a manner and to such an extent, as is best calculated to bring the fact of dissolution to the knowledge of the public in general.⁴

c. NOTICE BY CHANGES IN THE FIRM.—That the continuing partners have adopted a firm name so widely different from the name of the former firm as to show that the retiring partners are no longer connected with it, is in itself sufficient notice of the dissolution to persons seeking to hold them upon contracts entered into under the new name, or to persons knowing of the change seeking to hold them upon contracts entered into under the old

1. See *Vernon v. Manhattan Co.*, 22 Wend. (N. Y.) 183; *Mitchum v. Bank of Kentucky*, 9 Dana (Ky.) 166; *Grinnan v. Baton Rouge Co.*, 7 La. Ann. 638; *Solomon v. Kirkwood*, 55 Mich. 256; *Polk v. Oliver*, 56 Miss. 566; *Deering v. Flanders*, 49 N. H. 225; *Irby v. Vining*, 2 McCord (S. Car.) 379; *Martin v. Walton*, 1 McCord (S. Car.) 16; *Lovejoy v. Spafford*, 93 U. S. 430; *Graves v. Merry*, 6 Cow. (N. Y.) 701; *Hicks v. Russell*, 72 Ill. 230; *Shurlds v. Tilson*, 2 McLean (U. S.) 458.

2. See *Martin v. Seales*, 28 Conn. 43; *Southern v. Grim*, 67 Ill. 106; *Backus v. Taylor*, 84 Ind. 504; *Southwick v. McGovern*, 28 Iowa 533; *Rose v. Coffield*, 53 Md. 18; 36 Am. Dec. 389; *Stimson v. Whitney*, 130 Mass. 591; *Graves v. Merry*, 6 Cow. (N. Y.) 701; 16 Am. Dec. 471; *Tudor v. White*, 27 Tex. 584; *White v. Tudor*, 24 Tex. 639. And see cases cited in the above notes.

A mere declaration that the firm is dissolved made before witnesses, even though it is generally known in the neighborhood, would not be sufficient. *Bradley v. Kent*, 1 Kirby (Conn.) 77; 1 Am. Dec. 13. And see *Pursley v. Randall*, 31 Ga. 403.

Where a partnership engaged in running a cotton factory in a small place, dissolves and gives notice of the dissolution by posting notices in four or five places in the town, it was held that a bank in another town, twelve miles distant, which took a note of the firm sub-

sequently made, could hold the firm on the ground that the dealings of such firm could not be supposed to be confined to its own town. *Mitchum v. Bank of Kentucky*, 9 Dana (Ky.) 166.

3. See *Hammond v. Aiken*, 3 Rich. Eq. (S. Car.) 119; *Vice v. Flemming*, 1 Young & J. 227; *Uhl v. Harvey*, 78 Ind. 26.

An editorial notice without signatures in a newspaper may be as valid and effectual as an advertisement purporting to issue by authority of the partner over their signatures. *Solomon v. Kirkwood*, 55 Mich. 256; *Young v. Tibbits*, 32 Wis. 79.

In *Southwick v. Allen*, 11 Vt. 75, it was held that a publication in effect, that the firm was discontinued, would import a dissolution, but that a notice that the business would thereafter be done under the name of A, B & Co., is not a notice of dissolution of the firm of A & B.

A publication, in substance that one partner will not be liable for future contracts of the firm, merely announces a change in the manner of doing its business. *Johnston v. Dutton*, 27 Ala. 245.

Merely omitting the name of a person from the advertised list of directors, is not a notice that he had retired; it can be, at most, merely a notice that he is no longer an active partner. *Clark v. Fletcher*, 96 Pa. St. 416.

4. See *Ellison v. Sexton*, 105 N. Car. 356.

name.¹ But if the change does not indicate the withdrawal of the particular partner sought to be held, while it may be notice of the dissolution of the old firm it is also notice of the formation of the new one, in which all the members of the old firm are presumed to continue.² The removal to a new place a long distance away has been held sufficient to put a customer upon inquiry, though the name of the new firm is the same as that of the old.³ And where a long interval of time has elapsed between the former dealing, or between the dissolution and the transactions upon which the retiring partners are sought to be held, though it is a circumstance to be considered on the question of notice or knowledge, unless the interval was very great, that alone would not exonerate the retiring partners.⁴

1. See *Holdane v. Butterworth*, 5 Bosw. (N. Y.) 1; *Irby v. Vining*, 2 McCord (S. Car.) 390; *Barfoot v. Goodall*, 3 Camp. 147; *Carter v. Whally*, 1 B. & Ad. 13.

Where A & B are partners, and B & C form another partnership, it is not necessary for A to publish a notice that he is not a member of the firm of B & C. *Jones v. O'Farrel*, 1 Nev. 354.

In *Robinson v. Worden*, 33 Mich. 316, the reports of a measurer, given to plaintiff to enable him to settle with third persons, in which the mill is described under the name of the continuing partner alone, was held to be evidence of the plaintiff's knowledge of the dissolution of the firm.

2. *Howe v. Thayer*, 17 Pick. (Mass.) 91; *American Linen Thread Co. v. Wortendyke*, 24 N. Y. 550; *Simonds v. Strong*, 24 Vt. 642; *Coggswell v. Davis*, 65 Wis. 191. And see *Duff v. Baker*, 78 Iowa 642; *Holt v. Allebrand*, 52 Hun (N. Y.) 217; *Elkinton v. Booth*, 143 Mass. 479.

Where *Smith v. Patterson*, were doing business under the firm name of *Patterson & Co.*, and *Patterson* retired, *Smith* continuing the business as *Smith & Co.*, and *Patterson* remaining in the store as managing clerk, a verdict holding *Patterson* liable was upheld. *Jordan v. Smith*, 17 Up. Can. Q. B. 590.

Where N of the firm of N & Co. bought out the whole firm and gave it to his son W W N, the former partner remaining as clerk, no notice of dissolution being given, and the son afterwards made payments to a former dealer by checks signed W W N, it was held, that though this was strong and cogent evidence of a change, as the same manager and the same clerks

were retained, it is not conclusive of notice as the plaintiff may have believed that the son was giving his personal checks for the firm's debts. *Newcomet v. Brotzman*, 69 Pa. St. 185.

3. *Clapp v. Upson*, 12 Wis. 492.

In the case of the dissolution of a commercial partnership without notice, and their reorganization as a planting partnership, a creditor of the latter firm who was not a former dealer, cannot hold it as a commercial partnership. *Stewart v. Caldwell*, 9 La. Ann. 419.

But where business continues to be transacted under the firm name, the fact that one of the partners has gone into other business or removed from the State, is not sufficient notice of the dissolution. *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280.

4. One year not sufficient. *Princeton etc. Turnpike Co. v. Gulick*, 16 N. J. L. 161. Nor two. *Simonds v. Strong*, 24 Vt. 642. To the contrary, see *Spurck v. Leonard*, 9 Ill. App. 174; *Long v. Garnett*, 59 Tex. 229. And see generally *Hottgreve v. Wintker*, 85 Ill. 470; *Lyon v. Johnson*, 28 Conn. 1; *Hixon v. Pixley*, 15 Nev. 475; *Irby v. Vining*, 2 McCord (S. Car.) 379.

If there is a lapse of time sufficient to put a reasonable man on his guard, the jury may find the creditor not to be an old dealer. *Treadwell v. Wells*, 4 Cal. 260.

Where a firm dissolves in 1849, without notice, and in 1860 one of the partners makes a note in the firm name in a different town and the plaintiff who had never heard of the firm discounts it, a verdict in favor of the other partner finding notice, is proper. *Farmers' etc. Bank v. Green*, 30 N. J. L. 316.

In *Coddington v. Hunt*, 6 Hill (N.

A note signed "in liquidation" may import dissolution, and, if so, may be regarded as conveying notice to the persons into whose hands it comes.¹

d. HOLDING OUT AFTER DISSOLUTION.—Although due notice of dissolution or of the withdrawal of a partner may have been given, if the partners afterwards hold themselves out as members of the firm or as partners, they will thereby render themselves liable on new contracts made by their former co-partners.²

5. Effect of Dissolution.—The effect of a dissolution is to put an end to all powers of the partners to act as agents for the firm and for each other and to incur liability on behalf of the firm, except so far as is necessary to close up the business, indebtedness incurred before dissolution, however, remaining unaffected.³

Upon the dissolution of a firm by the withdrawal of a partner, while both partners are liable as principals as between them and the firm creditors,⁴ the purchaser, if he has assumed the debts, becomes in equity the principal debtor, and the retiring partner becomes his surety.⁵ And if the dissolution was caused by the

Y.) 595, the expiration of two years after dissolution before the making of the note in suit, together with the fact of notoriety of the dissolution, and that the partners had gone into business separately on different streets, was held to be sufficient to warrant a jury in finding notice as against one not a former dealer.

1. *Burr v. Williams*, 20 Ark. 171; *Speake v. Barrett*, 13 La. Ann. 479; *Haddock v. Crocheron*, 32 Tex. 276; 5 Am. Rep. 244; *Woodson v. Wood*, 81 Va. 478.

2. *Richards v. Hunt*, 65 Ga. 342; *Richards v. Butler*, 65 Ga. 593; *Ellis v. Bronson*, 40 Ill. 455; *Spears v. Toland*, 1 A. K. Marsh. (Ky.) 203; *Williams v. Rogers*, 14 Bush (Ky.) 776; *Howe v. Thayer*, 17 Pick. (Mass.) 91; *Hixon v. Pixley*, 15 Nev. 475; *Freeman v. Falconer*, 44 N. Y. Super. Ct. 132; *Speer v. Bishop*, 24 Ohio St. 598; *Spaulding v. Ludlow Woolen Mill*, 36 Vt. 150; *Amidown v. Osgood*, 24 Vt. 278; 58 Am. Dec. 171; *In re Krueger*, 2 Low. (U. S.) 66; 5 Nat. Bankr. Reg. 438; *Jordan v. Smith*, 12 Up. Can., Q. B. 590; *Lacy v. Woolcott*, 2 Dow. & Ry. 458; *Williams v. Keates*, 2 Stark. 290; *Emmet v. Butler*, 7 Taunt. 600; *Stables v. Eley*, 1 Car. P. 614.

Where a person who is doing business under a firm name sold such business to his son, who carried it on in the same name, no notice of dissolution having been given, a former dealer with the father, without knowledge of

the change, can hold the father. *Elverson v. Leeds*, 97 Ind. 336; 49 Am. Rep. 458.

A retiring partner is liable on a note, executed in the firm name by the remaining partner after dissolution, although the plaintiff knew the fact of dissolution at the date of taking the note, where the defendant had suffered his name to continue in the firm. *Brown v. Leonard*, 2 Chitty 120.

3. See *infra*, this title, *Powers and Rights of Partners; Surviving Partners; Winding Up and Distribution; Dissolution*.

The dissolution of a law partnership does not dissolve the relation to the client, and the client may look to both partners for the performance of a duty confided to the firm. *McCoon v. Galbraith*, 29 Pa. St. 293.

4. *Conwell v. McCowan*, 81 Ill. 285; *Smith v. Sheldon*, 35 Mich. 42; 24 Am. Rep. 529; *Burnside v. Fetzner*, 63 Mo. 107; *Millerd v. Thorn*, 56 N. Y. 402; *Colgrove v. Tallman*, 67 N. Y. 95; 23 Am. Rep. 90.

5. *Stone v. Chamberlin*, 20 Ga. 259; *McNeal v. Blackburn*, 7 Dana (Ky.) 170; *Hoopes v. McCan*, 19 La. Ann. 201; *Barber v. Gillson*, 18 Nev. 89; *Bell v. Hall*, 5 N. J. Ep. 477; *Wilde v. Jenkins*, 4 Paige (N. Y.) 481; *Thurber v. Corbin*, 51 Barb. (N. Y.) 215; *Thurber v. Jenkins*, 36 How. Pr. (N. Y.) 66; *Maier v. Canavan*, 8 Daly (N. Y.) 272; *Savage v. Putnam*, 32 N. Y. 501; *Millerd v. Thorn*, 56 N. Y. 402; *Palmer*

sale of an interest to a third party, and he is received into the firm as a partner, the withdrawing partner occupies the position of surety for the firm debts to the extent of the assets, such assets being held by the new firm in trust for the payment of the debts of the old one.¹ So, though the purchaser has agreed to assume the share of the liabilities of the firm belonging to the withdrawing partner, such partner will occupy a like position,² and if he is compelled to pay firm indebtedness he is entitled to be subrogated to all rights of and to all securities held by or for

v. Purdy, 83 N. Y. 144; *Morrison v. Perry*, 11 Hun (N. Y.) 33; *Dodd v. Dreyfus*, 17 Hun (N. Y.) 600; 57 How. Pr. (N. Y.) 319; *Mathews v. Colburn*, 1 Strobh. (S. Car.) 258; *Johnson v. Young*, 20 W. Va. 614; *Gates v. Huges*, 44 Wis. 332; *Brikett v. McGuire*, 31 Up. Can., Com. Pl. 430; *Colgrove v. Tallman*, 67 N. Y. 95; *Oakeley v. Pasheler*, 10 Bligh New Par. R. 548, 590; *Millerd v. Thorn*, 56 N. Y. 402; *Savage v. Putnam*, 32 N. Y. 501; *Kinney v. McCullough*, 1 Sandf. Ch. (N. Y.) 370; *Highland v. Highland*, 5 W. Va. 63. And see *Gordon v. Joslin*, 4 Hayw. (Tenn.) 115; *Morss v. Gleason*, 64 N. Y. 204; *Bays v. Conner*, 105 Ind. 415.

Where a person carrying on a business takes in a partner and transfers his assets and stock in trade to the firm in consideration of an agreement of the firm to assume and pay certain specified debts incurred in the business and to apply the assets first in payment of said debts, the agreement is to be deemed as made for the benefit of the creditors holding the claims specified, and any such creditor may maintain an action against the firm upon such agreement. *Arnold v. Nichols*, 64 N. Y. 117.

Where a partner who has become a surety for the firm is compelled to pay its debts, he is entitled to come in as a creditor and be subrogated to the rights of the creditor whom he paid. *Merrill v. Green*, 55 N. Y. 270. Though a partner who has paid a firm debt is not generally entitled to subrogation against his co-partner until after the settlement of their partnership accounts. *Fessler v. Hickernell*, 82 Pa. St. 150.

The retiring partner thereby becomes a creditor at large of the continuing one, and as such is entitled to file a bill to impeach a fraudulent conveyance of land in which his former co-partner was interested.

Highland v. Highland, 5 W. Va. 63.

If the retiring partner is compelled to pay a debt of the firm he can set it off against the continuing partner's claim against him. *Rogers v. Maw*, 10 M. & W. 444, or sue them in assumpsit. *Shamburg v. Abbott*, 112 Pa. St. 6; *Hupp v. Hupp*, 6 Gratt. (Va.) 310.

If the continuing partner, who has agreed to pay the debts, goes into bankruptcy, the retired partner can prove his claim as surety as the holder of a contingent claim, and hence, if he fails to do so, the claim is discharged by a discharge in bankruptcy of the debtor. *Fisher v. Tift*, 127 Mass. 313; *Berry v. McLean*, 11 Md. 92; *Fisher v. Tift*, 12 R. I. 56; 18 Am. Law Reg. N. S. 9.

1. *Morss v. Gleason*, 64 N. Y. 204; *Savage v. Putnam*, 32 N. Y. 501; *Ketchum v. Durkee*, Hoffm. Ch. (N. Y.) 538.

If a person purchases property subject to partnership debts, of a member of a firm and agrees in writing to assume and pay such debts, as a part of the purchase price the purchaser thereby recognizes the equitable lien of the partnership creditor and the creditors may file a bill to compel such payment without first putting their claims in judgment. *Eakin v. Knox*, 6 S. Car. 14.

If the continuing partners misapply the assets they are individually bound to reimburse the retiring partner for his payments. *Peyton v. Lewis*, 12 B. Mon. (Ky.) 356.

2. *Coleman v. Lansing*, 61 Barb. (N. Y.) 54.

To entitle one partner to recover at law of another for his proportion of the debts of the firm paid by him after dissolution, it must appear that such other partner was notified of such payment before suit. *Dakin v. Graves*, 48 N. H. 45.

the creditor paid.¹ If a firm creditor with knowledge of these facts makes a valid agreement with the principal debtor to extend the time of payment, he thereby discharges his surety.² There are many American cases, however, which agree with the prevalent English doctrine that mere knowledge on the part of the creditor of the new arrangement does not make him a party to it, and that their relationship toward him cannot be changed without his consent.³

a. EFFECT ON THE FIRM'S SURETIES.—It is a fundamental principle of the law of suretyship that any act on the part of the principal creditor, which alters the risk of the surety without his consent, discharges him from future liability.⁴ Where a person

1. *Conwell v. McCowan*, 81 Ill. 285; *Johnson v. Young*, 20 W. Va. 614; *Frow's Appeal*, 73 Pa. St. 459; *Scott's Appeal*, 88 Pa. St. 173.

He can, upon being sued, apply to the court to compel the continuing partners to pay the debts. *West v. Chasten*, 12 Fla. 315. And see *Kinney v. McCullough*, 1 Sandf. Ch. (N. Y.) 370; *Croone v. Bivens*, 2 Head (Tenn.) 339. And he is entitled to participate with creditors of the new firm on distribution of its assets in insolvency or bankruptcy. *Frow's Appeal*, 73 Pa. St. 459; *Scott's Appeal*, 88 Pa. St. 173.

A debt which he is compelled to pay will be kept alive for his benefit, or he can have the judgment assigned to him. *Suydam v. Cannon*, 1 Houst. (Del.) 431; *Chandler v. Higgins*, 109 Ill. 602; *Laylin v. Knox*, 41 Mich. 40; *Frow's Appeal*, 73 Pa. St. 459; *Brown v. Black*, 96 Pa. St. 482; *Ætna Ins. Co. v. Wires*, 28 Vt. 93; *Scott's Appeal*, 88 Pa. St. 173.

Where retired partners thus become sureties and the new firm creates a debt, and by collusion with the creditor procures him to recover judgment against them with the new firm, and the retired partners pay part of it in separate sums, they can join in an action against the actual partners. *Abbott v. Johnson*, 32 N. H. 9.

2. *Smith v. Shelden*, 35 Mich. 42; *Millerd v. Thorn*, 56 N. Y. 402; *Arnold v. Camp*, 12 Johns. (N. Y.) 409; *Dodd v. Ross*, 57 How. Pr. (N. Y.) 319; *Waydell v. Luer*, 3 Den. (N. Y.) 410; *Oakeley v. Pasheller*, 10 Bligh N. P. R. 548.

If the outgoing partner requests the creditor to collect his claim of the partner who has become the principal debtor, and he refuses and neglects to do so while the principal is solvent and

able to pay, he cannot after the principal has become insolvent recover the amount of the debt from the partner who has become the surety. *Colgrove v. Tallman*, 67 N. Y. 95.

Where the continuing partners pay a debt due to a creditor of the old firm, they pay as principals and the retiring partner being merely a surety is thereby discharged, such payment giving no right of contribution against him. *Savage v. Putnam*, 32 N. Y. 501.

A discharge in bankruptcy, though voted for by the creditor, does not discharge the surety, as it is not a release, but a discharge by operation of law. *Hill v. Trainer*, 49 Wis. 537; *Ex parte Jacobs*, 10 Ch. App. 211.

3. See *Roberts v. Strang*, 38 Ala. 566; *Mason v. Tiffany*, 45 Ill. 392; *Williams v. Boyd*, 75 Ind. 286; *Aiken v. Thompson*, 43 Iowa 506; *Faulkner v. Hill*, 104 Mass. 188; *Smith v. Shelden*, 35 Mich. 42; 24 Am. Rep. 529; *Hayes v. Knox*, 41 Mich. 529; *Rawson v. Taylor*, 30 Ohio St. 389; 27 Am. Rep. 464; *Whittier v. Gould*, 8 Watts (Pa.) 485; *Umbarger v. Plume*, 26 Barb. (N. Y.) 461; *Ward v. Woodburn*, 27 Barb. (N. Y.) 346; *Morton v. Richards*, 13 Gray (Mass.) 15; *Fisher v. Tift*, 127 Mass. 313.

As to the English rule see *Rogers v. Man*, 15 M. & W. 444; *Wilson v. Lloyd*, L. R. 16 Eq. 60; *Ex parte Jacobs*, 10 Ch. App. 211; *Swire v. Redman*, 1 Q. B. D. 536; *Bedford v. Deakin*, 2 B. Ald. 210.

The retiring partner cannot notify the creditors to sue pursuant to the *Indiana* statute relating to sureties, for the statute applies only to those who were sureties from the beginning. *Fensler v. Prather*, 43 Ind. 119.

4. *Lindley on Part.* 212, citing *Arlington v. Merrick*, 2 Wms. Saund.

becomes surety to a firm, therefore, if no intention to become surety for a fluctuating body appears, the contract will be deemed to be binding upon the surety only so long as the firm remains unchanged, the guaranty instantly ceasing to cover additional acts or credits, either in case of the death or withdrawal of a partner,¹ or of the addition of a new partner,² the surety being liable only to the persons to and for whom he became surety;³ but if it appears that changes in the firm were contemplated at the time of entering into the contract of suretyship, the liability of the surety will continue during the period covered by the contract independent of changes in the persons composing the concern;⁴ and where the

414; *Lloyd v. Blackburn*, 9 M. & W. 362; *Rex v. St. Martins*, 2 A. & E. 655. And see *Louderbach v. Lilly*, 75 Ga. 855.

Where a bond for an employee's fidelity runs to A B & C and their successors as governors of a society, and the society afterwards becomes incorporated, the bond is no longer binding. *Danse v. Gridler*, 1 B. & P. N. R. 34.

Where a firm contracted a debt, and subsequently dissolved, and thereafter, with notice of the dissolution, the creditors accepted the individual drafts of one of the partners for the debt, and extended the time of payment, without the knowledge or consent of the retiring partner, the latter was thereby released from such debt. *Louderback v. Lilly*, 75 Ga. 855.

1. *Holland v. Teed*, 7 Hare 50; *Strange v. Lee*, 3 East 484; *Weston v. Barton*, 4 Taunt. 673; *Pemberton v. Oakes*, 4 Russ. 154; *Simson v. Cooke*, 1 Bing. 452; *Chapman v. Beckington*, 3 Q. B. 703; *Backhouse v. Hall*, 6 N. R. Q. B. 98; *Myers v. Edge*, 7 T. R. 254; *Dry v. Davey*, 10 A. & E. 30; *Solvency Mut. Guarantee Co. v. Freeman*, 7 H. & N. 17.

A letter of guaranty asking advances to S. & H. H. does not cover advances to each separately, but only those on partnership account, and is revoked by dissolution. *Cremer v. Higginson*, 1 Mason (U. S.) 323; *Bill v. Barker*, 16 Gray (Mass.) 62.

A surety for a firm on an appeal bond is not the surety of individuals, nor bound by a judgment against one of them and in favor of the rest. *Grieff v. Kirk*, 17 La. Ann. 25; *McCloskey v. Wingfield*, 29 La. Ann. 141.

2. *Barnett v. Smith*, 17 Ill. 565; *Parhan Sewing Mach. Co. v. Brock*, 113 Mass. 194; *Barns v. Barrow*, 61 N. Y. 39; *Sollie v. Meugy*, 1 Bailey (S.

Car.) 620; *Stevenson v. McLean*, 11 Up. Can. C. P. 208; *Wright v. Russell*, 2 Wm. Black. 934; *Spiers v. Houston*, 4 Bligh N. R. 515; *Pemberton v. Oakes*, 4 Russ. 154.

Where a guaranty runs to one person, and the obligation is incurred by both such person and his partner, neither the promisee nor his firm can recover. *Sollie v. Meugy*, 1 Bailey (S. Car.) 620.

A person who becomes surety to a corporation, for the conduct of one of its servants, would be discharged by the amalgamation of that corporation with another, for the two together would be a different body from either of its amalgamated members. *Lindley on Part.* 214.

3. See *Greer v. Bush*, 57 Miss. 575; *Sollie v. Meugy*, 1 Bailey (S. Car.) 620; *Stevenson v. McLean*, 11 Up. Can. C. P. 208.

A mere change of name of a firm does not discharge the surety. *Shine v. Central Sav. Bank*, 70 Mo. 524.

4. *Pease v. Hirst*, 10 B. & C. 122; *Metcalf v. Bruin*, 12 East 400; 2 Camp. 422; *Barclay v. Lucas*, 1 T. R. 291, n.; 3 Doug. 321; *Chapman v. Beckington*, 3 Q. B. 703. And see *Kipling v. Turner*, 5 B. & Ald. 261; *Pariente v. Lubbock*, 8 De G. M. & G. 5.

A guaranty of all debts that A should owe to a bank, for assistance to enable him to carry on business, includes a debt incurred by him while trading in partnership. *Bank of British North America v. Cubillier*, 14 Moo. P. C. 187.

A bond to pay any and every indebtedness now existing or which may hereafter in any manner be incurred includes a note of his firm to the obligee. *Singer Mfg. Co. v. Allen*, 122 Mass. 467.

A mortgage by A, to M and S, con-

promise is in the form of negotiable paper it is deemed to have been intended to inure to indorsees of the paper.¹

The same doctrine applies in cases where a third person becomes surety for the conduct of the firm, the contract being instantly extinguished as to future acts either by the withdrawal² or by the addition³ of a partner. A surety is liable for the acts of an agent appointed by the principal debtor, however, the agent differing from a partner in that he is not also a principal.⁴

tioned to secure M and S for liabilities incurred by them as sureties for A, includes not only his liabilities to them it also to each separately, and to those incurred by their survivor. *National Bank v. Biglew*, 83 N. Y. 51.

A bond to pay all indebtedness does it cover a debt incurred for the benefit another by becoming surety. *Donley Bank*, 40 Ohio St. 47.

Parol evidence is not competent to show that a mortgage to cover subsequent purchases was intended to cover goods bought by a subsequent partnership. *Parks v. Parker*, 50 Mich. 57; *Hilds v. Walker*, 2 Allen (Mass.) 259. It is admissible to show that a mortgage to one member of a firm individually to secure payment for goods to be sold by him was made in contemplation of sales by the firm. *Ball v. Tay*, 131 Mass. 192.

1. See *Greer v. Bush*, 57 Miss. 575; *Wulles v. De Forrest*, 19 Conn. 190; *Case v. Hirt*, 10 B. & C. 122; 5 M. & W. 88.

A judgment was confessed by D, in favor of a firm consisting of A, B and C, to secure future advances. Three years afterwards C withdrew from the firm, A and B purchasing his interest. The new firm continued to make advances, charging them, and giving credit for payments, etc., as before, no change being made in the books. The judgment was entered up by A and B, and was the first lien on D's land. *Weld*, that the judgment secured the advances made by both the old and the new firm. *Shenk's Appeal*, 33 Pa. St. 11.

2. *Bank of Scotland v. Christie*, 8 L. & Fin. 214; *Simson v. Cooke*, 1 Bing. 452; *University of Cambridge v. Baldwin*, 5 M. & W. 580; *Backhouse v. All*, 6 Best & S. 507. And see *McCloskey v. Wingfield*, 29 La. Ann. 141; *Rieff v. Kirk*, 17 La. Ann. 25; *Starrs*

Cosgrave, 12 Duval (Can.) 571; *Connecticut etc. Ins. Co. v. Bowler*, 1 Holmes (U. S.) 263.

A bond to repay advances by five persons or any of them as bankers does not cover advances by the four survivors as bankers after the death of one, the words "or any of them" meaning any on behalf of all five. *Weston v. Barton*, 4 Taunt. 673.

A bond to hold B harmless for all notes of a person indorsed by the firm of S M & G does not include notes signed by them after dissolution, unless such notes were given for the purpose of winding up; but their liability for such notes is a liability as partners rather than as individuals. *New Haven Co. Bank v. Mitchell*, 15 Conn. 206.

3. See *First Nat. Bank v. Hall*, 101 U. S. 43; *First Nat. Bank v. Tarbox*, 38 Hun (N. Y.) 57; *Donley v. Bank*, 40 Ohio St. 47; *Bell v. Norwood*, 7 La. 95; *Russell v. Perkins*, 1 Mason (U. S.) 368; *Shaw v. Vandusen*, 5 Up. Can., Q. B. 353; *Bellairs v. Ebsworth*, 3 Camp. 53; *London Assur. Co. v. Bold*, 6 Q. B. 514; *Montefiori v. Lloyd*, 15 C. B., N. S. 203.

Where an agent takes in a partner, and the firm becomes his successor and gives a bond for the proper performance of their duties they cannot charge the surety by assuming a debt of the former agent. *Ball v. Watertown F. Ins. Co.*, 44 Mich. 137. And see *Cochrane v. Stewart*, 63 Mo. 424.

4. *Palmer v. Bagg*, 56 N. Y. 523; *Hayden v. Hill*, 52 Vt. 259; *Montefiori v. Lloyd*, 15 C. B., N. S. 203.

Where an agent takes in a partner, but the principal never recognizes the partner as his agent, but deals with his former agent alone, the surety is bound by the agent's default, as such agent was at liberty to employ such means as he chose to assist him. *Palmer v. Bagg*, 56 N. Y. 523; *Hayden v. Hill*, 52 Vt. 259. And see *Roberts v. Griswold*, 35 Vt. 496; *Hansom v. Dodge*, 134 Mass. 273; *Kuhn v. Abat*, 2 Martin, N. S. (La.) 168.

In *Roberts v. Griswold*, 35 Vt. 496,

In case of the giving of credits or the performance of acts for which the surety would have been liable but for the change, both before and after such change took place, general payments thereafter made without appropriation will be applied to items of indebtedness incurred before the change, thus reducing the surety's liability.¹

XIX. PROVISIONS FOR CONTINUANCE AFTER DEATH.—A direction in the will of a partner for the continuance of the partnership after his death is dependent upon the consent of the surviving partner or partners, both as to the continuance and as to the substitution of the executor as partner, to give it effect.² It is competent, however, for partners to agree that the death of one of their number shall not terminate the partnership or necessitate a winding up;³ but such an agreement must appear in express and unambiguous

where R. was employed as an attorney, and G. guaranteed the payment of his fees, and R. afterwards went into partnership with C. another attorney, and subsequently performed the services, and R. sued upon the guaranty, it was held that the defendant was not discharged because C. was to share the fees.

1. *Cremer v. Higginson*, 1 Mason (U. S.) 323; *Strange v. Lee*, 3 East 484; *Pemberton v. Oakes*, 4 Russ. 154; *Bank of Scotland v. Christie*, 8 Cl. & Fin. 214; *Spiers v. Houston*, 4 Bligh, N. R. 115.

2. *Exchange Bank v. Tracy*, 77 Mo. 594; *Wilson v. Simpson*, 89 N. Y. 619; *White v. Gardner*, 37 Tex. 407; *Davis v. Christian*, 15 Gratt. (Va.) 11.

It is also dependent upon the consent of the executor. *Wild v. Davenport*, 48 N. J. L. 129.

A direction in a will to continue business for two years, or for such further time as may be necessary to close up without injury, empowers the surviving partner to enter into a partnership contract after the expiration of the two years, if the creditors and distributees do not object. *Brasfield v. French*, 59 Miss. 672.

3. *Vincent v. Martin*, 79 Ala. 540; *Blodgett v. American Nat. Bank*, 49 Conn. 9; *Pitkin v. Pitkin*, 7 Conn. 307; 18 Am. Dec. 111; *Powell v. Hopson*, 13 La. Ann. 626; *Stanwood v. Owen*, 14 Gray (Mass.) 195; *Edwards v. Thomas*, 66 Mo. 468; *Nave v. Sturges*, 5 Mo. App. 557; *Exchange Bank v. Tracy*, 77 Mo. 594; *Gibson v. Stevens*, 7 N. H. 352; *Ballantine v. Frelinghuysen*, 38 N. J. Eq. 266; *In re Laney* (Supreme Ct.), 2 N. Y. Supp. 443; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Alexander v.*

Lewis, 47 Tex. 481; 51 Tex. 578; *Kottwitz v. Alexander*, 34 Tex. 689; *Davis v. Christian*, 15 Gratt. (Vt.) 11.

In *Exchange Bank v. Tracy*, 77 Mo. 594, it was doubted whether a continuation of the partnership business after the death of a partner could be accurately termed a continuation of the old partnership. See also *Pitkin v. Pitkin*, 7 Conn. 315; 18 Am. Dec. 111. And in *Gibson v. Stevens*, 7 N. H. 352, it was doubted whether, if the business was carried on by a single survivor it could be considered as a partnership at all. And see also *Kershaw v. Matthews*, 2 Russ. 62.

An agreement to continue a firm after the death of a member is valid, and the survivors have the power to assign for the benefit of creditors. The agreement is unaffected by Rev. Stat. *Maine*, ch. 69, § 1, providing that the administrator of a deceased partner shall include the partnership assets in his inventory, and in a certain event administer it. *In re Shaw's Estate*, 81 Me. 207.

The executors have no right to dissolve or retire because the surviving partner acts contrary to their advice, and an injunction cannot be issued against him, even though the continuance of the business was, by the partnership agreement, to be subject to their advice and inspection. *Gratz v. Bayard*, 11 S. & R. (Pa.) 41.

In *Laney v. Laney*, 6 Dem. (N. Y.) 241, it was held that a provision in a partnership agreement that the firm shall not be dissolved by the death of a member within a certain time, but that the survivors may continue the business, is void as an attempt to abrogate the intestate laws.

terms, and will not be drawn from inference or implication,¹ the fact that the profits of the business depend upon skill rather than capital tending to exclude a construction in favor of continuance.²

While a testator has the power either to render his entire estate liable for the payment of business debts contracted after his death,³ or to restrict the liability to the capital already put into the partnership, exempting the rest,⁴ nothing but the most clear and unambiguous language demonstrating in the most positive manner that the testator intended to make his general assets liable for all debts contracted in the continued trade will justify such a conclusion.⁵ A provision in the will or in the articles that the business is to be continued, or that his capital is to remain, not being sufficient to affect that part of the estate not already embarked in the partnership,⁶ though in a partnership having trans-

1. *Berry v. Folkes*, 60 Miss. 576; *Kirkman v. Booth*, 11 Beav. 273; *Alexander v. Lewis*, 47 Tex. 481; *Exchange Bank v. Tracy*, 77 Mo. 594; *Gratz v. Bayard*, 11 S. & R. (Pa.) 41.

A mere option in the articles giving the surviving partner, in the event of the death of either, a right to continue or not as he chooses, is void for want of mutuality. *Hart v. Anger*, 38 La. Ann. 341.

Under a will, making the survivor the executor of the deceased partner and authorizing him to use the residue of the estate in the business until wanted for distribution, it was held that this did not authorize a prolongation of the business, and that the executor should settle the partnership affairs with reasonable diligence notwithstanding the clause. *In re Clap*, 168 (U.S.).

The provision in the articles for the continuance of a partnership, after the death of a partner, does not cover branch business in a different city subsequently undertaken and not contemplated at the time of the formation of the partnership. *Carroll v. Alston*, 1 S. Car. 7.

A power given to an executor in a will to manage and invest the estate of the deceased partner at discretion, is not a power to continue the estate in firm partnership. *Citizens' Mut. Ins. Co. v. Ligon*, 59 Miss. 305.

2. *Carroll v. Alston*, 1 S. Car. 7.

3. *Davis v. Christian*, 15 Gratt. (Va.) 1; *Laughlin v. Lorenz*, 48 Pa. St. 275. In *Ballantine v. Frelinghuysen*, 38 N. J. Eq. 266, it was held that a direction to continue the testator's interest in the firm includes his individual real

estate and buildings which are used by and essential to the firm; and also private real estate upon which buildings had been erected with partnership funds.

4. *Pitkin v. Pitkin*, 7 Conn. 307; 18 Am. Dec. 111; *Jones v. Walker*, 103 U. S. 444; *Burwell v. Cawood*, 2 How. (U. S.) 500; *Ex parte Garland*, 10 Ves. 110; *Thompson v. Andrews*, 1 Myl. & K. 116.

The liability of the estate of a deceased partner to persons who become creditors after his decease, is subject to its liability to those who were its creditors at his decease. These last must first be paid. *Lindley on Part.* 1063.

5. *Burwell v. Cawood*, 2 How. (U. S.) 500; *Pitkin v. Pitkin*, 7 Conn. 307; 18 Am. Dec. 111; *Brasfield v. French*, 59 Miss. 632; *Lucht v. Behrens*, 28 Ohio St. 231; *Cook v. Rogers*, 3 Fed. Rep. 69; 8 Am. Law Rec. 641; *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, 3 Madd. 138; *Skirving v. Williams*, 24 Beav. 275; *Kirkman v. Booth*, 11 Beav. 273. And see *Jacquín v. Buisson*, 11 How. Pr. (N. Y.) 385; *Stewart v. Robinson*, 115 N. Y. 328; *Delamater v. Hepworth*, 115 N. Y. 664.

An executor of one partner, continuing the business with the survivor as directed by will, is not personally liable for debts previously contracted, and the surviving partner has no implied authority to bind him for such debts. *Mattison v. Farnham*, 44 Minn. 95.

6. *Vincent v. Martin*, 79 Ala. 540; *Brasfield v. French*, 59 Miss. 632; *Wild v. Davenport*, 48 N. J. L. 129; *Ballantine v. Frelinghuysen*, 38 N. J. Eq. 266; *Davis v. Christian*, 15 Gratt. (Va.) 11;

ferrable shares providing that death shall not work a dissolution nor entitle the representatives to an accounting, but that they should simply succeed to the rights of the decedent, the whole estate is subjected to the liability of a partner.¹ Under a positive direction in a will that the legatee shall continue the partnership, he must take the legacy, if at all, upon the terms upon which it was given,² and a direction or an authority to continue a business extends only to a continuance upon the same terms and with the same partners as before,³ though if the firm is then engaging in some undertaking or practice outside the scope of its business, such undertaking or practice cannot be continued by the executor.⁴

It is within the power of a court of equity to authorize the continuance of a partnership business for the benefit of infant children of a deceased partner, if the survivors consent;⁵ but this, like

In re Clapp, 2 Low. (U. S.) 168; *Burwell v. Cawood*, 2 How. (U. S.) 560; *Cook v. Rogers*, 3 Fed. Rep. 69; 8 Am. Law Rec. 641; *McNeillie v. Acton*, 4 De G. M. & G. 744. See also *Stanwood v. Owen*, 14 Gray (Mass.) 195; *Butcher v. Hepworth*, 115 N. Y. 328; *Ex parte Richardson*, 3 Madd. 79. But see *Laughlin v. Lorenz*, 48 Pa. St. 275.

Where articles of co-partnership provided that the business should be conducted with a capital not exceeding a certain sum, furnished by one partner, and that upon the death of either partner "the business shall be conducted by the survivor" for a specified period, decedent's estate to receive and bear the same share of the profits and losses "as would have been received and borne by the deceased partner, had he lived," it was held that on the death of the partner who furnished the capital his general estate was not liable for debts contracted by the firm during the specified period after his death. *Stewart v. Robinson*, 115 N. Y. 328; *Delamater v. Hepworth*, 115 N. Y. 664.

1. *Blodgett v. American Nat. Bank*, 49 Conn. 9; *Phillips v. Blatchford*, 137 Mass. 510. And see *Kottwitz v. Alexander*, 34 Tex. 689; *Stanwood v. Owen*, 14 Gray (Mass.) 195.

Notice of Dissolution on Final Discontinuance.—If business is commenced under a provision for continuing it after the death of a partner, dealers with the continued firm are entitled to notice of a second dissolution, and will be entitled to hold the estate as well as the survivors upon any contract made with reference to it, if such notice is not given. *Watterson v. Patrick* (Pa. 1885), 1 Atl. Rep. 602.

If the parties refuse to continue, however, no notice is necessary. *Edgar v. Cook*, 2 Ala. 588.

2. *Nave v. Sturges*, 5 Mo. App. 557; *Crawshay v. Maule*, 1 Swanst. 492; *Page v. Cox*, 10 Hare 163.

Where the legatees permit the surviving partner to continue the business pursuant to a request in the will of the deceased partner, and the survivor does continue, the legatees hold under the will. *Tillotson v. Tillotson*, 34 Conn. 335.

Where a will directs that the testator's capital shall continue in the business for a certain time, the executors cannot recover it from the survivor during that time when not wanted to pay debts; nor can they require security for its payment from the surviving partner. *Vernon v. Vernon*, 7 Lans. (N. Y.) 492.

3. *Smith v. Ayer*, 101 U. S. 320; *Berry v. Folkes*, 60 Miss. 576. And see *Alexander v. Lewis*, 47 Tex. 481.

In *Watterson v. Patrick* (Pa. 1885), 1 Atl. Rep. 602, it was held that authority to continue a business which consisted in dealing in scrap iron, included power to carry on a rolling mill to manufacture the scrap iron.

Authority in executors to form the partnership into a corporation and receive stock in place of the testator's interest, authorizes the executors to act in the formation of the corporation and to convey to it the testator's interest, including private property used by and essential to the business of the firm. *Ballantine v. Frelinghuysen*, 38 N. J. Eq. 266.

4. *Nat. Bank v. Bigler*, 83 N. Y. 51.

5. *Powell v. North*, 3 Ind. 392; 56

a continuance under a will, implicates no part of the estate except that actually embarked in the partnership.¹

Profits earned by a partnership during its continuance after the death of a member are applicable to subsequent partnership debts, though that part of the estate not embarked in the partnership is exempt from liability.² The share belonging to the estate, however, is an asset for which the executor is accountable and his bond responsible.³

Where the will of a partner or the articles of co-partnership provide for continuance after death and it is so continued, third persons must take notice of the power of the partners in the continued firm to bind the estate of the decedent,⁴ and notice of the dissolution of the continued firm is as necessary as in other cases.⁵

XX. POWERS AND RIGHTS OF PARTNERS AFTER DISSOLUTION.—A partnership, notwithstanding its dissolution, continues to exist so far as may be necessary for the winding up of its business.⁶ But

Am. Dec. 513; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619; *Cock v. Carson*, 45 Tex. 429. And see *Dowling v. Gally*, 33 La. Ann. 893.

The withdrawal from the firm business of a part or the whole of his share of intestate's capital as an heir, will diminish *pro tanto* the amount of profits made after intestate's death to which he would be entitled. *Robinson v. Simmons*, 146 Mass. 167.

1. *Cock v. Carson*, 45 Tex. 429.

2. *Gratz v. Bayard*, 11 S. & R. (Pa.) 41.

If a partnership is continued under a will for the benefit of a person for life with remainder to others, the life tenant who gets the benefit of a profitable year, cannot throw the whole loss of a losing year upon the capital at the expense of the remaindermen. *Gow v. Forrester*, 26 Ch. Div. 672.

3. *Gandolfo v. Walker*, 15 Ohio St. 251; *Cook v. Collingridge*, Jac. 607; *Giblet v. Read*, 9 Mod. 459; *Palmer v. Mitchell*, 2 Myl. & K. 672, note.

Where a testator bequeathes the residue of his personal property without specific description, or in other words, indicating an intention that it shall be enjoyed *in specie* and the property is invested in a commercial partnership in which it is directed by the testator to remain, but not for the purpose of a lasting investment, the amount received upon the winding up of the partnership, is to be distributed between the life tenant and the remainderman by computing what sum if received at the death of the testator, adding interest

with annual rests, would produce the amount afterwards actually received from the partnership, and by investing the original sum, so computed, as principal, and distributing the residue as income. *Westcott v. Nickerson*, 120 Mass. 410.

A testator by his will directed the trustees to hold the residue of his property invested as they received it, and at their discretion to sell or exchange it. He was, at the time, a member of the partnership, the articles of which provided that if any member should die, his executors should be entitled to his share of the profits up to the time of taking the two semi-annual accounts after his death. It was held, that the profits received by the trustees over and above interest on loans which had been made to the members according to the provisions in the articles of co-partnership, should be treated as capital and not as income. *Mudge v. Parker*, 139 Mass. 153.

4. *Burwell v. Cawood*, 2 How. (U. S.) 560; *Alexander v. Lewis*, 47 Tex. 481.

5. *Watterson v. Patrick* (Pa. 1885), 1 Atl. Rep. 602.

6. See *Bender v. Markle*, 37 Mo. App. 234; *Belanger v. Dana*, 52 Hun (N. Y.) 39; *Brown v. Higginbotham*, 5 Leigh (Va.) 583; 27 Am. Dec. 618; *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 Ves. 5; *Crawshay v. Collins*, 15 Ves. 227; *Peacock v. Peacock*, 16 Ves. 57; *Wilson v. Greenwood*, 1 Swanst. 480; *Crawsley v. Maule*, 1 Swanst. 495.

this doctrine cannot be carried further than that a partner has implied authority to bind the firm, so far as may be necessary to settle and liquidate existing demands, and to complete transactions begun but unfinished at the time of the dissolution.¹ A dissolution revokes the power of the partners to bind each other in respect to any new contracts, and restricts it to the settlement of the partnership concerns.² But to accomplish this purpose every partner has full power, unless it is specially limited to one or more, to collect and pay debts, to adjust and settle unliquidated accounts, to make due releases, discharges, receipts and acknowledgments, and to divide the proceeds of the partnership property among the persons entitled thereto;³ and to this end he may in-

Though a partnership for a single transaction, mutually terminates with the completion of the purposes for which it was formed, yet, as between the partners themselves and others, it continues for the purpose of winding up its affairs. *Petrikin v. Collier*, 1 Pa. St. 247.

1. *Lindley on Part.* 412, citing *Lyon v. Haynes*, 5 Man. & Gr. 541; *Smith v. Winter*, 4 M. & W. 461. And see *Butchart v. Dresser*, 4 De G. M. & G. 542; *Ault v. Goodrich*, 4 Russ. 430.

After the dissolution of a firm, one of its members cannot act as the agent of a creditor of the firm, in holding the obligations due the firm as collateral security for a note due from the firm to such creditor, and taking a conveyance of land in settlement of such an obligation; and, in such a case the creditor, in an action on the firm note, is not bound to account for the value of such land, or of such alleged collaterals, where it appears that they were never in his possession, that he never authorized such agent to hold them for him, and never received any payments thereon, and that the land was not conveyed to him, but to such alleged agent. *Bray v. Morse*, 41 Wis. 343.

2. *Chase v. Kendall*, 6 Ind. 304; *Dunlap v. Limes*, 49 Iowa 177; *Hurst v. Hill*, 8 Md. 399; *Ellicott v. Nichols*, 7 Gill (Md.) 85; *Bank of Port Gibson v. Baugh*, 9 Smed. & M. (Miss.) 290; *Sutton v. Dillaye*, 3 Barb. (N. Y.) 529; *Palmer v. Dodge*, 4 Ohio St. 21; *Whitehead v. Bank of Pittsburgh*, 2 W. & S. (Pa.) 172; *Veale v. Hassan*, 3 McCord (S. Car.) 278; *Speake v. White*, 14 Tex. 364; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Bacon v. Hutchings*, 5 Bush (Ky.) 595; *Easter v. Farmers' Nat. Bank*, 57 Ill. 215; *Helm v. Can-*

trell, 59 Ill. 524; *Simmons v. Curtis*, 41 Me. 373; *Hicks v. Russell*, 72 Ill. 230. And see *Bennett v. Buchan*, 61 N. Y. 222; *Mauney v. Coit*, 80 N. Car. 300; *Sanders v. Ward*, 23 Ark. 242; *Payne v. Smith*, 28 Hun (N. Y.) 104.

Where an action is brought against the former partners after dissolution, and one of them is held to bail, and after judgment against both, the bail is compelled to pay the debt, the sureties cannot recover any part from the other partner. *Bowman v. Blodgett*, 12 Met. (Mass.) 308. And see *Palmer v. Dodge*, 4 Ohio St. 21; 62 Am. Dec. 271. Though in resisting an unfounded action against the firm, a partner may procure surety on its behalf in order to prosecute an appeal. *Gard v. Clark*, 29 Iowa, 189.

A power given to a firm as such, is terminated by its dissolution, and cannot be exercised by the members; but not so with the power given them as individuals. *Bank of Mobile v. Andrews*, 2 Sneed (Tenn.) 535.

3. *Robbins v. Fuller*, 24 N. Y. 570; *Heartt v. Walsh*, 75 Ill. 200; *Nickels v. Mooring*, 16 Fla. 76; *Mayor v. Hawkes*, 12 Ill. 298; *Milliken v. Loring*, 37 Me. 408; *Gannett v. Cunningham*, 34 Me. 56; *Drury v. Roberts*, 2 Md. Ch. 157; *Hall v. Clagett*, 48 Md. 225; *Ward v. Barber*, 1 E. D. Smith (N. Y.) 423; *Riddle v. Etting*, 32 Pa. St. 412; *Ruffner v. Hewitt*, 7 W. Va. 585; *Knowlton v. Rud*, 38 Me. 246; *Hilton v. Vanderbilt*, 82 N. Y. 591; *Robbins v. Fuller*, 24 N. Y. 570.

If the firm pays a debt with the note of a third person, guaranteeing its payment, and it proves to be worthless, it may be received back by a partner after dissolution. *Torrey v. Baxter*, 13 Vt. 452.

cur such expenses as are necessary for the collection of debts and the protection and preservation of the property.¹

An authority to sign the firm name in liquidation does not enlarge the powers of the partner so authorized, and does not empower him to issue commercial paper in payment of debts,² or to renew such paper theretofore issued.³ The exemption from liability on negotiable paper or other contracts made in the firm name by one partner may be waived, however, either by previous

1. See *Holloway v. Turner*, 61 Md. 217; *Gard v. Clark*, 29 Iowa 189; *Bradley v. Camp*, Kirby (Conn.) 77; 1 Am. Dec. 13; *White v. Jones*, 14 La. Ann. 692; *Ward v. Barber*, 1 E. D. Smith (N. Y.) 423.

Partners are entitled to charge each other for services rendered the firm after dissolution, necessary to the preservation of the property of the partnership, but not for repairing it. *Stebbins v. Willard*, 53 Vt. 665.

Among the affairs of a dissolved firm was a contract with a person who shipped certain products, the partners were compelled by him to allow a higher than the agreed price for compensation, this being the only means of transportation. It was held on settlement with the other partners that they were entitled to be allowed such higher price, as they had the same right as before dissolution to use their best judgment in incurring such expense. *Tyng v. Thayer*, 8 Allen (Mass.) 391.

In *Kemp v. Coffin*, 3 Greene (Iowa) 190, it was held that a liquidating partner could give a note binding upon the firm for the purpose of releasing partnership property from an attachment.

2. *Bank of Montreal v. Page*, 98 Ill. 109; *Hamilton v. Seaman*, 1 Ind. 185; *Chase v. Kendall*, 6 Ind. 304; *Conklin v. Ogborn*, 7 Ind. 553; *Cronly v. Bank of Kentucky*, 18 B. Mon. (Ky.) 405; *Johnson v. Marsh*, 2 La. Ann. 772; *Perrin v. Keene*, 19 Me. 355; 36 Am. Dec. 759; *Parker v. Macomber*, 18 Pick. (Mass.) 505; *Smith v. Shelden*, 35 Mich. 42; 24 Am. Rep. 529; *Maxey v. Strong*, 53 Miss. 280; *Fellows v. Wyman*, 33 N. H. 351; *Sanford v. Mickles*, 4 Johns. (N. Y.) 224; *Lusk v. Smith*, 8 Barb. (N. Y.) 570; *Mauney v. Coit*, 80 N. Car. 300; 30 Am. Rep. 80; *Foltz v. Pourie*, 2 Desaus. (S. Car.) 40; *Martin v. Walton*, 1 McCord (S. Car.) 16; *Fowler v. Richardson*, 3 Sneed (Tenn.) 508; *White v. Tudor*, 24 Tex. 639; *Haddock v. Crocheron*, 32 Tex. 276; 5 Am. Rep. 244; *Brown v.*

Chancellor, 61 Tex. 437; *Conrad v. Buck*, 21 W. Va. 396; *Fontaine v. Lee*, 6 Ala. 889.

Written authority, given by one partner to another, to sign the firm name at discretion, though it would authorize him to use the firm name in matters not connected with the firm, gives him, after dissolution, no authority to sign any paper whatever. *Cronley v. Bank of Kentucky*, 18 B. Mon. (Ky.) 405.

But where by the articles of dissolution, the liquidating partner was given power to act for the firm to collect and dispose of assets to the best advantage, to compromise and settle claims, and to "meet all the obligations and debts of the co-partnership," he has authority to compensate another partner for attending to an action against the firm. *Leserman v. Bernheimer*, 113 N. Y. 39.

3. *Myatts v. Bell*, 41 Ala. 222; *First Nat. Bank v. Ells*, 68 Ga. 192; *Carter v. Pomeroy*, 30 Ind. 438; *Van Valkenburg v. Bradley*, 14 Iowa 108; *Kemp v. Coffin*, 3 Greene (Iowa) 190; *Long v. Story*, 10 Mo. 636; *National Bank v. Norton*, 1 Hill (N. Y.) 572; *Palmer v. Dodge*, 4 Ohio St. 21; 62 Am. Dec. 271; *Haven v. Goodel*, 1 Disney (Ohio) 26; *Martin v. Kirk*, 2 Humph. (Tenn.) 529; *Hatton v. Stewart*, 2 Lea (Tenn.) 233; *White v. Tudor*, 24 Tex. 639; *Haddock v. Crocheron*, 32 Tex. 276; 5 Am. Rep. 244; *Brown v. Chancellor*, 61 Tex. 437; *Parker v. Cousins*, 2 Gratt. (Va.) 372; 44 Am. Dec. 388.

After an assignment for benefit of creditors by a firm, one member, in the presence of the others, executed a note in the name of the firm, the proceeds of which were paid to the firm's assignee, with the knowledge and consent of all the partners, and used to procure the release of property of the firm which would otherwise have been applied in payment of the firm debts. It was held that the note was that of the firm, which was liable therefor. *Williston*, 9 Mont. 88.

authority or by subsequent ratification, which may be established by parol or inferred from circumstances.¹

1. To Collect Debts.—Each partner has the same power to collect, discharge, release or receipt for debts due the firm after dissolution, as that possessed by a partner in the ordinary conduct of the partnership business.² Nor can such power be revoked or limited by the other co-partners, its exercise being controllable only by the

1. See *Catlin v. Gilders*, 3 Ala. 536; *New Haven County Bank v. Mitchel*, 15 Conn. 206; *Bower v. Douglass*, 25 Ga. 714; *Easter v. Farmers' Nat. Bank*, 57 Ill. 215; *Carter v. Pomeroy*, 30 Ind. 438; *Van Valkenburg v. Bradley*, 14 Iowa 108; *Leonard v. Wildes*, 36 Me. 265; *Swan v. Stedman*, 4 Met. (Mass.) 545; *Yale v. Eames*, 1 Met. (Mass.) 486; *Eaton v. Taylor*, 10 Mass. 54; *Richardson v. Moies*, 31 Mo. 430; *Randolph v. Peck*, 1 Hun (N. Y.) 138; *Graves v. Merry*, 6 Cow. (N. Y.) 701; 16 Am. Dec. 471; *Anderson v. Norton*, 15 Lea (Tenn.) 14; *McElroy v. Melear*, 7 Coldw. (Tenn.) 140; *Kelly v. Crawford*, 5 Wall. (U. S.) 788; *Draper v. Bissell*, 3 McLean (U. S.) 275; *Smith v. Winter*, 4 M. & W. 454.

Mere silence cannot amount to a ratification after dissolution. *Hatton v. Stewart*, 2 Lea (Tenn.) 233.

The statement of a partner "perhaps they will be paid sometime. Hold on, I will see about it," is not a ratification. *Conklin v. Ogborn*, 7 Ind. 553.

Where one partner submits a claim to arbitration, and the other went on with the arbitration, merely saying that he was not to be subjected to any liability in consequence of it, it is not a sufficient ratification of the submission. *McArthur v. Oliver*, 53 Mich. 299.

Where a partner, after dissolution, renews firm notes making the interest usurious and including a separate debt of his own, and his co-partner supposing the note to be a mere renewal at legal interest, promises to pay it, it was held that the ratification was good only as to the amount of the original note with simple interest. *Wilson v. Forder*, 20 Ohio St. 627.

A request by the firm to the bank for permission to renew, does not authorize a partner to renew after dissolution. *Bank of South Carolina v. Humphreys*, 1 McCord (S. Car.) 388. Though if they had agreed with the holder to renew a particular note, such request would be a sufficient ratification. *Richardson v. Moies*, 31 Mo. 430.

2. *Hawn v. Seventy-six Land & Wa-*

ter Co., 74 Cal. 418; *Bradley v. Camp, Kirby* (Conn.) 77; 1 Am. Dec. 13; *Nickels v. Mooring*, 16 Fla. 76; 26 Am. Rep. 709; *Granger v. McGilvra*, 24 Ill. 152; *Major v. Hawkes*, 12 Ill. 298; *Gordon v. Freeman*, 11 Ill. 14; *Gregg v. James*, 1 Ill. 143; *Yandes v. Le-favour*, 2 Blackf. (Ind.) 371; *Combs v. Boswell*, 1 Dana (Ky.) 473; *Lunt v. Stevens*, 24 Me. 534; *Tyng v. Thayer*, 8 Allen (Mass.) 391; *Morse v. Bellows*, 7 N. H. 549; *Gillilan v. Sun Mut. Ins. Co.*, 41 N. Y. 376; *Robbins v. Fuller*, 24 N. Y. 570; *Huntington v. Potter*, 32 Barb. (N. Y.) 300; *Napier v. McLeod*, 9 Wend. (N. Y.) 120; *Ward v. Barber*, 1 E. D. Smith (N. Y.) 423; *Riddle v. Etting*, 32 Pa. St. 412; *Sims v. Smith*, 11 Rich. (S. Car.) 565; *Beckam v. Peay*, 1 Bailey (S. Car.) 121; *Thrall v. Seward*, 37 Vt. 573; *Torrey v. Baxter*, 13 Vt. 452.

A partner to whom, by agreement on dissolution is given power to use the firm name in liquidation of the business, and who has given bond to account for money coming into his hands in settling the business, may discharge a mortgage held as partnership property. *Burhans v. Burhans* (Supreme), 1 N. Y. Supp. 37.

One partner, after dissolution, is empowered to sign the certificate of discharge of a bankrupt debtor. *Ex parte Hall*, 17 Ves. 62.

After the dissolution of a partnership, one of the partners, who has authority to collect the debts may transfer to himself a debt due to the firm. *Oxley v. Willis*, 1 Cranch (C. C.) 436.

After a receiver is appointed, however, a payment by a debtor to a partner knowing of the appointment, is void and not binding upon the other partners. *Manning v. Briskell*, 2 Hayw. (N. Car.) 133.

In *Kirk v. Hiatt*, 2 Ind. 322, it was held that as no new contract can be made after dissolution, no implied power exists to take property in payment of debts, as the receipt of property is not itself a payment, and can only become so by agreement.

court, by injunction and the appointment of a receiver.¹ Even though another partner is appointed by the agreement of dissolution, with the knowledge of the debtor, to collect the debts and wind up the affairs,² or though a third person is so appointed,³ if it does not amount to an assignment, he can bind the firm and discharge the debt by receiving payment. But the discharge of a debt without consideration, or for an individual consideration will not bind a co-partner;⁴ and if a particular debt has been transferred to one partner, a debtor with notice will not be discharged by payment to any one else.⁵

2. Power to Pay Firm Indebtedness.—As each partner has an equitable right to insist upon the application of joint funds to joint indebtedness, each may, after dissolution as before, appropriate such funds as may come to his hands to the satisfaction of their partnership liabilities.⁶ So, either may compromise debts due from the firm,⁷ or authorize an agent of the firm to wind up his agency and adjust accounts with the customers he dealt with.⁸ The liquidating partner is under no obligation to make *pro rata* payments to different creditors; he is at liberty to pay certain creditors preferentially over others if he wishes.⁹

1. Gillilan v. Sun Mut. Ins. Co., 41 N. Y. 376; Cannon v. Wildman, 28 Conn. 472; Granger v. McGilvra, 24 Ill. 152. But see Sims v. Smith, 11 Rich (S. Car.) 565.

That a partner is insolvent and unable to pay private debts does not deprive him of the powers of a partner in winding up, nor impose upon the debtor the obligation of seeing to the application of his payments. Major v. Hawkes, 12 Ill. 298; Heartt v. Walsh, 75 Ill. 200; Gillilan v. Sun Mut. Ins. Co., 41 N. Y. 376.

2. See Gordon v. Freeman, 11 Ill. 14; King v. Smith, 4 C. & P. 108; Arton v. Booth, 4 Moore 192; Thrall v. Seward, 37 Vt. 573.

3. See Gordon v. Freeman, 11 Ill. 14; Bristow v. Taylor, 2 Stark 50; Porter v. Taylor, 6 M. & S. 156.

Conferring such power for the purpose of winding up either upon a partner or upon a third person is not an assignment of the debts. Napier v. McLeod, 9 Wend (N. Y.) 120. But see *contra* Combs v. Boswell, 1 Dana (Ky.) 473. But where one of the partners assumes payment of all the firm's indebtedness and takes exclusive charge of the liquidation, leaving no power in the other partner to collect the debts due the firm, or to direct in any way as to the settlement of its affairs, it amounts to an absolute transfer. Hilton v. Van-

derbilt, 82 N. Y. 591; Cram v. Cadwell, 5 Cow. (N. Y.) 489. And see Lunt v. Stevens, 24 Me. 534.

4. Lunt v. Stevens, 24 Me. 534; Gram v. Cadwell, 5 Cow. (N. Y.) 489; Sims v. Smith, 11 Rich. (S. Car.) 565; Lemiette v. Starr, 66 Mich. 539.

5. Bank of Montreal v. Page, 98 Ill. 109; Hilton v. Vanderbilt, 82 N. Y. 591; Davis v. Briggs, 39 Me. 304; Gram v. Cadwell, 5 Cow. (N. Y.) 489; Duff v. East India Co., 15 Ves. 198.

Payment to a partner without notice, however, is good. Gillilan v. Sun Mut. Ins. Co., 41 N. Y. 376; Huntington v. Potter, 32 Barb. (N. Y.) 300.

6. Rice v. McMartin, 39 Conn. 573; Schalck v. Harmon, 6 Minn. 265.

7. Cannon v. Wildman, 28 Conn. 472; Bass v. Taylor, 34 Miss. 342; Moist's Appeal, 74 Pa. St. 166; Tutt v. Cloney, 62 Mo. 116. And see Union Bank v. Hall, Harp. (S. Car.) 245.

A partner may lawfully assign to a creditor a demand due to the firm. Milliken v. Loring, 37 Me. 408.

8. Ruffner v. Hewitt, 7 W. Va. 585.

One partner may authorize the debtor of the firm to pay his indebtedness direct to a firm creditor, and his co-partners will be bound. Cannon v. Wildman, 28 Conn. 472.

9. See Smith v. Dennison, 101 Ill. 531. But see Baldwin v. Johnson, 1 N. J. Eq. 441.

3. To Dispose of Firm Property.—For the purposes of winding up, the title to the firm property remains joint,¹ each partner having the power to dispose of the assets, either for the payment of debts or for the purpose of converting them into money for distribution;² though after all the debts have been paid the property then remaining will be held by the partners as tenants in common.³

The power to dispose of the firm's property includes the power to assign debts and accounts due to the firm,⁴ but the power to transfer and dispose of negotiable paper made to the order of the firm is denied by a preponderance of authority, upon the ground that its indorsement constitutes a new contract creating a new obligation, beyond the power of a partner to make, even for the purpose of the payment of existing debts,⁵ though the power to

1. See *Strange v. Graham*, 56 Ala. 614; *Stillwell v. Gray*, 17 Ark. 473; *Yale v. Eames*, 1 Met. (Mass.) 486; *Ober v. Indianapolis etc. R. Co.*, 13 Mo. App. 81; *Murray v. Mumford*, 6 Cow. (N. Y.) 441; *Kinsler v. McCants*, 4 Rich. (S. Car.) 46; 53 Am. Dec. 711; *Rice v. McMartin*, 39 Conn. 573.

When it is provided in the articles of co-partnership that property shall be divided equally on dissolution, it is held by them as tenants in common by force of the contract, and neither can dispose of the interest of the other. *Phillips v. Reeder*, 18 N. J. Eq. 95.

The English Rule.—"The moment the partnership ceases, the partners become distinct persons; they are tenants in common of the partnership property undivided of from that period." *LORD KENYON, J.*, in *Abel v. Sutton*, 3 Esp. 108. And see *Collyer on Part.*, § 545.

2. *Stanton v. Lewis*, 26 Conn. 444; *Beach v. State Ins. Co.*, 64 Iowa 595; *Western Stage Co. v. Walker*, 2 Iowa 504; *Bennett v. Buchan*, 61 N. Y. 222; *Robbins v. Fuller*, 24 N. Y. 570; *Van Doren v. Horton*, 19 Hun (N. Y.) 7; *McClelland v. Remsen*, 23 How. (N. Y.) Pr. 175; *Thursby v. Lidgerwood*, 69 N. Y. 198; *Murphy v. Yeomans*, 29 Up. Can. C. P. 421.

In *Robbins v. Fuller*, 24 N. Y. 570, the court held, that after dissolution, each partner has the same authority as before to dispose of property, and that the right is not lost by the fact that all debts are paid, nor does it depend upon the state of the accounts between the partners as against those having no notice.

In *Miller v. Florer*, 15 Ohio St. 148, it was held that the settling partner

had power to place an asset in a creditor's hands as collateral security, and that a settling partner, who was authorized to borrow, could pledge assets as collateral for the loan, even though he could not give a note.

3. *Hogendobler v. Lyon*, 12 Kan. 276; *Ruckman v. Decker*, 23 N. J. Eq. 283; *Bilton v. Blakely*, 6 Grant's Ch. (Up. Can.) 575. And see *Stair v. Richardson*, 108 Ind. 429.

In *Halstead v. Shepard*, 23 Ala. 558, it was held that, after the firm's business had closed, though without formal dissolution, where a partner sold an overdue note belonging to the firm, with the intent to appropriate the proceeds, and the buyer had notice of the co-partner's interest and rights in the notes, and that the selling partner was insolvent, he must respond to the extent of the firm's interest.

4. See *Stanton v. Lewis*, 26 Conn. 444; *Melliken v. Loring*, 37 Me. 408; *Morse v. Bellows*, 7 N. H. 549; 28 Am. Dec. 372; *Thursby v. Lidgerwood*, 69 N. Y. 198. But see *Stair v. Richardson*, 108 Ind. 429.

One partner may transfer or assign a judgment in favor of the firm and the transfer is binding on the firm, but he cannot bind his co-partners by a covenant in the assignment that the whole of the judgment remains unpaid. *Bennett v. Buchan*, 61 N. Y. 222.

5. *Glasscock v. Smith*, 25 Ala. 474; *Humphries v. Chastian*, 5 Ga. 166; 48 Am. Dec. 247; *Stair v. Richardson*, 108 Ind. 429; *Whitworth v. Ballard*, 56 Ind. 279; *Curry v. Burnett*, 36 Ind. 102; *Boger v. Gueringer*, 14 La. Ann. 483; *Lumbermans' Bank v. Pratt*, 51 Me. 563; *Yale v. Eames*, 1 Met.

transfer and pass title to such paper is distinctly held to exist in one partner in some cases.¹

4. To Create New Indebtedness.—The rule that no new indebtedness can be created by one partner after dissolution is so strictly observed that the borrowing power cannot be exercised, even for the purpose of paying partnership debts;² nor can one partner sign the firm name to negotiable paper, either for an old debt or for a loan, either as maker, drawer, acceptor or indorser,³ nor in

(Mass.) 486; *Fowle v. Harrington*, 1 Cush. (Mass.) 146; *Parker v. Macomber*, 18 Pick. (Mass.) 505; *Bryant v. Lord*, 19 Minn. 396; *Mutual Sav. Inst. v. Enslin*, 37 Mo. 453; *Bredow v. Mutual Sav. Ins.*, 28 Mo. 181; *McDaniel v. Wood*, 7 Mo. 542; *Fellows v. Wyman*, 33 N. H. 351; *Sanford v. Nichles*, 4 Johns. (N. Y.) 224; *Fisher v. Tucker*, 1 McCord Eq. (S. Car.) 169; *Dickerson v. Wheeler*, 1 Humph. (Tenn.) 51; *Tudor v. White*, 27 Tex. 584; *White v. Tudor*, 24 Tex. 639; *Dana v. Conant*, 30 Vt. 246; *Smith v. Winter*, 4 M. & W. 454; *Abel v. Sutton*, 3 Esp. 108.

A note made by a partner to a third person, and indorsed by the latter and given to the settling partner in payment of a debt, can be delivered by the latter to a third person, no indorsement being necessary. *Parker v. Macomber*, 18 Pick. (Mass.) 505.

Where an express authority is given to sell a note, authority is implied to convey title, and an indorsement without recourse is proper as it conveys title and creates no new obligation. *Yale v. Eames*, 1 Met. (Mass.) 486.

1. See *Waite v. Foster*, 33 Me. 424; *Chappell v. Allen*, 38 Mo. 213; *Morse v. Bellows*, 7 N. H. 549; *Lewis v. Reilly*, 1 Q. B. 349; *Smith v. Winter*, 4 M. & W. 454.

Where the indorsee has no notice of dissolution, the indorsement is of course good. *Cony v. Wheelock*, 33 Me. 366.

2. *Hayden v. Cretcher*, 75 Ind. 108; *Bowman v. Blodgett*, 2 Met. (Mass.) 308; *Bank of Port Gibson v. Baugh*, 9 Smed. & M. (Miss.) 290; *Dowzelot v. Rawlings*, 58 Mo. 75; *Payne v. Gardiner*, 29 N. Y. 146; *Sutton v. Dillaye*, 3 Barb. (N. Y.) 529; *Cotton v. Evans*, 1 Dev. & B. Eq. (N. Car.) 284; *Veale v. Hassan*, 3 McCord (S. Car.) 278; *Lee v. Stowe*, 57 Tex. 444; *Kendall v. Riley*, 45 Tex. 20; *Roots v. Mason City S. & M. Co.*, 27 W. Va. 483.

After dissolution of a partnership,

the power of each member is limited to winding up its affairs, and one partner cannot be subjected to liability for use of the money of a third party by his partner, when he himself has derived no advantage from its use and has not ratified the act of his partner in using it. *Dunlap v. Limes*, 49 Iowa 177.

In *Virginia*, if one partner, after dissolution, requests a third person to pay a debt of the firm, such third person, upon compliance, becomes a creditor of the firm. *Brown v. Higginbotham*, 5 Leigh (Va.) 583; 27 Am. Dec. 618; *Peyton v. Strattan*, 7 Gratt. (Va.) 380; *Stebbins v. Willard*, 53 Vt. 665. And see *Lee v. Stowe*, 57 Tex. 444.

In *Butchart v. Dresser*, 4 D. M. & G. 524; 10 Hare 463, it was held that a partner could pledge unpaid-for goods to raise money with which to pay for them.

3. *Fontaine v. Lee*, 6 Ala. 889; *Cunningham v. Bragg*, 37 Ala. 436; *Burr v. Williams*, 20 Ark. 171; *Curry v. White*, 51 Cal. 530; *Macon Bank v. Ells*, 68 Ga. 192; *Humphries v. Chastain*, 5 Ga. 166; 48 Am. Dec. 247; *Bower v. Douglas*, 25 Ga. 714; *Easter v. Farmers' Nat. Bank*, 57 Ill. 215; *Spurck v. Leonard*, 9 Ill. App. 174; *Taylor v. Hillyer*, 3 Blackf. (Ind.) 433; 26 Am. Dec. 430; *Conklin v. Ogborn*, 7 Ind. 553; *Falls v. Hawthorn*, 30 Ind. 444; *Floyd v. Miller*, 61 Ind. 224; *Hayden v. Cretcher*, 75 Ind. 108; *Meritt v. Pollys*, 16 B. Mon. (Ky.) 355; *Cronley v. Bank of Kentucky*, 18 B. Mon. (Ky.) 405; *Montague v. Reakert*, 6 Bush (Ky.) 393; *Turnbow v. Broach*, 12 Bush (Ky.) 455; *Nott v. Douming*, 6 La. 680; *Meyer v. Atkins*, 29 La. Ann. 586; *Lumberman's Bank v. Pratt*, 51 Me. 563; *Perrin v. Kune*, 19 Me. 355; *Hurst v. Hill*, 8 Md. 399; 63 Am. Dec. 705; *Eaton v. Taylor*, 10 Mass. 54; *Fowle v. Harrington*, 1 Cush. (Mass.) 146; *Parham Sewing Mach. Co. v. Brock*, 113 Mass. 194; *Matteson v. Nathanson*, 38 Mich. 377; *Jenness v.*

renewal of prior similar paper issued before dissolution.¹ Paper signed before dissolution cannot be afterwards issued, as it is of

Carlton, 40 Mich. 343; 42 Mich. 110; Goodspeed v. South Bend etc. Plow Co., 45 Mich. 237; Bryant v. Lord, 19 Minn. 396; Brown v. Broach, 52 Miss. 536; Maxey v. Strong, 53 Miss. 280; Richardson v. Moies, 31 Mo. 430; Moore v. Lackman, 52 Mo. 323; Central Sav. Bank v. Mead, 52 Mo. 546; Fellows v. Wyman, 33 N. H. 351; Morrison v. Perry, 11 Hun (N. Y.) 33; Haven v. Goodell, 1 Disney (N. Y.) 26; Gardner v. Conn, 34 Ohio St. 187; Bank v. Green, 40 Ohio St. 431; McCleery v. Thompson, 130 Pa. St. 443; Bank of S. Car. v. Humphreys, 1 McCord (S. Car.) 388; Loomis v. Pearson, Harper (S. Car.) 470; Galliot v. Planters' etc. Bank, 1 McMull. (S. Car.) 209; 36 Am. Dec. 256; Vanzant v. Kay, 2 Humph. (Tenn.) 106; Isler v. Baker, 6 Humph. (Tenn.) 85; Fowler v. Richardson, 3 Sneed (Tenn.) 508; Hatton v. Stewart, 2 Lea (Tenn.) 233; Haddock v. Crocheron, 32 Tex. 276; 5 Am. Rep. 244; Seward v. L'Estrange, 36 Tex. 295; Torrey v. Baxter, 13 Vt. 452; Woodworth v. Downer, 13 Vt. 522; 37 Am. Dec. 611; Miller v. Miller, 8 W. Va. 542; Roots v. Mason City S. & M. Co., 27 W. Va. 483; Lange v. Kennedy, 20 Wis. 279; Draper v. Bissel, 3 McLean (U. S.) 275; Lockwood v. Comstock, 4 McLean (U. S.) 383; *In re* Weaver, 9 Nat. Bankr. Reg. 132; Tombeckbee Bank v. Dumell, 5 Mason (U. S.) 56; Paterson v. Zachariah, 1 Stark. 71; Kilgour v. Finlyson, 1 H. Bl. 155; Heath v. Sansom, 4 B. & Ad. 172. But see to the contrary, Siegfried v. Ludwig, 102 Pa. St. 547.

In *Pennsylvania*, the liquidating partner may borrow on the credit of the firm, for the purpose of paying its debts, and give a note for the purpose. See Davis' Estate, 5 Whart. (Pa.) 530; 34 Am. Dec. 574; Whitehead v. Bank of Pittsburg, 2 W. & S. (Pa.) 172; Houser v. Irvine, 3 W. & S. (Pa.) 345; Robinson v. Taylor, 4 Pa. St. 242; Herberton v. Jepherson, 10 Pa. St. 124; McCowin v. Cubbison, 72 Pa. St. 358; Lloyd v. Thomas, 79 Pa. St. 68; Fulton v. Central Bank, 92 Pa. St. 112; Siegfried v. Ludwig, 102 Pa. St. 547; Prudhomme v. Henry, 5 La. Ann. 700. Or he may renew a note. Fulton v. Central Bank, 92 Pa. St. 112; Earon v. Mackey, 106 Pa. St.

452. Or he may give a note for an outstanding debt, or in settlement of past business. Brown v. Clark, 14 Pa. St. 469; Robinson v. Taylor, 4 Pa. St. 242. The loan in such case being regarded not as a new obligation, but a mere change of creditor.

No other member of the firm, however, has such authority. McCowin v. Cubbison, 72 Pa. St. 358; Lloyd v. Thomas, 79 Pa. St. 68.

The partner who acts as liquidating partner, with the knowledge of the rest, is presumed to do so with their consent, no specific appointment is necessary. Fulton v. Central Bank, 92 Pa. St. 112; Siegfried v. Ludwig, 102 Pa. St. 547.

The renewal by one partner of a partnership note, after dissolution of the partnership, is binding upon the co-partner, if he recognized and consented to it. Sanborn v. Stark, 31 Fed. Rep. 18.

1. Spurck v. Leonard, 9 Ill. App. 174; Merritt v. Pollys, 16 B. Mon. (Ky.) 355; Cronley v. Bank of Kentucky, 18 B. Mon. (Ky.) 405; Lumbermans' Bank v. Pratt, 51 Me. 563; Hurst v. Hill, 8 Md. 399; 63 Am. Dec. 705; Richardson v. Moies, 31 Mo. 430; Central Sav. Bank v. Mead, 52 Mo. 546; National Bank v. Norton, 1 Hill (N. Y.) 572; Bank of South Carolina v. Humphreys, 1 McCord (S. Car.) 388; Planters' etc. Bank v. Galliot, 1 McMull. (S. Car.) 209; 36 Am. Dec. 256; Torrey v. Baxter, 13 Vt. 452; Lange v. Kennedy, 20 Wis. 279.

When on the dissolution of a firm, one of the partners, by agreement, is to wind up its affairs, and account to the others on the basis of their sharing equally in the assets, or equally assuming any deficit, and he, for the purpose of convenience only, takes up an accommodation note of the firm by giving his own note therefor, which he is afterwards obliged to pay, the others will be liable for their proportional share of it. Converse v. Hobbs, 64 N. H. 42.

In *South Carolina*, it is left to the jury to infer from the customs of trade and usages of merchants whether a power to settle the business of the partnership includes the power to use the firm name in the renewal of exist-

no effect until delivered,¹ and the same rule applies to paper antedated, so as to appear perfect, in the hands of a holder with notice.² A partner may waive demand and notice upon paper upon which the firm is an indorser, this not being a new contract, but a mere modification of an existing one,³ though after maturity without demand and notice a partner cannot waive the want of it.⁴ A demand upon one member of a dissolved firm is sufficient to charge an indorser of its paper,⁵ and service of notice of protest upon one partner is all that is required.⁶

So, after dissolution, as before, one partner has no implied power to assign the partnership assets for the benefit of creditors,⁷ or to confess judgment against the firm,⁸ though if one partner has

ing notes. *Myers v. Huggins*, 1 Strobh. (S. Car.) 473.

Liable on Original Consideration.—Where a creditor of the firm of A & B had, after its dissolution, refused to accept the paper of B, and discharge A, his receiving paper in the name of A & B without knowing that it was signed by B alone, without authority, was not such an acceptance and discharge. *Alder v. Foster*, 39 Mich. 87.

1. *Robb v. Mudge*, 14 Gray (Mass.) 534; *Gale v. Miller*, 54 N. Y. 536; *Lansing v. Gaine*, 2 Johns. (N. Y.) 300; *Woodford v. Dorwin*, 3 Vt. 82; 21 Am. Dec. 573; *Glasscock v. Smith*, 25 Ala. 474; *Abel v. Sutton*, 3 Esp. 108; *Parker v. Macomber*, 18 Pick. (Mass.) 505; *Grasswelt v. Connally*, 27 Gratt. (Va.) 19. But see *Chappell v. Allen*, 38 Mo. 213; *Lewis v. Reilly*, 1 Q. B. 349; *Garland v. Jacomb*, L. R., 8 Ex. 216.

But where a firm obtained the name of a third party on a blank note after dissolution, and one partner filled it out and indorsed the firm name and used it to pay a partnership debt, the maker having been compelled to pay it, is entitled to reimbursement from both partners. *Roberts v. Adams*, 8 Port. (Ala.) 297.

2. *Lansing v. Gaine*, 2 Johns. (N. Y.) 300; *Smyth v. Strader*, 4 How. (U. S.) 404. And see *Gale v. Miller*, 54 N. Y. 536.

But not so in the hands of an innocent holder. *Knapp v. McBride*, 7 Ala. 19.

When a bill is duly signed and indorsed before dissolution, and is delivered to an agent or clerk of the firm to fill up the date and negotiate it, his authority to do so is not determined by the death of a partner. *Knapp v. McBride*, 7 Ala. 19; *Usher v. Dauncey*, 4

Camp, 97. And see *Bank of N. Y. v. Vanderhorst*, 32 N. Y. 553.

3. See *Star Wagon Company v. Swezey*, 52 Iowa 394; 59 Iowa 609; *Darling v. March*, 22 Me. 184; *Seldner v. Mt. Jackson Nat. Bank*, 66 Md. 488; *Myers v. Standart*, 11 Ohio St. 29. But see *Mauney v. Coit*, 80 N. Car. 300; 30 Am. Rep. 80.

In *Gilley v. Singleton*, 3 Litt. (Ky.) 249, it was held that service of notice, to take depositions upon one partner after dissolution is sufficient, his co-partners being abroad.

4. *Hart v. Long*, 1 Rob. (La.) 83; *Central Sav. Bank v. Mead*, 52 Mo. 546; *Schoneman v. Fegley*, 7 Pa. St. 433.

5. *Brown v. Turner*, 15 Ala. 832; *Coster v. Thomason*, 19 Ala. 717; *Crowley v. Barry*, 4 Gill (Md.) 194; *Fourth Nat. Bank v. Heuschen*, 52 Mo. 207; *Gates v. Beecher*, 60 N. Y. 518; 19 Am. Rep. 207.

6. *Coster v. Thomason*, 19 Ala. 717; *Slocumb v. Lizardi*, 21 La. Ann. 355; *Nott v. Douming*, 6 La. Ann. 684; *Hubbard v. Matthews*, 54 N. Y. 43; 13 Am. Rep. 562; *Bank of Com. v. Mudgett*, 44 N. Y. 514; *Burnet v. Howell*, 8 Phila. (Pa.) 531.

7. *Egberts v. Wood*, 3 Paige (N. Y.) 517; *Deckert v. Filbert*, 3 W. & S. (Pa.) 454; *Holland v. Drake*, 29 Ohio St. 441; *Mygatt v. McClure*, 3 Head (Tenn.) 495.

8. *Mair v. Beck* (Pa. 1886), 2 Atl. Rep. 218; *Bennett v. Marshall*, 2 Miles (Pa.) 436; *Mitchell v. Richmond*, 1 Ala. 228; *Waring v. Robinson*, Hoffm. Ch. (N. Y.) 524; *Castle v. Reynolds*, 10 Watts (Pa.) 51; *McClerry v. Thompson*, 130 Pa. St. 443; *Canada Lead Mine Co. v. Walker*, 11 Low. Can. 433. But see *Taylor v. Hill*, 36 Md. 494.

sold his interest to a third person the other may assign, the sale being a dissolution and the assignment covering only his interest.¹

After dissolution, as before, the partner incurring the obligation in behalf of the firm is himself bound, whether he succeeds in binding the firm or not.² One member of a dissolved partnership has no power, unless expressly conferred, to retain an attorney to defend the other members in a suit brought against the partnership.³

5. To Revive Old Debts—See also LIMITATION OF ACTIONS, vol. 13, p. 667).—There is but slight difference between reviving an old debt and creating a new one, and it is, therefore, almost universally held that a partner cannot by an acknowledgment or part payment after dissolution revive a debt already barred by the Statute of Limitations so as to render his co-partners liable.⁴ So, the rule has been adopted by a preponderance of authority that such an acknowledgment or part payment will not extend the time of payment of a debt not yet barred by the statute,⁵ though the theory that making payments is included in the power to wind up, and that such an act by a partner in his capacity as an agent for the purpose of winding up, is therefore effectual to prolong

1. *Clark v. Wilson*, 19 Pa. St. 414; *Clark v. McClelland*, 2 Grant's Cas. (Pa.) 31.

2. *Myatts v. Bell*, 41 Ala. 222; *Dean v. Savage*, 28 Conn. 359; *Fowle v. Harrington*, 1 Cush. (Mass.) 146; *Brown v. Broach*, 52 Miss. 536; *Prentiss v. Foster*, 28 Vt. 742; *Ramsbottom v. Lewis*, 1 Camp. 179; *Lumberman's Bank v. Pratt*, 51 Me. 563.

A declaration, alleging that a note was made in the name of the firm by one of the partners after dissolution, except for the purpose of settlement, and given for a pre-existing debt of the firm, does not show a partnership liability, but does show the liability of the partner making the note in his separate capacity. *Fontaine v. Lee*, 6 Ala. 889.

3. *Hall v. Lanning*, 91 U. S. 160; *Bowler v. Houston*, 30 Gratt. (Va.) 266.

4. *Espey v. Comer*, 76 Ala. 501; *Wilson v. Torbet*, 3 Stew. (Ala.) 296; 21 Am. Dec. 632; *Bissell v. Adams*, 35 Conn. 299; *Conkey v. Barbour*, 22 Ind. 196; *Merritt v. Pollys*, 16 B. Mon. (Ky.) 355; *Walsh v. Cane*, 4 La. Ann. 533; *Newman v. McComas*, 43 Md. 70; *Ellicott v. Nichols*, 7 Gill (Md.) 85; *Whitney v. Reese*, 11 Minn. 138; *Graham v. Selover*, 59 Barb. (N. Y.) 313; *Payne v. State*, 39 Barb. (N. Y.) 634; *Van Keuren v. Parmelee*, 2 N. Y. 523; 51 Am. Dec. 322; *Bloodgood v.*

Bruen, 8 N. Y. 362; *Grimes v. Osterhoudt* (Supreme Ct.), 2 N. Y. Supp. 436; *Reppert v. Colvin*, 48 Pa. St. 248; *Kauffman v. Fisher*, 3 Grant's Cas. Pa. 302; *Steele v. Jennings*, 1 McMull. (S. Car.) 297; *Cocke v. Hoffman*, 5 Lea (Tenn.) 105; *Belote v. Wayne*, 7 Yerg. (Tenn.) 534. And see *Burr v. Williams*, 20 Ark. 171; *Fisher v. Tucker*, 1 McCord Eq. (S. Car.) 169; *Conrad v. Buck*, 21 W. Va. 396. But see to the contrary, *Wheelock v. Doolittle*, 18 Vt. 440; 46 Am. Dec. 163; *McIntire v. Oliver*, 2 Hawks (N. Car.) 209; *Merritt v. Day*, 38 N. J. L. 32; *Sage v. Ensign*, 2 Allen (Mass.) 245.

The contrary rule adopted in *North Carolina* and *Vermont* has since been altered by statute, in *Vermont* generally and in *North Carolina* as to claims already barred. See *Carlton v. Coffin*, 27 Vt. 496; *Wood v. Barber*, 90 N. Car. 76.

It is immaterial whether the creditor knew of the dissolution or not; if the debt is barred, the want of notice cannot mislead him. *Tate v. Clements*, 16 Fla. 339.

In *Ex parte Dewdney*, 17 Ves. 499, however, it was held, that payment of a dividend in bankruptcy, by one partner, deprives the other of the benefit of the statute.

5. *Myatts v. Bell*, 41 Ala. 222; *Curry v. White*, 51 Cal. 530; *Tate v. Clem-*

the time as against his co-partners, is ably and extensively maintained.¹ Under the latter theory, such effect can be given to a part payment only when it was made with partnership funds,² and under the former, the assent of the other partners to such acknowledgment or part payment may be shown, thus making it effectual as against all.³

A part payment either by the surviving partner or by the representative of a deceased partner does not affect the other, as they are not joint debtors,⁴ and if one partner has assumed the pay-

ents, 16 Fla. 339; 26 Am. Rep. 709; Kirk v. Hiatt, 6 Ind. 322; Gaudes v. Le-favour, 2 Blackf. (Ind.) 371; Carroll v. Gayarre, 15 La. Ann. 671; Peirce v. Tobey, 5 Met. (Mass.) 168; Gates v. Fisk, 45 Mich. 522; Sigler v. Platt, 16 Mich. 206; Mayberry v. Willoughby, 5 Neb. 368; 25 Am. Rep. 491; Tappan v. Kimball, 30 N. H. 136; Mann v. Locke, 11 N. H. 246; Shoemaker v. Benedict, 11 N. Y. 176; Graham v. Selover, 59 Barb. (N. Y.) 313; Payne v. Slate, 39 Barb. (N. Y.) 634; Levy v. Cadet, 17 S. & R. (Pa.) 126; 17 Am. Dec. 650; Wilson v. Waugh, 101 Pa. St. 233; Fortune v. Hayes, 5 Rich. Eq. (S. Car.) 112; Meggett v. Finney, 4 Strobb. (S. Car.) 220; Muse v. Donelson, 2 Humph. (Tenn.) 166; 36 Am. Dec. 309; Had-dock v. Crocheron, 32 Tex. 276; 5 Am. Rep. 244; Carlton v. Coffin, 27 Vt. 496; Conrad v. Buck, 21 W. Va. 406; Conk-hite v. Herrin, 15 Fed. Rep. 888; Wat-son v. Woodman, L. R. 20 Eq. 721.

In an action on a debt contracted by a partnership, which was subsequently dissolved, one of the partners assuming all the debts of the firm, the retiring partner pleaded the statute of limita-tions. The court, at the request of de-fendant, charged the jury that after the dissolution the surviving partner could not bind the other by promise or part payment of the debt. *Held*, that this was not prejudicial error, where the court finally charged that the only ques-tion was whether plaintiff brought this action within six years after he had no-tice of the dissolution. *Chase v. Van-derwerf* (Supreme Ct.), 7 N. Y. Supp. 188.

1. *Burr v. Williams*, 20 Ark. 171; *Beardsley v. Hall*, 36 Conn. 270; 4 Am. Rep. 74; *Bissell v. Adams*, 35 Conn. 299; *Brewster v. Hardeman*, Dudley (Ga.) 138; *Van Staden v. Kline*, 64 Iowa 180; *Greenleaf v. Quincy*, 12 Me. 11; 28 Am. Dec. 145; *White v. Hale*, 3 Pick. (Mass.) 291; *McClurg v. Howard*, 45 Mo. 365; *Casebolt v. Ackerman*, 46

N. J. L. 169; *Merritt v. Day*, 38 N. J. L. 32; 20 Am. Rep. 362; *Willis v. Hill*, 2 Dev. & B. (N. Car.) 231; *Wood v. Barber*, 90 N. Car. 76; *Walton v. Rob-inson*, 5 Ired. (N. Car.) 341; *Houser v. Irvine*, 3 W. & S. (Pa.) 345; 38 Am. Dec. 768. And see *Fisher v. Tucker*, 1 McCord Eq. (S. Car.) 169; *Veale v. Hassan*, 3 McCord (S. Car.) 278; *Turner v. Ross*, 1 R. I. 88; *Mix v. Shat-tuck*, 50 Vt. 421; 28 Am. Rep. 511; *Wheelock v. Doolittle*, 18 Vt. 440.

Where no notice of dissolution has been given and the creditor had no knowledge of it, he might have re-frained from reducing his claim to judg-ment in time in reliance on the part payment as a protection from the statute; thus losing the benefit to his claim. See *Tappan v. Kimball*, 30 N. H. 136; *Kenniston v. Avery*, 16 N. H. 117; *Buxton v. Edwards*, 134 Mass. 567; *Sage v. Ensign*, 2 Allen (Mass.) 245; *Gates v. Fisk*, 45 Mich. 522.

The rule in *Massachusetts* permitting one partner to prolong the time of pay-ment by an acknowledgment, or a part payment, of a debt, has been changed by statute, but the statute does not apply to a creditor without notice of dissolution. *Sage v. Ensign*, 2 Allen (Mass.) 245; *Buxton v. Edwards*, 134 Mass. 567.

Under a statute allowing any part-ner, after dissolution, to compromise for his share of the debt, a compromise will be considered as of an individual account and will not affect the co-part-ner. *Turner v. Ross*, 1 R. I. 88.

2. *Carlton v. Coffin*, 27 Vt. 496; *Shelton v. Cocke*, 3 Munf. (Va.) 191; *Carlton v. Coffin*, 28 Vt. 504; *Mix v. Shattuck*, 50 Vt. 421; 28 Am. Rep. 511; *Conrad v. Buck*, 21 W. Va. 396; *Conk-hite v. Herrin*, 15 Fed. Rep. 888.

3. *Wilson v. Waugh*, 101 Pa. St. 233; *Meggett v. Finney*, 4 Strobb. (S. Car.) 220.

4. See *Stahr v. Lawson*, 1 B. & Ad.

ment of the debts, his part payment will be deemed to have been made on his own behalf.¹ Where a partner revives a debt as to himself but not as to his co-partners, and is obliged to pay it, he cannot require them to contribute to remunerate him,² though if by reason of non-residence the statute does not run against a partner and he is compelled to pay, he can require contribution, even though the statute has barred the debt as to his co-partners.³

There is a well balanced conflict of authority on the question as to the binding effect upon the firm of admissions made by a partner after dissolution with respect to rights or obligations created during the continuance; a large number of well considered cases holding that as the acts, declarations and admissions of an agent made after the termination of his agency are incompetent to affect his principal, so those of a partner are equally incompetent to bind the firm, his agency having been terminated by dissolution;⁴ while about an equal number of equally respectable

396; *Atkins v. Tredgold*, 2 B. & C. 25; *Bloodgood v. Bruen*, 8 N. Y. 362; *Espy v. Comer*, 76 Ala. 501. And see also *infra*, this title, *Surviving Partners*.

This rule applies, even though the surviving partner is also the executor of a deceased partner, for he acts as survivor and not as executor. *Brown v. Gordon*, 16 Beav. 302; *Thompson v. Waithman*, 3 Drew 628.

So the unauthorized payment of a dividend by a receiver will not prolong the time of payment. *Forwood v. Forwood*, 6 Allen (Mass.) 494.

In *Forwood v. Forwood*, 6 Allen (Mass.) 494, it was held that, as a surviving partner is in law the sole debtor, a payment by him after the debt is barred, cannot be complained of by the representatives of the decedent. And see *Vanstaden v. Kline*, 64 Iowa 180.

1. *Watson v. Woodman*, L. R., 20 Eq. 721. And see *Ford v. Clark*, 72 Ga. 760; *Wood v. Barber*, 90 N. Car. 76; *Stewart's Appeal*, 105 Pa. St. 307; *Turner v. Ross*, 1 R. I. 88.

If the creditor was not aware that the payment was on individual account, it may be treated as having been made upon partnership account. *Bissell v. Adams*, 35 Conn. 299.

2. *Merritt v. Polleys*, 16 B. Mon. (Ky.) 355. And see *Cocke v. Hoffman*, 5 Lea (Tenn.) 105.

If the creditor cannot show by which partner the partial payment was made, he cannot hold either liable. *Conkey v. Barber*, 22 Ind. 196.

3. *Town v. Washburn*, 14 Minn. 268.

4. *Hackley v. Patrick*, 3 Johns. (N. Y.) 536; *Burns v. McKenzie*, 23 Cal. 101; *Curry v. White*, 51 Cal. 530; *Brewster v. Hardeman*, *Dudley* (Ga.) 138; *Winslow v. Newlan*, 45 Ill. 145; *Miller v. Neimerick*, 19 Ill. 172; *Yandes v. Lefavour*, 2 Blackf. (Ind.) 371; *Hotchkiss v. Lyon*, 2 Blackf. (Ind.) 222; *Taylor v. Hillyer*, 3 Blackf. (Ind.) 433; *Walker v. Duberry*, 1 A. K. Marsh. (Ky.) 189; *Bentley v. White*, 3 B. Mon. (Ky.) 263; *Craig v. Alverston*, 6 J. J. Marsh. (Ky.) 609; *Spears v. Toland*, 1 A. K. Marsh. (Ky.) 203; *Daniel v. Nelson*, 10 B. Mon. (Ky.) 316; *Hamilton v. Summers*, 12 B. Mon. (Ky.) 11; 54 Am. Dec. 509; *Conery v. Hayes*, 19 La. Ann. 325; *Ostrom v. Jacobs*, 9 Met. (Mass.) 454; *National Bank v. Meader*, 40 Minn. 325; *Curry v. Kurtz*, 33 Miss. 24; *Maxey v. Strong*, 53 Miss. 280; *Owings v. Low*, 5 Gill & J. (Md.) 134; *Atwood v. Gillett*, 2 Dougl. (Mich.) 206; *Pope v. Risley*, 23 Mo. 185; *Little v. Ferguson*, 11 Mo. 598; *Brady v. Hill*, 1 Mo. 315; 13 Am. Dec. 503; *Dowzelot v. Rawlings*, 58 Mo. 75; *Flowers v. Helm*, 29 Mo. 324; *Iron Mountain Co. v. Evans*, 27 Mo. 552; *Brady v. Hill*, 1 Mo. 315; *Pringle v. Leverich*, 97 N. Y. 181; 49 Am. Rep. 522; *Nichols v. White*, 85 N. Y. 531; *Williams v. Manning*, 41 How. Pr. (N. Y.) 454; *Bank of Vergennes v. Cameron*, 7 Barb. (N. Y.) 143; *Mercer v. Sayre*, Anth. (N. Y.) 119; *Hart v. Woodruff*, 24 Hun (N. Y.) 510; *Brisban v. Boyd*, 4 Paige (N. Y.) 17; *Baker v. Stackpoole*, 9 Cow. (N. Y.) 420; 18 Am. Dec. 508; *Gleason*

authorities adopt the theory that the partners still constitute a partnership as to transactions before the dissolution, and that the power to pay debts implies the right to judge as to the existence and amount of such debts, and that therefore the admissions and declarations of a partner as to the existence or amount of such indebtedness is binding upon the firm.¹

v. Clark, 9 Cow. (N. Y.) 57; *Hopkins v. Banks*, 7 Cow. (N. Y.) 650; *Walden v. Sherburne*, 15 Johns. (N. Y.) 409; *Willis v. Hill*, 2 Dev. & B. (N. Car.) 231; *Hogg v. Orgill*, 34 Pa. St. 344; *Tassey v. Church*, 4 W. & S. (Pa.) 141; 39 Am. Dec. 65; *Hawkins v. Lee*, 8 Lea (Tenn.) 42; *Crumbles v. Sturgess*, 6 Heisk. (Tenn.) 190; *Lacaste v. Bexar Co.*, 28 Tex. 420; *Speake v. White*, 14 Tex. 364; *Nalle v. Gates*, 20 Tex. 315; *Rootes v. Wellford*, 4 Munf. (Va.) 215; *Shelton v. Cocke*, 3 Munf. (Va.) 191; *Bispham v. Patterson*, 2 McLean (U. S.) 87; *Thompson v. Bowman*, 6 Wall. (U. S.) 316.

Where the admission of a partner is that he had released the defendant, thus disqualifying himself as plaintiff, the right of all the partners to recover upon the claim would be thus defeated. *Cochran v. Cunningham*, 16 Ala. 448; 50 Am. Dec. 186.

Where the plaintiff claims to have consigned goods to a firm, a denial by one partner, after dissolution, that the goods had been received, is not evidence against the other of the fact of conversion, there being no partnership at the time of such a conversion as thus proved. *Pattee v. Gilmore*, 18 N. H. 460; 45 Am. Dec. 385.

The date of the dissolution, if it is uncertain, is a question for the court. *Harris v. Wilson*, 7 Wend. (N. Y.) 57.

But in *American Iron Mountain Co. v. Evans*, 27 Mo. 552, it was held that where the date of the dissolution is uncertain, the admission could go for what it was worth, as the jury could decide upon it. See also *Jameson v. Franklin*, 6 How. (Miss.) 376.

In *Little v. Ferguson*, 11 Mo. 598, it was held that the court could exclude such admissions, as the party offering them should show the date.

1. *Wood v. Braddick*, 1 Taunt. 104; *Munson v. Wickwire*, 21 Conn. 513; *Austin v. Bostwick*, 9 Conn. 496; *Kirk v. Hiatt*, 2 Ind. 322; *Taylor v. Hillyer*, 3 Blackf. (Ind.) 433; 26 Am. Dec. 430; *Foster v. Fifield*, 29 Me. 136; *Parker v. Merrill*, 6 Me. 41; *Hinkley v. Gilligan*,

34 Me. 101; *Buxton v. Edwards*, 134 Mass. 567; *Gay v. Bowen*, 8 Met. (Mass.) 100; *Ide v. Ingraham*, 5 Gray (Mass.) 106; *Vinal v. Burrill*, 16 Pick. (Mass.) 404; *Bridge v. Gray*, 14 Pick. (Mass.) 55; 25 Am. Dec. 358; *Cady v. Shepherd*, 11 Pick. (Mass.) 200; 22 Am. Dec. 379; *Pennoyer v. David*, 8 Mich. 407; *Curry v. Kurtz*, 33 Miss. 24; *Rich v. Flanders*, 39 N. H. 304; *Pierce v. Wood*, 23 N. H. 519; *Mann v. Locke*, 11 N. H. 246; *McElroy v. Ludlum*, 32 N. J. Eq. 828; *Feigley v. Whitaker*, 22 Ohio St. 606; 10 Am. Rep. 778; *Myers v. Standart*, 11 Ohio St. 29; *Fripp v. Williams*, 14 S. Car. 502; *Beckham v. Peay*, 1 Bail. (S. Car.) 121; *Kendrick v. Campbell*, 1 Bail. (S. Car.) 522; *Fisher v. Tucker*, 1 McCord Eq. (S. Car.) 169; *Simpson v. Geddes*, 2 Bay (S. Car.) 533; *Chardon v. Oliphant*, 3 Brev. (S. Car.) 183; 6 Am. Dec. 572; *Hunter v. Hubbard*, 26 Tex. 537; *Loomis v. Loomis*, 26 Vt. 198; *Woodworth v. Downer*, 13 Vt. 522; 37 Am. Dec. 611; *Garland v. Agee*, 7 Leigh (Va.) 862; *Brockenbrough v. Hackley*, 6 Call (Va.) 51.

That the rule would have been the other way by the law of the partner's domicile, does not affect the admissibility of the evidence. *Parker v. Merrill*, 6 Me. 41.

In *Pennsylvania*, the admissions of the liquidating partner are competent. *Houser v. Irvine*, 3 W. & S. (Pa.) 345.

Where the nature of an admission is to show that the proceeds of the transaction with the declaring partner went to the use of the firm, thus enabling a partner to cast his own debts upon the shoulders of the firm, it is not admissible. *Uhlen v. Browning*, 28 N. J. L. 79; *Parker v. Merrill*, 6 Me. 41; *Thorn v. Smith*, 21 Wend. (N. Y.) 365. Though even such an admission made during the existence of the partnership is competent. *Klock v. Beekman*, 13 Hun (N. Y.) 502.

Entries made, after the dissolution of a partnership, in the partnership books, may be given in evidence against the party who made them. *Simonton v. Boucher*, 2 Wash. (U. S.) 473.

6. To Complete Unfulfilled Contracts.—The dissolution of a partnership does not release it from contracts previously entered into but unfulfilled. Each partner has the power, therefore, to complete such contracts and to bind the other partners by his acts in so doing.¹ Thus a tender or delivery of goods ordered before dissolution to one partner is sufficient, and his misappropriation charges the firm,² and if a firm of commission merchants receive goods for sale before dissolution, selling them after a partner has retired, the claim of the assignor for the proceeds is a debt of all the partners.³

Nor can the other party claim that the dissolution of the firm with which it contracted rescinds the contract,⁴ though where

1. Collyer on Part., § 580. And see *Star Wagon Co. v. Swezey*, 59 Iowa 609; *Page v. Walcott*, 15 Gray (Mass.) 536; *Holmes v. Shands*, 27 Miss. 40; *Rust v. Chisholm*, 57 Md. 376; *Western Stage Co. v. Walker*, 2 Iowa 504; *Richardson v. Moies*, 31 Mo. 430.

A retiring partner continues liable for rent of premises leased to the firm. *Graham v. Whichelo*, 2 C. & M. 188.

Where A gives a guaranty to be responsible for paper discounted for S M & G, the guaranty covers paper given in renewal after dissolution by S M & G. *New Haven Co. Bank v. Mitchell*, 15 Conn. 206.

In *Butchart v. Dresser*, 10 Hare 463, it was held that a partner had the power to borrow money and pledge an asset to secure it in order to obtain means to complete a continuing contract. And in *Mason v. Tiffany*, 45 Ill. 392, it was held that he had power to give a note for such purpose.

But after dissolution, one partner cannot waive any of the conditions of a contract, as such a waiver would constitute it a new contract not binding upon the ex-partner. And if new conditions are annexed, the other partner is liable upon the original contract, but not upon such conditions. *Goodspeed v. Wiard Plow Co.*, 45 Mich. 322.

2. *Cady v. Shepherd*, 11 Pick. (Mass.) 400; 22 Am. Dec. 379; *Hubbard v. Matthews*, 54 N. Y. 43; 13 Am. Rep. 562; *Kennedy v. Altwater*, 77 Pa. St. 34; *Cahoon v. Hobart*, 38 Vt. 244; *Whiting v. Farrand*, 1 Conn. 60.

Where a partner orders goods of plaintiffs, and the order is countermanded by him after plaintiffs received notice of the dissolution of the partnership, but the countermand is afterwards withdrawn, the subsequent delivery of

the goods is a completion of plaintiffs' contract with the partnership, and entitles them to recover the price agreed on. *French v. Griffin*, 104 N. Car 141.

After the dissolution of a partnership, one partner, though he is authorized to settle the partnership concerns, has no right to receive goods consigned to the partnership for sale prior to the dissolution; and a purchase of the goods by a person having knowledge of the facts, to pay a debt due him from the partnership, is void. *Stierner mann v. Cowing*, 7 John. Ch. (N. Y.) 275.

Where a contract is not complete until acceptance however, there is no power to accept after dissolution revokes the offer. *Goodspeed v. Wiard Plow Co.* 45 Mich. 322.

3. *Offutt v. Scott*, 47 Ala. 104; *Hall v. Long*, 56 Ala. 493; *Johnson v. Totten*, 3 Cal. 343; 58 Am. Dec. 412; *Washburne v. Goodman*, 17 Pick. (Mass.) 519; *Briggs v. Briggs*, 15 N. Y. 471. And see *Whiting v. Farrand*, 1 Conn. 60.

Where the consignor firm and the consigning firm have a common partner, his death dissolves both firms, and the other partners in the latter are not bound to continue to receive goods from the former. *Oliver v. Forrester*, 96 Ill. 315.

Authority to a firm to receive goods is not extended to a new firm, formed after dissolution of the original one from a part of the members thereof. *Angle v. Mississippi etc. R. Co.*, 9 Iowa 487.

4. *Dickson v. Indianapolis Cotton Mfg. Co.*, 63 Ind. 9; *Jones v. Foster*, 67 Wis. 296; *Palmer v. Sawyer*, 114 Mass. 1.

Completed contracts made in favor of

personal trust and confidence enter into and form a part of the consideration for a contract, the disability or retirement of the trusted partner is a release;¹ so, where the dissolution renders the partnership unable to carry out its contract.²

The above rules apply only to contracts to do a particular act to complete a particular thing, however, and not to contracts to do all work of a particular description, or to receive or supply commodities of a particular kind or class,³ though a contract for a specified length of time is not rescinded by dissolution,⁴ and one for the accomplishment of a particular object, as the collection of a certain claim, continues binding upon all the members of the firm, though dissolved, until completion.⁵ Contracts of employment by a firm, however, have been held to be conditioned upon the firm not being dissolved by death.⁶

7. Power After Dissolution by Bankruptcy of a Partner.—In case of the bankruptcy of or an assignment in insolvency by one partner the solvent partners have the sole right to wind up the partnership, and are entitled to the exclusive possession of the assets for that purpose,⁷ the bankruptcy or the assignment making the as-

person or firm are not released by the addition of a partner by the promisee. See *Cramer v. Metz*, 57 N. Y. 650.

1. See *Fulton v. Thompson*, 18 Tex. 8; *First Nat Bank v. Hall*, 101 U. S. 3; *Robson v. Drummond*, 2 B. & Ad. 3; *Stevens v. Buming*, 1 K. & J. 168; *De G. M. & G.* 223.

A partner may purchase his co-partner's interest in a contract which is not the joint personal services of the two partners. *Love v. Van Every*, 18 0. App. 196.

2. See *Redheffer v. Leather*, 15 Mo. pp. 12; *Hiatt v. Gilmer*, 6 Ired. (N. ar.) 450.

3. *Caldwell v. Stileman*, 1 Rawle Pa.) 212. And see *Lochrane v. Stewart* (Ky. 1887), 2 S. W. Rep. 903; *Schlatter v. Winpenny*, 75 Pa. St. 321; *Henry Mahone*, 23 Mo. App. 83; *Tasker v. Shepherd*, 6 H. & M. 575.

A client has an option to consider the dissolution of a law firm as a discharge of his contract for their services. *Griffiths v. Griffiths*, 2 Hare 587; *Rawlson v. Moss*, 7 Jur., N. S. 1053. But in *Page v. Wolcott*, 15 Gray (Mass.) 16, it was held that the arrangement of their affairs between the partners does not concern the client and that he is not released by dissolution.

Where a firm has promised a cotton buyer to honor his drafts, and afterwards a partner retires and the rest form a new firm, continuing to honor his drafts without revoking the latter of

credit, it was held that they had ratified it and were liable on refusal to accept. *Smith v. Ledyard*, 49 Ala. 279.

4. *Oakford v. European & Am. Steam Shipping Co.*, 1 H. & M. 182; *Swire v. Redman*, 1 Q. B. D. 536. And see *Bird v. Austin*, 40 N. Y. Super. Ct. 109.

As Between Themselves.—Where a firm leased a building to one of the partners for a definite period of time, such lease is subject to the continuance of the firm and ceases on dissolution. *Johnson v. Hartshorne*, 52 N. Y. 173; *Doe v. Bluck*, 8 C. & P. 464.

5. *Smyth v. Harvie*, 31 Ill. 62; *McGill v. McGill*, 2 Metc. (Ky.) 258; *Bryant v. Hawkins*, 47 Mo. 410; *Poole v. Gist*, 4 McCord (S. Car.) 259; *Waldeck v. Brande*, 61 Wis. 579. And see *Williams v. Whitmore*, 9 Lea (Tenn.) 262. But see to the contrary *Johnson v. Wilcox*, 25 Ind. 182.

A contract with attorneys by which they are to litigate a case for an interest in the proceeds with power to compromise, is not affected by dissolution. *Jeffreys v. Mutual L. Ins. Co.*, 100 U. S. 305.

6. *Tasker v. Shepherd*, 6 H. & N. 575; *Burnet v. Hope*, 9 Ont. Rep. (Ca.) 10. But see to the contrary *Fereira v. Sayres*, 5 W. & S. (Pa.) 210; 40 Am. Dec. 496.

7. *Talcott v. Dudley*, 5 Ill. 427; *Hanson v. Paige*, 3 Gray (Mass.) 239; *Schalck v. Harmon*, 6 Minn. 265;

signee a tenant in common with the solvent partners in the assets, and the right of *delectus personarum* preventing him from acting in the place of the bankrupt partner.¹ But this right is not an absolute one; where the assignee is in possession of assets of the partnership he will be permitted to administer them in the same order and for the same purpose that the solvent partners would have done,² and the court has the power to transfer the whole right to wind up to the assignee, but will act with great caution in so doing.³ The tenancy in common extends to choses in action, and the solvent partners cannot, therefore, maintain a suit for the collection of a debt without joining the assignee;⁴ nor can the assignee sue without joining the solvent partners;⁵

Renton v. Chaplain, 9 N. J. Eq. 62; Ogden v. Arnot, 29 Hun. (N. Y.) 146; Amsinck v. Bean, 22 Wall. (U. S.) 395; Fox v. Hanbury, Cowp. 445; Allen v. Kilbre, 4 Madd. 464; *Ex parte* Owen, 13 Q. B. D. 113; Fraser v. Kershaw, 3 K. & J. 496; *Ex parte* Finch, 1 D. & Ch. 274. And see Antenneith v. Hassenbauer, 43 Cal. 356; Dearborn v. Keith, 5 Cush. (Mass.) 224; Cunningham v. Munroe, 15 Gray (Mass.) 471.

In *England* the effect of an assignment in bankruptcy dates back to the commission of the act of bankruptcy except as against *bona fide* intervening rights. See Thomson v. Frere, 10 East 418; Lacy v. Woolcott, 2 B. & R. 458; Heilbut v. Nevill, L. R., 4 C. P. 354; Craven v. Edmonson, 6 Bing. 734; *Ex parte* Robinson, 3 Dea. & Ch. 376. A commission in bankruptcy therefore supersedes an attachment levied after the act of bankruptcy. Dutton v. Morrison, 17 Ves. 193; *In re* Wait, 1 Jac. & N. 605. But see to the contrary in *United States*, Fern v. Cushing, 4 Cush. (Mass.) 357; Forsaith v. Merritt, 1 Low. (U. S.) 338; 3 Nat. Bankr. Reg. 11.

1. See Halsey v. Norton, 45 Miss. 703; Murray v. Murray, 5 Johns. Ch. (N. Y.) 60; Wilkins v. Davis, 2 Low. (U. S.) 511; Forsaith v. Merritt, 1 Low. (U. S.) 336; Holderness v. Shackles, 8 B. & C. 612. And also see cases cited in the above note.

2. Hubbard v. Guild, 1 Duer (N. Y.) 662; Murray v. Murray, 5 Johns. Ch. (N. Y.) 60; Amsinck v. Bean, 22 Wall. (U. S.) 395; Wilkins v. Davis, 2 Low. (U. S.) 511; 15 Nat. Bankr. Reg. 60; *In re* Shanahan, 6 Biss. (U. S.) 39. But see Hudgins v. Lane, 11 Nat. Bankr. Reg. 462.

Where the assignee is in possession, he can proceed to wind up the affairs

of the partnership without having special power conferred upon him by the court. Wilkins v. Davis, 2 Low. (U. S.) 511; 15 Nat. Bankr. Reg. 60.

The solvent partners cannot annul the acts of the assignee performed in the process of winding up, or compel him to account, or compel a creditor from whom he has collected a debt to pay it over again. Murray v. Murray, 5 Johns. Ch. (N. Y.) 60.

Creditors may intervene in an action for an accounting to reach property fraudulently converted by the partners. Grossinni v. Perazzo, 66 Cal. 546. But not for the purpose of obtaining personal judgments against the partners. Seligman v. Kalkman, 17 Cal. 152.

3. Talcott v. Dudley, 5 Ill. 427; Parker v. Muggridge, 2 Story (U. S.) 334; Wilkins v. Davis, 2 Low. (U. S.) 511; 15 Nat. Bankr. Reg. 60.

The assignee may take the property and administer the estate if the solvent partner is absent from the country. Murray v. Murray, 5 Johns. Ch. (N. Y.) 60; Barker v. Goodair, 11 Ves. 77.

The assets of a firm in the hands of the bankrupt must be accounted for to the partnership creditors by the assignee, if he gets possession of them. Jones v. Newsom, 7 Biss. (U. S.) 321.

4. Halsey v. Norton, 45 Miss. 703; Browning v. Marvin, 22 Hun (N. Y.) 547; Murray v. Murray, 5 Johns. Ch. (N. Y.) 60; Thomason v. Frere, 10 East 418; Eckhardt v. Wilson, 8 T. R. 140; Graham v. Robertson, 2 T. R. 282.

Where the assignee has forbidden firm debtors to pay the solvent partner, and the solvent partner is thereby compelled to sue the debtors, the assignee may be made liable for costs. Freeland v. Stansfield, 2 Sm. & G. 479.

5. Forsaith v. Merritt, 1 Low. (U. S.) 336; Hudgins v. Lane, 11 Nat.

he assignee being unable to recover fraudulent payments made by the firm, as only the firm or its assignee can claim such a fund.¹

Like a partner after an ordinary dissolution, the solvent partner has all the powers necessary, and only such as are necessary to wind up the concern, and can, therefore, collect the debts,² sell the effects,³ and pay the debts⁴ of the partnership. But he can make no new contracts involving a continuance of the business; any dealing or trading with the assets being at his own risk, and rendering him liable to account either for the profits or for interest, at the option of the assignee.⁵ The power to wind up is personal to the solvent partner, and cannot be assigned by him;⁶ but he may waive it by allowing the assignee to take possession and proceed with the settlement.⁷

8. Power After Dissolution by Sale of an Interest.—The same principles apply in case of a dissolution by the sale by a partner of his interest in the firm, the duty of collecting the credits, disposing of the assets and paying the debts devolving upon the remaining partners,⁸ the buyer or the creditors being entitled

Bankr. Reg. 462; *Eckhardt v. Wilson*, T. R. 142.

1. *Wallace v. Milligan*, 110 Ind. 498; *Grant v. Crowell*, 42 N. J. Eq. 524; *Beligman v. Kalkam*, 17 Cal. 152; *Aminck v. Bean*, 22 Wall. (U. S.) 395; *Forsyth v. Merritt*, 1 Low. (U. S.) 36.

The assignee of one partner cannot recover for the benefit of the creditors under the assignment, moneys which appear by his bill to have been due from and to have been paid by his assignor to the defendant, on a mere allegation that his assignor and the defendant may have been partners as to third persons in the transaction wherein such moneys were paid. *Grant v. Crowell*, 42 N. J. Eq. 524.

2. *Freeland v. Stansfield*, 2 Sm. & 1. 479; *Harvey v. Crickett*, 5 M. & S. 36; *Ogden v. Arnot*, 29 Hun (N. Y.) 46.

3. *Ogden v. Arnot*, 29 Hun (N. Y.) 46; *Fox v. Hanbury*, Cowp. 445; *Moran v. Marquis*, 9 Ex. 145; *Fraser v. Kershaw*, 2 K. & J. 496.

4. *Ogden v. Arnot*, 29 Hun (N. Y.) 46; *Harvey v. Crickett*, 5 M. & S. 36; *Woodbridge v. Swan*, 4 B. & Ad. 33.

The solvent partner is not obliged to pay pro rata; he may prefer certain creditors over others, and he has power to give a chattel mortgage for the purpose of the payment of a debt to a firm creditor. *Ogden v. Arnot*, 29 Hun (N. Y.) 146.

He may pay firm indebtedness by the delivery of the firm's goods. *Smith v. Oriell*, 1 East 368.

5. See *Crawshaw v. Collins*, 15 Ves. 218.

6. *Bates' Law of Part.*, § 755.

Where a creditor obtains a judgment and issues execution against the solvent partner, and purchases his interest at the execution sale, his right to wind up does not pass, and the assignee of the bankrupt partner can obtain an injunction against the buyer for interfering with the assets. *Frazer v. Kershaw*, 2 K. & J. 496.

7. *Vetterlein v. Barnes*, 6 Fed. Rep. 693; *Tracy v. Walker*, 1 Flip. (U. S.) 41; 3 West. L. Month. 574.

A liquidating partner who, having obtained judgment for the firm, becomes bankrupt, and at the assignee's sale purchases his interest in the judgment, cannot issue execution without showing a subsequent authority from his former co-partners. *Florance v. Bridge*, 5 La. Ann. 735.

8. *Reece v. Hoyt*, 4 Ind. 169; *Chopin v. Wilson*, 27 La. Ann. 444; *Saloy v. Albrecht*, 17 La. Ann. 75; *Miller v. Brigham*, 50 Cal. 615; *Hamill v. Hamill*, 27 Md. 679; *Benton v. Chaplain*, 9 N. J. Eq. 62; *McGlensy v. Cox*, 1 Phila. (Pa.) 387; 5 Pa. L. J. Rep. 203; *Fox v. Rose*, 10 Up. Can. Q. B. 16. And see *Farley v. Moog*, 79 Ala. 148.

A transfer, after notice of dissolution, by two members of a firm, of all the firm property to a corporation organ-

to an injunction and a receiver in case of their abuse of the trust.¹

9. Compensation for Winding Up.—The rule is laid down by a preponderance of authority, that in the absence of an agreement therefor, no compensation will be allowed to a partner for winding up the concern after dissolution.² It has been held by some cases, however, that if one partner has given his time and services, while another has contributed nothing to the winding up, an allowance should be made, though no provision for such allowance has been agreed upon.³ Where services in excess of mere winding up are rendered, the partner rendering them is entitled to compensation for such excess.⁴

XXI. SURVIVING PARTNERS.—Upon the dissolution of a partnership by the death of a partner the survivor becomes the sole owner of all the personal property including choses in action, of the partnership;⁵ as a trustee, however, for the benefit of all con-

ized by them for the purpose of continuing the business under a new arrangement, cannot affect the rights of a remaining partner who does not consent thereto; and he is thereafter entitled to the exclusive control of all the firm property for the purpose of winding up the partnership business. *Macdonald v. Trojan Button Fastener Co.* (Supreme Ct.), 9 N. Y. Supp. 383; 10 N. Y. Supp. 91.

1. *Renton v. Chaplain*, 6 N. J. Eq. 62; *Ballard v. Callison*, 4 W. Va. 326. See also *INJUNCTIONS*, vol. 10, page 777, and *infra*, this title, *Receivers*.

A receiver of the firm's property will not be appointed unless the remaining partner neglects to perform, or improperly performs, his duty of closing up the business as expeditiously as may be, with due regard to the interests of all concerned. *Macdonald v. Trojan Button Fastener Co.* (Supreme Ct.), 10 N. Y. Supp. 91.

2. *McMichael v. Raoul*, 14 La. Ann. 305; *Dunlap v. Watson*, 124 Mass. 305; *Bennett v. Russell*, 34 Mo. 524; *Courseen v. Hamlin*, 2 Duer (N. Y.) 513; *Anderson v. Taylor*, 2 Ired. Eq. (N. Car.) 420; *Appeal of Shriver* (Pa. 1888), 12 Atl. Rep. 553; *Brown's Appeal*, 89 Pa. St. 139; *Cothran v. Knox*, 13 S. Car. 496. And see *Berry v. Jones*, 11 Heisk. (Tenn.) 206; *Osment v. McElrath*, 68 Cal. 466.

If the guardian or parent of an infant partner renders services in winding up, he can claim compensation from his ward's estate, but not from the firm. *McMichael v. Raoul*, 14 La. Ann. 305.

Abandonment.—Where one partner

goes out of the country, leaving the other to wind up the affairs of the partnership, the latter is entitled to a reasonable allowance for his services. *Clement v. Ditterline*, *Ditterline v. Clement* (Ky. 1889), 11 S. W. 658.

A assigned all his interest in the partnership effects to his co-partner B, who was to settle up the business, take reasonable pay for his trouble in so doing, and divide any balance then remaining between them. *Held*, that in a suit by A against B, B should be allowed to show the value of his services in settling up the business. *Pierce v. Cubberly*, 19 Ind. 157.

3. *Bradley v. Chamberlain*, 16 Vt. 613. And see *Setzer v. Beale*, 19 W. Va. 274; *Hutchinson v. Onderdonk*, 6 N. J. Eq. 277; *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 506.

In *Stidger v. Reynolds*, 10 Ohio 351, a liquidating partner was allowed compensation for collecting, on the ground that the debts might have been divided and that he was therefore under no obligation to collect them.

4. See *infra*, this title, *Surviving Partner; Compensation for Winding Up*.

5. *Strange v. Graham*, 56 Ala. 614; *Andrews v. Brown*, 21 Ala. 437; *Filley v. Phelps*, 18 Conn. 294; *Smith v. Wood*, 31 Md. 293; *Berry v. Harris*, 22 Md. 30; *Bush v. Clark*, 127 Mass. 111; *Bassett v. Miller*, 39 Mich. 133; *Pfeffer v. Steiner*, 27 Mich. 537; *Barry v. Briggs*, 22 Mich. 201; *Robertshaw v. Hanway*, 52 Miss. 713; *Benson v. Ela*, 35 N. H. 402; *Adams v. Hackett*, 27 N. H. 289; 59 Am. Dec. 376; *Betts v. June*, 51 N.

cerned, as is held by many of the cases, for the purpose of winding up the partnership affairs and the distribution of the proceeds,¹ though the theory has been advanced that he is the absolute owner, subject only to the right of the representatives of the deceased partner to an account of the property, its collection and application to partnership debts, and to receive the balance found to belong to the decedent's estate.² The surviving partner has also the exclusive right of possession, management and control of

Y. 274; *Bernard v. Wilcox*, 2 Johns. Cas. (N. Y.) 374; *Holmes v. De Camp*, 1 Johns. (N. Y.) 34; 3 Am. Dec. 293; *Mendenhall v. Ben Bow*, 84 N. Car. 646; *Oram v. Rothermel*, 98 Pa. St. 300; *Knox v. Schepler*, 2 Hill (S. Car.) 595; *Stearns v. Houghton*, 38 Vt. 583; *Bohler v. Tappan*, 1 Fed. Rep. 469; 1 McCrary (U. S.) 134; *Knox v. Gye*, L. R., 5 H. L. 656; *Crawshaw v. Collins*, 15 Ves. 226; *People v. White*, 11 Ill. 350; *Allen v. Hill*, 16 Cal. 117; *Offutt v. Scott*, 47 Ala. 104; *Smith v. Walker*, 38 Cal. 385; *Hardesty v. Jones*, 10 Gill & J. (Md.) 404.

To the contrary, that as to the property in possession the survivor is a tenant in common with the personal representatives of the deceased partner. *Adams v. Ward*, 26 Ark. 135; *Skipwith v. Lea*, 16 La. Ann. 247; *McKowen v. McGuire*, 15 La. Ann. 637; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411; 56 Am. Dec. 573; *Trammell v. Harrell*, 4 Ark. 602; *Bredow v. Mut. Sav. Inst.*, 28 Mo. 181; *Stanhope v. Supplee*, 2 Brewst. (Pa.) 453; *Rathwell v. Rathwell*, 26 Up. Can., Q. B. 179. And see *Weil v. Jones*, 70 Mo. 560.

The surviving partner in a law business is not chargeable with rent for the use of the library while winding up. *Starr v. Case*, 59 Iowa 491.

In *Barney v. Smith*, 4 Harr. & J. (Md.) 485, it was held that a promise made to a surviving partner was sufficient to avoid the Statute of Limitations, and that there is no necessity to declare specially on the promise, as a promise to the surviving partner. But in *Stewart's Appeal*, 105 Pa. St. 307, it was held that running accounts with a partner, though he be a surviving partner, and as such has the collection of the partnership assets, cannot be called an account with the firm, and can therefore be of no avail to stop the running of the statute against a partnership claim.

1. *Nelson v. Hayner*, 66 Ill. 487; *Ames v. Downing*, 1 Bradf. (N. Y.) 321; *Case v. Abeel*, 1 Paige (N. Y.)

393; *Brown v. Watson*, 66 Mich. 223; *Washburn v. Goodman*, 17 Pick. (Mass.) 519; *Phillips v. Atkinson*, 2 Bro. Ch. 272; *Burden v. Burden*, 1 Ves. & B. 170; *Eastwick v. Conningsby*, 1 Vern. 118; *Hartz v. Schrader*, 8 Ves. 317.

In *Smith v. Walker*, 38 Cal. 385, a survivor is said not to be a tenant in common, but is called a trustee to wind up an account for the balance.

A legal title to lands owned by a firm consisting of equal partners, on the death of one partner vests in the survivor and the heirs of the deceased partner as tenants in common, subject to the dower right of the widow out of one moiety, but the equitable title vests in the survivor so far as is necessary to pay the liabilities of the partnership, including that due the survivor as a general creditor, or any balance due him on a settlement of the partnership accounts. *Clay v. Field*, 34 Fed. Rep. 375.

In *Crescent City Ins. Co. v. Camp*, 64 Tex. 521, insurance issued to the surviving partner, who was also administrator on the partnership stock of goods, was held void under a clause requiring that if the insured is not sole and unconditional owner for his own use and benefit, it must be so stated.

2. *Knox v. Gye*, L. R., 5 H. L. 656; *Skinner v. Bedell*, 32 Ala. 44; *Bush v. Clark*, 127 Mass. 111; *Holbrook v. Lackey*, 13 Met. (Mass.) 132; 46 Am. Dec. 726. And see *Hogg v. Ashe*, 1 Hayw. (N. Car.) 471; *Tremper v. Conklin*, 44 N. Y. 58; *Buckley v. Barber*, 6 Exch. 164; *Krueger v. Spieth*, 8 Mont. 482.

In *Knox v. Gye*, L. R., 5 H. L. 656 the court said "that it is a mistake to apply the term trust to the legal relation existing between the surviving partner and the estate of the deceased partner."

In *re Clapp*, 2 Low. (U. S.) 468, it was held that the joint creditors can insist upon the property being applied

the entire property for the purpose of winding up,¹ and where there are two or more survivors such right and duty devolves equally upon all.² The right to wind up is a personal privilege which may be waived by the survivor, or resigned to the representative of the other partner,³ but he cannot be denuded of his

to the partnership debts, where the surviving partner has become bankrupt or insolvent, the property not being solely the property of the survivorship. See also *Farley v. Moog*, 79 Ala. 148.

The legal interest in the assets is absolutely transferred to the survivor, and his individual creditor may garnishee a claim due to the firm without showing the state of accounts between him and the decedent, though the administrator or creditors of the firm may interfere by invoking the equitable action of the court. *Berry v. Harris*, 22 Md. 30. And see *Knox v. Scheppler*, 2 Hill (S. Car.) 305.

An individual creditor of a surviving partner cannot complain that an assignment for the benefit of creditors by such survivor devotes property which belonged to the firm to the payment of the survivor's individual debts. *Haynes v. Brooks*, 116 N. Y. 487.

Pardon of Survivor.—A pardon to a surviving partner for an offense committed by both partners prior to the dissolution whereby the entire property of the firm was forfeited, entitles the surviving partner to have the entire property awarded to him. *U. S. v. Athens Armory*, 35 Ga. 344.

1. *Farley v. Moog*, 79 Ala. 148; *Davis v. Sowell*, 77 Ala. 262; *Marlatt v. Scantland*, 19 Ark. 443; *McKay v. Joy*, 70 Cal. 58; *Allen v. Hill*, 16 Cal. 113; *Florida Territory v. Redding*, 1 Fla. 279; *Miller v. Jones*, 39 Ill. 54; *People v. White*, 11 Ill. 341; *Anderson v. Ackerman*, 88 Ind. 481; *Wilson v. Nicholson*, 61 Ind. 241; *Cobble v. Tomlinson*, 50 Ind. 550; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411; 56 Am. Dec. 573; *Ely v. Horine*, 5 Dana (Ky.) 398; *Kahn's Estate*, 18 Mo. App. 426; *Merritt v. Dickey*, 38 Mich. 41; *Barry v. Briggs*, 22 Mich. 201; *Krueger v. Spieth*, 8 Mont. 482; *Carrere v. Spofford*, 46 How. Pr. (N. Y.) 294; *Wallace v. Fitzsimmons*, 1 Dall. (U. S.) 248; *Bohler v. Tappan*, 1 Fed. Rep. 469; 1 *McCrary* (U. S.) 134.

The surviving partner can vote on corporate stock owned by the firm.

Kenton Furnace etc. Co. v. McAlpin, 5 Fed. Rep. 737.

The surviving partner alone is entitled to the possession of the books and cannot be compelled to give them up even for the purpose of allowing the representatives of the deceased partner to examine as to the correctness of the accounts. *Waring v. Waring*, 1 Redf. (N. Y.) 205; *Platt v. Platt*, 61 Barb. (N. Y.) 52; 11 Abb. Pr. (N. Y.) N. S. 110; *Murray v. Mumford*, 6 Cow. (N. Y.) 441. And is not liable as for a contempt of court for refusing permission to the appraisers of the decedent's estate to go into the place of business of the partnership. *Camp v. Fraser*, 4 Dem. (N. Y.) 212.

In *Bilton v. Blakely*, 6 Grant's Ch. (Up. Can.) 575, however, it was held, that the administrators have a right to inspect the books and be informed of the proceedings and progress of the winding up, and that an exclusion would be a sufficient ground for equitable interference. See also *Davis v. Davis* (Supreme Ct.), 10 N. Y. Supp. 897.

2. *Davis v. Sowell*, 77 Ala. 262; *Heartt v. Walsh*, 75 Ill. 200. See *Godfrey v. Templeton*, 86 Tenn. 161. *Cooper v. Burns*, 6 La. Ann. 740.

Where there is more than one surviving partner, they are joint tenants under the law merchant, and one cannot bind the other by accepting a bill, or indorsing a note, or otherwise, without authority. *Jenness v. Carlton*, 40 Mich. 343.

Where, after dissolution, one of the several surviving partners indorses a note payable to the firm, and the others bring suit thereon as indorsees, the latter necessarily ratify the indorsement and make it effectual. *Murray v. Ayer*, 16 R. I. 665.

3. *Griffin v. Spence*, 69 Ala. 393; *Wellborn v. Coon*, 57 Ind. 270; *Black v. Bush*, 7 B. Mon. (Ky.) 210; *Vetlerlein v. Barnes*, 6 Fed. Rep. 693.

In case of the refusal to bring an action, the administrator can file a bill in equity against the debtor for a receiver and accounting. *Kirby v.*

trust except by a court of equity upon proof that he has abused it, or has been otherwise guilty of fraudulent conduct.¹ That the survivor was a dormant partner does not interfere with his right to wind up;² nor is his insolvency a disqualification,³ and even in case of temporary insanity he has been held entitled to proceed through the agency of his committee.⁴

As a correlation to the ownership of the partnership property and the right to its possession and control the surviving partner is subjected to liability for all the partnership debts, as well as upon the theory that they were originally his debts.⁵

A general sale of all the assets and a division of the proceeds after payment of the debts is usually deemed to be a proper mode of winding up a partnership.⁶

1. Who is a Surviving Partner.—The powers, rights, responsibility and title incident to the relation of surviving partner attaches not only to one who becomes a survivor by the death of his co-partner during the continuance of the partnership, but also to one who becomes such at any time before the final settlement

Lake Shore etc. R. Co., 8 Fed. Rep. 462.

Where the surviving partner has absented himself, and cannot be found, the administrator can file a bill in equity as *cestui que trust* in a case in which the trustee neglects to assert his rights at law and recover the debt due to the firm. *Drape v. Blount*, 3 Dev. Eq. (N. Car.) 353.

Where the administrator sues a debtor of the estate, the debtor may set-off a debt due him from the decedent's partnership. *Blair v. Wood*, 108 Pa. St. 287. And see *Simpson v. Schulte*, 21 Mo. App. 639.

1. *Nelson v. Hayner*, 66 Ill. 487; *People v. White*, 11 Ill. 350; *Connor v. Allen, Harr. Ch. (Mich.)* 371. And see *Jacquin v. Buisson*, 11 How. Pr. (N. Y.) 385; *Shad v. Fuller*, R. M. Charlt. (Ga.) 501; *Hartz v. Schrader*, 8 Ves. 317.

It is the duty of a surviving partner to take an account of stock, and keep a record of all sales of the partnership effects; and if he fails to do so, and there is danger of loss to the estate of the deceased, a receiver may be appointed. *Word v. Word* (Ala. 1890), 7 So. Rep. 412.

Only the administrator of the deceased partner can interfere, with the right of the surviving partner to wind up the partnership estate. Any one else is an interloper. *Weise v. Moore*, 22 Mo. App. 530.

2. *Beach v. Hayward*, 10 Ohio, 455.

And see *Johnson v. Ames*, 6 Pick. (Mass.) 330.

3. *Heartt v. Walsh*, 75 Ill. 200; *McCandless v. Haddon*, 9 B. Mon. (Ky.) 86.

4. *Uberoth v. Union Bank*, 9 Phila. (Pa.) 83.

Contracts made by the administrator of the deceased partner during the temporary insanity of the surviving partner will not be enforced even as against themselves, if this would impair the survivor's rights. *Lockwood v. Mitchell*, 7 Ohio St. 387.

5. See *infra*, this title, *The Remedy of Firm Creditors*.

6. *Sigourney v. Munn*, 7 Conn. 11; *Dougherty v. Van Nostrand, Hoffm. Ch. (N. Y.)*; *Evans v. Evans*, 9 Paige (N. Y.) 178; *Ogden v. Astor*, 4 Sandf. (N. Y.) 313; *Case v. Abeel*, 1 Paige (N. Y.) 393; *Booth v. Parks*, 1 Malloy 465; *Crayshaw v. Collins*, 15 Ves. 218; *Featherstonhaugh v. Fenwick*, 17 Ves. 310.

The accounts upon settlement are to be stated as of the day of the death of deceased partner. *Millard v. Ramsdell, Harr. Ch. (Mich.)* 373; *Ames v. Downing*, 1 Bradf. (N. Y.) 321; *Washburn v. Goodman*, 17 Pick. (Mass.) 519; *Crayshaw v. Collins*, 15 Ves. 373.

It being found that testator bought certain lands under an agreement that on a resale thereof he and plaintiff should divide the profits or losses, the court should order a sale thereof, and a division of the proceeds according to

and winding up of all the affairs of the firm.¹ If one partner buys the other out on dissolution, however, the whole interest goes to his administrator on the death of the purchaser, and the seller can claim nothing as surviving partner.²

In case of the death of all of the partners before the settlement of the partnership affairs, the administrator of the last survivor is charged with the duty of completing the settlement, not as owner, but as trustee in possession,³ he being the proper plaintiff to collect outstanding accounts,⁴ and the

the interests of the parties, rather than that an accounting should be taken, and the amount found which one party should pay to the other for the land. *Wing v. Bliss* (Supreme Ct.), 8 N. Y. Supp. 500.

1. See *Murray v. Mumford*, 6 Cow. (N. Y.) 441; *Strange v. Graham*, 56 Ala. 614; *Ober v. Indianapolis etc. R. Co.*, 13 Mo. App. 81; *Kinsler v. McCants*, 4 Rich. (S. Car.) 46; *Stillwell v. Gray*, 17 Ark. 473. To the contrary see *Mutual Sav. Inst. v. Enslin*, 37 Mo. 453.

Where all the members of a partnership agree to change it into a corporation, and articles are drawn up transferring to it all the firm property, the fact that the articles are not recorded until after the death of one of the partners, and that the others thereafter in good faith conduct the business of the corporation, using the partnership assets, does not render them guilty of a conversion of the partnership property. *McCarthy v. Wood* (Ky. 1890), 13 S. W. Rep. 792.

That the testator's estate was to have the entire beneficial interest in the debt, if the defendant was not a party to the agreement, does not entitle the administrator to sue. *Clark v. Howe*, 23 Me. 560; *McCandless v. Haddon*, 9 B. Mon. (Ky.) 186; *Daby v. Ericsson*, 45 N. Y. 786.

2. *White v. Parish*, 20 Tex. 688. See also *Valentine v. Farnsworth*, 21 Pick. (Mass.) 176. To the contrary see *Felton v. Reid*, 7 Jones (N. Car.) 269.

Though a purchase by one partner from another dissolves the firm and winds up the partnership yet, even in this case if the seller agrees to leave his name in the firm for a period, and this is not known to the creditor until after the seller's death, he can proceed against the other as a surviving partner. *Wright v. Storrs*, 6 Bosw. (N. Y.) 600.

Where both partners die their administrators can agree that the representatives of the one who died first shall wind up the business of the partnership, and where the one so agreed upon obtains a decree against the debtor and afterwards dies, as this decree merges the debt, his successor in the administration of the estate must collect it and not the representative of the last survivor, for it is an asset of such estate although held in trust for the partnership. *Griffin v. Spence*, 69 Ala. 393.

That the survivor and the administrator have adjusted all their matters and agreed to divide the proceeds of the demand sued upon, is not a severance which will subject the debtor to two actions, and an action by the administrator will be dismissed. *Peters v. Davis*, 7 Mass. 257.

3. *Thomson v. Thomson*, 1 Bradf. (N. Y.) 24; *Dayton v. Bartlett*, 38 Ohio St. 357; *Brooks v. Brooks*, 12 Heisk. (Tenn.) 12. And see *McGilway v. Clement*, 6 Mo. App. 598.

But where A & B, who were partners, both died, and A's administrator lived and administered in L county, and B's in M county, and an action was brought against both in L county, it was held that this was not a misjoinder, and that B's administrator could not raise the objection that he should have been sued in his own county. *Kottwitz v. Alexander*, 34 Tex. 689.

4. *Costley v. Wilkerson*, 49 Ala. 210; *Copes v. Fultz*, 1 Smed. & M. (Miss.) 623; *Richards v. Heather*, 1 B. & A. 20; *Calder v. Rutherford*, 3 Brod. & B. 302; *Nehrboss v. Bliss*, 88 N. Y. 600; *Carrere v. Spofford*, 46 How. Pr. (N. Y.) 294. But see to the contrary, *Filton v. Reid*, 7 Jones (N. Car.) 269.

In *Copes v. Fultz*, 1 Smed. & M. (Miss.) 623, it was held that a judgment in favor of the last survivor must be revived in the name of his administrator, and not in the name of the

proper party against whom to enforce partnership indebtedness.¹

2. Powers of Surviving Partners.—A surviving partner has power to collect the assets of the partnership, receive and receipt for payments, pay and settle partnership debts, settle and wind up the partnership business and distribute the net surplus among the parties entitled to it,² and if there are several surviving partners, each has power to collect debts and settle claims.³ Like a partner engaged in winding up after a dissolution for other causes, a surviving partner need not pay creditors *pro rata*, but may pay them in such order and proportions as he pleases, though it results in a preference of one at the expense of another,⁴ but he cannot give a firm note even for a pre-existing debt,⁵ nor can he bind his co-survivors

administrator of the former decedent.

1. *Whitney v. Cook*, 5 Mass. 139; *Bridge v. Swain*, 3 Redf. (N. Y.) 487; *Gere v. Clarke*, 6 Hill (N. Y.) 350. But see *Carter v. Currie*, 5 Call (Va.) 158.

If both partners die and the same person is appointed as administrator of each, he cannot be sued in his double capacity, nor could several administrators of his estate be sued together. *McNally v. Kerswell*, 37 Me. 550.

In *Bridge v. Swain*, 3 Redf. (N. Y.) 487, it was held, that where both partners are dead, a creditor can procure an order to sell real estate of the last survivor, although the partner first dying left sufficient assets to pay.

2. See *Offutt v. Scott*, 47 Ala. 104; *Smith v. Walker*, 38 Cal. 386; *Gleason v. White*, 34 Cal. 258; *Allen v. Hill*, 16 Cal. 117; *Calvert v. Marlow*, 18 Ala. 73; *Heartt v. Walsh*, 75 Ill. 200; *People v. White*, 11 Ill. 350; *Hodgkins v. Nurrett*, 53 Me. 208; *Dwinel v. Stone*, 30 Me. 386; *Clark v. Howe*, 23 Me. 561; *Berry v. Harris*, 22 Md. 31; *Hardesty v. Jones*, 10 Gill & J. (Md.) 404; *Oakman v. Dorchester etc. Co.*, 98 Mass. 58; *Barry v. Briggs*, 22 Mich. 201; *Heath v. Waters*, 40 Mich. 457; *Murray v. Mumford*, 6 Cow. (N. Y.) 441; *Evans v. Evans*, 9 Paige (N. Y.) 180; *Betts v. June*, 51 N. Y. 274; *Egberts v. Wood*, 3 Paige (N. Y.) 517; *Alexander v. Coulter*, 2 S. & R. (Pa.) 494; *Kinsler v. McCants*, 4 Rich. (S. Car.) 46; *Stearns v. Houghton*, 38 Vt. 586; *Roys v. Vilas*, 18 Wis. 170; *Shields v. Fuller*, 4 Wis. 104; *Phillips v. Phillips*, 3 Hare 281; *Brasier v. Hudson*, 9 Sim. 1.

Under Civil Code California § 2461, providing that "a partner authorized to

act in liquidation may collect, compromise or release any debts due to the partnership, pay or compromise any claims against it, and dispose of the partnership property," a surviving partner may sue for damages to the partnership estate by reason of a malicious prosecution of a claim, the words "debts" and "claims" being here used synonymously. *Berson v. Ewing*, 84 Cal. 89.

3. *Heartt v. Walsh*, 75 Ill. 200; *Davis v. Sowell*, 77 Ala. 262.

4. *Wilson v. Soper*, 3 B. Mon. (Ky.) 411; 56 Am. Dec. 573; *Roach v. Brannon*, 57 Miss. 490; *Easton v. Courtwright*, 84 Mo. 27; *Crow v. Weidner*, 36 Mo. 412; *Collier v. Cairns*, 6 Mo. App. 188; *Loeschigk v. Hatfield*, 51 N. Y. 660; *Williams v. Whedon*, 39 Hun (N. Y.) 98; *Nelson v. Tenny*, 36 Hun (N. Y.) 327; *Hutchinson v. Smith*, 7 Paige (N. Y.) 26; *Egberts v. Wood*, 3 Paige (N. Y.) 517; *Kreis v. Gorton*, 23 Ohio St. 468.

To the contrary, that as a trustee he must make a ratable distribution. *Salisbury v. Ellison*, 7 Colo. 167; 49 Am. Rep. 347; *Watkins v. Fakes*, 5 Heisk. (Tenn.) 185; *Anderson v. Norton*, 15 Lea (Tenn.) 14; *Barcroft v. Snodgrass*, 1 Coldw. (Tenn.) 430.

5. *Lang v. Waring*, 17 Ala. 145; *Carleton v. Jenness*, 42 Mich. 110; *Janness v. Carlton*, 40 Mich. 343; *Matteson v. Nathanson*, 38 Mich. 377; *Citizens Mut. Ins. Co. v. Ligon*, 59 Miss. 305; *Bank of Port Gibson v. Baugh*, 9 Smed. & M. (Miss.) 290. *Central Sav. Bank v. Mead*, 52 Mo. 546. But see *Dundass v. Gallagher*, 4 Pa. St. 205.

An agreement by the surviving partner to pay usurious interest on firm debts is void. *Wiesenfeld v. Byrd*, 17 S. Car. 106.

by issuing commercial paper without their consent,¹ though he has the power to draw checks against the firm's bank account,² and, unlike a partner after an ordinary dissolution, he can transfer a note belonging to the firm by indorsement, the indorsement not being operative against the firm, as a new contract, but merely as a means of passing title.³ So, as he represents the power of all the partners for the purpose of winding up, he can, in order to wind up, in case of insolvency, at least, make a general assignment for the benefit of the partnership creditors,⁴ making prefer-

1. *Matteson v. Nathanson*, 38 Mich. 377; *Carlton v. Janness*, 42 Mich. 110; *Janness v. Carlton*, 40 Mich. 343.

2. See *Commercial Nat. Bank v. Proctor*, 98 Ill. 558; *Bank of N. Y. v. Vanderhorst*, 32 N. Y. 553; *Backhouse v. Charlton*, 8 Ch. D. 414.

3. *Johnson v. Berlzheimer*, 84 Ill. 54; 25 Am. Rep. 427; *Bredow v. Mutual Sav. Inst.*, 28 Mo. 181; *Pinckney v. Wallace*, 1 Abb. Pr. (N. Y.) 82. But see *Cavitt v. James*, 39 Tex. 189.

In *Missouri*, though a surviving partner may transfer a note in payment of a firm debt, yet if he fails to give the security required of administrators by law the personal representatives of the deceased partner may, upon giving the required bond, recover the possession and control of such note from him. *Bredow v. Mutual Sav. Inst.*, 28 Mo. 181.

4. *Salisbury v. Ellison*, 7 Colo. 167; 49 Am. Rep. 347; *Atkinson v. Jones* (Ky. 1886), 1 S. W. Rep. 406; *Wilson v. Soper*, 13 B. Mon. (Ky.) 311; 56 Am. Dec. 573; *Gable v. Williams*, 59 Md. 46; *Burnside v. Merrick*, 4 Met. (Mass) 537; *Moody v. Downs*, 63 N. H. 50; *Williams v. Windon*, 109 N. Y. 333; *Stanford v. Lockwood*, 95 N. Y. 582; *Hutchinson v. Smith*, 7 Paige Ch. (N. Y.) 26; *Beste v. Burger*, 110 N. Y. 644; *Gratz v. Bayard*, 11 S. & R. (Pa.) 41; *White v. Union Ins. Co.*, 1 Nott & McCord (S. Car.) 556; 9 Am. Dec. 726; *Patton v. Leftwich*, 86 Va. 421; *Galt v. Calland*, 7 Leigh (Va.) 594; *Emerson v. Senter*, 118 U. S. 3; *Shanks v. Klein*, 104 U. S. 18; *contra Shattuck v. Chandler*, 40 Kan. 516.

In *Nelson v. Tenny*, 36 Hun (N. Y.) 327, and *Barcroft v. Snodgrass*, 1 Coldw. (Tenn.) 431, it was held that the surviving partner had power to make such an assignment only with the consent of the administrator of the deceased partner. And see *Tieman v. Molliter*, 71 Mo. 512; *Vosper v. Kramer*, 31 N. J. Eq. 420. But such an

assignment is valid until attacked by the administrator for want of consent. *Williams v. Whedon*, 39 Hun (N. Y.) 98.

If there are two surviving partners, the assent of both is necessary to an assignment for the benefit of creditors. *Egberts v. Wood*, 3 Paige (N. Y.) 517. An assignment for the benefit of creditors cannot be made by the surviving partner for the payment of a separate debt of the deceased partner. *Hutchinson v. Smith*, 7 Paige (N. Y.) 26. Nor for subsequent debts incurred by himself in the continuance of the business without authority. *Tieman v. Molliter*, 71 Mo. 512.

In *Gratz v. Bayard*, 11 S. & R. (Pa.) 41, where the articles of a partnership provided that the survivor was to continue the business for the joint benefit, subject to the advice and inspection of the other executor, it was held that the executor had no remedy if the surviving partner went counter to his advice in making an assignment for the benefit of creditors.

In *Moody v. Downs*, 63 N. H. 50, an assignment for the benefit of "my" creditors, by a surviving partner of all partnership and individual property was considered as an assignment of partnership property for the benefit of partnership creditors and of separate property for the benefit of separate creditors, and held valid.

It is no ground of objection that the assignment includes his own individual property. *Haynes v. Brooks*, 116 N. Y. 487.

In an action by the assignees on a chose in action of an insolvent partnership, which has been assigned by a surviving partner, the assignment is presumed to have been made in *bona fide* settlement of the partnership business; the onus is on creditors asking to file a counter claim to show the contrary. *Wilson v. Nicholson*, 61 Ind. 241.

ences, if that is permissible, in case of ordinary assignments in the State in which it is made.¹

The acts, admissions and acknowledgments of a surviving partner are binding upon the firm only with respect to the property in his hands.²

a. AS AGAINST THE REPRESENTATIVES OF THE DECEASED PARTNER—(See also EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165). The surviving partner can maintain an action against the administrator of his deceased co-partner for the recovery of the possession of any of the partnership property appropriated by him,³ and he can compel him to pay over any money wrongfully collected by him,⁴ or he can, if he so

Cannot Confess Judgment.—A surviving partner has no power to give a note and warrant to confess judgment in the name of the firm, and a judgment so confessed is void. *Castle v. Reynolds*, 10 Watts (Pa.) 51.

1. *Wilson v. Soper*, 13 B. Mon. (Ky.) 411; 56 Am. Dec. 573; *Hutchinson v. Smith*, 7 Paige (N. Y.) 26; *Beste v. Burger*, 110 N. Y. 644; *Williams v. Whedon*, 39 Hun (N. Y.) 98; *Loeschigk v. Hatfield*, 51 N. Y. 660; 5 Robt. (N. Y.) 26; *Emerson v. Senter*, 118 U. S. 3; *Patton v. Leftwich*, 86 Va. 421.

The contrary is sometimes held, however, on the ground that as a trustee he cannot consistently give one advantages over another. *Salsbury v. Ellison*, 7 Colo. 167; 49 Am. Rep. 347; *Anderson v. Norton*, 15 Lea (Tenn.) 14; *Barcroft v. Snodgrass*, 1 Coldw. (Tenn.) 430.

The insolvent survivor of an insolvent firm can make a valid general preferential assignment of the property which belonged to the firm for the benefit of its creditors, and it is no ground of objection that the assignment includes his own individual property. *Haynes v. Brooks*, 116 N. Y. 487.

An assignment with preferences made in Georgia by a surviving partner, which does not show the fact of such insolvency on its face, is void. *August v. Calloway*, 35 Fed. Rep. 381.

2. *Rose v. Gunn*, 79 Ala. 411.

But a receipt by a new firm, composed of the surviving partners of the old one, is admissible as evidence of payment of a debt due to the old. *Adams v. Ward*, 26 Ark. 135.

3. *McKay v. Joy* (Cal. 1886), 9 Pac. Rep. 940; *Smith v. Wood*, 31 Md. 293; *Berolzheimer v. Strauss*, 51 N. Y. Supr. Ct. 96.

Or for their conversion. *Stearns v. Houghton*, 38 Vt. 583. And see *Calvert v. Marlow*, 18 Ala. 67. But see *Kantz v. Dreibelbis*, 126 Pa. St. 335.

The administrator by ignorantly taking possession of the books, however, and collecting some of the debts does not become liable to the surviving partner for all of the debts as for a conversion. *Alexander v. Coulter*, 2 S. & R. (Pa.) 494.

If the surviving partner has given accounts to the administrator for collection, and the administrator has been compelled to allow a set-off to the debtor, he is liable only for a balance. *Ely v. Horine*, 5 Dana (Ky.) 398.

It has been held, where the old idea that the survivor and the administrators of the deceased held the partnership property as tenants in common obtains, that the survivor has no exclusive right to possession except for the purpose of paying debts, and cannot therefore sue the executor for conversion or for possession. *Canfield v. Hard*, 6 Conn. 180; *Strathy v. Brooks*, 2 Up. Can., Q. B. 51.

Land conveyed to a firm, but never used in the partnership business, cannot, as a whole, be recovered in ejectment by the surviving partner, the partnership having been dissolved before the death of his copartner. *Baker v. Middlebrooks*, 81 Ga. 491.

4. *Calvert v. Marlow*, 18 Ala. 67; *Bonne v. Kay*, 5 Ark. 19; *Sweet v. Taylor*, 36 Hun (N. Y.) 256; *Shields v. Fuller*, 4 Wis. 102; *McCartey v. Nixon*, 2 Dall. (U. S.) 65.

Where the deceased partner had collected but not accounted for a sum of money, and the administrator had received it undistinguished from the accounts of the individual property, it is not subject to any trust or equitable

elects, compel the debtor to pay it over again,¹ the action lying against the administrator personally and not in his representative capacity, the tort not having been committed by the deceased.²

Though the estate of the deceased partner is indebted to the firm the relation of debtor and creditor does not arise between the administrator and the surviving partner while the accounts remain unsettled;³ but when the balance is ascertained the sur-

lien in favor of the surviving partner; he is required to prove his claim in the probate court for its recovery. *White v. Chapin*, 134 Mass. 230; *Allison v. Davidson*, 1 Dev. & B. Eq. (N. Car.) 46. And in *Calvert v. Marlow*, 6 Ala. 337, it is held that he could not sue at law in such a case.

If the administrator has administered partnership assets as part of the estate of the deceased partner, and has rendered his accounts and been discharged, the survivor may sue the administrator *de bonis non* for the recovery of such assets, but such suit cannot be maintained if the fund had not gone into the estate. *Marlatt v. Scantland*, 19 Ark. 443. And see *Davis v. Sowell*, 77 Ala. 262.

Where, after the death of a partner, the widow collects partnership money, or sells partnership property, the surviving partner is not permitted to charge the estate with it in his account with the administrator any more than if it had been done by a stranger. *Price v. Hicks*, 14 Fla. 569.

Where an attorney had, at the instance of the deceased partner in his lifetime, collected money for the firm, and afterwards paid it to the administrator of the deceased partner, the attorney was held responsible to the surviving partner for the amount. *Kinsler v. McCants*, 4 Rich. (S. Car.) 46.

1. *Calvert v. Marlow*, 18 Ala. 67; *Rice v. Richards*, Busb. Eq. (N. Car.) 277; *Shields v. Fuller*, 4 Wis. 102; *Wallace v. Fitzsimmons*, 1 Dall. (U. S.) 248. And see *Lockwood v. Mitchell*, 7 Ohio St. 387.

Where the deceased partner had agreed to apply to the payment of his individual debts certain notes belonging to the firm, but had not consummated the contract, it was held that the surviving partner was in no respect bound by the agreement, but could compel the administrator of the deceased partner to deliver up the notes. *Stearns v. Houghton*, 38 Vt. 584.

The surviving partner cannot set-off against the administrator what he has furnished to the widow out of the partnership stock. *State v. Donegan*, 12 Mo. App. 190.

2. *Davis v. Sowell*, 77 Ala. 262; *Smith v. Wood*, 31 Md. 293; *Stearns v. Houghton*, 38 Vt. 583; *Shields v. Fuller*, 4 Wis. 102. And see *Marlatt v. Scantland*, 19 Ark. 443.

Where there is a probability that a tract of land, the title to which stands in the names of the partners as tenants in common, is a part of the partnership assets, the court will enjoin the administrator from selling it. *Williams v. Moore*, Phil. Eq. (N. Car.) 211.

3. *Cannon v. Copeland*, 43 Ala. 201; *Painter v. Painter*, 68 Cal. 395; *Van Dyke v. Kilgo*, 54 Ga. 551; *Huff v. Lutz*, 87 Ind. 473; *Wilby v. Phinney*, 15 Mass. 116; *White v. Waide*, Walk. (Miss.) 263; *Grini's Appeal*, 105 Pa. St. 375; *Ozeas v. Johnson*, 4 Dall. (U. S.) 434. And see *Warren v. Wheelock*, 21 Vt. 223; *Stanberry v. Cattell*, 55 Iowa 617; *Bartlett v. McRae*, 4 Ala. 688.

That the balance is deducible from the partnership books does not enable the surviving partner to sue the administrator, as there may be false entries or omissions. *Anderson v. Allen*, 9 S. & R. (Pa.) 241.

Where, in answer to a bill by the surviving partner to enforce against the lands of a deceased partner the lien of a judgment in favor of the partnership, it is alleged that the partnership is largely indebted to the estate of the decedent, there should be a settlement of the partnership accounts, as the heirs and devisees are entitled to have the decedent's debts paid out of the personal estate as far as possible before the real estate is subjected thereto. *Kilbreth v. Root*, 33 W. Va. 600.

But where the deceased partner sold the property for the firm, and had promised to transfer it, the surviving partner may maintain an action for it against the administrator, as the court

vivor is entitled to recover the amount due him,¹ and may prove his claim against the estate as though it were a personal debt.² So, if the estate is insolvent he can recover the amount due from the estate of his deceased co-partner for the benefit of the creditors,³ a judgment against the surviving partner being usually, though not universally, regarded as conclusive whether in favor of the creditor or of the surviving partner, on accounting with the administrator, if he has paid it.⁴

will not compel the parties to proceed for a judicial accounting when justice can be done without it. *Berolzheimer v. Strauss*, 51 N. Y. Super. Ct. Rep. 96.

1. *Morris v. Morris*, 4 Gratt. (Va.) 293.

The surviving partner may make the wife of the deceased partner a party to an action for an accounting of the partnership affairs in order to reach the funds appropriated by such deceased partner and invested in his wife's name. *White v. Russell*, 79 Ill. 156.

In *Cannon v. Copeland*, 43 Ala. 201, where the estate of the deceased partner consisted chiefly of real estate, from which contribution was sought, it was held that the heirs should be made defendants.

2. *Olleman v. Reagan*, 28 Ind. 109; *Chapman v. Chapman*, 13 R. I. 680; *Hunt v. Gookin*, 6 Vt. 462.

It is not necessary for the surviving partner to present his claim to the administrator for what the estate owes him until a final balance has been struck. *Stansberry v. Cattell*, 55 Iowa 617.

The New York statute authorizing a reference of claims, presented to an executor or administrator for payment, is broad enough to include unliquidated claims by a surviving partner against the estate of a deceased partner growing out of the partnership. *Francisco v. Fitch*, 25 Barb. (N. Y.) 130. So of the Rhode Island statute. *Chapman v. Chapman*, 13 R. I. 680.

3. *Bird v. Bird*, 77 Me. 499. And see *Ross v. Pearson*, 21 Ala. 473; *Moffatt v. Thomson*, 5 Rich. Eq. (S. Car.) 155; 57 Am. Dec. 737; *Joplin v. Cordrey* (Ky. 1887), 5 S. W. Rep. 397.

One of two partners who becomes the administrator of his deceased partner, is, with his sureties in the administration, liable to distributees for slaves sold and their hire, to pay partnership debts whilst partnership funds remained out of which to pay

firm debts. *Boyle v. Boyle*, 4 B. Mon. (Ky.) 570.

In *People v. Lott*, 36 Ill. 447, however, it was held that while the individual creditors of the estate of a deceased partner can insist on the full payment of their debts before the partnership creditors can receive anything from the individual estate, yet, as to the heirs, in a proceeding calling the administrator to account, the order of payment of the firm and individual debts is a matter of no consequence, provided the partnership funds are wholly exhausted in payment of the partnership debts, before the administration is closed.

4. See *Sears v. Starbird*, 78 Cal. 225; *Hanna v. Wray*, 77 Pa. St. 27; *Black v. Struthers*, 11 Iowa 459; *Willey v. Thompson*, 9 Met. (Mass.) 329.

But see to the contrary that it would not be evidence on a question of contribution. *Hamilton v. Summers*, 12 B. Mon. (Ky.) 11; 54 Am. Dec. 509. And not evidence for any purpose. *Sturges v. Beach*, 1 Conn. 507.

A judgment against the surviving partner is held not to conclude the representatives in *Buckingham v. Ludlum*, 37 N. J. Eq. 137; *Leake etc. Orphan House v. Lawrence*, 11 Paige (N. Y.) 80.

In *Rose v. Gunn*, 79 Ala. 411, it was held that if the judgment was established only by the admissions of the surviving partner, the survivor, in turning over to the administrator his surplus, must show that the judgment was based on a debt incurred before the death of his partner; and that the cost of an execution against the surviving partner cannot be collected from the estate.

In *Valentine v. Farnsworth*, 21 Pick. (Mass.) 176, where the heir had taken upon himself the defense of an action against the surviving partner, it was held that he could not show in the subsequent action that the claim would have been barred had not the sur-

Upon the dissolution of a partnership by the death of one of the partners, the survivor has an equitable lien upon all the assets to indemnify him against the debts of the firm and to secure any balance which may be due him from the deceased partner on settlement of the partnership accounts between them.¹

(1) *The Administrator's Duties.*—Where the debts are paid and the partnership affairs are wound up properly and with reasonable expedition the rights of the representatives of the deceased partner consist merely in receiving the decedent's share after the completion of the winding up,² and he may then maintain an action at law for its recovery;³ but the representative has

vivor avoided the statute of limitations by an acknowledgment, the former judgment being conclusive unless fraud or collusion was shown.

1. *Pearson v. Keedy*, 6 B. Mon. (Ky.) 128; 43 Am. Dec. 160; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573; *Talbot v. Pierce*, 14 B. Mon. (Ky.) 198; *Shearer v. Shearer*, 98 Mass. 107; *Gray v. Palmer*, 9 Cal. 616; *Dyer v. Clark*, 5 Met. (Mass.) 563, 39 Am. Dec. 697.

The lien of the surviving partner for the payment of debts due him relates to debts due him from the firm and does not extend to mere private debts due him from his deceased partner. *Moffatt v. Thomson*, 5 Rich. Eq. (S. Car.) 155; 57 Am. Dec. 737; *Mack v. Woodruff*, 87 Ill. 570.

The surviving partner having paid off the partnership debts, does not stand on the footing of a joint creditor, but is entitled to come in *pari passu* with separate creditors for contributive payment of such debts, because, as between the solvent surviving partner and the insolvent deceased partner the claim for such payment is a separate debt. *Busby v. Chenault*, 13 B. Mon. (Ky.) 554; *Payne v. Matthews*, 6 Paige (N. Y.) 19.

Where it appears that a surviving partner has paid all the partnership debts, and that the estate of the deceased partner is indebted to him, the heirs of such deceased partner cannot compel the surviving partner to account without showing that he has in his hands partnership property in excess of the amount required to reimburse himself. *Valentine v. Wysor*, 123 Ind. 47.

2. *Walsley v. Mendelsohn*, 31 La. Ann. 152; *Shearer v. Paine*, 12 Allen (Mass.) 289; *Roberts v. Kelsey*, 38 Mich. 602; *Scott v. Searles*, 4 Smed. & M. (Miss.) 25; *Brooks v. Brooks*, 12

Heisk. (Tenn.) 12. And see *Montgomery v. Dunning*, 2 Bradf. (N. Y.) 220.

In *Heath v. Waters*, 40 Mich. 457, it was held that after all the debts are paid, the survivor ought to pay over to the administrator his share of collections as fast as they are realized.

The administrator can compel the surviving partner to pay over any part of the individual estate of the decedent which has come into his hands, even though there are partnership debts outstanding. *Roberts v. Law*, 4 Sandf. (N. Y.) 642. And even though the estate is indebted to the survivor individually. *Moffatt v. Thompson*, 5 Rich. Eq. (S. Car.) 155; 57 Am. Dec. 737. And see *Ross v. Pearson*, 21 Ala. 473.

A surviving partner bound by the articles to liquidate the concern within six months after the dissolution of the partnership by death, and who has no right, after the expiration of the term, to prolong the liquidation, is liable for the value of all the assets at the termination of the delay, when they cannot be returned in specie. *Klotz v. Macready*, 30 La. Ann. 638.

After the administrator has settled the individual debts of his decedent, he must still retain and apply the surplus to pay the deceased's share of partnership debts. *Laurens v. Hawkins*, 1 Desaus. (S. Car.) 144.

3. *Holman v. Nance*, 84 Mo. 674. And see *Krutz v. Craig*, 53 Ind. 561; *Robinson v. Wright*, Brayt. (Vt.) 22.

In *Krutz v. Craig*, 53 Ind. 561, a demand was required to be made.

In *French v. Hayward*, 16 Gray, (Mass.) 512, it was held that the fact that survivors are sued on notes made by the deceased partner in the firm name, but in fraud of the firm, for his own use, does not create a contingent claim authorizing the probate court to hold back funds from distribution, as

the same right to have the assets applied to the debts and the concern wound up and the balance distributed as the decedent would have had,¹ and may, therefore, compel an accounting by the surviving partners, of the partnership estate.² The surviving partner has no right in the absence of express authority, either in the will or in the articles, to continue the business and incur debts, nor power to bind the estate by so doing,³ and it is the duty of the administrator to apply for the interference of a court of equity in case of neglect or omission of duty on the part of the surviving partner in winding up, or his misapplication of the part-

the contingency is one of evidence merely; if the surviving partners do not owe the claim, the possibility that they may have to pay it is not a contingency.

1. Hoard v. Clum, 31 Minn. 186; Egberts v. Wood, 3 Paige (N. Y.) 517; Allen v. National Bank, 6 Lea (Tenn.) 558; Watkins v. Fakes, 5 Heisk. (Tenn.) 185; Hoyt v. Sprague, 103 U. S. 613; *In re Clapp*, 2 Low. (U. S.) 468.

The administrator may compel the survivor to wind up the business and apply the assets to the debts, so as to reduce the liability of the estate even though the partnership is insolvent and there will be no surplus coming to the estate. Jennings v. Chandler, 10 Wis. 21.

The representative of the deceased partner has the same right to have the concern wound up and the balance distributed as against a purchaser of a surviving partner's interest, that he has against the survivor himself. Williams v. Love, 2 Head (Tenn.) 80. And see Deveau v. Fowler, 2 Paige, (N. Y.) 400. But where the administrator had sold one half specifically to the survivor, not subject to debts, the rule would be different. Wilson v. Soper, 13 B. Mon. (Ky.) 411; 56 Am. Dec. 573.

2. Costley v. Fowles, 46 Ala. 660; McLaughlin v. Simpson, 3 Stew & P. (Ala.) 85; Tate v. Tate, 35 Ark. 289; Spann v. Fox, 1 Ga. Dec. 1; Miller v. Jones, 39 Ill. 54; Freeman v. Freeman, 136 Mass. 260; Goldthwaite v. Day, 149 Mass. 185; Cheeseman v. Wiggins, 1 Thomp. & C. (N. Y.) 595; Pitt v. Moore, 99 N. Car. 85; Grim's Appeal, 105 Pa. St. 375; Tillinghast v. Champlin, 4 R. I. 173; Watkins v. Fakes, 5 Heisk. (Tenn.) 185; Jennings v. Chandler, 10 Wis. 21; Denver v. Roane, 99 U. S. 355; Wickliffe v. Eve, 17 How. (U. S.) 468; Hackwell v.

Eustman, Cro. Jac. 410; Heyne v. Middlemore, 1 Ch. Rep. 138.

If the administrator pays debts, he can compel contribution. Sells v. Hubbell, 2 John. Ch. (N. Y.) 394.

The account between the surviving partner and the administrator of the deceased partner is a matter of equitable and not of probate cognizance, and submission to arbitration of such an account, therefore, is not an interference with the jurisdiction of the probate court. Anderson v. Beebe, 22 Kan. 768.

A decree in favor of the administrator for a sum due should be against the surviving partners jointly, though it should be several if they had divided the assets among themselves before the death, and with the consent of the deceased partner. Bundy v. Youmans, 44 Mich. 376.

In *Indiana*, a demand for an accounting is necessary before suit. Anderson v. Ackerman, 88 Ind. 481; Skillen v. Jones, 44 Ind. 136.

In *Logan v. Greenlaw*, 25 Fed. Rep. 299, it was held that a judgment against the survivor and administrator binds the real estate of the partnership, the title to which is in the heir, and that he cannot compel the plaintiff to re-establish the debt, for the land is to be considered as personalty until the debts are paid.

3. See Wood's Estate, 1 Pa. St. 368; Lucht v. Behrens, 28 Ohio St. 231; *Ex parte* Garland, 10 Ves. 110; Lovell v. Gibson, 19 Grant's Ch. (Up. Can.) 280; Kirkman v. Booth, 11 Beav. 273.

If the surviving partner continues the business without the consent of the administrator, and so mingles the old with the new stock as to destroy its identity, the lien attaches to the whole as against all, other than *bona fide* buyers, or holders of specific liens by levy. Hooley v. Gieve, 9 Daly (N. Y.) 104; 9 Abb. N. S. (N. Y.) 271.

nership funds, or other misconduct endangering the estate.¹ A continuance of the business with the partnership assets is an abuse of trust.² And if the surviving partner continues the trade or business with the partnership stock it is at his own risk, and he will be liable at the option of the representatives of the deceased partner to account for the profits made thereby or to be charged with interest upon the deceased partner's share of the surplus besides bearing all the losses.³ So a commingling by the surviving partner of the partnership assets with his private estate applying them to his own use without a separate account is a ground for

But if the executor acquiesces in a continuance of the business with the old assets, his lien for an accounting, though still superior to newly incurred debts in such assets as remain unchanged, is gone as to new property which takes the place of the old in the course of the continued business, and he cannot share with the creditors of the new firm, though if there are no new creditors his lien extends to the whole. *Hoyt v. Sprague*, 103 U. S. 613.

1. *McKean v. Vick*, 108 Ill. 373; *People v. White*, 11 Ill. 341; *Barcroft v. Snodgrass*, 1 - Coldw. (Tenn.) 431; *Gynne v. Estes*, 14 Lea (Tenn.) 662; *Watkins v. Fakes*, 5 Heisk. (Tenn.) 185; *Wayt v. Peck*, 9 Leigh (Va.) 435. And see *Miller v. Kingsbury*, 28 Ill. App. 532; affirmed 128 Ill. 45.

Where the doctrine obtains that the surviving partner is but a tenant in common, the administrator can sue him in trover as for conversion, if he sells with intent to misappropriate. *Rathwell v. Rathwell*, 26 Up. Can. Q. B. 179.

In *Alston v. Rowles*, 13 Fla. 117, the representative of the deceased was regarded as a creditor of the surviving partner to the extent of permitting him to attack a conveyance by him, to his wife, as in fraud of creditors.

In *Thompson v. Rogers*, 69 N. Car. 357, a sale of personal property was made at an auction by the surviving partner without the consent of the administrator. It was purchased for a firm in which the surviving partner was a member, but being in good faith, it was held valid. The surviving partner then offered one-half the price to the administrator, who refused it, and who thereupon invested that one-half in confederate bonds which were lost. It was held that the loss should be divided between them, as he held the one-half not lost, for the firm.

Measure of Damages.—In an action

on the bond of a surviving partner, conditioned for the payment of partnership debts, the measure of damages for a breach of the condition is the amount of the funds in defendant's hands applicable to the debts. *Miller v. Kingsbury*, 28 Ill. App. 532; affirmed 128 Ill. 45.

2. *Hooley v. Gieve*, 9 Daly (N. Y.) 104; 9 Abb. N. Cas. (N. Y.) 271; *Jennings v. Chandler*, 10 Wis. 21.

An administrator permitted the business, in which the decedent had been a partner, to be carried on by the surviving partner, and the result was a profit and increase in value of the firm assets. When the business was finally closed and the real and personal property sold, the firm was found to be insolvent. It appeared also that the firm was in fact insolvent at the time of the decedent's death. There was no property of the decedent other than his interest in the firm. *Held*, that there was no reason for surcharging the administrator, he not having adventured or lost in the business any of the estate of the decedent. *Stern's Appeal*, 95 Pa. St. 504.

3. *Millard v. Ramsdell*, Harr. Ch. (Mich.) 373; *Spann v. Fox*, 1 Ga. Dec. 1; *Fithian v. Jones*, 12 Phila. (Pa.) 201; *Oliver v. Forrester*, 96 Ill. 315; *Brown's Appeal*, 89 Pa. St. 139; *Freeman v. Freeman*, 136 Mass. 260; *Klotz v. Macready*, 39 La. Ann. 638; *Forrester v. Oliver*, 1 Ill. App. 259; *Freeman v. Freeman*, 142 Mass. 98; *Waring v. Cram*, 1 Pars. Sel. Cas. Eq. (Pa.) 516; *Ames v. Downing*, 1 Bradf. (N. Y.) 321.

If the personal representatives elect to take profit or interest, they must take the one selected for the entire period during which the survivor continued the business. They cannot take profits for one period and interest for another. *Goodburn v. Stevens*, 1 Md. Ch. 420; 5 Gill. (Md.) 1; *Millard v. Ramsdell*, Harr. Ch. (Mich.) 373;

an injunction, a receiver and an accounting,¹ and any misconduct, bad faith or other violation of duty will be enjoined upon application of the representative, either with or without a receiver.²

b. POWER OF DISPOSITION.—The surviving partner has full power of disposition of all the partnership property, whether it consists of tangible property or choses in action, for the purpose of transforming them into distributable shape in order to wind up,³ his right to transfer choses in action either by sale or in payment of

Forrester v. Oliver, 1 Ill. App. 259; *Brown's Appeal*, 89 Pa. St. 139; *Washburn v. Goodman*, 17 Pick. (Mass.) 519; *Skidmore v. Collier*, 8 Hun (N. Y.) 50; *Remick v. Emig*, 42 Ill. 342; *Story on Part. § 343*; *Lindley on Part. 977*; *Pernie v. Vandever*, 16 Ark. 616.

Where the surviving partner has invested partnership funds in lands in his own name, the heirs or representatives of the decedent may ratify the investment and claim a share in it, or recover the money and fasten a lien upon the land for it; until a right to the land is asserted, however, the claim is a money demand *ex contractu* within the Statute of Limitations. *Morgan v. Morgan*, 68 Ala. 80.

A surviving partner cannot mortgage the partnership assets, including, of course, the share of the deceased partner, to secure a debt due chiefly by himself, and only in part by the deceased, with a view to the continuance of the trade. *Buckley v. Barber*, 1 Eng. L. & E. 506.

Where the deceased partner has no capital in the concern which might be endangered by the continuance of the trade the rule prohibiting him from continuing the business does not apply. *Hyde v. Easter*, 4 Md. Ch. 84.

Where the heirs of the deceased have consented for a number of years to his continuance of the business, they are bound by his acts, and cannot hold him liable for the profits that he might have made, but lost by negligence and mismanagement. *Reynaud v. Peytavin*, 13 La. 121.

Where the interest of the deceased partner had become vested in one of the surviving partners, who consented to the continuance of the copartnership, it was held that the rule did not apply. *Millard v. Ramsdell*, Harr. Ch. (Mich.) 373.

1. *Jennings v. Chandler*, 10 Wis. 21; *Hooley v. Gieve*, 9 Daly (N. Y.) 104; 9 Abb. N. Cas. (N. Y.) 271.

It is not fraud upon partnership

creditors to apply to the payment of individual debts goods belonging to the surviving partner, which never belonged to the partnership, but were his own individual property, merely because they had been mingled with the stock formerly belonging to the firm. *McGinty v. Flannagan*, 106 U. S. 661.

2. *People v. White*, 11 Ill. 341; *Fletcher v. Vandusen*, 52 Iowa, 448; *Gable v. Williams*, 59 Md. 46; *Citizens Mut. Ins. Co. v. Ligon*, 59 Miss. 305; *Scott v. Tupper*, 8 Smed. & M. (Miss.) 280; *Stanhope v. Supplee*, 2 Brewst. (Pa.) 455; *Foster v. Shephard*, 33 Tex. 687; *Fulton v. Thompson*, 18 Tex. 278; *Rathwell v. Rathwell*, 26 Up. Can. Q. B. 179; *Hartz v. Schrader*, 8 Ves. 317.

3. *Allen v. Hill*, 16 Cal. 113; *Milner v. Cooper*, 65 Iowa 190; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411; 56 Am. Dec. 573; *Barry v. Briggs*, 22 Mich. 201; *Loeschigk v. Hatfield*, 51 N. Y. 660; *Calvert v. Miller*, 94 N. Car. 600; *Hogg v. Ashe*, 1 Hayes 471; *Knott v. Stephens*, 3 Oregon 269; *Smith's Estate*, 11 Phila. (Pa.) 131; *Herd v. Delp*, 1 Heisk. (Tenn.) 530; *Allen v. National Bank*, 6 Lea. (Tenn.) 558; *Fulton v. Thompson*, 18 Tex. 278; *Bohler v. Tappan*, 1 Fed. Rep. 469; 1 McCrary (U. S.) 134.

The surviving partner may sell the stock as a whole if advisable, and he cannot be compelled to sell at retail only, and although a landlord has a lien on the stock, if the fund is secured in the survivor's notes, the landlord will not be allowed to interfere. *Milner v. Cooper*, 65 Iowa 190.

The surviving partners have power to sell and convey the firm real estate, without regard to whether this be necessary to pay debts. *Solomon v. Fitzgerald*, 7 Heisk. (Tenn.) 552.

That the firm and each of the surviving partners are insolvent is no impediment to a *bona fide* transfer for the purpose of closing up, and the

partnership debts being an incident to his legal title in them,¹ nor is his right confined to selling; he may also and upon the same principle, pledge assets as security for partnership debts,² or for advances for partnership purposes,³ and pledge or mortgage the partnership choses in action to secure a firm indebtedness.⁴ A reasonable delay in making sales in order to avoid a dull season is permissible.⁵ He cannot, however, transfer a partnership asset in payment of an individual debt;⁶ as the property is that of the surviving partner it cannot be taken from him on execution against an individual partner which had not become a lien upon his interest before his death.⁷

transfer will be presumed to be for a legitimate purpose, until the contrary appears. *Wilson v. Nicholson*, 61 Ind. 241.

He cannot assign or transfer partnership property, however, for the payment of a separate debt, or of the debt of another firm of which he is also surviving partner. *Scott v. Tupper*, 8 Smed. & M. (Miss.) 280; *Allen v. National Bank*, 6 Lea (Tenn.) 558. But the contrary was held where the sale was made in good faith in *Fitzpatrick v. Flannagan*, 106 U. S. 48.

In *Bilton v. Blakely*, 6 Grant's Ch. (Up. Can.) 575, the power of the surviving partner to sell after the debts are paid is denied.

1. *Johnson v. Berlzheimer*, 84 Ill. 54; 25 Am. Rep. 427; *Willson v. Nicholson*, 61 Ind. 241; *Jones v. Thorn*, 2 Mart., N. S. (La.) 463; *Scott v. Tupper*, 8 Smed. & M. (Miss.) 280; *Mutual Sav. Inst. v. Enslin*, 37 Mo. 453; *Bredow v. Mutual Sav. Inst.*, 28 Mo. 181; *French v. Lovejoy*, 12 N. H. 458; *Daby v. Ericsson*, 45 N. Y. 786; *Pinckney v. Wallace*, 1 Abb. Pr. (N. Y.) 82; *Farmers' Bank v. Ritter*, (Pa. 1888), 12 Atl. Rep. 659; *Roys v. Vilas*, 18 Wis. 169; *Bohler v. Tappan*, 1 Fed. Rep. 469.

If he is the creditor of the firm, and indebted to another person, he may transfer to his creditor the debt due to him by the firm, who will in his stead, become liable to his creditor; and this may be done, although the affairs of the partnership have not been settled. *Peyton v. Stratton*, 7 Gratt. (Va.) 380; *Brown v. Higginbotham*, 5 Leigh (Va.) 583, 27 Am. Dec. 618.

In *Mutual L. Ins. Co. v. Sturges*, 33 N. J. Eq. 328, an agreement by the surviving partner, postponing a mortgage made to the firm to a later mortgage, was held valid and binding upon him, and an assignee of the mortgage, with-

out inquiring into its effect upon the deceased partner's interest.

2. *Breen v. Richardson*, 6 Colo. 605; *Bohler v. Tappan*, 1 Fed. Rep. 469; 1 McCrary (U. S.) 134; *In re Clough*, L. R., 31 Ch. Div. 324. And see *Keck v. Fisher*, 38 Mo. 532.

The right to mortgage partnership property extends to personal property only. A legal mortgage cannot be made of partnership real estate without the concurrence of all the partners. *Lindley on Part.* 284.

3. *Butchart v. Dresser*, 4 D. M. & G. 542.

4. *Bohler v. Tappan*, 1 Fed. Rep. 469; 1 McCrary (U. S.) 134; *In re Clough*, L. R., 31 Ch. Div. 324. But see to the contrary, *Bank of Port Gibson v. Baugh*, 9 Smed. & M. (Miss.) 290.

A surviving partner has power to mortgage the firm property in settling up the partnership business, and, when such mortgage is executed in good faith, the right of the mortgagee is superior to the right of representatives of the deceased partner to compel an accounting and payment of the amount due the latter's estate. *Bell v. Hepworth*, 51 Hun (N. Y.) 616.

5. *Oliver v. Forrester*, 96 Ill. 315.

6. See *Hutchinson v. Smith*, 7 Paige (N. Y.) 26; *Tiemann v. Molliter*, 71 Mo. 512; *Scott v. Tupper*, 8 Smed. & M. (Miss.) 280; *Allen v. National Bank*, 6 Lea (Tenn.) 558.

A was indorser for the accommodation of the firm of C D. D died leaving the debts unpaid. A then indorsed for C on his credit alone, and C used the proceeds to pay the firm notes. A thus becomes a separate creditor of C, and C's delivery of partnership property to him in payment will be set aside in behalf of partnership creditors. *Holland v. Fuller*, 13 Ind. 195.

7. *Newell v. Townsend*, 6 Sim.

(1) *Purchase by the Survivor of the Decedent's Interest.*—Some of the States have statutory provisions permitting the surviving partner to take the assets and the business of the partnership at an appraised valuation,¹ and when it has been provided in the articles that the survivor may take at a valuation or that he is to become the owner, and a debtor to the amount of its value, a *bona fide* settlement with the administrator binds the distributers.² In the absence of such authority, either by agreement or by statute, if the survivors take the property at a valuation fixed by themselves, they will be held to account for the profits at the election of the representatives irrespective of the fairness of the estimate,³ though a *bona fide* and fair sale by the administrators to the surviving partners will be binding upon the heirs, distributees and creditors, and will be upheld and ratified by the court,⁴ and the partnership affairs may be otherwise settled and adjusted between the representatives and the survivors, and in the absence of fraud or mistake the settlement is conclusive, both upon all the parties, and all persons claiming through or under them.⁵ If the

419; *Bank of N. America v. McCall*, 3 Binn. (Pa.) 338; 4 Binn. (Pa.) 371; *Vienne v. McCarty*, 1 Dall. (Pa.) 154.

Where a levy was made in a foreign country and the property was decreed by a competent court to belong to the deceased partner, the separate creditor is nevertheless bound to refund if he had notice before attaching the surviving partner's claim. *Bank of N. America v. McCall*, 3 Binn. (Pa.) 338; 4 Binn. (Pa.) 371.

1. See *Rammelsberg v. Mitchell*, 29 Ohio St. 22.

2. *Holmes' Appeal*, 79 Pa. St. 279; *Eldred v. Warner*, 1 Ariz. 175; *Gaut v. Reed*, 24 Tex. 46.

Where, upon the death of a partner, the survivors give notice pursuant to agreement that they would take the interest of the decedent, the personal representatives of the latter were not entitled to any profits accruing subsequent to such notice, although accruing before the close of the current year. *Harbster's Appeal*, 125 Pa. St. 1.

3. *Ogden v. Aston*, 4 Sandf. (N. Y.) 311. And see *Brown v. Gellatly*, 31 Beav. 243.

4. *Moses v. Moses*, 50 Ga. 9; *Kimball v. Lincoln*, 99 Ill. 578; *Valentine v. Wysor*, 123 Ind. 47; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411; 56 Am. Dec. 573; *Heath v. Waters*, 40 Mich. 457; *Ludlum v. Buckingham*, 35 N. J. Eq. 71; *Sage v. Woodin*, 66 N. Y. 578; *Ludlow v. Cooper*, 4 Ohio St. 1;

Grim's Appeal, 105 Pa. St. 375; *Roys v. Vilas*, 18 Wis. 169; *Ex parte Sessions*, 2 Up. Can., Ch. Cham. 360; *Chambers v. Howell*, 11 Beav. 6.

A settlement between the representatives of the deceased partner, and the survivors, will be deemed *prima facie* fair. *Moses v. Moses*, 50 Ga. 9. And will not be disaffirmed except for mistake or fraud or some such ground. *Kimball v. Lincoln*, 99 Ill. 578; *Sage v. Woodin*, 66 N. Y. 578.

In *Foster's Appeal*, 74 Pa. St. 391; 15 Am. Rep. 553, where part of the assets consisted of real estate, it was held that personality must first pay the debts before realty can be resorted to; and that a surviving partner cannot sell the real estate in conjunction with the personality; he must sell the latter separately, but that the administrator and guardians may obtain relief to sell to the surviving partner at an advantageous price on showing that a sale in portions would be prejudicial.

The utmost good faith, however, is required; where the executrix of the deceased partner was the widow and was sister-in-law of the surviving partner, having great confidence in him, it was held that where he failed to show her what the assets were and put her in as complete a state of knowledge as himself; and where he inventoried the property at cost instead of at its value, and also made misrepresentations, the sale should be set aside. *Heath v. Waters*, 40 Mich. 457.

5. *Sage v. Woodin*, 66 N. Y. 578;

surviving partner is also executor of the deceased partner, however, such a transaction would be a sale to or a settlement with himself, and neither good faith nor an adequate consideration can uphold it in the absence of assent by the heirs and distributees,¹ though it would seem that such a purchase or settlement made with the subsequent approval and consent of the heirs and distributees would be binding, the fraud being constructive only and the transaction avoidable rather than void.²

c. POWER TO CONTRACT.—The possession of the surviving partner is exclusive for the purpose of winding up only, and a surviving partner has as little right as any other partner after dissolution to make new contracts or to change the form of old ones.³ He may

Hoyt v. Sprague, 12 Chic. Leg. News 210; affirmed, 103 U. S. 613; Davis v. Davis, 2 Keen 534; Smith v. Everitt, 27 Beav. 446; Yeatman v. Yeatman, 7 Ch. Div. 210.

In Roys v. Vilas, 18 Wis. 169, it was held that the administrator could receive payment in a chases in action on the ground that the parties can make a specific division of assets after the debts are paid instead of selling them.

1. Case v. Abeel, 1 Paige (N. Y.) 393; Nelson v. Hayner, 66 Ill. 487; Colgate v. Colgate, 23 N. J. Eq. 372; Denholm v. McKay, 148 Mass. 434. And see Washburn v. Goodman, 17 Pick. (Mass.) 519; Wedderburn v. Wedderburn, 2 Keen 722; 22 Beav. 84; Cook v. Collingridge, Jac. 607.

Where two of three administrators sold the deceased's interest in the firm to the third administrator, who was one of the surviving partners, the court held that the transaction was voidable at the election of the parties in interest regardless of the *bona fides*. Gilbert's Appeal, 78 Pa. St. 266.

In Colgate v. Colgate, 23 N. J. Eq. 372, it was held that one of two executors have power to sell personal property, and that he may therefore sell to a firm of which his co-executor was a member, but if both sell to such firm, the sale would be set aside for inadequacy of price; and that a trustee who is in a position to give more than any other purchaser would give, may purchase the property for the firm of which he is a member, upon permission being granted by the court after directing the guardian *ad litem* or the heir to employ counsel approved by the court.

2. See Grim's Appeal, 105 Pa. St. 375; Denholm v. McKay, 148 Mass. 434; Filley v. Phelps, 18 Conn. 294;

Moses v. Moses, 50 Ga. 9; Simpson v. Chapman, De G. M. & J. 454. But see Ludlum v. Buckingham, 35 N. J. Eq. 71; Wedderburn v. Wedderburn, 2 Keen 722.

In Gaut v. Reed, 24 Tex. 46, the doctrine that a survivor who is executor cannot convey to his co-survivor was held not applicable where the assets were, by the articles, to vest in the surviving partner, who was to become indebted to the estate for their value; because in such case as owner, he could sell to the executor as well as to a stranger.

Survivor's Accountability.—The proceeds of the sale of a deceased partner's interest in firm property are firm assets, and first applicable to firm debts, and a surviving partner, who is administrator of his partner's estate, and has bought his share of certain firm property, is chargeable as administrator with only the balance of the price of such share, after deducting the deceased partner's proportion of the firm debt to the survivor. Hart v. Hart, 31 W. Va. 688.

3. Bates' Law of Part., § 727; Remick v. Emig, 42 Ill. 242; Cock v. Carson, 45 Tex. 429. And see also *infra*, this title, *Powers of Surviving Partners*.

Where the surviving partners form a new firm and continue the business with the assets of the old firm, and make an assignment for the benefit of creditors of the new firm, and the assignee sells the property, the buyer receives no title, and can therefore rescind. Tiemann v. Molliter, 71 Mo. 512.

In Oliver v. Forrester, 96 Ill. 315, however, it was held that a surviving partner might make small purchases so as to render the stock more salable.

In Betts v. June, 51 N. Y. 274, where

incur necessary liability for expenses proper to the legitimate winding up of the business, however, as distinguished from continuing it.¹

(1) *Unfulfilled Contracts*.—Like a partner after an ordinary dissolution the surviving partner not only has the right but it is his duty to carry out and complete such unfinished and executory contracts as had been previously entered into, and from which death does not dissolve the firm,² but when the contract is based upon personal trust and confidence reposed in the deceased, or expressly requires his personal attention, his death justifies the others in rescinding it if the parties can be placed in *statu quo*,³ and it has been held that the surviving partner is not obliged to carry out uncompleted contracts of service, as in case of the employment of an agent for an unexpired period which is terminated by the death of a partner.⁴

a lease with privilege of renewal on three months' notice was made to a firm, and before the expiration of the original time one partner died, it was held that the other could give the notice and enforce the renewal.

1. See *Allen v. Blanchard*, 9 Cow. (N. Y.) 631; *Roach v. Brannon*, 57 Miss. 490; *Schenkl v. Dana*, 118 Mass. 236; *Offutt v. Scott*, 47 Ala. 104.

Where the surviving partner raised money on his individual credit and paid partnership debts with it, his use of the assets to repay the loan, does not subject him to an attachment. *Fitzpatrick v. Flannagan*, 106 U. S. 648.

Where the partnership stock consisted of a large amount of unfinished material salable in that shape only at a sacrifice and the surviving partner borrowed money with which to work it up, the loan can be paid out of the partnership assets. *Calvert v. Miller*, 94 N. Car. 600.

2. *Davis v. Sowell*, 77 Ala. 262; *Ayres v. Chicago etc. R. Co.*, 52 Iowa 478; *McGill v. McGill*, 2 Metc. (Ky.) 258; *Pingree v. Coffin*, 12 Gray (Mass.) 288; *Tompkins v. Tompkins*, 18 S. Car. 1; *Connell v. Owen*, 4 Up. Can., C. P. 113; *Denver v. Roane*, 99 U. S. 355. And see *Oliver v. Forrester*, 96 Ill. 315; *Johnson v. Hartshorne*, 52 N. Y. 173; *Mason v. Tiffany*, 45 Ill. 392; *Miller v. Hoffman*, 26 Mo. App. 199.

The estate of a deceased partner is liable for loss occasioned by the efforts of the surviving partner to carry unfulfilled contracts. *Tompkins v. Tompkins*, 18 S. Car. 1.

It is also liable for his misconduct. *McGill v. McGill*, 2 Metc. (Ky.) 258.

Though deceased died soon after the making of a joint contract by him and defendants for doing certain brick-work and excavating, and the defendants went on alone, and completed the work, his estate is entitled to share in the profits realized; it appearing that it was liable to make good its share of any loss. *Jepson v. Killian*, 151 Mass. 593.

May Gather Crops.—The surviving partner in a cotton plantation, before the late war, not being authorized by the articles of partnership, or the will of the deceased partner, was not authorized to continue the business longer than was necessary to gather and sell the growing crop. *Clay v. Field*, 34 Fed. Rep. 375.

3. See *Fulton v. Thompson*, 18 Tex. 278; *Ayres v. Chicago etc. R. Co.*, 52 Iowa 478; *McGill v. McGill*, 2 Metc. (Ky.) 258.

In *Johnson v. Wilcox*, 25 N. Y. 184, death was held to revoke the employment of a firm of attorneys.

Where the firm of A & B agreed to furnish the firm of A, B & Co. with certain lumber, it was held that the death of A, dissolving both firms at once terminated the agreement, the contract being one among themselves, and relating to a continuance of the business rather than a continuing contract. *Oliver v. Forrester*, 96 Ill. 315.

4. *Burnett v. Hope*, 9 Ont. Rep. (Ca.) 10; *Tasker v. Shepherd*, 6 H. & N. 575. But see to the contrary, *Fereira v. Sayres*, 5 W. & S. (Pa.) 210; 40 Am. Dec. 496.

Rental Contract.—A firm occupied a store owned by one of them, under

d. ACTION BY AND AGAINST SURVIVING PARTNERS.—All actions in favor of the partnership relating to partnership affairs must be brought by the surviving partners alone, without joining with the representatives of the deceased co-partner,¹ including actions for injury to the personal property of the firm,² for the rescission of a contract induced by fraud,³ and actions upon contracts or securities running to the firm as partners and not as tenants in common,⁴ as well as actions for the collection of partnership claims and accounts. So, as the title to choses in action rests in him individually, the surviving partner may unite partnership claims with his

an agreement that it should be without rent. *Held*, that the death of the other partner terminated the contract, and that the partnership estate was properly charged with the rent thereafter accruing. *In re Beck's Estate* (Oregon 1890), 24 Pac. Rep. 1038.

1. *Calvert v. Marlow*, 18 Ala. 67; *Costley v. Wilkerson*, 49 Ala. 210; *Davidson v. Weems*, 58 Ala. 187; *Belton v. Fisher*, 44 Ill. 32; *Willson v. Nicholson*, 61 Ind. 241; *Nicklaus v. Dahn*, 63 Ind. 87; *Brown v. Allen*, 35 Iowa, 306; *Morrison v. Winn*, Hard. (Ky.) 488; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411; 56 Am. Dec. 573; *Stevens v. Rollins*, 34 Me. 226; *Strang v. Hirst*, 61 Me. 9; *Barney v. Smith*, 4 Har. & J. (Md.) 485; *Stafford v. Gold*, 9 Pick. (Mass.) 533; *Holbrook v. Lackey*, 13 Met. (Mass.) 132; 46 Am. Dec. 726; *Oakman v. Dorchester Mut. F. Ins. Co.*, 98 Mass. 57; *Pfeffer v. Stenier*, 27 Mich. 537; *Bassett v. Miller*, 39 Mich. 133; *Robinson v. Thompson, Smed. & M. Ch.* (Miss.) 454; *Copes v. Fultz*, 1 Smed. & M. (Miss.) 623; *Amb's v. Caspari*, 13 Mo. App. 586; *Matney v. Gregg Bros. Co.*, 19 Mo. App. 107; *Bohm v. Dunphy*, 1 Mont. 333; *Quillen v. Arnold*, 12 Nev. 234; *Manning v. Smith*, 16 Nev. 85; *Reese v. Kindred*, 17 Nev. 447; *Ledden v. Colby*, 14 N. H. 33; 40 Am. Dec. 173; *Daly v. Ericson*, 45 N. Y. 786; *Bernard v. Wilcox*, 2 Johns. Cas. (N. Y.) 374; *Holmes v. D'Camp*, 1 Johns. (N. Y.) 34; 2 Am. Dec. 293; *Murray v. Mumford*, 6 Cow. (N. Y.) 441; *Egberts v. Wood*, 3 Paige (N. Y.) 517; *Pinckney v. Wallace*, 1 Abb. Pr. (N. Y.) 82; *Daby v. Ericson*, 45 N. Y. 786; *Manning v. Brickell*, 2 Hayw. (N. Car.) 133; *Felton v. Reid*, 7 Jones (N. Car.) 269; *Rice v. Richards*, 1 Busb. Eq. (N. Car.) 277; *Beach v. Hayward*, 10 Ohio 455; *Wallace v. Fitzsimmons*, 1 Dall. (Pa.) 248; *McCary v. Nixon*, 2 Dall. (Pa.) 65 n.;

Davis v. Church, 1 W. & S. (Pa.) 240; *Dial v. Agnew*, 28 S. Car. 454; *Kinsler v. McCants*, 4 Rich. (S. Car.) 46; 53 Am. Dec. 711; *Watson v. Miller*, 55 Tex. 289; *Shields v. Fuller*, 4 Wis. 102; *Roys v. Vilas*, 18 Wis. 169; *McCartney v. Hubbell*, 52 Wis. 360; *Kirby v. Lake Shore etc. R. Co.*, 8 Fed. Rep. 62; *Bolckow v. Foster*, 24 Grant's Ch. (Up. Can.) 333; *Martin v. Crump*, 2 Salk. 444; 1 Ld. Ray. 340; *Comb. 474*; *Kemp v. Andrews*, Carth. 170; 3 Lev. 290; *Smith v. Barrow*, 2 T. R. 476; *Hancock v. Haywood*, 3 T. R. 433; *Dixon v. Hammond*, 2 B. & Ald. 310; *Goldring v. Vaughn*, 2 Chit. 436; *Haig v. Gray*, 3 De G. & Sm. 741.

That the surviving partner was a dormant partner does not make it necessary or proper to join the administrator of the deceased partner as a co-plaintiff. *Beach v. Hayward*, 10 Ohio 455.

2. *Brown v. Allen*, 35 Iowa 306; *Pfeffer v. Steiner*, 27 Mich. 537; *Hunt v. Drane*, 32 Miss. 243; *Bohm v. Dunphy*, 1 Mont. 333.

In *Mead v. Raymond*, 52 Mich. 54, which was a case of breach of warranty in the sale of a horse, it was held that under the common law system where a tort is committed after the death of the partner, and an action is brought by the surviving partner as such, there is a fatal variance, tort against two partners being averred, and the proof being of tort against one only.

3. *Bischoffsheim v. Baltzer*, 20 Fed. Rep. 890.

4. *Robinson v. Thompson, Smed. & M. Ch.* (Miss.) 454; *Bolckow v. Foster*, 24 Grant's Ch. (Up. Can.) 333.

In *Oakman v. Dorchester Mut. L. Ins. Co.*, 98 Mass. 575, it was held that the surviving partner is entitled to maintain an action alone on a policy of insurance issued to the partnership on a house owned by the partners as tenants in common.

own individual ones in the same action,¹ or if he is the surviving partner of two different firms he can unite in one action claims due from the same person to each firm.² Nor need he sue as surviving partner or in a representative capacity; he may proceed as in his own right,³ though to sue as survivor has been held to be the better practice.⁴ The complaint should allege the partnership, its ownership, the death and survivorship,⁵ though if the action is brought as surviving partner the allegation of death is unnecessary.⁶ If, pending the action, a partner dies,

1. *Smith v. Wood*, 31 Md. 293; *Berry v. Harris*, 22 Md. 30; *Stafford v. Gold*, 9 Pick. (Mass.) 533; *Adams v. Hackett*, 27 N. H. 289; 59 Am. Dec. 376; *Quillen v. Arnold*, 12 Nev. 234; *Nehrboss v. Bliss*, 88 N. Y. 600; *Bernard v. Wilcox*, 2 Johns. Cas. (N. Y.) 374; *Davis v. Church*, 1 W. & S. (Pa.) 240; *McCartney v. Hubbell*, 52 Wis. 360; *Smith v. Barrow*, 2 T. R. 476; *Hyat v. Hare*, Comb. 383.

As the surviving partner combines the character of an original party to the contracts of the firm and that of representative of a deceased party, there are some peculiarities of right and remedy growing out of the anomaly. Where he brings suit on a demand due the firm, a promise to him by the debtor after the death of his co-partner will take the case out of the Statute of Limitations. It is not a new assumpsit, but is a saving of the remedy on the original promise; the right and remedy are united in him, the original promise still exists, and the right of action survives to him. *Barney v. Smith*, 4 Har. & J. (Md.) 485.

His representative capacity does not enable him to prejudice the estate of the deceased partner by admissions and payments. *Way v. Bassett*, 5 Hare 66.

2. *Stafford v. Gold*, 9 Pick. (Mass.) 533; *Adams v. Hackett*, 27 N. H. 289; 59 Am. Dec. 376.

3. *Vandenhewvel v. Storrs*, 3 Conn. 203; *Smith v. Wood*, 31 Md. 293; *Farwell v. Davis*, 66 Barb. (N. Y.) 73; *Hogg v. Ashe*, 1 Hayw. (N. Car.) 471; *Meador v. Leslie*, 2 Vt. 569; *Joyslin v. Taylor*, 24 N. H. 268. But see to the contrary, *Brown v. Allen*, 35 Iowa 306; *Reeder v. Sayre*, 70 N. Y. 180.

In such case, however, the cause of action must be correctly set forth, that the defendant may know who he is called to answer. *Vandenhewvel v. Storrs*, 3 Conn. 203.

4. *Reese v. Kindred*, 17 Nev. 447. And see *Berolzheimer v. Strauss*, 51 N. Y. Supr. Ct. 96. *

Under code practice, that a surviving partner describes himself as such when sued upon a claim which arose after the death of his co-partner, is not fatal. *Quillen v. Arnold*, 12 Nev. 34. *Kinsler v. McCants*, 4 Rich. (S. Car.) 46; 53 Am. Dec. 711.

5. *Reese v. Kindred*, 17 Nev. 447; *Bolchow v. Foster*, 24 Grant's Ch. (Up. Can.) 333.

If the action by the surviving partner as such, be for the return of money loaned or paid, he must say that he paid it on behalf of the firm, an action by him as surviving partner being equivalent to an action by the firm. *Stevens v. Rollins*, 34 Me. 226.

Where an action is commenced in the name of persons who have been partners, and one of them is dead when the suit is commenced, it is proper to allow the other, by amendment, to declare as surviving partner, and in such action plaintiff may recover for all work done in completion of a job undertaken by the partnership, and partly performed before the other partner died. *O'Connell v. Schwana-beck*, 76 Mich. 517.

6. *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 595; *Ledden v. Colby*, 14 N. H. 33; 40 Am. Dec. 173. And see *Wright v. McCampbell*, 75 Tex. 644.

A general practice is to declare on a contract as made by both deceased and the survivors. *Spaulding v. Mure*, 6 T. R. 369; *Bovill v. Wood*, 2 M. & S. 25. This cannot be done, however, where the cause of action arose after the death of the partner. *Tom v. O'Goodrich*, 2 Johns. (N. Y.) 213.

In *Black v. Struthers*, 11 Iowa 459, it was held that the action against a surviving partner must be brought against him as such, and not as an individual contractor, in order that the

it does not abate, but death is suggested and the action proceeds.¹

If the representatives of the deceased partner have been joined an amendment striking out their names will be allowed,² and the misjoinder is waived if not objected to in the trial court.³

The same rules apply to actions against a surviving partner; he may be proceeded against upon the indebtedness of the firm without noticing the fact of partnership, death or survivorship;⁴ his creditor may unite demands against him as surviving partner and claims due from him individually, in the same action,⁵ and an

demand may be evidence in his favor against the estate of the decedent.

The question of plaintiffs' right to recover under the allegation that they held a claim for services as assignees is immaterial, as they are entitled to sue by reason of their relation of surviving partners. *Wright v. McCampbell*, 75 Tex. 644.

1. *Phoenix Ins. Co. v. Moog*, 81 Ala. 335; *Atlanta v. Droby*, 74 Ga. 702; *Childs v. Hyde*, 10 Iowa 294; *McCandless v. Haddon*, 9 B. Mo. (Ky.) 186; *Byrne v. Schwing*, 6 B. Mon. (Ky.) 199; *Sprawles v. Barnes*, 1 Smed. & M. (Miss.) 629; *Dunman v. Coleman*, 59 Tex. 199.

The same rule applies in case of the death of one partner, the partners being plaintiffs in error. *Gunter v. Jarvis*, 25 Tex. 581.

2. *Davidson v. Weems*, 58 Ala. 187; *Amb's v. Caspari*, 13 Mo. App. 586. And see *Kennedy v. Richey*, 1 Strobb. (S. Car.) 4.

The same rule applies to a joinder of the representatives as parties defendant. *Hoskinson v. Eliot*, 62 Pa. St. 393.

Where a copartnership brings an action for a firm debt, and it appears that one of the partners died after the claim was created, but before the suit was commenced, the process, pleadings, and all the proceedings may be amended where no substantial rights of defendant are affected thereby, by substituting as plaintiffs the surviving partners, and depositions taken before the amendment, are admissible in evidence to establish the cause of action. *Cragan v. Gardiner*, 64 Mich. 399.

The executors of a deceased partner are not necessary parties defendant in an action on a claim against the partnership; and, though they have been joined, a judgment in plaintiff's favor is not erroneous, because it does not

require that the amount awarded thereby shall be paid in the due course of the administration of the deceased partner's estate. *Corson v. Berson* (Cal. 1890), 25 Pac. Rep. 7.

3. *Belton v. Fisher*, 44 Ill. 32; *Nicklaus v. Dahn*, 63 Ind. 87; *Matney v. Gregg Bros. Co.*, 19 Mo. App. 107.

The judgment cannot be collaterally attached on account of the joinder of the personal representatives as parties plaintiff. *Fuqua v. Mullen*, 13 Bush (Ky.) 467.

4. *Culbertson v. Townsend*, 6 Ind. 64; *Goelet v. M'Kinsty*, 1 Johns. Cas. (N. Y.) 405; *Butler v. Kirby*, 53 Wis. 155; *Hyat v. Hare*, Comb. 383; *Richards v. Hunter*, 3 B. & B. 302; *Mountstephen v. Brooke*, 1 B. & Ald. 214; *Richardson v. Heather*, 1 B. & Ald. 29. And see *Offutt v. Scott*, 47 Ala. 104; *Cullum v. Batre*, 1 Ala. 126.

He is the only necessary defendant in a bill in chancery. *Hardesty v. Jones*, 10 Gill & J. (Md.) 404; 32 Am. Dec. 180; *Robertshaw v. Hanway*, 52 Miss. 713.

A partnership agreement may, after dissolution by death of one of the partners, be enforced against the survivor as a personal obligation. *McLean v. McAllister*, 30 Mo. App. 107.

5. *Friermuth v. Friermuth*, 46 Cal. 42; *Fitzgerald v. Boehm*, 7 J. B. Moore 322; *Richards v. Heather*, 1 B. & A. 29; *Nehrboss v. Bliss*, 88 N. Y. 600; *Butler v. Kirby*, 53 Wis. 188; *Calder v. Rutherford*, 7 J. B. Moore, 158; *Jell v. Douglas*, 4 B. & A. 374. See to the contrary *Tassard v. Warcup*, 2 Mod. 279.

Where the property belonging to the community has been purchased at a sheriff's sale, under a judgment rendered on an individual debt of the surviving partner in community, the minor heirs of the deceased partner are entitled to a judgment in revendication, without any alternative or conditional

attachment may be issued in an action against him for a partnership claim on the grounds of his non-residence.¹

So, when a surviving partner is sued on an individual claim he may set off a debt due him as surviving partner,² or when sued on a partnership demand he may set off his individual claim,³ and when he sues on a partnership demand his individual indebtedness may be set off against it,⁴ or his liability as surviving partner may be set off in a suit brought by him on his individual demand.⁵

1. *The Remedy of Firm Creditors*.—Though a partnership contract be joint or, as by statute in some States, joint and several, death severs it and it is no longer joint,⁶ the English rule being that a creditor of the partnership can pursue his remedy, not only against

allowance. *Waring v. Zunts*, 16 La. Ann. 49.

1. *Wiley v. Sledge*, 8 Ga. 532; *Roach v. Brannon*, 57 Miss. 490.

The choses in action of the firm may be attached for individual debts and the creditor is not bound to show that the accounts of the firm have been settled, or that, when settled, the assets attached would not exceed the share which would be allotted to the surviving partner. The creditor cannot be deprived of the advantage gained by the fact that the law has thrown the legal estate upon the surviving partner, and if there exist equitable liens in favor of firm creditors, such liens must be set up by their holders in courts of equity. *Berry v. Harris*, 22 Md. 30.

In *Barber v. Hartford Bank*, 9 Conn. 407, it was maintained that an heir has a right to interfere and defeat an attachment by an individual creditor of the surviving partner, as a diversion of partnership funds to pay a separate debt. And in *Thompson v. Lewis*, 34 Me. 167, the right of a partnership creditor to take such action was upheld.

2. *Trammell v. Harrell*, 4 Ark. 602; *Harris v. Pearce*, 5 Ill. App. 622; *Johnson v. Kaiser*, 40 N. J. L. 286; *Slipper v. Stidstone*, 5 T. R. 493; *Golding v. Vaughn*, 2 Chitty 436. But see *Hughes v. Trahern*, 64 Ill. 148; *Weil v. Jones*, 70 Mo. 560.

3. *Lewis v. Culbertson*, 11 S. & R. (Pa.) 48.

4. *Holbrook v. Lackey*, 13 Met. (Mass.) 132; 46 Am. Dec. 726; *Cowden v. Elliott*, 2 Mo. 60; *Hogg v. Ashe*, 1 Hayes 471; *Meador v. Leslie*, 2 Vt. 569; *Meador v. Scott*, 4 Vt. 26. And see *Dalton City Co. v. Dalton Mfg. Co.*, 33 Ga. 243; *Berry v. Harris*, 22 Md. 30; *Nehrboss v. Bliss*, 88 N. Y. 604; *Masterson v. Goodlett*, 46 Tex.

402; *Lawrence v. Vilas*, 20 Wis. 381; *French v. Lovejoy*, 12 N. H. 458; *Wain v. Hewes*, 5 S. & R. 467. But see *Edwards v. Parker*, 88 Ala. 356.

The debtor cannot set-off a liability of the surviving partner, as indorser of a bill of exchange in an action by the assignee of the partnership assets, from the surviving partner for the benefit or creditors. *White v. Union Ins. Co.*, 1 Nott & M. (S. Car.) 556; 9 Am. Dec. 726. But debts due from the firm, may be set-off in equity against a claim made by the surviving partner derived from the firm as a partner. *Smith v. Parks*, 16 Beav. 115.

5. *French v. Andrade*, 6 T. R. 582. But where money is not deposited with a firm, but with one of the partners individually, and as a special bailee, and is not mixed up with the partnership funds, but kept separately in his possession, it constitutes only a personal liability, and cannot be set off, in an action by the surviving partner, on a demand due the partnership. *Edwards v. Parker*, 88 Ala. 356.

In *Missouri*, the legal title of the surviving partner is not recognized, and a set-off of the demand due the firm in an action against him on his individual debt is not allowed. *Weil v. Jones*, 70 Mo. 560, and in *Welborne v. Coon*, 57 Ind. 270, where an administrator of the deceased partner had sold the interest of the estate to the surviving partner and sued him on the purchase money notes, it was held that the survivor could not set-off a judgment rendered in his favor against the administrator upon the ground that the claims were not due between the parties in the same capacity.

6. *Southard v. Lewis*, 4 Dana Ky. 148; *Rice Appellant*, 7 Allen (Mass.) 112; *Forward v. Forward*, 6 Allen

the surviving partner, but also against the estate of the deceased partner without first exhausting his remedy against the survivor, and without reference to the state of the accounts between the partners, subject, however, to the rights of separate creditors in the separate estate,¹ and the same rule is adopted by a large number of the American cases, the claim being considered as joint and several in equity, the creditor being permitted at his option to proceed at law against the surviving partner, or go into equity in the first instance against the representative of the deceased;² or he could join the representatives and the survivors as co-defendants in one action in order to obtain judgment against both.³ An equal or greater number of the American cases hold, however, that the representatives of the deceased partner cannot be sued either in equity or under the code if a remedy at law exists against the

(Mass.) 494; *Carrere v. Spofford*, 46 How. Pr. N. Y. 294; *Fogarty v. Cullen*, 49 N. Y. Supr. Ct. 397; *Livingston v. Cox*, 6 Pa. St. 360.

As the debt is no longer joint, a payment by the executor will not affect the Statute of Limitations as to the survivor, nor will a payment by the survivor affect it as to the executor. See *Slater v. Lawson*, 1 B. & Ad. 396; *Atkins v. Treadgold*, 2 B. and C. 25.

Where money is advanced, and the partnership note taken, the surviving partner is liable. *Marvin v. M'Rea*, 1 Rice (S. Car.) 171.

Where the assets of the estate of a deceased partner are insufficient to pay all debts of such estate in full, Code Va. § 2855, which makes the representative of a deceased partner liable for the firm debts to the same extent that he would have been if the debts had been contracted by the partners severally as well as jointly, does not affect the order in which such assets should be applied to the payment of debts. *Robinson v. Allen*, 85 Va. 721.

1. *Devaynes v. Noble*, 1 Mer. 530; *Hills v. McRae*, 9 Hare 297; *Stephenson v. Chiswell*, 3 Ves. 566; *Wilkinson v. Henderson*, 1 M. & K. 582; *Throop v. Jackson*, 2 Y. & C. Ex. 553; *Sleech's Case*, 1 Mer. 539; *Winter v. Innes*, 4 M. & C. 101.

Where the creditor elects to pursue the estate of the deceased partner, it is necessary to make the surviving partners parties, as they are interested in the result of the suit. *In re Hodgson*, L. R. 31 C. H. Div. 177. And see cases above cited.

2. *McLain v. Carson*, 4 Ark. 104; 37

Am. Dec. 777; *Camp v. Grant*, 21 Conn. 41; *Fillyau v. Laverty*, 3 Fla. 72; *Mason v. Tiffany*, 45 Ill. 392; *Silverman v. Chase*, 90 Ill. 37; *Eads v. Mason*, 16 Ill. App. 545; *Braxton v. State*, 25 Ind. 82; *Ramson v. Pomeroy*, 5 Blackf. (Ind.) 383; *Ralston v. Moore*, 105 Ind. 243; *Postlewait v. Howes*, 3 Iowa 365; *Maxey v. Averill*, 2 B. Mon. (Ky.) 107; *Rice Appellant*, 7 Allen (Mass.) 112; *Sampson v. Shaw*, 101 Mass. 145; *Manning v. Williams*, 2 Mich. 105; *Simpson v. Schultze*, 21 Mo. App. 639; *Freeman v. Stewart*, 41 Miss. 425; *Moore's Appeal*, 34 Pa. St. 411; *Blair v. Wood*, 108 Pa. St. 278; *Gaut v. Reed*, 24 Tex. 46; *Wardlaw v. Gray*, Dudley Eq. (S. Car.) 85; *Higgins v. Rector*, 47 Tex. 361; *Cocke v. Upshaw*, 6 Munf. (Va.) 464; *Cresswell v. Blank*, 3 Grant's Cas. (Pa.) 320.

The surrogate has no power to direct the unpaid balance of a judgment against a surviving partner to be paid from the estate of the deceased partner. *Bennett v. Crain*, 41 Hun (N. Y.) 183.

Creditors may obtain judgment against the survivor and the representative of the deceased partner jointly; or at their election, against either separately, and proceed to enforce satisfaction against either. Of this neither the representative of the deceased partner nor the survivor can complain, but they have their remedy over against each other. *Saunders v. Wilder*, 2 Head (Tenn.) 577.

3. *Gerrard v. Dawson*, 49 Ga. 434; *Maxey v. Averill*, 2 B. Mon. (Ky.) 107; *Freeman v. Stewart*, 41 Miss. 138; *Butts v. Genung*, 5 Paige (N. Y.) 254; *Hamersley v. Lambert*, 2 Johns. Ch. (N. Y.) 508; *Wiesenfeld v. Byrd*, 17 S. Car. 106; *Jackson v. King*, 8 Leigh

surviving partners.¹ But the creditor may pursue his remedy against the estate if the surviving partner is bankrupt,² or insolvent;³ and while execution returned unsatisfied is good and suffic-

(Va.) 689; *Nelson v. Hill*, 5 How. (U. S.) 127; *Dowell v. Mitchell*, 105 U. S. 430. But see to the contrary, *Childs v. Hyde*, 10 Iowa 294; *Hedden v. Van Ness*, 2 N. J. L. 84; *Hoskinson v. Elliot*, 62 Pa. St. 393.

A statute allowing an administrator to be sued with the survivor, does not change the survivor's liability; a demand against the administrator alone, therefore, and a dismissal of the survivor is not valid unless there are allegations of the firm's insolvency. *Pullen v. Whitfield*, 55 Ga. 174.

A creditor's suit is not based upon a creditor's lien, and cannot, therefore, take the form of seeking to subject assets before a judgment has been recovered. *Freeman v. Stewart*, 41 Miss. 128.

1. *Sturges v. Beach*, 1 Conn. 507; *Alsop v. Mather*, 8 Conn. 584; 21 Am. Dec. 703; *Filley v. Phelps*, 18 Conn. 294; *Currey v. Warrington*, 5 Harr. (Del.) 147; *Roosvelt v. McDowell*, 1 Ga. 489; *Daniel v. Townsend*, 21 Ga. 155; *Pullen v. Whitfield*, 55 Ga. 174; *Hamersley v. Lambert*, 2 Johns. Ch. (N. Y.) 508; *Bloodgood v. Bruen*, 8 N. Y. 362; *Richter v. Poppenhausen*, 42 N. Y. 373; 9 Abb. Pr., N. S. (N. Y.) 263; *Roper v. Poppenhausen*, 43 N. Y. 68; *Haines v. Hollister*, 64 N. Y. 1; *First Natl. Bank v. Morgan*, 73 N. Y. 593; *Parker v. Jackson*, 16 Barb. (N. Y.) 33; *Voorhis v. Baxter*, 18 Barb. (N. Y.) 592; *Lawrence v. Leake etc. Orphan House*, 2 Den. (N. Y.) 577; 11 Paige (N. Y.) 80; *Voorhis v. Childs*, 17 N. Y. 354; *Pope v. Cole*, 55 N. Y. 124; 14 Am. Rep. 198; *Moore v. Brink*, 6 Thomp. & C. (N. Y.) 22; 4 Hun N. Y. 402; *Bridge v. Swain*, 3 Redf. (N. Y.) 487; *Burgwyn v. Hostler*, Tayl. (N. Car.) 124; 1 Am. Dec. 582; *Jarvis v. Hyer*, 4 Dev. (N. Car.) 367; *Gowan v. Tunno*, Rich. Eq. (S. Car.) 369; *Sale v. Dishman*, 3 Leigh (Va.) 548; *Barlow v. Coggan*, 1 Wash. Ter. 257; *Sherman v. Kruel*, 42 Wis. 33; *Van Reimsdyk v. Kane*, 1 Gáll. (U. S.) 371; *West v. Randall*, 2 Mason (U. S.) 181; *Troy Iron etc. Factory v. Winslow*, 11 Blatchf. (U. S.) 513.

An action for a firm debt cannot be maintained against the estate of a deceased partner, in the absence of proof

of a final settlement between the surviving partner and the estate, and that the partnership assets are insufficient to pay the debt. *Beaton v. Wade*, 14 Colo. 4.

A statute providing that on a judgment against a joint debtor a proceeding may be filed against a co-debtor to make him party to the judgment, is not applicable to executors of a deceased partner as they are not joint debtors. *Richter v. Poppenhausen*, 42 N. Y. 373.

In *Roosvelt v. McDowell*, 1 Ga. 489, it was held that a statute providing that where a note is signed by two or more persons, and one of them dies, his representative may be joined, was held to be subject to a strict construction as being in derogation of the common law, and that it does not therefore enlarge the remedy where a partnership name only is used.

2. *Storer v. Hinkley*, Kirby (Conn.) 147; *Anderson v. Pollard*, 62 Ga. 46; *Lang v. Keppele*, 1 Binn. (Pa.) 123. And see *Rice*, Appellant, 7 Allen (Mass.) 112. But see *Pullen v. Whitfield*, 55 Ga. 174.

3. *Emanuel v. Bird*, 19 Ala. 596; 54 Am. Dec. 200; *Filley v. Phelps*, 18 Conn. 294; *Vance v. Cowing*, 13 Ind. 460; *First Nat. Bank v. Morgan*, 73 N. Y. 593; *Pope v. Cole*, 55 N. Y. 124; 14 Am. Rep. 198; *Wilder v. Keeler*, 3 Paige (N. Y.) 167; *Stahl v. Stahl*, 2 Lans. (N. Y.) 60; *Horse v. Heath*, 5 Ohio 353; *Caldwell v. Stileman*, 1 Rawle (Pa.) 212; *Pearce v. Cooke*, 13 R. I. 184; *Fisher v. Tucker*, 1 McCord Eq. (S. Car.) 169; *Wardlaw v. Gray*, Dudley Eq. (S. Car.) 85; *Sale v. Dishman*, 3 Leigh (Va.) 548; *Galt v. Calland*, 7 Leigh (Va.) 594.

A creditor of the firm of A and B obtained judgment against B. The surviving partner took out execution and had it returned *nulla bona*, he then presented his judgment to the commissioners of A's estate as a claim against it, they rejected the claim, whereupon the creditors brought an action for the amount against A's administrator. It was held that the creditor was entitled to prove his judgment against the estate of A. *Pearce v. Cooke*, 13 R. I. 184.

If the demand is joint and several a suit in equity may be brought against

ient, proof of insolvency,¹ a judgment is not necessary,² or if judgment has been obtained, execution is not necessary.³ The estate of the deceased is not exonerated by laches in the pursuit of the surviving partner.⁴ In an action against the representative of the deceased partner, the surviving partner is usually held to be a necessary party.⁵

e. THE SURVIVING PARTNER AS EXECUTOR OF THE DECEASED PARTNER—(See also EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165).—While, by reason of the inconsistent duties of the two positions, it has been deemed improper to appoint the surviving partner an administrator of his deceased co-partner,⁶ his

both the surviving debtor and the representatives of the deceased co-defendant without alleging the insolvency of the survivor. *Parker v. Jackson*, 16 Barb. (N. Y.) 33.

1. *Fillyau v. Lavery*, 3 Fla. 72; *Pope v. Cole*, 55 N. Y. 124; 14 Am. Rep. 198; *Pearce v. Cooke*, 13 R. I. 184.

A sheriff's return on an execution against two surviving partners of *nulla bona*, that he could not find one either in his precinct or the State, and the other was too sick to be committed to jail without danger of life, shows a sufficient compliance with the statute prescribing that surviving partners shall be pursued to final judgment and execution, before a claim against the firm shall be valid against a representative of a deceased co-partner. *Shaw v. Knowles*, 3 R. I. 112.

That the survivor has absconded, and is out of the jurisdiction of the court, is sufficient to enable the creditor to bring his action against the estate of the deceased partner. See *Horsev v. Heath*, 5 Ohio 353; *Drake v. Blount*, 2 Dev. Eq. (N. Car.) 353.

2. *Vance v. Cowing*, 13 Ind. 460; *People v. Morgan*, 73 N. Y. 593; *Pope v. Cole*, 55 N. Y. 124; 14 Am. Rep. 198; *Copcutt v. Merchant*, 4 Bradf. (N. Y.) 18; *Slatte v. Carroll*, 2 Sandf. Ch. (N. Y.) 573; *Horsev v. Heath*, 5 Ohio 373; *Sale v. Dishman*, 3 Leigh (Va.) 548.

Where a bill by the representatives of a deceased partner shows that the partnership has not been fully settled, and that there has been no adjustment of the expenses of the concern, and that the surviving partner has the assets of the partnership, including the entire capital which was paid in by the deceased partner, and refuses to pay the same to the personal representatives of latter, it sufficiently shows

that there is no adequate remedy at law, and a general demurrer for want of jurisdiction will be overruled. *Haynes v. Short*, 88 Ala. 562.

3. *Stahl v. Stahl*, 2 Lans. (N. Y.) 60.

It is usually held that the firm assets must be first exhausted before proceeding against the estate of the deceased. *Waldron v. Simmons*, 28 Ala. 629; *Pullen v. Whitfield*, 55 Ga. 174; *McGill v. McGill*, 2 Metc. (Ky.) 258; *Buckingham v. Ludlum*, 37 N. J. Eq. 137. But in *Pearce v. Cooke*, 13 R. I. 184, where the survivor had assigned for the benefit of creditors, it was held not to be necessary to wait until the assignment was wound up.

4. *Silverman v. Chace*, 90 Ill. 37; *Doggett v. Dill*, 108 Ill. 560; 48 Am. Rep. 565; *Mason v. Tiffany*, 45 Ill. 392; *Sale v. Dishman*, 3 Leigh (Va.) 548; *Lane v. Williams*, 2 Vern. 492; *Winter v. Innes*, 4 My. & Cr. 101. But see to the contrary *Jackson v. King*, 12 Gratt. (Va.) 499.

A creditor is not required to press his claim against the surviving partner, the estate of the deceased partner being equally a fund on which he has a right to rely. *Mason v. Tiffany*, 45 Ill. 392.

5. *Fillyau v. Lavery*, 3 Fla. 72.

In *Stahl v. Stahl*, 2 Lans. (N. Y.) 60, it was held that the surviving partner was a proper party defendant, but not always a necessary one. See also *Butts v. Genung*, 5 Paige (N. Y.) 254.

If the general estate is embarked in the business by the will of the decedent, a creditor in suing a survivor and administrator need not make a residuary legatee a party, but he may be joined as having an interest; and if so joined, he alone can object. *Burwell v. Cawood*, 2 How. (U. S.) 560.

6. See *Heward v. Slagle*, 52 Ill. 336; *White v. Gardner*, 37 Tex. 407.

A surviving partner who has contin-

appointment as executor in the will of the deceased co-partner is of common occurrence.¹ In such case partnership funds coming to his hands are received as surviving partner, and his bond given for the proper performance of his representative duties is not liable for them.² Contracts by him as surviving partner do not bind the estate;³ and, while he cannot settle his partnership accounts in probate court in connection with the estate,⁴ the account of the estate necessarily involves his account as surviving partner, and he is therefore bound to render an account of both estates to that court.⁵ Neither a co-executor nor a co-survivor can sue him

ued the partnership business, and has been appointed administrator of his deceased partner's estate, thus obtaining unrestricted control of affairs, and preventing investigation into his manner of doing business, may be charged, on his failure to account for his deceased partner's assets, with their highest value shown by the proofs, and for all rents and profits which he might by judicious management have received; or he may be charged with interest on the deceased partner's capital. *Killefer v. McLain*, 78 Mich. 249.

1. *Bates' Law of Part.* § 742.

Duty to Pay Debts.—The lien of the deceased partner to have the assets applied to the debts descends upon his executor, and the executor's duty is to do it; if the executor is also surviving partner he should do it of his own accord, and if he disregards the duty, the law will make the appropriation. *Strauss v. Frederick*, 91 N. Car. 121.

2. *Pearson v. Keedy*, 6 B. Mon. (Ky.) 128; 43 Am. Dec. 160.

But if the interest of the deceased in the partnership goods is inventoried, the fact that they come to him as surviving partner, is no defense to action on his bond by the administrator *de bonis non*. *Grant v. McKinney*, 36 Tex. 62.

In qualifying and giving bond as an administrator, the surviving partner is required to value the interest in the partnership property undiminished by deductions for the liabilities of the firm. *Re Surrogate's Court*, 44 U. P. Can., Q. B. 207.

In *People v. White*, 11 Ill. 341, it was held that if the administrator takes possession of the whole partnership effects with the consent of the surviving partner, his bond is liable both as to the partnership and as to individual creditors.

3. *Pyke v. Searcy*, 4 Port. (Ala.) 52.

Where a surviving partner, also administrator of the deceased partner, continued the same business under the old name for some time, and even after his appointment merely as agent for a new firm, and while acting as agent sold goods to A, who contracted to pay for them by accounting to B, to whom the deceased partner's estate was indebted, and was not informed of the new firm till after this contract, it was held that the new firm could not recover the price of the goods of A, although he had not fully accounted with B. *Dean v. Plunkett*, 136 Mass. 195.

4. *Vincent v. Martin*, 79 Ala. 540.

The probate court has no power to order the sale of a deceased partner's interest in partnership lands before the firm debts have been paid and the accounts between the partners settled and adjusted. *Roulston v. Washington*, 79 Ala. 529.

5. *Leland v. Newton*, 102 Mass. 350. But see *Stewart v. Burkhalter*, 28 Miss. 396.

Where the surviving partner as executor or administrator inventories the partnership effects at one-half their value as part of the testator's estate, if he afterwards pay the debts of the firm, he can charge one-half the debts against such inventoried property charged to himself. *Mead v. Byington*, 10 Vt. 116.

If he uses partnership money to pay separate debts of the deceased, he may set off such payment when sued by the administrator *de bonis non* for money belonging to the estate. *Skillen v. Jones*, 44 Ind. 136. And if he has paid debts due from the firm at any time before the final settlement of his accounts as executor, he may allow for the testator's share, even though the time for the limitation of actions against executors had expired. *Forward v. Forward*, 6 Allen (Mass.) 494.

for a balance,¹ and he is not entitled to any commissions for the administration of the partnership affairs even though the separate estate has no other assets.²

f. THE STATUTORY PARTNERSHIP ADMINISTRATOR.—Several of the States have statutory provisions for the appointment of an administrator of a partnership dissolved by the death of a partner.³ Under these statutes precedence is given to the surviving partner, but upon his failure to qualify by giving bond within a specified time after having been duly cited for that purpose, the administrator of the deceased co-partner may be appointed in his stead.⁴ The appointment and qualification of the surviving partner, however, is not the source of his power to wind up, but a mere condition of its exercise, his action in winding up being taken as surviving partner and not as administrator,⁵ his failure to qualify depriving

1. *Forward v. Forward*, 6 Allen (Mass.) 494.

2. See *Scudder v. Ames*, 89 Mo. 496; *Gregory v. Menefee*, 83 Mo. 413; *Cooper v. Reid*, 2 Hill (S. Car.) Eq. 549; *Dodson v. Dodson*, 6 Heisk. (Tenn.) 110.

3. See *Carr v. Catlin*, 13 Kan. 393; *Shattuck v. Chandler*, 40 Kan. 516; *Flower v. O'Connor*, 7 La. 194; *Putnam v. Parker*, 55 Me. 235; *Cook v. Lewis*, 36 Me. 340; *Green v. Viriden*, 22 Mo. 510.

In Louisiana the right of succession to the share of a deceased partner is in his heir, and without the consent of such heir, the surviving partner can take no authority over that share. *McKowen v. McGuire*, 15 La. Ann. 637; *Skipwith v. Lee*, 16 La. Ann. 247. He must either show authority as liquidator or else join in the action of the representatives of the deceased. *Connelly v. Cheevers*, 16 La. 30. And see *Lockhart v. Hanell*, 6 La. Ann. 531. And if there is more than one surviving partner, all must join. *Hyde v. Brashear*, 19 La. 402; *Babcock v. Brashear*, 19 La. 404.

In *Adams v. Marsteller*, 70 Ind. 381, it was held that the statute did not affect the rights of a surviving partner who had charge of an estate under the law in force prior to its passage.

4. *Putnam v. Parker*, 55 Me. 235; *Cook v. Lewis*, 36 Me. 340; *Green v. Viriden*, 22 Mo. 510; *Carr v. Catlin*, 13 Kan. 393; *Shattuck v. Chandler*, 40 Kan. 516.

Notice to the surviving partner by the administrator of the deceased partner that he will apply to the probate court for an order directing him to take

charge of the partnership estate unless the survivor give bond, is sufficient. *James v. Dickson*, 21 Mo. 538; *Carr v. Catlin*, 13 Kan. 393.

The administrator of the deceased partner may qualify after the voluntary appearance and annunciation of the surviving partner even though no citation has ever been served upon such survivor. *Carr v. Catlin*, 13 Kan. 393.

A non-resident surviving partner is disqualified from becoming administrator of the partnership, and the administrator of the decedent is therefore entitled to qualify at once. *Denny v. Primeau*, 35 Mo. 529. A survivor who has qualified, however, is not removable upon subsequently becoming a non-resident. *Green v. Viriden*, 22 Mo. 506.

In Maine, in an action to collect a debt by the surviving partner, the objection that he has not given a bond must be made by plea in abatement or it will be deemed waived. *Strang v. Hirst*, 61 Me. 9. And see *Macready v. Schenck*, 41 La. Ann. 456.

5. *Gregory v. Menefee*, 83 Mo. 413; *Easton v. Courtwright*, 84 Mo. 27; *Denny v. Turner*, 2 Mo. App. 52; *Holman v. Nance*, 84 Mo. 674; *Blaker v. Sands*, 29 Kan. 551. And see *Nelson v. Hayner*, 66 Ill. 487.

Under the Missouri act the powers of a surviving partner in closing up the affairs of the partnership are not changed or restricted otherwise than as he is required to give bond and security, that he will use due diligence and fidelity for any misconduct or neglect, there being a remedy on his bond. *Crow v. Weidner*, 36 Mo. 412.

A surviving partner is not entitled

him of power to act only in case of the coming forward and due qualification of the administrator,¹ and if the administrator thus qualifies after the failure or renunciation of the survivor, he acts, not as administrator, but as a special trustee.² The jurisdiction thus conferred upon probate courts over the partnership estate is exclusive, and it includes such equitable powers as may be necessary to wind up the partnership affairs, and until final settlement of the estate in that court, courts possessing original chancery powers have no jurisdiction over it;³ and the final settlement has the force and effect of a final judgment from which an appeal can

to commissions for winding up the partnership estate under a statute allowing commissions to administrators. *Gregory v. Menefee*, 83 Mo. 413.

Under a Maine statute it is held, that a sale by the surviving partner who had not given bond is void, and notes given for goods so sold are without consideration. *Cook v. Lewis*, 36 Me. 340; *Hill v. Treat*, 67 Me. 501.

Under the Oregon statute it has been doubted whether a surviving partner has power to transfer joint assets or any interest in real estate held for partnership purposes without an order of the probate court, and without giving the bond required by the statute. *Knott v. Stephens*, 3 Oregon 269.

1. *Bredow v. Mutual Sav. Inst.* 28 Mo. 181; *Easton v. Courtwright*, 84 Mo. 27; *Blaker v. Sands*, 29 Kan. 551; *Holman v. Nance*, 84 Mo. 674; *Weise v. Moore*, 22 Mo. App. 530. And see *Mutual Sav. Inst. v. Enslin*, 37 Mo. 453.

A surviving partner who has duly qualified, is not within a statutory exception permitting legal representatives to testify as to facts occurring before death. *Holmes v. Brooks*, 68 Me. 416.

But a surviving partner is so far an administrator that he need not give bond on appeal from an order of distribution. *In re Bruening*, 42 Mo. 276.

2. *Carr v. Catlin*, 13 Kan. 393:

If a claim is allowed in the hands of the partnership administrator, the surviving partner cannot appeal from the allowance. *Ashbury v. McIntosh*, 20 Mo. 278.

A note payable to the administrator of a partnership, for a sale made by him, must be sued upon after his death by his personal representatives and not by the administrator *de bonis non* of the partnership estate. *McGilway v. Clement*, 6 Mo. App. 598.

3. *Caldwell v. Hawkins*, 73 Mo. 450;

Ensworth v. Curd, 68 Mo. 282; *Gray v. Clement*, 12 Mo. App. 579; *Farmers' Sav. Inst. v. Garesche*, 12 Mo. App. 584; *Anderson v. Beebe*, 22 Kan. 768. And see *Fitz v. Reichard*, 20 La. Ann. 549.

Under the California statute the probate court can neither adjudge upon the question of partnership, if raised, nor decree a balance on the account, but it has jurisdiction to require a surviving partner not denying the partnership to file an account and to examine him as to its sufficiency. *Andrade v. Superior Ct. (Cal.)*, 17 Pac. Rep. 532; *Theller v. Such*, 57 Cal. 447.

If the surviving partner admits the existence of the partnership, the court may compel him to testify in relation to his accounts. *Andrade v. Superior Court*, 75 Cal. 459.

Where the brother and late partner of a decedent administers the partnership property, and he and the widow, who has a community interest therein, have annual settlements whereby, through mutual fault, his accounts are brought into inextricable confusion, it is within the discretion of the court to dismiss proceedings instituted by the widow, the only party in interest, to compel him to account for the whole, and to leave the parties where they have placed themselves. *Succession of Gassie*, 42 La. Ann., 7 So. Rep. 454.

But the probate court cannot allow a claim until the surviving partner has refused to allow it, and cannot require him to pay claims allowed by it in preference to those presented only to him. *Easton v. Courtwright*, 84 Mo. 27. And where a settlement of the partnership, and the partition of real estate, and division of the proceeds is necessary, a probate court, which can only authorize the partnership administrator to sell real estate to pay debts, has no jurisdiction. *Burnsides v. Savier*, 6 Oregon 154.

be taken.¹ The survivor or partnership administrator may pay off demands without presentation to the probate court for allowance,² and pay one claim in full to the exclusion of another.³ Where the administrator has qualified as administrator of the partnership he can proceed against the survivor for possession of the partnership property.⁴ He may be sued alone by a firm creditor,⁵ and as each estate is primarily liable for its own debts, he must keep the accounts separate.⁶

The bond of the surviving partner is liable for his conversion of the partnership estate,⁷ and if the administrator has given an additional bond as partnership administrator the sureties upon his

1. *McCartney v. Garneau*, 4 Mo. App. 516.

2. *Easton v. Courtriwght*, 84 Mo. 27; *Collier v. Cairnes*, 6 Mo. App. 183.

A promise to pay, by the surviving partner, is equivalent to an allowance by court, so as to stop the running of the statute of limitations. *Denny v. Turner*, 2 Mo. App. 52.

The surviving partner not being an administrator, an action may be maintained against him for a debt, although the claim has not been presented to him for allowance. *Carr v. Catlin*, 13 Kan. 393. In case of his death however, it may be necessary to present the claim to his administrator. *Denny v. Turner*, 2 Mo. App. 52.

3. *Collier v. Cairns*, 6 Mo. App. 183; *Easton v. Courtwright*, 84 Mo. 27; *Crow v. Weidner*, 36 Mo. 412.

In *Missouri* it is now provided by statute that in the winding up of the partnership estate, the method of distribution must conform in all respects to the law of administration and the payment of all partnership debts must be pro rata according to their class. 1 Warner's Law of Administration 300.

In *Kansas* it is held that under these statutes a surviving partner cannot transfer his trust by assigning for the benefit of creditors. *Shattuck v. Chandler*, 40 Kas. 516.

4. *McCrary v. Menteer*, 58 Mo. 446. And see *James v. Dixon*, 21 Mo. 538.

Where the administrator has qualified as administrator of the partnership, he is entitled to the partnership property as against an officer who has attached it in an action by a creditor of a firm against the survivor. *Putnam v. Parker*, 55 Me. 235.

5. *Bass v. Emery*, 74 Me. 338.

The surviving partner who has

qualified must account to the probate court even for the beneficial interest in real estate, but if there are no debts and he has leased the land without the order of the court, he must account for the rents received, to their heirs as cotenants. *Hartnett v. Fegan*, 3 Mo. App. 1.

6. See *Boston etc. Glass Co. v. Ludlum*, 8 Kan. 40.

Where the same person is administrator of the deceased partner and of the partnership estate, an acceptance and allowance of a partnership note against the firm is not an allowance as against the individual estate. *Burton v. Rutherford*, 49 Mo. 255.

7. *Carr v. Catlin*, 13 Kan. 393. And see *State v. Myers*, 9 Mo. App. 44; *Adams v. Marsteller*, 70 Ind. 381.

In *Missouri* when the surviving partner gives the required bond it is available for creditors and others, like the bond of an administrator or guardian, and through this bond is the only way in which the court can exercise authority over him, he cannot be removed from his office, although he may have left the State. *Green v. Viriden*, 22 Mo. 510.

The surviving partner must publish notice of final settlement like an administrator, and if he fails to do so, the settlement is open to review. *State v. Donegan*, 12 Mo. App. 190.

The settlement is not *ex parte* and binds his sureties. *McCartney v. Garneau*, 4 Mo. App. 566.

As to practice on settlement, see *State v. Baldwin*, 31 Mo. 561; *State v. Dalton*, 27 Mo. 13.

In order to establish the liability of the surviving partner's bond, the claim must be presented to him and recognized by him. *State v. Woods*, 36 Mo. 73.

original bond are not liable for his conversion of partnership assets.¹

g. COMPENSATION FOR WINDING UP.—A surviving partner is entitled to no extra compensation for services rendered by him in winding up the affairs of the partnership, the death of a co-partner being one of the risks with reference to which the partnership contract was made and which is necessarily incurred by each.² After the death of a surviving partner, however, his administrator is entitled to compensation for the completion of the settlement, whether there is a surplus or not.³

If the surviving partner performs services in excess of mere winding up, as by the continuance of the partnership business or the completion of the enterprise in which the partnership is engaged, he will be allowed to deduct from the profits such compensation as the nature of the business and the difficulty and result of the undertaking and its necessity and desirability will warrant.⁴

1. Carr v. Catlin, 13 Kan. 393; Boston etc. Glass Co. v. Ludlum, 8 Kan. 40; Orrick v. Vahey, 49 Mo. 428.

An action upon the bond of a surviving partner may be brought by the administratrix individually, though payable to her in her representative capacity, and the measure of damages for a failure to apply the funds of the firm to payment of the debts is the amount of the funds in defendant's hands applicable to the debts. Miller v. Kingsbury, 128 Ill. 45.

2. Colgin v. Cummins, 1 Port. (Ala.) 148; Shelton v. Knight, 68 Ala. 598; Griggs v. Clark, 23 Cal. 427; Kimball v. Lincoln, 5 Ill. App. 316; Hite v. Hite, 1 B. Mon. (Ky.) 177; Washburn v. Goodman, 17 Pick. (Mass.) 519; Schenkl v. Dana, 118 Mass. 236; Loomis v. Armstrong, 49 Mich. 521; Scudder v. Ames, 89 Mo. 496; Buford v. Neely, 2 Dev. Eq. (N. Car.) 481; Beatty v. Wray, 19 Pa. St. 516; Cooper v. Reid, 2 Hill Eq. (S. Car.) 649; Cooper v. Merrihew, Riley Eq. (S. Car.) 166; Piper v. Smith, 1 Head (Tenn.) 93; Griffey v. Northcutt, 5 Heisk. (Tenn.) 746; Berry v. Jones, 11 Heisk. (Tenn.) 206; Patton v. Calhoun, 4 Gratt. (Va.) 138; Denver v. Roane, 99 U. S. 355; Stocken v. Davison, 6 Beav. 371; Burden v. Burden, 1 Ves. & B. 172. And see Brown v. McFarland, 41 Pa. St. 133; Gyger's Appeal, 62 Pa. St. 73; Marsh's Appeal, 69 Pa. St. 30; Brown's Appeal, 89 Pa. St. 139; Tillotson v. Tillotson, 34 Conn. 335; Ames v. Downing, 1 Bradf. (N. Y.) 321.

A surviving partner, even though ap-

pointed receiver at his own instance, is not entitled to any compensation for settling and winding up the business of the partnership. Piper v. Smith, 1 Head (Tenn.) 93; Berry v. Jones, 11 Heisk. (Tenn.) 206.

Nor will he be allowed compensation where he was employed by the executor of the deceased partner to wind up the partnership business, as in the absence of a provision to that effect in the testator's will, the executor had no power to engage his services. Brown v. McFarland, 41 Pa. St. 129.

In North Carolina, the surviving partner is entitled to compensation. Royster v. Johnson, 73 N. Car. 474.

3. Dayton v. Bartlett, 38 Ohio St. 357. And see Wilby v. Phinney, 15 Mass. 116.

In Miller's Appeal (Pa. 1886), 7 Atl. Rep. 190, it was held that executors were not entitled to compensation who had settled partnership affairs, because the surviving partner had not the capacity to do so.

4. See Newell v. Humphrey, 37 Vt. 265; Gyger's Appeal, 62 Pa. St. 73; 1 Am. Rep. 382; Cameron v. Francisco, 26 Ohio St. 190; Vanduzer v. McMillan, 37 Ga. 299; Schenkl v. Dana, 118 Mass. 236; Griggs v. Clark, 23 Cal. 427; O'Reilly v. Brady, 28 Ala. 530; Calvert v. Miller, 94 N. Car. 600; Sears v. Munson, 23 Iowa 380; Osment v. McElrath, 68 Cal. 466; Brown v. DeTastet, 1 Jac. 284; Mellush v. Keen, 27 Beav. 236; Avery v. Borham, 29 Beav. 620. But see Pierce v. Daniels, 25 Vt. 624; Shelton v. Knight, 68 Ala. 598.

Where one of the partners in a mer-

But if the partnership agreement provides for the continuance of the business after death without making provision for compensation none will be allowed,¹ though effect will be given an intent to permit an allowance to its fullest extent, if such intent appears,² and if such compensation is found regularly credited upon the partnership books, it will be deemed to be as express an agreement as though it had been contracted for in the articles.³

XXII. GOOD WILL—(See also GOOD WILL, vol. 8, page 1366).—The good will of a partnership is every possible advantage acquired by a firm in carrying on its business, whether connected with premises or name or other matter.⁴ It is a mere incident to other property and more frequently attaches to the premises than to the stock of goods,⁵ though where it depends upon personal skill

cantile firm was a lawyer, and, on dissolution, he collected certain accounts belonging to the firm, those collected without suit were held to be gratuitous, but where a suit was necessary, he was allowed the usual value of such professional services. *Vanduzen v. McMillen*, 37 Ga. 299.

But the contrary was held where the firm was a legal and not a mercantile one, in *Starr v. Case*, 59 Iowa 491.

Where the partnership assets consisted of a large landed estate, and the winding up involved its management paying taxes, prosecuting and defending law suits, and selling and collecting, the labor being extraordinary and perplexing, of which the infant heirs got the benefit, remuneration was allowed. *Hite v. Hite*, 1 B. Mon. (Ky.) 177.

1. *Washburn v. Goodman*, 17 Pick. (Mass.) 519; *Cameron v. Francisco*, 26 Ohio St. 190; *Frazier v. Frazier*, 77 Va. 775; *Burden v. Burden*, 1 Ves. & B. 172; *Tillotson v. Tillotson*, 34 Conn. 335; *Berry v. Folkes*, 60 Miss. 576; *Kimball v. Lincoln*, 5 Ill. App. 316; *Colgin v. Cummins*, 1 Port. (Ala.) 148. And see *Cunliff v. Dyerville Mfg. Co.*, 7 R. I. 325.

Where the articles provided for a salary to the managing partner and for an immediate winding up on dissolution, and the other partner died, and the managing partner continued the business beyond the time when it could have been closed making no profits, compensation was refused. *O'Neill v. Duff*, 11 Phila. (Pa.) 244.

2. See *Godfrey v. White*, 43 Mich. 171; *Wood v. Wood*, 26 Barb. (N. Y.) 356; *Garett v. Bradford*, 28 Gratt. (Va.) 609.

The formation of a new business,

carrying it on in the same place while winding up, is not a waiver of the benefits of an agreement for compensation. *Sangston v. Hack*, 52 Md. 173.

Where the compensation of the managing partner has been agreed upon and he fails to claim it until after dissolution, it is no waiver of his right, even though the other partner had claimed a right to abrogate such allowance. *Askew v. Springer*, 111 Ill. 662.

If a dissolution by decree is dated back, allowance may be made for services rendered in winding up after the date of dissolution. *Dumont v. Rueprecht*, 38 Ala. 175.

3. *Pratt v. McHatton*, 11 La. Ann. 260. And see *Godfrey v. Templeton*, 86 Tenn. 161.

Charges against an absent partner on the books for his absence, when it is not shown that he is aware of the entries, does not establish his assent. *Boardman v. Close*, 44 Iowa 428.

4. *Ginise v. Cooper*, 14 Ch. D. 596: "The good will of a trade is nothing more than the probability that the old customers will resort to the old place." Lord Eldon in *Crutwell v. Lye*, 17 Ves. 336.

In *Chessum v. Dewes*, 5 Rus. 29, good will was defined to be the advantage attached to the possession of a house. And in *Howe v. Searing*, 6 Bosw. (N. Y.) 354, it was said to be "reputation."

5. *Rawson v. Pratt*, 91 Ind. 9; *Robertson v. Quiddington*, 28 Beav. 529; *Chittenden v. Whitbeck*, 50 Mich. 401. And see *Booth v. Curtis*, 17 W. R. 393.

In *Thackray's Appeal*, 75 Pa. St. 132, the court said: "It seems to us to be improper to consider the good will separately from the rental. It was an

it does not attach to the premises,¹ and in any event it is an asset of the partnership,² belonging to the business and not to the property.³ A good will is a proper subject of an action or a counter-claim in an action,⁴ but it is too intangible an interest to be partitioned or sold upon execution or bill of equity against a partner,⁵ though it may be sold as an entirety, so far as it is local.⁶ It does not survive as his own property, to the surviving partner, but a due proportion belongs to the estate of the deceased partner,⁷

incident so intimately blended with the house that, for the purpose of leasing, it should have been deemed a constituent part of the premises. Its integral character should have been recognized as one of the elements in fixing the value of the rental of the whole property. See also *Musselman's Appeal*, 62 Pa. St. 81.

The good will of a business has been held to be incident to the stock and lease, and not to the premises where the business was carried on. *England v. Downs*, 6 Beav. 269; *Dougherty v. Van Nostrand*, Hoffm. Ch. (N. Y.) 68.

A trademark is not attached to the premises, although established by the original owner of the property. *Sohier v. Johnson*, 111 Mass. 238.

1. See *Cooper v. Metropolitan Board of Works*, 25 Ch. D. 472.

Where the good-will of a business depends very largely upon the skill of one of the partners, it is not the property of the partnership in such a sense as to be subject to sale to pay its debts. *McCall v. Moschowitz*, 14 Daly (N. Y.) 16.

2. *Bradbury v. Dickens*, 27 Beav. 53; *Dougherty v. Van Nostrand*, 1 Hoffm. Ch. (N. Y.) 68; *Holden v. McMakin*, 1 Pars. Sel. Cas. (Pa.) 270; *Dayton v. Wilkes*, 17 How Pr. (N. Y.) 510.

3. *Smith v. Everett*, 27 Beav. 446; *England v. Downs*, 6 Beav. 269; *Morris v. Moss*, 25 L. J. Ch. 194; *Pawsey v. Armstrong*, 18 Ch. D. 698.

Where the premises belong to one partner, and, upon his death or retirement, were sold, so much of the enhanced value as was attributable to good will, is to be counted as an asset of the partnership. *Smith v. Everett*, 27 Beav. 446; *England v. Downs*, 6 Beav. 269; *Morris v. Moss*, 25 L. J. Ch. 194; *Pawsey v. Armstrong*, 18 Ch. Div. 698.

4. *Herfort v. Cramer*, 7 Colo. 483; *Rawson v. Pratt*, 91 Ind. 9; *Hines v. Driver*, 71 Ind. 125; *Collins v. Jackson*, 54 Mich. 186. And see *Buckingham v. Waters*, 14 Cal. 146.

Where the property was not delivered, but the good will alone was turned over to the purchaser, an action for its value may be maintained. *Wallingford v. Burr*, 17 Neb. 137.

The sale of a good will is a sufficient consideration to support a note given for its price, although the business is not afterwards successful. *Smock v. Pierson*, 68 Ind. 405; and a sale of stock and good will may be rescinded for false representations as to the good will, though the stock may have been worth more than the price paid. *Cruess v. Fessler*, 39 Cal. 336.

5. *Taylor v. Bemis*, 4 Biss. (U. S.) 406; *Robertson v. Quiddington*, 28 Beav. 529; *Helmores v. Smith*, 35 Ch. D. 436.

The subscription list of a newspaper is not a separate asset, but passes on sale as an incident of the materials. *McFarland v. Stewart*, 2 Watts (Pa.) 111.

The value of a good will will not be added to the value of shares of stock for the purposes of taxation. *Spring Valley Works v. Schottler*, 62 Cal. 69.

An excessive verdict in a condemnation proceeding cannot be sustained by proof of a good will of a business that would be destroyed by the appropriation of the property. *Chicago v. Garrity*, 7 Ill. App. 474.

6. *Allen v. Woonsocket Co.*, 11 R. I. 288; *Cassidy v. Metcalf*, 1 Mo. App. 593. And see *Sohier v. Johnson*, 111 Mass. 238; *Bryson v. Whitehead*, 1 Sim. & S. 74; *Baxter v. Connolly*, 1 Jac. & W. 576.

While it is competent for one partner to bind the other by a sale of the good will of the business, it is out of his power to bind his partner, by a contract, not to go into the same business. *Moreau v. Edwards*, 2 Tenn. Ch. 347.

7. *Dougherty v. Van Nostrand*, Hoffm. Ch. (N. Y.) 68; *Williams v. Wilson*, 4 Sandf. Ch. (N. Y.) 379; *Howe v. Searing*, 6 Bosw. (N. Y.) 354; *Holden v. McMakin*, 1 Pars. Sel. Cas.

though the surviving partner has still the right to carry on the same business at the same place,¹ being entitled to all the advantages incidental to his former connection with the firm, and under no obligation, in order to render these advantages salable, to retire from business himself.² Where a partner retires from the firm, however, and from the business carried on by it, the continuing partners, in the absence of agreement, become entitled to the good will without compensation.³

1. Protection and Disposition of Good Will.—Upon dissolution, if the good will is salable, the court will, upon application, direct its sale for the joint benefit,⁴ or permit its retention by a continuing partner upon payment of its full value,⁵ and it will enjoin its misappropriation,⁶ or appoint a receiver to carry on the business in

(Pa.) 270; *Smith v. Everett*, 27 Beav. 446; *Wedderburn v. Wedderburn*, 22 Beav. 84. And see *Crawshaw v. Collins*, 15 Ves. 218.

It was formerly held to be the sole property of the surviving partner. See *Hammond v. Douglas*, 5 Ves. 539; *Lewis v. Langdon*, 7 Sim. 421.

A manufacturer was doing business as E. & W. Winchester, which name was used as a trade mark, he took in a partner and continued the business under the old name with the privilege of dissolving at any time and retaining the good will and name but did not dissolve, after his death it was held that the partner was entitled to a share of the good will and trade name. *Sohier v. Johnson*, 11 Mass. 238.

By a contract of partnership entered into for the manufacture of certain patented articles, it was stipulated that neither party should have an independent right to manufacture the articles. Held, that a continuation of the business by the surviving partner entitled the administratrix of the deceased partner to an accounting. *Farr v. Morrill*, 53 Hun (N. Y.) 31.

1. *Smith v. Everett*, 27 Beav. 446; *Cook v. Collingridge*, Jac. 607; *Statts v. Howlett*, 4 Den. (N. Y.) 559. But see to the contrary, *Fenn v. Bolles*, 7 App. (N. Y.) Pr. 202.

While a surviving partner acquires all the benefit of the good will, he does not do so by virtue of his survivorship. If he did, he might sell the good will for his own benefit, and this he cannot do. *Lindley on Part. 861, citing Smith v. Everitt*, 27 Beav. 446; *Mellersh v. Keen*, 27 Beav. 446; *Wedderburn v. Wedderburn*, 22 Beav. 104.

2. *Lindley on Part. 861, citing Farr*

v. Pearce, 3 Madd. 74; *Davies v. Hodgson*, 24 Beav. 177; *Mellersh v. Keen*, 27 Beav. 236; 28 Beav. 453.

3. *Lindley on Part. 861.*

When one of several partners retires from the firm, the good will remains as an entirety, with the continuing partners subject to any right of the retiring partner to be compensated. Hence a court of equity will not enforce nor enjoin proceedings at law upon an agreement for a sale of one-fourth part of a good will. *Cassidy v. Metcalf*, 1 Mo. App. 593.

4. *Bradbury v. Dickens*, 27 Beav. 53. And see *Dougherty v. Van Nostrand*, Hoffm. Ch. (N. Y.) 68; *Dayton v. Wilkes*, 17 How. Pr. (N. Y.) 510; *Hollden v. McMakin*, 1 Pars. Sel. Cas. (Pa.) 270.

5. *Sheppard v. Boggs*, 9 Neb. 257.

On dissolution of a partnership, the fact that the retiring partner undertakes to carry on a similar business near by, and to divert the former customers of the firm, is proper to be considered in estimating the amount to be allowed him for the good will of the business. *Rice v. Baggot* (Supreme Ct.), 7 N. Y. Supp. 518.

6. *Bininger v. Clark*, 60 Barb. (N. Y.) 113; *Dayton v. Wilkes*, 17 How. Pr. (N. Y.) 510; *Elves v. Crofts*, 14 Jur. 855; *Bell v. Lock*, 8 Paige (N. Y.) 75. And see *Perry v. Trufitt*, 6 Beav. 66; *Motley v. Downman*, 1 My. & Cr. 14; *Knott v. Morgan*, 2 Keen 213; *Hogg v. Kirby*, 8 Ves. 215.

The fact that there was no intentional deception does not excuse a violation, *Millington v. Fox*, 3 My. & Cr. 338.

In an action against a former partner to restrain him from engaging in business at a certain place, it appeared that plaintiff bought out defendant, and

the meantime,¹ or take such other steps as may be necessary to preserve it until it can be sold.² Where the good will is sold separate from the property it is usually valued at so many years' purchase based on average profits,³ though in many cases the court has found it not susceptible of valuation.⁴ The sale, in case of dissolution, should be at public auction and the different partners should be allowed to compete.⁵

The good will of a business is ordinarily understood to pass by the conveyance of the place where the business has been carried on up to that time.⁶

A sale by one partner to another of all of his interest passes his interest in the good will,⁷ and the exclusive right to the use of the

agreed to pay all partnership debts, and defendant agreed to give him the good will of the business, and not to engage in it at that point. *Held* that, as plaintiff had not paid an overdue debt in compliance with the contract on his part, he was not entitled to the injunction. *Hollis v. Shaffer*, 38 Kan. 492.

1. *Marten v. Van Schaick*, 4 Paige (N. Y.) 479; *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 198; *Levi v. Karrick*, 8 Iowa 150; *Jackson v. DeForest*, 14 How. (N. Y.) Pr. 81; *Young v. Buckett*, 51 L. J. Ch. 504.

Where a firm of attorneys retained original abstracts of the titles which they were employed to examine, and delivered copies to their clients, and the good will of their place of business, which included a business made by a deceased partner, is valuable, and, on dissolution, a portion of the former partners have given notice that they would continue business at the offices occupied by the firm, it is proper, in an action to adjust the affairs of the firm, to appoint a receiver of the abstracts, the unexpired lease of the offices, and the office furniture, with direction to sell the same, and permission to the members to purchase. *Brush v. Jay* (Supreme Ct.), 3 N. Y. Supp. 332.

2. See *Dayton v. Wilkes*, 17 How. Pr. (N. Y.) 510; *Turner v. Mayor*, 3 Giff. 442; *Pawsey v. Armstrong*, 18 Ch. 698.

3. See *Austen v. Boys*, 2 De G. & J. 626; *Mellersh v. Keen*, 28 Beav. 453; *Sheppard v. Boggs*, 9 Nev. 257.

In a settlement of partnership affairs, an appraisalment of the stock based on current price-lists, less reasonable percentage for the cost of selling, secures the value of the good will. *Rammelsberg v. Mitchell*, 29 Ohio St. 22.

The value of the good will is not to be diminished because the seller can carry on business at the same place, though this fact is to be taken into consideration. See *Burfield v. Roach*, 31 Beav. 241; *Reynolds v. Bullock*, 47 L. J. Ch. 773.

Where a firm bought goods and were sued six days afterwards in attachment and failed, and the seller sought to rescind the sale and replevy on the ground of their insolvency at the time of the purchase, the value of the good will was allowed to be proved in resistance to the rescission. *Bell v. Ellis*, 33 Cal. 620.

If a value has been placed upon the good will in the articles of co-partnership, it must be allowed in settlement of the partnership affairs. *Wade v. Jenkins*, 2 Giff. 509.

4. See *Steuart v. Gladstone*, 10 Ch. D. 626.

5. See *Cook v. Collingridge*, Jac. 607.

6. *Chisum v. Dewes*, 5 Russ. 29. And see *Churton v. Douglas*, H. V. Johns. 174.

The good will of a business passes with a mortgage of the house, and the mortgagee in possession is under no obligation to account in bankruptcy or to the mortgagor for it. *Ex parte Punnet*, 16 Ch. Div. 236.

An Express Contract Displaces the Implied One.—Where one enters into a contract not to re-engage in the same business for a certain period of time, after the expiration of that period, he may not only re-engage in the same business, but he may solicit the old customers. *Hanna v. Andrews*, 50 Iowa 462.

7. *Churton v. Douglas*, H. V. Johns. 174; *Kellogg v. Totten*, 16 Abb. Pr. (N. Y.) 35; *Hall v. Hall*, 20 Beav. 139. And see *Van Dyke v. Jackson*, 1 E.

firm's trade-marks¹ without further mention in the contract of sale. Where one partner has appropriated the good will to himself, the misappropriation is an item in the account,² and the damages for a violation of the right to the good will, committed after final accounting, are measured by the injury sustained.³

2. Effect of Sale.—The seller of a good will, or one who assigns it with his interest to his co-partners, is as a general rule prohibited from claiming to be the same concern as before, or to succeed the old firm, and from soliciting the old customers; but such sale or assignment imports no agreement not to compete in business with the purchaser;⁴ so with a surviving partner; and a sale of the

D. Smith (N. Y.) 419; Burrows v. Foster, cited at 32 Peav. 14, 23.

Where a surviving partner agreed to buy from the executor of the deceased partner the stock belonging to the partnership, the value of the good will and trademarks must be considered in ascertaining the value. Hall v. Barrows, 4 De G. J. & S. 150.

Where a partnership was engaged in the publication of a series of copy books known as Beatty's Head Line Copy Books, and they dissolved by one partner selling his interest to the other and afterwards the seller commenced the publication of a new series called Beatty's New and Improved Head Line copy books, the court held that this was an infringement upon the good will passed by the transfer to the other partner. Gage v. Canada Pub. Co., 11 Ont. App. C. A. 402.

1. Hoxie v. Chaney, 143 Mass. 592; Glen etc. Mfg. Co. v. Hall, 61 N. Y. 226; Shipwright v. Clements, 19 W. R. 599; Durham Smoking Tobacco Case, 3 Hughes (U. S.) 151. But see to the contrary Hazard v. Caswell, 93 N. Y. 259; Heuver v. Dannerhoffer, 82 N. Y. 499; Young v. Jones, 3 Hughes (U. S.) 274.

2. Cook v. Jenkins, 79 N. Y. 575. And see Smith v. Everett, 27 Beav. 446; Mellersh v. Keen, 27 Beav. 236; 28 Beav. 453.

Where a surviving partner continues the business which was insolvent at the time of his co-partner's death, but by his efforts it is made solvent and sold at a profit, he is chargeable with the value of the good will as at the date of the death of his partner and not as of the time of the sale. Musselman's Appeal, 62 Pa. St. 81; Broughton v. Broughton, 44 L. J. Ch. 526.

3. See Burckhardt v. Burckhardt, 42

Ohio St. 474; 36 Ohio St. 261; Dethlefs v. Tamsen, 7 Daly (N. Y.) 354; Hunt v. Tibbetts, 70 Me. 221.

No prospective damages will be allowed. Hunt v. Tibbetts, 70 Me. 221.

Lindley fixes the amount for which an infringing partner must account as "what it would have sold for." Lindley on Part. 860.

Where a partnership in keeping a hotel, was to expire with the expiration of the lease, and one partner clandestinely renewed the lease in his own name, the court declared the new lease to be partnership property and that the other partner's recovery from him should be arrived at by ascertaining the past profits of the hotel, the rent called for in the new lease and from expert testimony of hotel men as to the value of the good will and furniture from and above the rent, after deducting the price received for the furniture. Mitchell v. Reed, 19 Hun (N. Y.) 418.

4. Cottrell v. Babcock Ptg. Press Mfg. Co., 54 Conn. 122; Porter v. Gorman, 65 Ga. 11; Wiley v. Baumgardner, 97 Ind. 66; Hoxie v. Chaney, 143 Mass. 592; Dayton v. Wilkes, 17 How. Pr. (N. Y.) 510; White v. Jones, 1 Robt. (N. Y.) 321; 1 Abb. Pr., N. S. (N. Y.) 328; Howe v. Searing, 6 Bosw. (N. Y.) 354; Dethlefs v. Tamsen, 7 Daly (N. Y.) 354; Moody v. Thomas, 1 Disney (Ohio) 294; McCord v. Williams, 96 Pa. St. 78; Mossop v. Mason, 18 Grant's Ch., Up. Can. 464; Cruttwell v. Lye, 17 Ves. 335; 1 Rose, 123; Kenneday v. Lee, 3 Mer. 452; Churton v. Douglas, H. V. Johns. Ch. 174; Hudson v. Osborne, 39 L. J. Ch. 79; Bradbury v. Dickens, 27 Beav. 53; Davies v. Hodgson, 25 Beav. 177; Mellersh v. Keen, 27 Beav. 236; Smith v. Everett, 27 Beav. 446; John-

business and good will by the court is made upon the implied understanding that the survivor may continue the same business in the same locality, and that the purchaser acquires only a chance of retaining the old customers.¹ Though if the transfer of the interest of a partner is compulsory or if his retirement is enforced, as by a sale in bankruptcy proceedings or under execution,² or in case of expulsion under provisions in the articles,³ he may still solicit the old customers.

3. The Use of the Old Firm Name.—If no disposition is made of the good will any of the partners are at liberty after dissolution, to make any use of the firm name which does not involve

son v. Hellely, 34 Beav. 63; 2 De G. J. & S. 446; Bond v. Milbourn, 20 W. R. 197; Hookman v. Pottage, 27 L. T., N. S. 595; 11 W. R. 47; L. R., 8 Ch. 91; Labouchere v. Dawson, L. R. Eq. 322; Ginesi v. Cooper, 14 Ch. D. 596; Leggott v. Barrett, 15 Ch. D. 306; Pearson v. Pearson, 27 Ch. D. 145; Vernon v. Hallam, 34 Ch. D. 748.

In Pearson v. Pearson, 27 Ch. D. 145, the court concurred in holding that the selling partner might carry on a like business in the same neighborhood, but it was doubted whether or not he might not also solicit the old customers. See also Vernon v. Hallam, 34 Ch. Div. 748.

Whereby an agreement upon expiration of the partnership, one partner was to have the good will, and the other opened a similar business and advertised the fact, and stating in the advertisement, "thanking you for your support in the past," the court held, that this was a suggestion to the customers of the old firm that he was its successor, and should therefore be enjoined. Crutwell v. Lye, 17 Ves. 335.

In Harrison v. Gardner, 2 Madd. 198, the court granted an injunction against opening the same trade in the same street, thus depriving the vendee of the benefit of the sale even though the contract of sale contained no provision with respect to the good will, there having been a mutual understanding between the parties that the good will should pass. And see Williams v. Wilson, 4 Sandf. Ch. (N. Y.) 384.

In the sale of a *professional business* there is an implied covenant not to resume business within the same territory. Dwight v. Hamilton, 113 Mass. 175; Ginesi v. Cooper, 14 Ch. Div. 596.

Knowledge of the solicitation of old

customers must be shown. McCord v. Williams, 96 Pa. St. 78.

Merger of Agreement to Abstain.—Where two partners purchased the good will of a business and one bought the other's interest, and the buyer entered into a partnership with the former owner of the good will, the former owner was absolved from his original contract to abstain from the prosecution of the competing business. Norris v. Howard, 41 Iowa 508.

1. Rammelsberg v. Mitchell, 29 Ohio St. 22; Cook v. Collingridge, Jac. 607; Davis v. Hodgson, 25 Beav. 197; Johnson v. Hellely, 34 Beav. 63; Smith v. Everett, 27 Beav. 446; Farr v. Pearce, 3 Madd. 74; Reynolds v. Bullock, 47 L. J. Ch. 773; 39 L. T., N. S. 443; Hall v. Barrows, 4 De G. J. & S. 150.

When a sale of the good will of a business is ordered, the book debts will ordinarily be sold with it so that the possession of them may enable the buyer to secure to himself the customers of the old firm. Johnson v. Hellely, 34 Beav. 63.

2. See Iowa Seed Co. v. Dow, 70 Iowa 481; Crutwell v. Lye, 17 Ves. 335; 1 Rose 128; Walker v. Mottram, 19 Ch. D. 355.

Where, on dissolution by decree, one partner consents to take the stock and effects at valuation, and the other agrees to retire, the retiring partner is not entitled to an allowance for the good will. Hall v. Hall, 20 Beav. 139; Hookman v. Pottage, 27 L. T., N. S. 595.

After a sale of his interest in bankruptcy, however, a partner cannot use the old trade marks or represent himself as carrying on the identical business. Hudson v. Osborne, 39 L. J. Ch. 79.

3. Dawson v. Beeson, 22 Ch. D. 504. And see Clark v. Leach, 32 Beav. 14.

holding out the old members as present partners;¹ but after its sale or other disposition, the seller has no right to the use of the firm name, even though derived from his own name,² nor will the selling partners be permitted to form a corporation with a name closely resembling the old firm name.³ The right to the use of the firm name passes with the good will to the purchasing partner, who then has the sole right to whatever benefit may arise from it,⁴ and may hold himself out as successor to or late of the old firm,⁵ though a mere outside purchaser of the property at dissolution sale has no right to use the name of the firm or hold him-

1. *Young v. Jones*, 3 Hughes (U. S.) 274; *Banks v. Gibson*, 34 Beav. 556; *Cottrel v. Babcock Ptg. Press Mfg. Co.*, 54 Conn. 122. And see *Renny Button Holing Co. v. Somervell*, 38 L. T., N. S. 878; 28 L. J. Ch. 786; *Morison v. Moat*, 9 Hare 241.

After the dissolution of a partnership, a corporation organized by some of the members of the firm cannot be restrained from using the name which was arbitrarily adopted and used by the firm, nor from carrying on the same kind of business. *Macdonald v. Trojan Button Fastener Co.* (Supreme Ct.), 9 N. Y. Supp. 383.

A receipt given by executors for money due and paid to the estate of a deceased person from former partners, in which the latter are mentioned by the name of the former partnership, under which they continued to carry on business, will not be constructed as a written consent to the continued use of the former partnership's name in the new business and firm, if it was executed and delivered merely for the purpose of exhibiting the settlement of the claim. *Bowman v. Floyd*, 3 Allen (Mass.) 76.

2. *Churton v. Douglas*, II. V. Johns. Ch. 174; *Caswell v. Hazard*, 121 N. Y. 484. And see *White v. Jones*, 1 Abb. Pr., N. S. (N. Y.) 328; *Dayton v. Wilkes*, 17 How. Pr. (N. Y.) 510; *Mossop v. Mason*, 18 Grant's Ch. (Up. Can.) 453; *Crutwell v. Lye*, 17 Ves. 335; *Hudson v. Osborne*, 39 L. J. Ch. 79.

In *Bininger v. Clark*, 60 Barb. (N. Y.) 113, the firm had carried on its business under the name of A. Bininger & Co., the retiring partner who had usually signed his name Abm. Clark, was enjoined from carrying on a similar business as A. Bininger Clark, successor to A. Bininger & Co.

In *Hookman v. Pottage*, L. R., 8 Ch. 91; 27 L. T. N. S. 595, where the retiring partner opened business next

door to the old firm under a sign "S. Pottage, from Hookman & Pottage," so arranged that the old name was particularly conspicuous, an injunction was granted against such use of the old name. But the court said that the retiring partner could say that he was of the old firm, provided he did not do it in a way to create a belief that he was continuing the old firm's business. And see *Smith v. Cooper*, 5 Abb. N. Cas. (N. Y.) 247.

A person may use his own name in an honest and ordinary business manner, though it may be the same as that of another in the same business. Thus, where the plaintiff stamped silver ware "Rogers & Bros. a 1," and the defendant stamped his, "C. Rogers & Bros. a 1," an injunction was refused. *Rogers v. Rogers*, 53 Conn. 121; 55 Am. Rep. 78.

3. *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215.

The selling partner will be enjoined from using the trade mark of the old firm or any imitation of it calculated to deceive. *Hoxie v. Chaney*, 143 Mass. 592; *Dayton v. Wilkes*, 17 How. Pr. (N. Y.) 510.

4. *Adams v. Adams*, 7 Abb. N. Cas. (N. Y.) 292; *Rogers v. Taintor*, 97 Mass. 291.

Where the name of the retiring partner is part of the name of the firm so long as he lives, he would, in the absence of an agreement to the contrary, be entitled to constrain his old co-partners and their representatives from carrying on business under the old name, and so continually exposing his former co-partners to risk, as in case of A B retiring from a firm, the name of which was A B & Co. *Lindley on Part.* 863.

5. *Churton v. Davis*, H. V. Johns. Ch. 174. And see *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1.

On application to restrain the un-

self out as its successor,¹ and when the sale is between partners, if no mention is made of the good will, the continuing partners cannot use the name of the retiring one in such a manner, during his lifetime, as to lead the public to believe that he is still a partner.² Where the firm name consisted of that of the retiring partner only, the buyer cannot use it.³

One partner who purchases the interest of a co-partner, however, and continues the business exclusively, is entitled to the use of the firm name,⁴ provided he so uses it as not to lead the public to believe that the retiring member is still a partner;⁵ and as the estate of a decedent is not endangered by such act, a surviving partner may use the name of the deceased partner in continuing the business.⁶

authorized use of a firm name, it is not necessary to show that actual damage or loss has accrued to the plaintiff. *Reeves v. Denicke*, 12 Abb. Pr., N. S. (N. Y.) 92.

Damages ought not to be recovered against a defendant who, in ignorance of the plaintiff's rights and claims, has used a trade-mark belonging to plaintiff. *Weed v. Peterson*, 12 Abb. Pr., N. S. (N. Y.) 178.

1. See *Weed v. Peterson*, 12 Abb. Pr., N. S. (N. Y.) 178; *Reeves v. Denicke*, 12 Abb. Pr., N. S. (N. Y.) 92.

2. *Blumenthal v. Strauss*, 53 Hun (N. Y.) 501; *McGowan Bros. Pump etc. Co. v. McGowan*, 22 Ohio St. 370; *Morgan v. Schuyler*, 79 N. Y. 490; 35 Am. Rep. 543; *Scott v. Rowland*, 36 L. T., N. S. 390; 20 W. R. 508. But see *Adams v. Adams*, 7 Abb., N. Cas. (N. Y.) 292.

In *Levy v. Walker*, 10 Ch. Div. 436, where two ladies were partners doing business in London, one married and the firm was dissolved and all the stock and goods were sold to the other, who continued the business in the old firm name. The other afterwards set up the same kind of business with her husband in Paris, under her maiden name, with the addition of "& Co.," and sought to enjoin the former from using the old firm name. But the court refused the injunction upon the ground that the former partner was entitled to the old firm name by purchase, and that as the dissolution was duly advertised, the latter incurred no liability by such use.

Where a person allows a firm to use his name in its title, though it may thereby acquire an exclusive right to the name, it cannot transmit the right to its successor to use against the will

of such person, and no acquiescence on the latter's part will estop him from objecting. *Horton Mfg. Co. v. Horton Mfg. Co.*, 18 Fed. Rep. 816. And see *Lodge v. Weld*, 139 Mass. 499. *Howe v. Searing*, 6 Bosw. (N. Y.) 354.

An assignment by plaintiff to one of his former partners of his interest in the old firm name as a trade designation does not give the right to the assignee to take in new partners and continue the business under such name. *Howland v. Roosevelt* (Supreme Ct.), 5 N. Y. Supp. 75.

3. *Howe v. Searing*, 6 Bosw. (N. Y.) 354; 10 Abb. Pr. (N. Y.) 264; *Churton v. Davis*, H. V. Johns. Ch. 174; 5 Jur., N. S. 887.

4. *Adams v. Adams*, 7 Abb. N. Cas. (N. Y.) 292. And see *McGowan Bros. Pump etc. Co. v. McGowan*, 22 Ohio St. 370.

5. See *Hallett v. Cumston*, 110 Mass. 29; *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y.) 394; *McGowan Bros. Pump etc. Co. v. McGowan*, 22 Ohio St. 370; *Routh v. Webster*, 10 Beav. 561; *Troughton v. Hunter*, 18 Beav. 470; *Scott v. Rowland*, 26 L. T., N. S. 391; *Bullock v. Chapman*, 2 De G. & Sm. 211.

Where one of two partners in a ferry who were tenants in common of the lands adjacent died, and his moiety was sold by his administrator and the purchaser offered to form a partnership with the other partner and was refused, and afterwards set up an opposition ferry, a court of equity refused to enjoin him. *Spann v. Nance*, 32 Ala. 527.

6. *Staats v. Howlett*, 4 Den. (N. Y.) 559; *Webster v. Webster*, 3 Swanst. 490; *Banks v. Gibson*, 34 Beav. 566; *Robertson v. Quiddington*, 28 Beav. 529; *Levis v. Langdon*, 7 Sim. 425.

The same rules apply to a trade-mark; and where, after dissolution, it remains undisposed of, either party may make any use of it which does not imperil the other or involve false representations;¹ though it is an asset of the partnership, and upon demand of either party, will be sold on dissolution and the proceeds distributed.² A trade name like a trade-mark will be protected from infringement by third parties after it becomes established.³

4. Professional Partnerships.—The good will of a professional partnership is so exclusively made up of confidence in the personal integrity and ability of the individual that it has no local existence.⁴ There would be nothing to sell except the offices,

But see to the contrary *Fenn v. Bolles*, 7 Abb. Pr. (N. Y.) 202.

Where the articles provided that the representatives of a deceased member can take his share in the business, the surviving partner will be enjoined from carrying on business in any other name until a reasonable time to elect to take decedent's share has passed. *Evans v. Hughes*, 18 Jur. 691.

1. *Smith v. Walker*, 57 Mich. 456; *Hazard v. Caswell*, 93 N. Y. 259; *Huwer v. Dannenhoffer*, 82 N. Y. 499; *Taylor v. Botkin*, 5 Sawy. (U. S.) 584; *Young v. Jones*, 3 Hughes (U. S.) 274; *Condy v. Mitchell*, 37 L. T., N. S. 766; 26 W. R. 269.

A trade-mark belonging to a co-partnership may be used, after the death of one of the partners, by the surviving partners and the administrator of the deceased partner, if both continue to manufacture the article to which the trade-mark relates. *Lewis v. Smith*, 8 Pa. Co. Ct. Rep. 327.

A retiring partner, who assents to the continuation of the business by the other partners at the same place and under the same name, retains no interest in the good will, such as will give him a right to use a trade-mark belonging to the firm, especially where the evidence tends to show that it was verbally agreed that he surrendered all interest in the trade-mark. *Menendez v. Holt*, 128 U. S. 514.

2. *Hall v. Barrows*, 4 De G. J. & S. 150; *Bury v. Bedford*, 4 De G. J. & S. 352.

3. *Bell v. Locke*, 8 Paige (N. Y.) 75; *Lee v. Haley*, L. R., 5 Ch. App. 161; *Newby v. Oregon Cent. R. Co.*, Dedy (U. S.) 609. And see *Lawson v. Bank of London*, 18 C. B. 84.

Trade Name Attached to Premises.—Where a clothing merchant erected a

sign upon his place of business calling it "Tower Palace," and advertised largely, but afterwards left the premises and moved his sign to his new place, and the defendant rented the old stand and put up a similar sign, calling it "Tower Palace," an injunction against such use was refused, on the ground that the name designated the building and not the business of the person, and was not, therefore, a trade-mark. *Armstrong v. Kleinhans*, 82 Ky. 303.

And in *Booth v. Jarret*, 52 How. Pr. (N. Y.) 169, a buyer of Booth's Theater on foreclosure was held to be entitled to continue the old name. See also *Pepper v. Labrot*, 8 Fed. Rep. 29.

In *Howard v. Henriques*, 3 Sandf. (N. Y.) 725, it was held that the name "Irving Hotel" had become attached to the building and had become a trade mark as the designation of such building, and that another building in the same vicinity could not be given the same name even though there was no sign upon the former building.

But where plaintiff leased a lot and erected a hotel on it, which he called "What Cheer House," and afterwards bought an adjoining lot and erected a building upon that, moving the old sign to the new building and operating both as the "What Cheer House," and afterwards surrendered the lease of the former building and confined his business to his own lot; and the defendant took a lease of the old building and labeled it "The Original What Cheer House," an injunction was granted against such use of the name. *Woodward v. Lazar*, 21 Cal. 448.

4. *Austin v. Boys*, 2 De G. & J. 626; *Bozon v. Farlow*, 1 Mer. 459; *Arundell v. Bell*, 52 L. J. Ch. 537; 49 L. T. 345.

and as these are often changed, they would be of little value.¹ But if the good will of such a partnership is sold, the implied covenant not to injure the buyer will sustain an injunction against the resumption of business in the same locality,² and where it is sold or where a fund is otherwise created representing it, the fund will be treated as an asset, however valueless the good will itself might have been.³ The good will of a professional partnership may be the subject of sale and the contract may be enforced provided the price is fixed or the means of fixing it are provided,⁴ but the representatives of a deceased partner have no claim to a share in it.⁵

5. Agreements Not to Compete—(See also **ILLEGAL CONTRACTS**, vol. 9, page 879).—The agreement not to go into the same business in competition with the buyer usually accompanying contracts for the sale of the good will of a business is not an illegal restraint of trade if it is reasonable as to territory,⁶ the reasonableness varying according to the character of the business;⁷ and if the contract contains covenants fixing limits of a different character, a part of which is unreasonable and consequently void, effect will be given to the reasonable part, if the contract is divisible.⁸ A designation of time in such a restriction

1. See *Morgan v. Schuyler*, 79 N. Y. 490; *Arundell v. Bell*, 52 L. J. Ch. 537; 49 L. T. 345.

The good will must be taken to mean the interest a retired partner would have had had he remained. *Austin v. Boyes*, 2 De G. & J. 626.

2. *Dwight v. Hamilton*, 113 Mass. 175; *Butler v. Burleson*, 16 Vt. 176; *Ginesi v. Cooper*, 14 Ch. D. 596.

3. *Smale v. Graves*, 19 L. J., N. S. Ch. 157; 14 Jur. 662; *Christie v. Clark*, 14 Up. Can. C. P. 544. And see *Wiley's Appeal*, 8 W. & S. (Pa.) 244.

4. *Christie v. Clark*, 16 Up. Can. C. P. 544.

Where a partnership was formed between solicitors to run for seven years, with a stipulation that if any partner retired, the rest would pay him the value of his good will, and one partner retired two days before the expiration of the seven years, he was held to be entitled to the good will as of two days' duration and no more. *Austin v. Boys*, 24 Beav. 598.

5. *Farr v. Pearce*, 3 Madd. 74; *Arundell v. Bell*, 52 L. J. Ch. 537; 49 L. T. 345.

6. See *Mitchell v. Reynolds*, 1 Sm. Lead. Cas. 508, and note; *Goodman v. Henderson*, 58 Ga. 567; *Stewart v. Challacombe*, 11 Ill. App. 379; *Hubbard v. Miller*, 27 Mich. 15.

An agreement not to engage in a particular business at a particular place will be enforced at law without inquiring into the adequacy of the consideration, but upon an application in equity for an injunction, the court may decline to interfere when the disproportion between the consideration and the restriction is such as to make the agreement hard and oppressive. *Thayer v. Younge*, 86 Ind. 259. But see *Pierce v. Fuller*, 8 Mass. 223.

While it is competent for one partner to bind the other by a sale of the good will of a business, it is out of his power to bind his partner, by a contract, not to go into the same business. *Moreau v. Edwards*, 2 Tenn. Ch. 347.

7. See *Callahan v. Donnolly*, 45 Cal. 152; *Guerand v. Dandeleit*, 32 Md. 561; *Warfield v. Booth*, 33 Md. 63; *Oregon Steam Nav. Co. v. Winson*, 20 Wall. (U. S.) 64.

An agreement not to compete which is unlimited as to time and place is void and cannot be pleaded as a defense to an action for fraud in the sale of the effects of a partnership. *Maier v. Homan*, 4 Daly (N. Y.) 168, citing *Chappel v. Brockway*, 21 Wend. (N. Y.) 157; *Dunlop v. Gregory*, 10 N. Y. 243.

8. *Dean v. Emerson*, 102 Mass. 480; *Peltz v. Eichele*, 62 Mo. 171; *Thomas v.*

is unnecessary;¹ the covenant is deemed to be for the covenantor's life.²

A covenant not to go into business, either directly or indirectly, within certain limits is violated by going into business in adjoining territory and from thence supplying people within the prohibited district;³ and while a general covenant not to carry on business is not violated by acting on a salary as agent or manager for another,⁴ if it contains words to the effect that the covenantor will not engage in the same business or do any act interfering with the business of the covenantee, he cannot even act as agent or servant for a competing establishment.⁵

Miles, 3 Ohio St. 274; *Lange v. Work*, 2 Ohio St. 519; *Tallis v. Tallis*, 1 E. & B. 391; *Sheannan v. Hart*, 14 Abb. Pr. (N. Y.) 35. But see to the contrary, *More v. Bonnet*, 40 Cal. 251.

1. See *Cook v. Johnson*, 47 Conn. 175; 36 Am. Rep. 64; *Curtis v. Gokey*, 68 N. Y. 300; *Ropes v. Upton*, 125 Mass. 255; *Dean v. Emerson*, 102 Mass. 480; *Burrill v. Daggett*, 77 Me. 545; *Arnold v. Kreutzer*, 67 Iowa 214; *Thayer v. Young*, 86 Ind. 259; *Stewart v. Bedell*, 79 Pa. St. 336; *Jacoby v. Whitmore*, 32 W. R. 18; 49 L. T. 335.

2. *Jacoby v. Whitmore*, 32 W. R. 18; 49 L. T. 335.

The covenant remains binding notwithstanding the death of the covenantee and it adds to the good will upon which the administrator may realize upon by sale. *Vernon v. Hallam*, 34 Ch. D. 748.

3. *Boutelle v. Smith*, 116 Mass. 111; *Duffy v. Shockey*, 11 Ind. 71; *Sander v. Hoffman*, 64 N. Y. 248; *Turner v. Evans*, 2 E. & B. 512; 2 De G. M. & G. 740; *Brampton v. Beddoes*, 13 C. B., N. S. 538.

A purchased from B his patronage and good will in the towage business, B agreeing not to engage, directly or indirectly, in such business. Subsequently B entered into a mercantile partnership with C, and C acted as agent for another in procuring towage business for his tug. *Held*, that B was responsible for all acts of C done under the authority of the firm, or within the scope of the partnership, and that if the firm gave their patronage in the towage business to any other than A, or if C, under the authority he possessed as a member of the firm, acted as agent for another tug, it would be a breach of B's covenant, whether he knew of such employment and agency or not. *Congdon v. Morgan*, 13 S. Car. 190.

A covenant not to carry on a business "under said name or style of John Hallam, or Hallam Bros." is not a covenant not to compete generally. The words "under said name" qualify the whole covenant. *Vernon v. Hallam*, 34 Ch. Div. 748.

4. *Allen v. Taylor*, 39 L. J. Ch. 627; 18 W. R. 888; *Allen v. Taylor*, 24 L. T. 249; 19 W. R. 556; *Clark v. Watkins*, 9 Jur., N. S. 142; 8 L. T. 8; *Bowers v. Whittle*, 63 N. H. 147; 56 Am. Rep. 499.

A sale to a co-partner of the good will of the business with an agreement not to buy or sell goods in the same business in the same city, is not violated by acting as clerk in a competing establishment and being held out as a partner in it with his consent, if, in fact, he has no joint interest. *Greenebaum v. Gage*, 71 Ill. 46.

A covenant not to engage in a trade in a certain district, is not broken by lending money to a competitor to enable him to carry on business taking a mortgage upon his trade premises for the loan, knowing that the mortgagor could pay the debt only out of the profits of the business. *Bird v. Lake*, 1 H. & N. 338.

Leasing to premises to person to carry on a competing business is not a violation of a covenant not to engage in the same business. *Bradford v. Peckham*, 9 R. I. 250.

5. See *Boutelle v. Smith*, 116 Mass. 111; *Dales v. Weaver*, 18 W. R. 994; *Rolfe v. Rolfe*, 15 Sim. 88; *Hill v. Hill*, 55 L. T., N. S. 769; *Jones v. Heavens*, 4 Ch. D. 636; *Newling v. Dobell*, 38 L. J. Ch. 111; 19 L. T. 40.

A covenant by partners that they will not, and neither of them will enter into the same business, renders both liable for a breach by one. *Boutelle v. Smith*, 116 Mass. 111; *Stark v. Noble*, 24 Iowa 71.

The proper remedy for a breach of such a covenant, particularly when it contains no penalty in the nature of liquidated damages, is by injunction.¹

XXIII. WINDING UP AND DISTRIBUTION.—In order to wind up the affairs of a dissolved partnership it is necessary, first, to pay its debts; secondly, to settle all questions of account between the partners, and, thirdly, to divide the unexhausted assets, if any, between the partners in proper proportions; or if the assets are insufficient to pay the debts, then to make up the deficiency by proper contribution between the partners.² A dissolution, whether general or partial, does not discharge any of the partners from liabilities previously incurred by them; the partnership assets must therefore be applied to the satisfaction of partnership claims before they can be participated in by the individual partners or their individual creditors.³

Where a covenant not to carry on or engage in a competing business is broken by becoming manager of a competing concern, the covenantor will be held liable for all the injury done by the new partnership upon the inference that he participated in all its acts. *Dean v. Emerson*, 102 Mass. 480.

1. *Angier v. Webber*, 14 Allen (Mass.) 211; *Ropes v. Upton*, 125 Mass. 258; *Shearman v. Hart*, 14 Abb. Pr. (N. Y.) 358; *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Supr. Ct. 442; *Butler v. Burleson*, 16 Vt. 176; *Whittaker v. Howe*, 3 Beav. 176.

2. *Lindley on Part.* 1039. And see *Clay v. Field*, 34 Fed. Rep. 375.

In *Bates' Law of Part.*, § 811, the order of distribution of partnership assets after dissolution is stated to be:

1. The debts or liabilities due to third persons.

2. In repaying to each partner his advances, for as to these he is a creditor *inter se*.

3. In repaying each partner his capital.

4. Dividing the balance as profits.

Where a partner has failed to put in his share of capital, the deficiency is a debt due to the firm which may be retained out of his share.

The rule that, as between partners, there can be neither contribution nor subrogation until final settlement, applies, notwithstanding an agreement by a part of the members, on dissolution, to pay the partnership debts. *Miner's Trust Co. Bank v. Wren*, 10 Phila. (Pa.) 502.

The rights of partnership creditors are not affected by equities between the partners. *Bartels v. Creditors*, 11 La. Ann. 433.

If, on the dissolution of a partnership, it should appear that the amount of stock which one partner had contributed had been taken out of the common fund of any one claiming property in such stock, the partner whose interest is thus affected cannot claim an equal proportion of the residue of the fund, even if injustice has been done in awarding his property to another. *Gilman v. Brown*, 14 Mass. 123.

3. See *Schuster v. Rader*, 13 Colo. 329; *Union Natl. Bank v. Bank of Commerce*, 94 Ill. 271; *Black's Appeal*, 44 Pa. St. 503; *Buchanan v. Sumner*, 2 Barb. Ch. (N. Y.) 165; *Hardy v. Mitchell*, 67 Ind. 485; *Filley v. Phelps*, 18 Conn. 294; *Conkling v. Washington University*, 2 Md. Ch. 497; *Bond v. Nave*, 62 Ind. 505; *Conant v. Frary*, 49 Ind. 530; *Rainey v. Nance*, 54 Ill. 29; *Bass v. Estill*, 50 Miss. 300; *Crooker v. Crooker*, 46 Me. 250; *Sniffer v. Sass*, 14 Rich. (S. Car.) 20; *Houseal's Appeal*, 45 Pa. St. 484; *Cooper's Appeal*, 26 Pa. St. 262; *Morrison v. Kurtz*, 15 Ill. 193; *Moline Water Power etc. Mfg. Co. v. Webster*, 26 Ill. 233; *Pahlman v. Graves*, 26 Ill. 405; *Thornton v. Bussey*, 28 Ga. 302; *Toombs v. Hill*, 28 Ga. 371; *Bevan v. Allee*, 3 Harr. (Del.) 80; *Chase v. Steele*, 9 Cal. 64; *Collins v. Butler*, 14 Cal. 223; *Burpee v. Bunn*, 22 Cal. 194; *Wintersmith v. Poynter*, 2 Metc. (Ky.) 457; *North River Bank v. Stewart*, 4 Bradf. (N. Y.) 254; *Ganson v. Lathrop*, 25 Barb. (N. Y.)

455; Kirby v. Carpenter, 7 Barb. (N. Y.) 373; Smith v. Mallory, 24 Ala. 628; Bridge v. McCullough, 27 Ala. 661; Van Wagner v. Chapman, 29 Ala. 172; Lucas v. Atwood, 2 Stew. (Ala.) 378; Succession of Pilcher, 39 La. Ann. 362; McCulloch v. Dashiell, 1 Har. & G. (Md.) 96; Glen v. Gill, 2 Md. 1; Foster v. Hall, 4 Humph. (Tenn.) 346; Fleming v. Billings, 9 Rich. Eq. (S. Car.) 149; Gadsden v. Carson, 9 Rich. Eq. (S. Car.) 252; Wilson v. McConnell, 9 Rich. Eq. (S. Car.) 500; Woddrop v. Ward, 3 De-saus. (S. Car.) 203; Christian v. Ellis, 1 Gratt. (Va.) 396; Pierce v. Jackson, 6 Mass. 242; Fisk v. Herrick, 6 Mass. 271; Phillips v. Bridge, 11 Mass. 242; Goodwin v. Richardson, 11 Mass. 469; Rice v. Austin, 17 Mass. 197; Adams v. Paige, 7 Pick. (Mass.) 542; Wilson v. Conine, 2 Johns. (N. Y.) 280; Smith v. Barker, 10 Me. 458; Jarvis v. Brooks, 23 N. H. 136; Crockett v. Crain, 33 N. H. 542; Holton v. Holton, 40 N. H. 77; Treadwell v. Brown, 41 N. H. 12; Matlack v. James, 13 N. J. Eq. 156; Hill v. Beach, 12 N. J. Eq. 31; Wilder v. Keeler, 3 Paige (N. Y.) 167; Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 522; Muir v. Leitch, 7 Barb. (N. Y.) 341; Oakey v. Rabb, 1 Freem. Ch. (Miss.) 546; Arnold v. Hamer, 1 Freem. Ch. (Miss.) 509; Terry v. Butler, 43 Barb. (N. Y.) 395; Murrill v. Neill, 8 How. (U. S.) 414; *In re* Warren, Dav. (U. S.) 320; Hubble v. Per-rin, 3 Ohio 287; White v. Union Ins. Co., 1 Nott & M. (S. Car.) 556; Washburn v. Bank of Bellows Falls, 19 Vt. 278; Willis v. Freeman, 35 Vt. 44; Converse v. McKee, 14 Tex. 20; Ryder v. Gilbert, 16 Hun (N. Y.) 163; Irley v. Graham, 46 Miss. 425; Whipple v. Hill, 14 La. Ann. 437; Northern Bank of Kentucky v. Keizer, 2 Duv. (Ky.) 169; Whitehead v. Chadwell, 2 Duv. (Ky.) 432; Bell v. Newman, 5 S. & R. (Pa.) 78; White v. Dougherty, Mart. & Y. (Tenn.) 309; Owens v. Davis, 15 La. Ann. 22; Grosvenor v. Austin, 6 Ohio 103; Daniel v. Townsend, 21 Ga. 155; Scott v. Dansby, 12 Ala. 714; Egery v. Howard, 64 Me. 68; Davis v. Grove, 2 Robt. (N. Y.) 134; Strong v. Stapp, 74 Cal. 280; Smith v. McMicken, 3 La. Ann. 321; Beauchamp v. Chachere, 12 La. Ann. 851:

Where partners agree that one of them shall retain certain shares of stock belonging to the firm until the claim against the firm is settled, judgment directing their conveyance to such

partners will not be rendered in an action to wind up without proof that the claim has been settled. Harper v. Lamping, 33 Cal. 641.

One partner cannot owe his co-partner in matters of partnership, no matter how unequally either may have contributed to the partnership fund, until the partnership debts have been discharged. Ross v. Carson, 32 Mo. App. 148.

The fact that a partner who has purchased goods for his firm has given his individual notes in payment, does not deprive him of his right to have said notes paid out of the partnership assets before any distribution of profits is made. Thornton v. Lambeth, 103 N. Car. 86.

Two brothers were partners, and it was their custom for years to keep everything in common. That one drew from the firm for his private expense more than the other made no difference in the adjustment, all sums so drawn being charged to "expense" and settled in that way. It was held that, on the death of one, the other could not draw from the firm assets a sum necessary to make the amount drawn by him equal to that drawn by his brother. Scudder v. Ames, 89 Mo. 496.

If attorneys who are co-partners, accept a retainer, it is a joint contract, continuing to the termination of the suit, and neither can be released from the obligations they have assumed, so far as their clients are concerned, by a dissolution of their firm, or any other act or agreement between themselves. Walker v. Goodrich, 16 Ill. 341; Morgan v. Roberts, 38 Ill. 65. And see Wilkinson v. Griswold, 12 Smed. & M. (Miss.) 669.

An attorney who has received notes for collection is individually responsible for care and diligence in collection, although he gives his client notice that he has associated with him a partner who attends to the collecting; unless the client has recognized the partnership in the transaction of his business. Mardis v. Shackleford, 4 Ala. 493.

Part Owners of Ships.—The ordinary partnership creditors of the owners of a steamboat have no right to be paid by preference to the individual creditors, out of the proceeds of the boat; whether these proceeds result from sales or have been received on policies of insurance. Whipple v. Hill, 14 La. Ann. 437.

What each is entitled to charge in account with the others including whatever each has brought in, whether as capital or as advances, and what each should have brought in but has not done so, and what each has taken out more than he ought, should then be ascertained, and the profits to be divided or losses to be made good should be apportioned, ascertaining what each must pay to the others in order to settle all cross-claims,¹ the capital being required to be first divided and repaid to the party contributing it before dividing, and in order to ascertain the amount, of the profits.² Each partner has an equitable right or lien to compel the application of the assets to the joint debts and for the recovery of the surplus due to each after the settlement of the liabilities,³ extending not merely to secure balances for inequality

1. *Neudecker v. Kohlberg*, 3 Daly (N. Y.) 407; *Lusk v. Graham*, 21 La. Ann. 159; *Chambers v. Crook*, 42 Ala. 171; *Collins v. Owens*, 34 Ala. 66; *Scutt v. Robertson*, 26 Ill. App. 80; *Gaines v. Coney*, 51 Miss. 323; *Moore v. Wheeler*, 10 W. Va. 35; *Stevens v. Yeatman*, 19 Md. 480; *Schulte v. Anderson*, 13 Jones & S. (N. Y.) 489; *Fregerio v. Crottes*, 20 La. Ann. 351; *Phelan v. Hutchinson*, Phil. Eq. (N. Car.) 116; 43 Ann. Dec. 603; *West v. Skip*, 1 Ves. Sr. 242; *Myers v. Bennett*, 3 Lea (Tenn.) 184.

A decree of distribution of partnership assets, remaining in the hands of a trustee after the partnership debts have been paid, will not be made until an accounting has been had, and the respective claims of the partners determined. *Gale v. Sulloway*, 62 N. H. 57.

A partner who has drawn out more than he put in is not entitled to receive anything until his co-partners, who have drawn out less than they put in, are reimbursed their excess of advances, with interest. *Re Shepherd*, 3 Tenn. Ch. 189.

2. *Gunnell v. Bird*, 10 Wall. (U. S.) 304; *Nims v. Nims*, 23 Fla. 69; *Keaton v. Mayo*, 71 Ga. 649; *Taylor v. Cofing*, 18 Ill. 422; *Jackson v. Crapp*, 32 Ind. 522; *Lord v. Anderson*, 16 Kan. 185; *Norman v. Conn*, 20 Kan. 159; *Frigerio v. Crottes*, 20 La. Ann. 351; *Livingston v. Blanchard*, 130 Mass. 341; *Randle v. Richardson*, 53 Miss. 176; *Hayes v. Hayes* (N. H. 1890), 19 Atl. Rep. 571; *Raymond v. Putnam*, 44 N. H. 160; *Marquand v. New York Mfg. Co.*, 17 Johns. (N. Y.) 525; *Neudecker v. Kohlberg*, 3 Daly (N. Y.) 407; *Conroy v. Campbell*, 45 N. Y. Super. Ct. 326; *Rowland v. Miller*, 7

Phila. (Pa.) 362; *Shea v. Donahue*, 15 Lea (Tenn.) 160; *Moore v. Wheeler*, 10 W. Va. 35.

Where the capital was contributed unequally and profits were to be equally divided, the total expenditures are to be deducted from the total of the capital and receipts, the capital is then to be paid back and the balance is to be divided equally as profits. *Norman v. Conn*, 20 Can. 159.

The capital stock should not be taken into account until a balance is struck, and then if there is any fund on hand, each should be allowed to withdraw his capital or a rebating part of it. *Phelan v. Hutchinson*, Phil. Eq. (N. Car.) 116; 93 Am. Dec. 603.

3. *Donelson v. Posey*, 13 Ala. 752; *Duryea v. Burt*, 28 Cal. 569; *Rice v. Barnard*, 20 Vt. 479; *Freeman v. Stewart*, 41 Miss. 139; *Sigler v. Knox County Bank*, 8 Ohio St. 511; *Hawkeye Woolen Mills v. Conklin*, 26 Iowa 422; *Pearson v. Keedy*, 6 B. Mon. (Ky.) 128; *Black v. Bush*, 7 B. Mon. (Ky.) 210; *Ransom v. Van Deventer*, 41 Barb. (N. Y.) 313; *Crooker v. Crooker*, 46 Me. 250; *Menagh v. Whitwell*, 52 N. Y. 146; *Cope's Appeal*, 39 Pa. St. 284; *Houseal's Appeal*, 45 Pa. St. 485; *Foster v. Barnes*, 81 Pa. St. 377; *Betts v. Letcher* (S. Dak.) 46; *N. W. Rep.* 143; *Day v. Wetherby*, 29 Wis. 363; *Fain v. Jones*, 3 Head (Tenn.) 308; *Case v. Beauregard*, 99 U. S. 119; *Campbell v. Mullett*, 2 Swanst. 550, 570; *Ex parte Ruffin*, 6 Ves. 119. And see *Ridgeley v. Carey*, 4 Har. & M. (Md.) 167; *Pinkett v. Wright*, 2 Hare 120; *Spence v. Whitaker*, 3 Port. (Ala.) 297.

The answer of a defendant, alleged to be a surviving partner, simply denying the existence of the partnership,

of capital, but covering also all advances and expenditures for paying debts or other personal accounts with the firm,¹ and salaries and other agreed extra compensation,² as well as the return of the premiums paid for admission into the firm,³ including claims arising after as well as before dissolution.⁴ This equitable lien of a partner for the payment of debts and advances and the distribution of the assets attaches to partnership real estate wherever the title may be as well as to the personalty of the firm,⁵ and that personal property is in the hands or in the name of the debtor

is not a waiver of his right to have the partnership effects applied to the payment of the firm debts. *Robinson v. Allen*, 85 Va. 721.

It is proper to include in the consideration of a bill of sale to plaintiffs of the stock of goods of an insolvent firm, a debt originally due one of the plaintiffs from a member of the firm, which became a firm debt under the partnership agreement, and also to include in it a debt due primarily by one of the firm, but for which the firm became liable by indorsement. *Hine v. Bowe*, 114 N. Y. 350.

Partners in the Purchase of Land have an equity against each other for the purpose of producing equality, which fastens itself upon the land, and of which neither can be deprived by the other, or by a creditor of the other, or a purchaser from him. *Pearl v. Pearl*, 1 Tenn. Ch. 206.

1. *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 198; *Nims v. Nims*, 23 Fla. 69; *Hodges v. Holeman*, 1 Dana (Ky.) 50; *Crooker v. Crooker*, 52 Me. 267; *Wilson v. Davis*, 1 Mont. 183; *Hill v. Beach*, 12 N. J. Eq. 31; *Uhler v. Semple*, 20 N. J. Eq. 288; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165; *Lane v. Jones*, 9 Lea (Tenn.) 627. And see *Donelson v. Posey*, 13 Ala. 752; *Duryea v. Burt*, 28 Cal. 569; *Pearson v. Keedy*, 6 B. Mon. (Ky.) 128; *Black v. Bush*, 7 B. Mon. (Ky.) 210.

Each partner in cropping has a lien upon the proceeds of the crop for the payment of all partnership debts, and the debt of other partners to him, growing out of partnership transactions; but as against assignees of a partner, this lien does not extend to any general balance due him from the assignor, upon all matters, nor to a particular debt not connected with the partnership. *Nichol v. Stewart*, 36 Ark. 612.

2. *Luce v. Hartshorn*, 7 Lans. (N. Y.) 331; affirmed, 56 N. Y. 621.

3. *Freeland v. Stansfield*, 2 Sm. & G. 479.

4. *Hodges v. Holeman*, 1 Dana (Ky.) 55; *Edwards v. Remington*, 60 Wis. 33.

5. *Duryea v. Burt*, 28 Cal. 569; *Taylor v. Farmer* (Ill. 1886) 4 N. E. Rep. 370; *Roberts v. McCarty*, 9 Ind. 16; *Evans v. Hawley*, 35 Iowa 83; *Pennypacker v. Leary*, 65 Iowa 220; *Divine v. Mitichum*, 4 B. Mon. (Ky.) 488; 41 Am. Dec. 241; *Hodges v. Holeman*, 1 Dana (Ky.) 50; *Hewitt v. Sturdevant*, 11 B. Mon. (Ky.) 453; *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 631; *Bryant v. Hunter*, 6 Bush (Ky.) 75; *Spalding v. Wilson*, 80 Ky. 589; *Burleigh v. White*, 70 Me. 130; *Fall River Whaling Co. v. Borden*, 10 Cush. (Mass.) 458; *Dyer v. Clark*, 5 Met. (Mass.) 562; 39 Am. Dec. 697; *Howard v. Priest*, 5 Met. (Mass.) 582; *Arnold v. Wainwright*, 6 Minn. 358; *Dilworth v. Mayfield*, 36 Miss. 40; *Whitney v. Cotten*, 53 Miss. 689; *Priest v. Choteau*, 85 Mo. 398; *Hiscock v. Phelps*, 49 N. Y. 97; 2 Lans. (N. Y.) 106; *Tarbel v. Bradley*, 7 Abb. N. Cas. (N. Y.) 273; *Mendenhall v. Benbow*, 84 N. Car. 646; *Boyers v. Elliott*, 7 Humph. (Tenn.) 204; *Williams v. Love*, 2 Head (Tenn.) 80; *Lane v. Jones*, 9 Lea (Tenn.) 627; *Diggs v. Brown*, 78 Va. 292; *Thrall v. Crampton*, 16 Nat. Bankr. Reg. 261.

Where the articles of partnership provided that one partner was to contribute a mill and the other partner money, and that after dissolution the former to retain the mill, and the latter was to be repaid his capital and the profits divided, it was held that this provision referred to the matter of distribution only, and that the reverting of the mill and the repayment of the capital must be contemporaneous, the latter retaining a lien on the mill until his capital is paid him. *Palmer v. Tyler*, 15 Minn. 106.

partner does not destroy it; ¹ but it extends to partnership property only and does not affect the separate property of the co-partners.² The accounting must end with the cessation of partnership dealings, and if these dealings are continued after dissolution without authority with the assets of the firm the subsequent matters are to be included in the account.³ And where partners have had dealings together preparatory to the commencement of their partnership these dealings cannot be excluded from consideration.⁴ The considerations which govern the winding up and distribution of assets are the same whether the winding up is by the chancellor or by a surviving or a liquidating or settling partner.⁵

1. As to Creditors and Third Persons—*a. EFFECT OF PARTNER'S LIEN.*—The creditors themselves as such have no lien upon partnership property; the partners have the same right of absolute disposition, or to exercise other rights of ownership over partnership property that any individual has over his individual property, subject only to provisions of law forbidding voluntary conveyances in fraud of creditors and to each other's rights,⁶ and the lien resting in the part-

1. *Hobbs v. McLean*, 117 U. S. 567; *Meridian Nat. Bank v. Brandt*, 51 Ind. 56; *Dieckmann v. St. Louis*, 9 Mo. App. 9; *Frith v. Lawrence*, 1 Paige (N. Y.) 434; *Allison v. Davidson*, 2 Dev. Eq. (N. Car.) 79.

Where two firms agree to pack pork on joint account for one season, sharing profits and losses, one firm having control of the product with a right to sell it, the other may nevertheless require its application to the joint debts as against the creditors of the former. *Meador v. Hughes*, 14 Bush (Ky.) 652.

2. *Mann v. Higgins*, 7 Gill (Md.) 265; *Mosteller v. Bost*, 7 Ired. Eq. (N. Car.) 39; *Henry v. Henry*, 10 Paige (N. Y.) 314. And see *Boozar v. Webb*, 25 S. Car. 82.

3. *Bates' Law of Part.*, § 758, *citing* *Robinson v. Bland*, 2 Burr. 1086; *Day v. Lockwood*, 24 Conn. 185; *Clark v. Jones*, 50 Cal. 425.

A partner who, pending dissolution proceedings, performs his former duties with the assent of the continuing partners, may share in the profits up to the date when such performance ceases. *Oteri v. Oteri*, 37 La. Ann. 74.

4. *Cruikshank v. McVicar*, 8 Beav. 116. But see *Langell v. Langell*, 17 Oregon 220.

Ordinarily an accounting in equity between partners commences from the last account stated between the partners, unless special circumstances render that account inconclusive. *Moore v. Wheeler*, 10 W. Va. 35.

When a settlement is made between partners during the lifetime of one of the partners, on a suit for a settlement of the partnership by his executor, the settlement will be presumed to have included all differences between them to the time of the settlement. *Burke v. Fuller*, 41 La. Ann. 740.

5. *Bates' Law of Part.*, § 757; *Lindley on Part.* 1039.

6. *Reese v. Bradford*, 13 Ala. 837; *Coffin v. McCullough*, 30 Ala. 107; *Mayer v. Clark*, 40 Ala. 259; *Nichol v. Stewart*, 36 Ark. 612; *Allen v. Center Valley Co.*, 21 Conn. 130; 54 Am. Dec. 333; *McDonald v. Beach*, 2 Blackf. (Ind.) 55; *Schaeffer v. Fithian*, 17 Ind. 463; *Weyer v. Thornburgh*, 15 Ind. 124; *Frank v. Peters*, 9 Ind. 343; *Dunham v. Hanna*, 18 Ind. 270; *Kistner v. Sindlinger*, 33 Ind. 114; *Hawk Eye Woolen Mills v. Conklin*, 26 Iowa 422; *Ely v. Hair*, 16 B. Mon. (Ky.) 230; *Jones v. Lusk*, 2 Metc. (Ky.) 356; *Couchman v. Maupin*, 78 Ky. 33; *Harris v. Peabody*, 73 Me. 262; *Glenn v. Gill*, 2 Md. 1; *Guyton v. Flack*, 7 Md. 398; *Griffith v. Buck*, 13 Md. 102; *Thompson v. Frist*, 15 Md. 24; *Coakley v. Weil*, 47 Md. 277; *Schalck v. Harmon*, 6 Minn. 265; *Parish v. Lewis*, 1 Freem. Ch. (Miss.) 299; *Freeman v. Stewart*, 41 Miss. 138; *Williams v. Gage*, 49 Miss. 777; *Young v. Frier*, 9 N. J. Eq. 465; *Mittnacht v. Smith*, 17 N. J. Eq. 259; *Ross v. Tittsworth*, 37 N. J. Eq. 333; *Robb v. Stevens*, *Clarke Ch. (N. Y.)* 191; *Saunders v. Reilly*,

ners has no existence for practical purposes during the continuance of the partnership.¹ But when the partnership accounts have to be taken and the shares of the partners ascertained, the lien attaches for the purposes of winding up, the surviving or liquidating partner or the liquidating officer appointed for that purpose holding the assets in trust for the payment of debts and the distribution of any surplus,² and the right of the creditor to be first paid out of the assets of the partnership is then wrought out through the equities of the partners,³ the lien continuing in case of the death or

105 N. Y. 12; *Allen v. Grissom*, 90 N. Car. 90; *Strauss v. Frederick*, 91 N. Car. 121; *McGregor v. Ellis*, 2 Disney (Ohio) 286; *Rodgers v. Meranda*, 7 Ohio St. 179; *Doner v. Stauffer*, 1 P. & W. Pa. 198; *Foster v. Barnes*, 81 Pa. St. 377; *Carver Gin etc. Co. v. Bannon*, 85 Tenn. 712; *Fain v. Jones*, 3 Head (Tenn.) 308; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296; *White v. Parish*, 20 Tex. 688, 693; *DeCaussey v. Baily*, 57 Tex. 665; *Bardwell v. Perry*, 19 Vt. 292; 47 Am. Dec. 687; *Washburn v. Bank of Bellows Falls*, 19 Vt. 278; *Rice v. Barnard*, 20 Vt. 479; 50 Am. Dec. 54; *Shackelford v. Shackelford*, 32 Gratt. (Va.) 481; *Maxwell v. Wheeling*, 9 W. Va. 206; *Case v. Beauregard*, 99 U. S. 119; 1 Woods (U. S.) 127; *Fitzpatrick v. Flannagan*, 106 U. S. 648, 655; *Hoxie v. Carr*, 1 Sumn. (U. S.) 173.

In *New Hampshire*, partnership creditors have an independent right or lien not resting upon the equity of the partner. *Ferson v. Monroe*, 21 N. H. 462; *Jarvis v. Brooks*, 23 N. H. 136, 146; *Benson v. Ela*, 35 N. H. 402, 410; *Tenney v. Johnson*, 43 N. H. 144.

After one partner has bought out the interests of all his co-partners, the firm creditors cease to have any preference over the individual creditors of such partner in the application of the former partnership property, since the rule that firm assets should be first applied in payment of firm debts is founded, not on the equities of the creditors, but of the partners. *Hanford v. Prouty* (Ill. 1890), 24 N. E. 565.

1. *Lindley on Part.* § 80.

No creditor's lien attaches to the partnership assets of an insolvent firm until they have been brought into the custody of the law by the interposition of the court. *Sickman v. Abernathy*, 14 Colo. 174.

2. See *Strange v. Graham*, 56 Ala. 614; *Price v. Hicks*, 14 Fla. 565; *Costley v. Wilkerson*, 49 Ala. 210; *Miller*

v. Jones, 39 Ill. 54; *Boston etc. Glass Co. v. Ludlum*, 8 Kan. 40; *Wilson v. Soper*, 13 B. Mon. (Ky.) 311; 56 Am. Dec. 573; *Bank of Kentucky v. Herndon*, 1 Bush (Ky.) 359; *Bassett v. Miller*, 39 Mich. 133; *Robertshaw v. Hanway*, 52 Miss. 713; *People v. Till*, 3 Neb. 261; *Hanna v. Wray*, 77 Pa. St. 27; *Shields v. Fuller*, 4 Wis. 102. And see also *infra*, this title, *Powers and Rights of Partners After Dissolution, and Surviving Partners*.

Insolvent partners are to be considered as holding their joint property for the benefit of their joint creditors, and a misappropriation is to be deemed in fraud of the implied trust; a division by partners of co-partnership assets, therefore, for their application in payment of the individual indebtedness of one co-partner, even though made with the assent of all, is invalid as against the firm creditors. *Menagh v. Whitwell*, 52 N. Y. 146; *Ransom v. Van Deventer*, 41 Barb. (N. Y.) 307; *Burtus v. Tisdall*, 4 Barb. (N. Y.) 580; *Wilson v. Robertson*, 21 N. Y. 587; *Saloy v. Albrecht*, 17 La. Ann. 75; *Flack v. Charron*, 29 Md. 311; *Schmidlapp v. Currie*, 55 Miss. 597; But in *Marks v. Hill*, 15 Gratt. (Va.) 400, it is asserted that such appropriation may be made, although the partnership is unable to pay its firm debts.

Where a surviving partner has not in good faith parted with his right to have the partnership effects applied to the payment of firm debts, before the bringing of an action to have such effects so applied, he cannot afterwards surrender it, to the prejudice of the firm creditors. *Robinson v. Allen*, 85 Va. 721.

3. *Chasel v. Steel*, 9 Cal. 64; *Bullock v. Hubbard*, 23 Cal. 501; *Lucas v. Atwood*, 2 Stew. (Ala.) 378; *Bridge v. McCullough*, 27 Ala. 661; *Fillely v. Phelps*, 18 Conn. 300; *Camp v. Meyer*, 47 Ga. 414; *Clark v. Allee*, 3 Harr.

bankruptcy of a partner in favor of his representatives or trustees until his share has been ascertained and provided for.¹ The mere fact that a creditor and debtor are partners, however, gives the creditor no security for a debt not connected with the partnership, superior to that of other individual creditors, the lien of a partner not operating to secure the payment of individual indebtedness.² Though a separate debt may be converted into a joint one, or a partner may give a lien upon his interest in the concern.³

(Del.) 80; O'Bannon v. Miller, 4 Bush (Ky.) 25; Conant v. Frary, 49 Ind. 530; Cox v. Russell, 44 Iowa 560; Geyton v. Flack, 7 Md. 398; Pease v. Rush, 2 Minn. 112; Bass v. Estill, 50 Miss. 300; Williams v. Gage, 49 Miss. 777; Roberts v. Oldham, 63 N. Car. 298; French v. Lovejoy, 12 N. H. 458; Phelps v. Mc-Neeley, 66 Mo. 558; Arnold v. Hageman, 45 N. J. Eq. 186; Frow's Estate, 73 Pa. St. 459; Converse v. McKee, 14 Tex. 30; Miner v. Pierce, 38 Vt. 610; Washburn v. Bellows Falls Bank, 19 Vt. 278; Christian v. Ellis, 1 Gratt. (Va.) 396; Carper v. Hawkins, 8 W. Va. 291.

Partnership debts must be paid before the debts of a former partnership, of which one of the present firm was a member. Camp v. Mayer, 47 Ga. 414; Hurlbut v. Johnson, 74 Ill. 64.

Execution creditors of a partnership are subrogated to the lien which a partner has on all the assets of the firm to pay firm debts, and such creditors, lien takes precedence of any exemption rights claimed by the partners. Charleson v. McGraw, 3 Wash. Ter. 344.

1. See Stocken v. Dawson, 9 Beav. 239; West v. Skip, 1 Ves. Sr. 239; Skipp v. Harwood, 2 Swanst. 586.

But the mere insolvency of a partnership does not, of itself, work such a legal or equitable appropriation of its effects, in the absence of any proceedings for a *pro rata* distribution, as to prevent a judgment creditor from making his debt out of the effects by execution, or to prevent him from removing fraudulent obstructions or assignments intended by the debtor to hinder the execution. Greene v. Breck, 32 Barb. (N. Y.) 73.

2. Warren v. Taylor, 60 Ala. 218; Nichol v. Stewart, 36 Ark. 612; Lewis v. Harrison, 81 Ind. 278; Pierce v. Tirnnan, 10 Gill & J. (Md.) 253; Uhler v. Semple, 20 N. J. Eq. 288; Hill v. Beach, 12 N. J. Eq. 31; Mumford v. Nicoll, 20 Johns. (N. Y.) 611; Evans

v. Bryan, 95 N. Car. 174; Moffat v. Thomson, 5 Rich. Eq. (S. Car.) 155; 57 Am. Dec. 737; Mack v. Woodruff, 87 Ill. 570.

The fact that the creditor partner has possession of all joint assets, does not give him lien for a debt disconnected with the partnership. Mumford v. Nicoll, 20 Johns. (N. Y.) 611; Hill v. Beach, 12 N. J. Eq. 31.

A judgment confessed by one partner in favor of his co-partner, to secure him for capital advanced to the concern, is valid against the judgment of a private creditor of the partner who confessed the judgment. Purdy v. Lacock, 6 Pa. St. 490.

3. See Taylor v. Farmer (Ill. 1886), 4 N. E. Rep. 370; Union Nat. Bank v. Commerce Bank, 94 Ill. 271; Lewis v. Harrison, 81 Ind. 278; Cox v. Russell, 44 Iowa 556; Hagan v. Campbell (Wis. 1890), 47 N. W. Rep. 179. And see *infra*, this title, *Conversion of Joint Into Separate Property*.

Partnership notes given by one partner for his separate debt, with the consent of the others, converts the separate debt into a partnership claim, which will be protected by the partner's equitable lien. Warren v. Taylor, 60 Ala. 218.

In Hill v. Beach, 12 N. J. Eq. 31, it was held that a promise by a debtor partner to the other partner of a lien upon his interest upon borrowing money of him, creates no priority over the claims of separate creditors upon the surplus. But the contrary was held in Lewis v. Harrison, 81 Ind. 278; Couch v. Russell, 44 Iowa 556.

The past benefit is not a sufficient consideration for the assumption by the firm of the debt of one partner. The consideration, therefore, must be considered to be the release of the individual liability of the partner. See Smith v. Turner, 9 Bush (Ky.) 417; Nichols v. English, 3 Brewt. (Pa.) 260; Siegel v. Chidsey, 28 Pa. St. 279; Barcroft v. Snodgrass, 1 Coldw. (Tenn.)

Joint creditors being thus enabled to obtain a prior claim upon the joint assets in case of bankruptcy or insolvency, or in the distribution of decedent's estates, individual creditors are given a preference over joint ones in the separate estate on considerations of convenience in administration and as a correlative to the priority of the former in the joint assets, the rule that the joint estate goes primarily to joint creditors and the separate estate to separate creditors, being merely universal.¹ Though the reciprocal priority of separate creditors in

- 430; *McCreary v. Van Hook*, 35 Tex. 631; *Hotchkiss v. Ladd*, 36 Vt. 593.
1. *Emanuel v. Bird*, 19 Ala. 596; 54 Am. Dec. 200; *Smith v. Mallory*, 24 Ala. 628; *Clafin v. Behr*, 89 Ala. 503; *Van Wagner v. Chapman*, 29 Ala. 172; *Bridge v. McCullough*, 27 Ala. 661; *Evans v. Winson*, 74 Ala. 349; *Lucas v. Atwood*, 2 Stew. (Ala.) 378; *Forbes v. Scannell*, 13 Cal. 242; *Charles v. Eshelman*, 5 Colo. 107; *Schuster v. Rader*, 13 Colo. 329; *Bailey v. Kennedy*, 2 Del. Ch. 12; *Thornton v. Bussey*, 27 Ga. 302; *Haines v. Millers*, 61 Ga. 344; *Bevan v. Allee*, 3 Harr. (Del.) 80; *Toombs v. Hill*, 28 Ga. 371; *Keese v. Coleman*, 72 Ga. 658; *Pahlman v. Graves*, 26 Ill. 405; *Moline Water Power etc. Co. v. Webster*, 26 Ill. 233; *Union Nat. Bank v. Bank of Commerce*, 94 Ill. 271; *McIntire v. Yates*, 104 Ill. 491; *Doggett v. Dill*, 108 Ill. 560; 48 Am. Rep. 565; *Preston v. Colby*, 117 Ill. 477; *Weyer v. Thornburg*, 15 Ind. 124; *Dean v. Phillips*, 17 Ind. 406; *Bond v. Nave*, 62 Ind. 505; *Hardy v. Mitchell*, 67 Ind. 485; *Bake v. Smiley*, 84 Ind. 212; *Huff v. Lutz*, 87 Ind. 471; *New Market Bank v. Locke*, 89 Ind. 428; *Warren v. Able*, 91 Ind. 107; *Hubbard v. Curtis*, 8 Iowa 1; *Miller v. Clarke*, 37 Iowa 325; *Fulams v. Abrahams*, 29 Kan. 725; *Harris v. Peabody*, 73 Me. 262; *McCulloh v. Dashiell*, 1 Har. & G. (Md.) 96; 18 Am. Dec. 271; *Somerset Potters' Works v. Minot*, 10 Cush. (Mass.) 592; *Catskill Bank v. Hooper*, 5 Gray (Mass.) 574; *Thomas v. Minot*, 10 Gray (Mass.) 263; *Barclay v. Phelps*, 4 Met. (Mass.) 397; *Jewett v. Phillips*, 5 Allen (Mass.) 150; *Nutting v. Ashcraft*, 101 Mass. 300; *Bush v. Clark*, 127 Mass. 111; *Oakey v. Robb*, 1 Freem. Ch. (Miss.) 546; *Arnold v. Hamer*, 1 Freem. Ch. (Miss.) 509; *Irby v. Graham*, 46 Miss. 425; *Schmidlapp v. Currie*, 55 Miss. 597; 30 Am. Rep. 530; *First Nat. Bank v. Brenneisen*, 97 Mo. 145; *Level v. Farris*, 24 Mo. App. 445; *Rothwell v. Grimes*, 22 Nev. 526; *Ruth v. Lowrey*, 10 Neb. 260; *Jarvis v. Brooks*, 23 N. H. 136; *Crocket v. Crain*, 33 N. H. 542; *Holton v. Holton*, 40 N. H. 77; *Treadwell v. Brown*, 41 N. H. 12; *Fellows v. Greenleaf*, 43 N. H. 421; *Weaver v. Weaver*, 46 N. H. 191; *Davis v. Howell*, 33 N. J. Eq. 72; *Wilder v. Keeler*, 3 Paige (N. Y.) 167; *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522; 20 Johns. (N. Y.) 611; *Muir v. Leitch*, 7 Barb. (N. Y.) 341; *Kirby v. Carpenter*, 7 Barb. (N. Y.) 373; *Ganson v. Lathrop*, 25 Barb. (N. Y.) 455; *Terry v. Butler*, 43 Barb. (N. Y.) 395; *North River Bank v. Stewart*, 4 Bradf. (N. Y.) 254; 4 Abb. Pr. (N. Y.) 408; *Meech v. Allen*, 17 N. Y. 300; *Rodgers v. Meranda*, 7 Ohio St. 179; *D'Invillier's Estate*, 13 Phila. (Pa.) 362; *Black's Appeal*, 44 Pa. St. 503; *Cope's Appeal*, 39 Pa. St. 284; *Heckman v. Messinger*, 49 Pa. St. 465; *Hartman's Appeal*, 107 Pa. St. 327; *Colwell v. Weybosset Nat. Bank*, 16 R. I. 288; *Woddrop v. Price*, 3 Desaus. (S. Car.) 203; *Hall v. Hall*, 2 McCord Eq. (S. Car.) 269; *Blankenship v. Wartelsky* (Tex. 1887), 6 S. W. Rep. 140; *Washburn v. Bank of Bellows Falls*, 19 Vt. 278; *Murrill v. Neill*, 8 How. (U. S.) 414; *In re Montgomery*, 3 Nat. Bankr. Reg. 429; *In re Blumer*, 12 Nat. Bankr. Reg. 489; *In re Morse*, 13 Nat. Bankr. Reg. 376; *In re Smith*, 13 Nat. Bankr. Reg. 500; *In re Savage*, 16 Nat. Bankr. Reg. 368; *In re Leland*, 5 Ben. (U. S.) 168; 5 Nat. Bankr. Reg. 222; *In re Berrian*, 6 Ben. (U. S.) 297; affg. 44 How. Pr. (N. Y.) 216; *In re Dunkerson*, 4 Biss. (U. S.) 277, 323; 12 Nat. Bankr. Reg. 391; *South Boston Iron Co. v. Holmes*, 4 Cliff. (U. S.) 343; *In re Estes*, 3 Fed. Rep. 134; 6 Sawy. (U. S.) 459; *In re Hollister*, 3 Fed. Rep. 452; *In re Lloyd*, 22 Fed. Rep. 90; *In re Warren*, 1 Dav. (U. S.) 322; *In re Ingalls*, 5 Boston Law Rep.

separate assets is denied in a number of cases both classes of creditors being allowed to share ratably in individual property.¹

401; *In re Williams*, 5 Boston Law Rep. 402; *Ex parte Clay*, 6 Ves. 813; *Ex parte Chandler*, 9 Ves. 35; *Ex parte Taitt*, 16 Ves. 193; *Gray v. Chiswell*, 9 Ves. 118; *Lodge v. Prichard*, 1 De G. J. & S. 610. And see *Clafin v. Behr*, 89 Ala. 503; *Lewis v. Conrad*, 11 Iowa 153; *Pennington v. Bell*, 4 Sneed (Tenn.) 200; *Cowan v. Gill*, 11 Lea (Tenn.) 674; *Fowlkes v. Bowers*, 11 Lea (Tenn.) 144; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296; *McCullough v. Sommerville*, 8 Leigh (Va.) 415; *Straus v. Kerngood*, 21 Gratt. (Va.) 584; *Gordon v. Cannon*, 18 Gratt. (Va.) 387; *Morris v. Morris*, 4 Gratt. (Va.) 293; *Robinson v. Allen*, 85 Va. 721; *Lord v. Devendorf*, 54 Wis. 491; *Powers v. Large*, 69 Wis. 621; *Baker v. Dawbarn*, 19 Grant's Ch. (Up. Can.) 113; *Re Walker*, 6 Ont. App. (Ca.) 169; *Ex parte Crowder*, 2 Vern. 706; *Ex parte Cook*, 2 P. Wms. 500; *Ex parte Hunter*, 1 Atk. 228; *Twiss v. Massey*, 1 Atk. 67; *Ex parte Elton*, 3 Ves. Jr. 238; *Ex parte Clay*, 6 Ves. 813; *Ex parte Taitt*, 16 Ves. 193.

In *Virginia*, on the death of a partner, the firm assets are applied to the firm debts, and, these being insufficient, the firm creditors are then entitled, for any unpaid balance, to share as general creditors, on an equal footing with the separate creditors of the same class, in the separate assets of the deceased partner. *Pettyjohn v. Woodruff*, 86 Va. 478.

In *Kentucky*, where a firm is insolvent, if there is partnership property and partnership creditors and separate property and separate creditors, after the partnership creditors have exhausted the joint property the separate creditors are allowed to receive an equal percentage from the estate, after which both classes of creditors are allowed to receive the balance pro rata. *Fayette Nat. Bank v. Kenney*, 79 Ky. 173; *Whitehead v. Chadwell*, 2 Duv. (Ky.) 432; *Northern Bank of Kentucky v. Keiser*, 2 Duv. (Ky.) 169. See also *Brock v. Bateman*, 25 Ohio St. 609; *Bell v. Newman*, 5 S. & R. (Pa.) 78. But the rule laid down in the latter case was qualified in *Black's Appeal*, 44 Pa. St. 503.

Allowance of Interest.—Where a partnership is in bankruptcy, and the

separate estate of one partner is more than enough to pay his separate debts, without computing interest thereon the surplus of such estate, over such debts, is to be added to the partnership estate, and applied to the payment of the joint debts, before paying such interest on the separate debts. *In re Berrian*, 44 How. Pr. (N. Y.) 216; *Thomas v. Minot*, 10 Gray (Mass.) 263; *Ex parte Findlay*, 17 Ch. Div. 334. Interest was continued to the time of distribution in *In re Shipman*, 61 How. Pr. (N. Y.) 518; *In re Duncan*, 10 Daly (N. Y.) 95; *Level v. Ferris*, 24 Mo. App. 445. Joint creditors are allowed interest before the surplus is carried to the separate estate. *Ex parte Old*, Mont. 350; *Ex parte Reeb*, 9 Ves. 588.

1. See *Camp v. Grant*, 21 Conn. 41; 54 Am. Dec. 321; *Sparhawk v. Russell*, 10 Met. (Mass.) 305; *Shackelford v. Clark*, 78 Mo. 491; *Pearce v. Cook*, 13 R. I. 184; *Hutzler v. Phillip*, 26 S. Car. 136; *White v. Dougherty*, Mart. & Y. (Tenn.) 309; *Cox v. Miller*, 54 Tex. 16; *Higgins v. Rector*, 47 Tex. 361; *Bardwell v. Perry*, 19 Vt. 292; 47 Am. Dec. 687; *Wardlaw v. Gray*, Dud. Eq. (S. Car.) 85; *Wilson v. McConnell*, 9 Rich. Eq. (S. Car.) 500; *Gadsden v. Carson*, 9 Rich. Eq. (S. Car.) 252; *Flemming v. Billings*, 9 Rich. Eq. (S. Car.) 149; *Dahlgren v. Duncan*, 7 Smed. & M. (Miss.) 280; *Adlickes v. Lowry*, 15 S. Car. 128; *Kuhne v. Law*, 14 Rich. (S. Car.) 18; *Ashby v. Porter*, 26 Gratt. (Va.) 455; *Gray v. Chiswell*, 9 Ves. 118.

A judgment against partners for a firm liability is a lien against the real estate of each partner, and has preference over an unsecured debt of a deceased partner in the administration of his assets. *Pitts v. Spotts*, 86 Va. 71.

In *Mississippi* it has been held that a bank may apply the individual deposit of a partner to the payment of a firm debt. *Eyrich v. Capital State Bank*, 67 Miss. 60.

The rule has been adopted to some extent that a joint creditor who petitions for the bankruptcy of the several partners is entitled to share with the separate creditors in the separate estate upon the ground that a petition in bankruptcy is in the nature of an

Where a bankrupt is a member of two or more firms, some of which are also bankrupt, after his individual assets have been applied to the payment of his individual creditors in full and the assets of each firm to its creditors a surplus of individual assets, is distributed *pro rata* among all the creditors of the several firms of which he was a member.¹ The same general rule applies upon the winding up by a surviving partner in case of the death of a co-partner, the joint creditors not being entitled to any greater advantage in case of death than they would have had in case of bankruptcy,² and if the survivor become bankrupt the assignee must distribute the partnership and the individual assets each to its respective class of creditors,³ statutes making partnership debts joint and several,⁴ or requiring a *pro rata* distribution of the estates of the decedents and insolvents⁵ not being deemed to have been intended to permit joint creditors to share *pari passu* with separate creditors after exhausting the joint estate. As a partner's lien extends only to the payment of partnership liabilities, however, the rule of priority cannot be extended to include claims which, though joint, are not liabilities of the partnership as such,⁶ and even the statutory priority of the govern-

execution or attachment in an action. *Ex parte* Elton, 3 Ves. Jr. 33; *Ex parte* Crisp, 1 Atk. 133; *Ex parte* Abell, 4 Ves. 437. But see *Murrill v. Neill*, 8 How. (U. S.) 814.

1. *In re* Dunkerson, 4 Biss. (U. S.) 323; 12 Nat. Bankr. Reg. 301; *In re* Savage, 16 Nat. Bankr. Reg. 368; *Re* Williams, 5 Law. Rep. (U. S.) 102.

2. *Emanuel v. Bird*, 19 Ala. 596; 54 Am. Dec. 200; *Smith v. Mallory*, 24 Ala. 628; *Bridge v. McCullough*, 27 Ala. 661; *Charles v. Eshelman*, 5 Colo. 107; *Toombs v. Hill*, 28 Ga. 371; *Bagwell v. Bagwell*, 72 Ga. 92; *Moline Water Power etc. Co. v. Webster*, 26 Ill. 233; *Doggett v. Dill*, 108 Ill. 560; 48 Am. Rep. 565; *Weyer v. Thornburgh*, 15 Ind. 124; *McCulloh v. Dashiell*, 1 Har. & G. (Md.) 99; *Bush v. Clark*, 127 Mass. 111; *Level v. Farris*, 24 Mo. App. 445; *Fowlkes v. Bowers*, 11 Lea (Tenn.) 144; *Straus v. Kerngood*, 21 Gratt. (Va.) 584; *Ashby v. Porter*, 26 Gratt. (Va.) 455; *Baker v. Dawbarn*, 19 Grant's Ch. (Up. Can.) 113; *Gray v. Chiswell*, 9 Ves. 118; *Lodge v. Prichard*, 1 De G. J. & S. 610; *Harris v. Farwell*, 13 Beav. 403; *Ridgway v. Clare*, 19 Beav. 111.

In *Gray v. Chiswell*, 9 Ves. 118, the rule giving a priority to separate creditors in the separate estate is extended to the distribution in equity of the property of a deceased partner.

Dissolution by Sale of an Interest.—

After a dissolution by the sale of his interest by one member of the firm, his co-partners have a lien on the property so sold to a purchaser with notice for the settlement of their mutual claims. *Pierce v. Wilson*, 2 Iowa 20.

3. *Gorden v. Kennedy*, 36 Iowa 167; *Benson v. Ela*, 35 N. H. 402; *Bell v. Newman*, 5 S. & R. (Pa.) 78; *Brooks v. Brooks*, 12 Heisk. (Tenn.) 12; *Cowan v. Gill*, 11 Lea (Tenn.) 674. And see *Bagwell v. Bagwell*, 72 Ga. 92. But see to the contrary *In re Mills*, 11 Nat. Bankr. Reg. 74.

Where there is a judgment against a firm, and the creditor has a priority under an execution on the property of such firm, he retains it, though he does not show that his claim was on a partnership transaction, the presumption being that it was. *McDuffie v. Bartlett*, 3 Pa. St. 317.

4. *Smith v. Mallory*, 24 Ala. 628; *Irby v. Graham*, 46 Miss. 425; *Level v. Farris*, 24 Mo. App. 445.

But see *Ashby v. Porter*, 26 Gratt. (Va.) 455.

5. *Smith v. Mallory*, 24 Ala. 628; *Level v. Farris*, 24 Mo. App. 445; *Rodgers v. Meranda*, 7 Ohio St. 179. But see *Grosvenor v. Austin*, 6 Ohio 113; 25 Am. Dec. 743.

6. *Mack v. Woodruff*, 87 Ill. 570; *Ex parte Weston*, 12 Met. (Mass.) 1; *Buffum v. Seaver*, 16 N. H. 160; *Saunders v. Reilly*, 105 N. Y. 12; *Hulse's*

ment gives way to the equity of partnership creditors to be first paid out of the partnership assets, the priority attaching to the surplus due the indebted partner only,¹ though if the firm is indebted and the separate estates are in court for distribution, the government claim will be given priority over the individual indebtedness of the partners, even though collateral security held by the government has not been exhausted.²

1. *No Joint Estate*.—The doctrine of the priority of separate creditors in the separate estate has been quite extensively applied even in cases where there is no joint estate and no living solvent partner,³ but as the joint creditors have no means of satisfaction of any kind in such case, such priority has been denied and the joint creditors allowed to share with the separate ones, by a large preponderance of authority,⁴ though the fact that there is no separate es-

Estate, 11 W. N. C. (Pa.) 499; Forsyth v. Woods, 11 Wall. (U. S.) 484; *In re* Roddin, 6 Biss. (U. S.) 377; *In re* Nims, 16 Blatchf. (U. S.) 439. But see to the contrary Mosteller v. Bost, 7 Ired. Eq. (N. Car.) 39; Hoare v. Oriental Bank, Corp. L. R., 2 App. Cas. 589.

The property of a firm is not holden by an attachment at the suit of a creditor founded upon the joint and several note of the members of it and not a partnership debt. Buffum v. Seaver, 16 N. H. 160.

1. U. S. v. Hack, 8 Pet. (U. S.) 271; U. S. v. Duncan, 4 McLean (U. S.) 607; Rex v. Sanderson, Wright 50; Spears v. Lord Advocate, 6 Cl. and Fin. 180; Rex v. Rock, 2 Price 198; Rex v. Hodgson, 12 Price 537.

Where the partnership property is not sufficient to pay the debts of the firm, the priority of the United States does not reach the undivided interest of one of the partners in the partnership effects, if he is indebted to the United States, but when it has become his individual property, the rule is different. The true test is, whether the property belongs to the partnership, or to the individual. U. S. v. Duncan, 12 Ill. 523.

2. U. S. v. Lewis, 92 U. S. 618; U. S. v. Shelton, 1 Brock. (U. S.) 517.

3. See Weyer v. Thornburg, 15 Ind. 124; Warren v. Able, 91 Ind. 107; Robb v. Mudge, 14 Gray (Mass.) 534; Wild v. Dean, 3 Allen (Mass.) 579; Somerset Potters' Works v. Minot, 10 Cush. (Mass.) 592; Oakey v. Rabb, 1 Freem. Ch. (Miss.) 546; Arnold v. Hamer, 1 Freem. Ch. (Miss.) 509; Weaver v. Weaver, 46 N. H. 188; North

River Bank v. Stewart, 4 Bradf. (N. Y.) 254; *In re* Walker, 6 Ont. App. 169; *In re* Johnson, 2 Low. (U. S.) 129; *In re* Marwick, 2 Dav. (U. S.) 233; Murrill v. Neill, 8 How. (U. S.) 414; *In re* Byrne, 1 Nat. Bankr. Reg. 464; *In re* McLean, 15 Nat. Bankr. Reg. 333.

The claim of a surviving partner for a moiety of the debts which he has been compelled to pay after exhausting partnership assets is not a joint or partnership debt, which in the distribution of the estate of the deceased partner can be postponed till other debts are paid, but is an individual debt and entitled to share pro rata. Olleman v. Reagan, 28 Ind. 109.

Under the Massachusetts Statute separate estate of partners must be first distributed to separate creditors although there may be no solvent partner and no joint estate to which the joint creditors may report. Howe v. Lawrence, 9 Cush. (Mass.) 553; 57 Am. Dec. 68.

4. Emanuel v. Bird, 19 Ala. 596; 54 Am. Dec. 200; Van Wagner v. Chapman, 29 Ala. 172; Ladd v. Griswold, 9 Ill. 25; 46 Am. Dec. 443; Pahlman v. Graves, 26 Ill. 405; Westbay v. Williams, 5 Ill. App. 521; Harris v. Peabody, 73 Me. 262, 269; Davis v. Howell, 33 N. J. Eq. 72; M'Culloh v. Dashiell, 1 Har. & G. (Md.) 96; 18 Am. Dec. 271; Wilder v. Keeler, 3 Paige (N. Y.) 167; Grosvenor v. Austin, 6 Ohio 103; Miller v. Estill, 5 Ohio St. 508; Rodgers v. Meranda, 7 Ohio St. 179; Brock v. Bateman, 25 Ohio St. 609; 15 Am. Law Reg. N. S. 216; Sperry's Estate, 1 Ashm. (Ohio) 347; D'Inville's Estate, 13 Phila. (Pa.) 362; Scull's Ap-

tate gives the separate creditors no right to share with the partnership creditors in the joint fund.¹ There will be deemed to be no joint estate when there is nothing from which the joint creditors can realize or when so small as to be entirely consumed in the payment of costs,² and no living solvent partner within the above rule, when there is no partner from whom any sum, however small, can be derived,³ both circumstances being required to concur to entitle the joint creditors to prove against the separate estate with the separate creditors.⁴

peal, 115 Pa. St. 141; Johnston's Appeal (Pa. 1887), 9 Atl. Rep. 76; Alexander v. Gorman, 15 R. I. 421; Higgins v. Rector, 47 Tex. 361; Straus v. Kerngood, 21 Gratt. (Va.) 584; Bardwell v. Perry, 19 Vt. 292; Curtis v. Woodward, 58 Wis. 499; 46 Am. Rep. 647; *In re Jewett*, 1 Nat. Bankr. Reg. (U. S.) 491; *In re Downing*, 3 Nat. Bankr. Reg. 748; 1 Dill. (U. S.) 33; *In re Lealand*, 5 Nat. Bankr. Reg. 222; *In re Goedde*, 6 Nat. Bankr. Reg. 295; *In re Knight*, 8 Nat. Bankr. Reg. 436; 2 Biss. (U. S.) 518; *In re Rice*, 9 Nat. Bankr. Reg. 373; *In re Collier*, 12 Nat. Bankr. Reg. 266; *In re Pease*, 13 Nat. Bankr. Reg. 168; *In re Litchfield*, 5 Fed. Rep. 47; *In re Long*, 7 Ben. (U. S.) 141; *In re Blumer*, 12 Fed. Rep. 489; *Ex parte Mayden*, 1 Bro. Ch. 453; *Ex parte Hill*, 2 B. & P. 191; *Ex parte Kensington*, 14 Ves. 447; *Ex parte Janson*, 3 Madd. 229; *Ex parte Saddler*, 15 Ves. 52; Cowell v. Sikes, 2 Russ. 191.

Where one partner has purchased all the partnership assets and assumed all the partnership debts and afterwards becomes bankrupt, so that there is no joint estate, the joint creditors may share with the separate ones in the distribution of the buying partner's estate, even though there is a living solvent partner, for as to the continuing partner he becomes a surety, and therefore not primarily liable for the partnership debts. *In re Lloyd*, 22 Fed. Rep. 88; 5 Am. Law Reg. 679; *In re Rice*, 9 Nat. Bankr. Reg. 373; *In re Collier*, 12 Nat. Bankr. Reg. 226.

1. See *United States v. Hack*, 8 Pet. (U. S.) 271.

2. *McCulloh v. Dashiell*, 1 Har. & G. (Md.) 96; 18 Am. Dec. 271; *Harris v. Peabody*, 73 Me. 262; *Brock v. Bateman*, 25 Ohio St. 609; 15 Am. Law Reg. N. S. 216; *In re McEwen*, 6 Biss. (U. S.) 294; 12 Nat. Bankr. Reg. 11; *In re Goedde*, 6 Nat. Bankr. Reg.

295; *Ex parte Hill*, 2 B. & P. 191, note; *Ex parte Geller*, 2 Madd. 262; *Ex parte Peake*, 2 Rose 54.

In re Marwick, 2 Dav. (U. S.) 233, the only joint assets were some worthless claims for which a separate creditor gave \$40, thus creating a joint fund, and obtaining by this device nearly all of his debt, leaving the joint creditors to divide the \$40.

In *Ex parte Kennedy*, 2 De G. M. & G. 228, where the joint estate was so small that it would have been exhausted by the costs, proof against the separate estate was not allowed. See also *Ex parte Clay*, 2 De G. M. & G. 230. And *In re Blumer*, 12 Fed. Rep. 489, the joint creditors were not permitted to prove against the separate estate where a small balance of joint assets remained after payment of the costs, but was wholly consumed by protracted and expensive litigation carried on by the assignee in an attempt to realize a larger sum.

3. See *McCulloh v. Dashiell*, 1 Har. & G. (Md.) 96; 18 Am. Dec. 271; *In re Marwick*, 2 Dav. (U. S.) 233; *Ex parte Janson*, 3 Madd. 229; *Ex parte Hodgson*, 2 Bro. Ch. 5, note; *Everett v. Backhouse*, 10 Ves. 100.

If the living solvent partner has gone to a foreign country and is not likely to return, proof against the separate estate may be allowed. *Ex parte Pinkerton*, 6 Ves. 614, note.

If a joint creditor releases a partner he becomes a separate creditor of the remaining partner and loses his prior right to resort to the joint assets. *January v. Poyntz*, 12 B. Mon. (Ky.) 404; *Linford v. Linford*, 28 N. J. L. 113; *Curtis v. Wood*, 58 Wis. 499; 46 Am. Rep. 647.

4. *Ex parte Kensington*, 14 Ves. 447; *Ex parte Janson*, 3 Madd. 229; *Buch. 227*; *Ex parte Sadler*, 15 Ves. 52.

The solvent partner must be actually living. That the estate of the deceased partner is solvent will not prevent the

2. *Proof by One Estate Against the Other.*—It follows from the above doctrine that a partner cannot prove his claim against the bankrupt estate of his firm for an amount for which it is indebted to him, in competition with joint creditors,¹ and that until separate creditors are paid the firm cannot prove against the separate estate of a partner for a debt owed by him to it.² The rule is different, however, where the estate of a partner becomes a creditor of the firm in respect of its fraudulent conversion of property to the use of the firm.³

joint creditors from sharing in the separate estate with the separate creditors of the bankrupt partner. *Ex parte Bowerman*, 3 Dea. 476.

In *Northern Bank of Kentucky v. Keiser*, 2 Duv. (Ky.) 169, it was suggested that as the priority of separate creditors follows as a correlative of that of the joint creditors the surrender by the joint creditors of all the joint property leaving both classes of assets for general division would defeat the priority of separate creditors in the separate estate, leaving the whole estate both joint and separate for *pro rata* distribution among both classes of creditors.

1. *Stratton v. Tabb*, 8 Ill. App. 225; *Lyons v. Murray*, 95 Mo. 23; *In re Reiser*, 19 Hun (N. Y.) 202; *Rodgers v. Meranda*, 7 Ohio St. 179; *Barr v. McFall*, 131 Pa. St. 394; *Houseal's Appeal*, 45 Pa. St. 484; *Gordon's Estate*, 11 Phila. (Pa.) 136; *Bennett's Estate*, 13 Phila. (Pa.) 331; *Ramsay v. Deas*, 2 Desaus. (S. Car.) 239; *Amsinck v. Bean*, 22 Wall. (U. S.) 395; *In re Lane*, 2 Low. (U. S.) 333; *In re Savage*, 16 Nat. Bankr. Reg. 368; *In re Jewett*, 1 Nat. Bankr. Reg. 495; 7 Am. L. Reg., N. S. 294; *Ex parte Reeve*, 9 Ves. 588; *Ex parte Adams*, 1 Rose 305; *Ex parte Harris*, 1 Rose 437; *Ex parte Sillitoe*, 1 Gl. & J. 374; *Ex parte Edmonds*, 4 De G. F. & J. 488; *Ex parte Sheen*, 6 Ch. Div. 235; *Ex parte Westcott*, L. R., 9 Ch. App. 626; *Ex parte Blythe*, 16 Ch. Div. 620; *Nanson v. Gordon*, 1 App. Cas. 195; *Read v. Bailey*, 3 App. Cas. 94.

The creditors of an insolvent firm, one of whose members is deceased, have a claim upon the partnership assets superior to that of an administrator of the deceased partner. *Banks v. Steele*, 27 Neb. 138.

A partner's assignee cannot enforce as a firm debt a debt due from the firm to his assignor, until all the other creditors of the co-partnership have been

paid. *In re Rieser*, 19 Hun (N. Y.) 202.

The mere possibility that a joint debt may come in is not sufficient to exclude the claim of a former partner. *Ex parte Andrews*, 25 Ch. Div. 505. And in *Ex parte Hunter*, 1 Atk. 228, LORD HARDWICKE held, that although a partner cannot prove in competition with joint creditors, his separate creditors can make the claim through him, as this would not be for his benefit.

2. *Bowzer v. Stoughton*, 119 Ill. 47; *Harmon v. Clark*, 13 Gray (Mass.) 114; *Somerset Potters' Works v. Minot*, 10 Cush. (Mass.) 592; *Cowan v. Gill*, 11 Lea (Tenn.) 674; *Amsinck v. Bean*, 22 Wall. (U. S.) 395; *In re Lane*, 2 Low. (U. S.) 333; 10 Nat. Bankr. Reg. 135; *In re McLean*, 15 Nat. Bankr. Reg. 333; *In re McEwen*, 6 Biss. (U. S.) 294; 12 Nat. Bankr. Reg. 11; *In re Cooke*, 12 Nat. Bankr. Reg. 30; *In re May*, 19 Nat. Bankr. Reg. 101; *In re Hamilton*, 1 Fed. Rep. 800; *Gauss v. Schrader*, 10 Biss. (U. S.) 289; *Ex parte Harris*, 2 Ves. & B. 210; 1 Rose 437; *Ex parte Smith*, 1 Glyn. & J. 74; *Ex parte Turner*, 4 D. & C. 169; 1 Mont & A. 54; *Ex parte Hinds*, 3 De G. & S. 613; *Ex parte Maude*, L. R., 2 Ch. App. 550; *Walton v. Butler*, 29 Beav. 428; *Ex parte Lodge*, 1 Ves. Jr. 166.

Individual debts of a partner incurred before he entered the firm are entitled to payment out of the capital put into the firm by such partner, before the other partner is reimbursed for his payment of firm debts. *Killefer v. McLain*, 70 Mich. 508.

Notes executed by one partner to the order of and indorsed by the other, the proceeds of which were used by the firm, being partnership paper in fact, the holders are entitled to share *pari passu* with the undisputed partnership creditors. *Colwell v. Weybosset Nat. Bank*, 16 R. I. 288.

3. See *Rodgers v. Meranda*, 7 Ohio St. 179; *Ex parte Sillitoe*, 1 Gl. & J.

If one partner carries on another entirely separate and independent business, or in case of two firms with distinct trades having members in common, one partner or one firm may become the creditor of the other for a trading debt and may make proof in competition with the joint creditors,¹ while a partner who has been discharged in bankruptcy can prove a debt afterwards incurred by his firm.² So if the claim of the partnership against the separate estate was fraudulent or tortious, in its inception as in case of the misappropriation by a partner of the firm assets, the firm may prove its claim.³

And creditors who have dealt with an ostensible partner in ignorance of the partnership relation may treat their claims as either joint or separate, and may elect to prove either against the joint or his separate estate.⁴ A solvent partner or his estate cannot

374; *Ex parte* Harris, 1 Rose 37; 2 Ves. & B. 210.

1. Buckner v. Calcote, 28 Miss. 432; Rodgers v. Meranda, 7 Ohio St. 179; Houseal's Appeal, 45 Pa. St. 484; *In re* Buckhause, 2 Low. (U. S.) 331; 10 Nat. Bankr. Reg. 206; *In re* Lane, 2 Low. (U. S.) 333; *Ex parte* St. Barb. 11 Ves. 413; *Ex parte* Maude L. R., 2 Ch. App. 550; *Ex parte* Hesham, 1 Rose 146; *Ex parte* Hargreaves, 1 Cox 440; *Ex parte* Cook, Montague 228. And see Stamits v. Quinn, 27 N. J. Eq. 383; *In re* Rieser, 19 Hun (N. Y.) 202; *In re* Savage, 16 N. B. R. 368; Tanier v. Wallace (Ind. 1888), 17 N. E. Rep. 923; Indianapolis Board of Trade v. Wallace, 117 Ind. 599.

This principle does not apply in the United States where the two firms do not have distinct partners, or where one firm includes all the members of the other. See *In re* Lane, 2 Low. (U. S.) 333; Somerset Potters' Works v. Minot, 10 Cush. (Mass.) 592.

In *In re* Lloyd, 22 Fed. Rep. 90, the rule that the joint estate cannot prove against the separate, nor the separate against the joint, was held to be of universal application where there was no fraudulent abstraction of funds. *In re* McLean, 15 Nat. Bankr. Reg. 333, however, it was held that the joint estate might make proof against the separate estate after separate creditors are paid.

2. Bates' Law of Part., § 857.

Dealing as with a Third Person.—Where one partner purchases outstanding notes made by the firm, and the firm afterwards pays the same to him, the payments should not be charged to him in his accounts with the firm. *Im-*

eson v. Schriver (Ky. 1889), 11 S. W. Rep. 598.

3. *Ex parte* Harris, 2 Ves. & B. 210; 1 Rose 437. And see *In re* Hamilton, 1 Fed. Rep. 800; *Ex parte* Yonge, 3 Ves. & B. 31; 2 Rose 40; Lacey v. Hill, 4 Ch. D. 537; Read v. Bailey, L. R., 3 App. Cas. 94; Baker v. Dawborn, 19 Grant's Ch. (Up. Can.) 113.

Mere overdrafts not for the benefit of separate creditors, or otherwise fraudulent give no right of proof to the joint estate, until separate creditors are paid in full. Cowan v. Gill, 11 Lea (Tenn.) 674; *In re* Hamilton, 1 Fed. Rep. 80. And a mere accidental payment of an installment due on an antecedent private purchase out of partnership funds, gives the other partners no lien except for reimbursement. Wheatley v. Calhoun, 12 Leigh (Va.) 264.

4. Camck v. Johnson, 2 N. J. Eq. 163; Van Valen v. Russell, 13 Barb. (N. Y.) 590; Elliot v. Stevens, 38 N. H. 311; *Ex parte* Reid, 2 Rose 84; *Ex parte* Norfolk, 19 Ves. 455; *Ex parte* Watson, 19 Ves. 459.

The former doctrine, that the entire property is deemed to belong to the ostensible partner and passes to his assignee in bankruptcy, is now overruled. Reynolds v. Bowley, L. R., 2 Q. B. 474. And see *Ex parte* Hayman, 8 Ch. Div. 11.

Holders of firm notes having proved their claims against the insolvent estate of a deceased partner after the survivor had made an assignment, supposing that they could also prove against the partnership estate, may withdraw them, and prove against the latter estate, even though, when they

prove against the separate estate of his bankrupt co-partner until the joint debts are paid in full,¹ but if he has paid the debts of the firm he can share *pro rata* with the separate creditors of the bankrupt in his separate estate for the amount due him from the bankrupt,² and a retiring partner whose firm becomes bankrupt and he is compelled to pay its debts, may prove for the whole against the bankrupt estate as surety.³ So, a claim by a solvent partner against a bankrupt co-partner arising out of a fraud or breach of trust on the part of the bankrupt is provable in competition with joint credit-

took the notes, they thought they were taking individual, and not partnership, obligations. *Colwell v. Weybosset Nat. Bank*, 16 R. I. 288.

1. *Hill v. Beach*, 12 N. J. Eq. 31; *Amsinck v. Bean*, 22 Wall. (U. S.) 395; *Ex parte Ellis*, 2 Gl. & J. 312; *Ex parte Carter*, 2 Gl. & J. 233; *Ex parte Shean*, 6 Ch. Div. 235; *Ex parte Adams*, 1 Rose 305; *Ex parte Butterfield*, De Gex. 570; *Ex parte Kendall*, 17 Ves. 514; *Ex parte Collinge*, 4 D. J. & S. 533. And see *In re Hamilton*, 1 Fed. Rep. 800; *Ex parte Bass*, 36 L. J. Bankr. 39; *Nanson v. Gordan*, L. R., 1 App. Cas. 195.

This rule has no application where all the creditors of the firm have been paid. *Ex parte Gazebrook*, 2 D. & C. 186; *Ex parte Edmonds*, 4 D. F. & J. 488. And see *Weaver v. Weaver*, 46 N. H. 188.

Where the claims of the joint creditors against the individual partner are barred by the Statute of Limitations his proof against their estate is not in competition with his own creditors and can therefore be made, the Statute of Limitations preventing their collection from him. *In re Hetburn*, 14 Q. B. D. 394.

Where the joint creditors have assented to a discharge of their retiring partner and agreed to depend upon the responsibility of the others alone the former may prove against the latter's estate. *Ex parte Hall*, 3 Deac. 125; *Ex parte Graysbrook*, 2 D. & C. 186.

Where the solvent partner is unable to procure a discharge of a firm debt by reason of the lunacy of the creditor, he might be permitted to prove against the separate estate on giving security. *Colyer on Partnership*, 658, citing *Ex parte Younge*, 3 Ves. & B. 31.

2. *Busby v. Chenault*, 13 B. Mon. (Ky.) 554; *Olleman v. Reagan*, 28 Ind.

109; *Price v. Cavins*, 50 Ind. 122; *Hill v. Beach*, 12 N. J. Eq. 31; *Payne v. Matthews*, 6 Paige (N. Y.) 19; *Scott's Appeal*, 88 Pa. St. 173; *Morris v. Morris*, 4 Gratt. (Va.) 293; *Amsinck v. Bean*, 22 Wall. (U. S.) 395; *In re Dell*, 5 Sawy. (U. S.) 344; *Ex parte King*, 17 Ves. 115; *Ex parte Terrell*, Buck 345; *Ex parte Drake*, cited 1 Atk. 225; *Fereday v. Wightwick*, Taml. 250; *Ex parte Reeve*, 9 Ves. 588; *Taylor v. Fields*, 4 Ves. 396; 15 Ves. 559; *Craven v. Knight*, 2 Ch. Rep. 226; *Ex parte Taylor*, 2 Rose 175; *Holderness v. Shackels*, 8 B. & C. 612.

Where a solvent partner without paying the partnership debts has agreed to indemnify the joint estate against them, he may prove his claim, his indemnity removing the conflict with the joint creditors. *Ex parte O'Gilby*, 3 Ves. & B. 133; 2 Rose 177.

In *Baker v. Dawbarn*, 19 Grant's Ch. Up. Can. 113, the assignee for the benefit of creditors was allowed to prove against the administrator of a deceased partner without having paid the debts when the amount to be received by him did not exceed the amount which the joint creditors would receive from the partnership estate. See also *McCormick's Appeal*, 55 Pa. St. 252. But the contrary was held in *Stratton v. Tadd*, 8 Ill. App. 225.

3. See *Scott's Appeal*, 88 Pa. St. 173; *Webster v. Lawson*, 73 Wis. 561; *In re Gray's estate*, 111 N. Y. 404; *Ex parte Carpenter*, 1 M. & M. 1; *Parker v. Ramsbottom*, 3 B. & C. 257; *Wood v. Dodson*, 2 M. & S. 195; 2 Rose 47; *Ex parte King*, 17 Ves. 115; *Ex parte Ried*, 2 Rose 84; *Moody v. King*, 2 B. & M. 558; *Re Cleverdon*, 4 Ont. App. (Can.) 185.

Where a bankrupt partner was indebted to his co-partner on a contract

ors.¹ Where a creditor of the firm has in addition to the partnership obligation the several promises of all or any of the individual partners, he can prove against both the joint and separate estate,² and if a separate creditor has security upon joint property or a joint creditor has security upon separate property of one of the partners, the creditor may prove his debt and at the same time enforce and realize upon his security, the rule of distribution not amounting to a lien.³ Thus the lien of a judgment upon

independent of the partnership, and his estate will pay his separate creditors only, leaving no surplus for the joint creditors, the creditors of the estate of his bankrupt co-partner may prove against the estate of the debtor partner. *Ex parte* Topping, 4 De G. J. & S. 551; *Ex parte* Sheen, 6 Ch. Div. 235. In *Lacey v. Hill*, L. R., 8 Ch. App. 441, however, it was doubted if this could be done had there been a surplus for the joint creditors.

1. *Ex parte* Westcott, L. R., 9 Ch. App. 626; *Ex parte* Broome, 1 Coll. 598, note. And see *Ex parte* Topping, 4 De G. J. & S. 551; *Ex parte* Butterfield, De Gex 570; *Ex parte* Shean, 6 Ch. Div. 535.

Partnership debts are regarded in equity as both joint and several, and the creditors of a partnership may prove their debts against the estate of a deceased member. *Greene v. Butterworth*, 45 N. J. Eq. 738.

2. *Drake v. Taylor*, 6 Blatchf. (U. S.) 14; *Union Nat. Bank v. Bank of Commerce*, 94 Ill. 271; *Ex parte* Nason 70 Me. 363; *Fuller v. Hooper*, 3 Gray (Mass.) 334; *Borden v. Cuyler*, 10 Cush. (Mass.) 476; *Berkshire Woolen Co. v. Juillard*, 13 Hun (N. Y.) 506; *In re Gray's Estate*, 111 (N. Y.) 404; *Perman v. Tunno*, Riley Eq. (S. Car.) 181; *Fowkes v. Bowers*, 11 Lea (Tenn.) 144; *Morris v. Morris*, 4 Gratt. (Va.) 293; *Ashby v. Porter*, 26 Gratt. (Va.) 455; *Fayette Nat. Bank v. Kenney*, 79 Ky. 133; *In re Blumer*, 13 Fed. Rep. 622; *Mead v. Bank of Fayetteville*, 2 Nat. Bankr. Reg. 173; 6 Blatchf. (U. S.) 180; 7 Am. Reg., N. S. 818; *In re Bigelow*, 2 Nat. Bankr. Reg. 371; 3 Ben. (U. S.) 146; *In re Howard*, 4 Nat. Bankr. Reg. 571; *Emery v. Canal Natl. Bank*, 7; Nat. Bankr. Reg. 217; 3 Cliff. (U. S.) 507; *In re Lewis*, 8 Nat. Bankr. Reg. 546; 2 Hughes (U. S.) 320; *Stephenson v. Jackson*, 9 Nat. Bankr. Reg. 378; 2 Hughes (U. S.) 204; *In re Tesson*, 9 Nat. Bankr. Reg. 578; *In re*

Foot, 12 Nat. Bankr. Reg. 337; 8 Ben. (U. S.) 228; *In re Thomas*, 17 Nat. Bankr. Reg. 54; 8 Biss. (U. S.) 139; *In re Baxter*, 18 Nat. Bankr. Reg. 62; *In re Jordan*, 2 Fed. Rep. 319; *In re Bradley*, 2 Biss. (U. S.) 515; *In re Farnum*, 6 Law Reporter 21. And see *Stevens v. West*, 1 How. (Miss.) 308.

In *England* the rule formerly was that on a joint and several debt a creditor must elect as to which estate he would pursue. The present rule, however, is that in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, does not prevent proof in respect of such contracts against the properties respectively liable upon such contracts. See *Simpson v. Henning*, L. R., 10 Q. B. 406; *Ex parte* Wilson, L. R., 7 Ch. App. 490; *Ex parte* Honey, L. R., 7 Ch. App. 178; *Vanco de Portugal v. Wardell*, 11 Ch. Div. 317; *Ex parte* Stone, L. R., 8 Ch. App. 914.

A draft drawn by a deceased partner on the firm, payable to the other partner, and a note executed by the firm to itself, and indorsed by the firm and deceased, are lawful demands against deceased's individual estate, being valid claims against him individually as well as against the firm. *Claffin v. Behr*, 89 Ala. 503.

3. *Miller's River Nat. Bank v. Jefferson*, 138 Mass. 111; *Krueger v. Speith* 8 Mont. 482; *Wilder v. Keeler*, 3 Paige (N. Y.) 167; *Besley v. Lawrence*, 11 Paige (N. Y.) 581; *In re Holbrook*, 2 Low. (U. S.) 259; *In re Lewis*, 8 Nat. Bankr. Reg. 546; 2 Hughes (U. S.) 320; *In re Foote*, 12 Nat. Bankr. Reg. 337; 8 Ben. (U. S.) 228; *In re Thomas*, 17 Nat. Bankr. Reg. 54; 8 Biss. (U. S.) 139; *In re May*, 17 Nat. Bankr. Reg. 192; *In re Plummer*,

separate real estate for a partnership debt cannot be superseded by the lien for a junior judgment for a separate debt or by the subsequent levy of an execution for a separate debt upon the same property.¹ So, an execution for a joint debt levied upon separate property cannot be postponed to let in the equities of the separate creditors on application of the assignee of the individual partner upon his subsequent bankruptcy or insolvency,² and an attachment or garnishment by a partnership creditor of the individual assets of a partner, does not give way to a junior attachment in

1 Ph. 56; *Ex parte* Thornton, 5 Jur., N. S. 212; *Ex parte* English & American Bank, L. R., 4 Ch. App. 49; *Ex parte* Bate, 3 Deac. 358; *Ex parte* Parr, 1 Rose 76; *Ex parte* Turney, 3 M. D. & D. 576; *Ex parte* Peacock, 2 Gl. & J. 27; *Ex parte* Bowden, 1 Deac. & Ch. 135; *Ex parte* Groom, 2 Deac. 265; *Ex parte* Connell, 3 Deac. 201; *Ex parte* Smyth, 3 Deac. 597; *Ex parte* Adams, 3 Mont. & Ayr. 157; *Ex parte* Bidulph, 3 De G. & Sm. 587; *Ex parte* Leicestershire Banking Co. De Gex 292; *Ex parte* Manchetser etc. Bank, L. R., 18 Eq. 249; *Ex parte* Dickin, L. R. 20 Eq. 767; *Re* Collic, 3 Ch. D. 481; *Couldery v. Bartram*, 19 Ch. D. 394. But see *Harmon v. Clark*, 13 Gray (Mass.) 114; *White v. Dougherty*, Mart. & Y. 309. See also *Powers v. Large*, 69 Wis 621.

Where a mortgage on firm property is given by a surviving partner to secure a partnership debt, the mortgagee may proceed first against the partnership property, though he also holds a mortgage to secure the same debt against the surviving partner's individual property. *Bell v. Hepworth*, 51 Hun (N. Y.) 616.

A mortgage on partnership property will not postpone an execution of a partnership creditor against individual property to that of a separate creditor. *Roberts v. Oldham*, 63 N. Car. 297.

1. *Cleghorn v. Insurance Bank*, 9 Ga. 319; *Baker v. Wimpee*, 19 Ga. 87; *Thornton v. Bussey*, 27 Ga. 302; *Preston v. Colby*, 117 Ill. 477; *Dean v. Phillips*, 17 Ind. 406; *Louden v. Ball*, 93 Ind. 232; *Hamsmith v. Espy*, 13 Iowa 439; *Gillaspy v. Peck*, 46 Iowa 461; *Wisham v. Lippincott*, 9 N. J. Eq. 353; *Howell v. Teel*, 29 N. J. Eq. 490; *Meech v. Allen*, 17 N. Y. 300; *Davis v. Delaware etc. Canal Co.*, 109 N. Y. 47; *Cumming's Appeal*, 25 Pa. St. 268; *Baker v. Finney*, 2 Pears. (Pa.) 177;

Hutzler v. Phillips, 26 S. Car. 136; *Gowan v. Tunno*, Rich. Eq. Cas. (S. Car.) 369; *Kuhne v. Law*, 14 Rich. (S. Car.) 18; *House v. Thompson*, 3 Head (Tenn.) 512; *Straus v. Kerngood*, 21 Gratt. (Va) 584.

In order to entitle a judgment creditor, on a bond, given in the partnership name, to be satisfied out of the proceeds of a sale of partnership property, in preference to a prior execution against one partner, levied on the same property, it must appear affirmatively that the bond was given to secure the payment of a partnership debt. *Snodgrass' Appeal*, 13 Pa. St. 471.

2. *Cunningham v. Gushee*, 73 Me. 417; *Allen v. Wells*, 22 Pick. (Mass.) 450; 33 Am. Dec. 757; *Howell v. Teel*, 29 N. J. Eq. 490; *In re Lewis*, 8 Nat. Bankr. Reg. 546; *In re Sandusky*, 17 Nat. Bankr. Reg. 452. And see *Straus v. Kerngood*, 21 Gratt. (Va.) 584; *Preston v. Colby*, 117 Ill. 477.

But in *Hubble v. Perrin*, 3 Ohio, 287, it was held that separate assets could not be reached until the joint assets are exhausted.

Where partnership property is sold under separate executions, against the partners individually, the proceeds represent the several interests of the partners and not that of the partnership and the fund should be distributed accordingly. *Vandike's Appeal*, 57 Pa. St. 9.

In *New Hampshire* where land of one partner is set off on execution for a debt due from the partnership, and afterwards the same land is set off, on execution, for a separate debt of the partner, the separate creditor of the individual partner will hold the land. *Jarvis v. Brooks*, 23 N. H. 136; *Crocket v. Crain*, 33 N. H. 542; *Weaver v. Weaver*, 46 N. H. 188; *Holton v. Holton*, 40 N. H. 77. See *Bowker v. Smith*, 48 N. H. 111; 2 Am. Rep. 189; unless

favor of his individual creditor.¹ A court of equity, however, may marshal the assets upon the principle that a party having resort to two funds, shall not by his election, disappoint a party who has only one fund, by compelling a partnership creditor to exhaust the partnership property before resorting to separate property,² though in enforcing liens upon separate property, those prior in time will be preferred without regard to the question as to whether given for partnership or individual indebtedness.³ The separate creditors can compel a partnership creditor who has security on separate property to prove his whole debt against the joint assets and resort to the separate assets for the deficiency only;⁴ and if the joint creditor has secured payment out of the separate estate the separate creditors will be subro-

the separate debt was contracted after the lien attached. *Miles v. Pennock*, 50 N. H. 564.

1. *Fuller v. Abrahams*, 29 Kan. 725; *Cunningham v. Gushee*, 73 Me. 417; *Stevens v. Perry*, 113 Mass. 380; *Allen v. Wells*, 22 Pick. (Mass.) 450; 33 Am. Dec. 757. And see *Armistead v. Cocke*, 62 Miss. 198.

That an individual creditor was induced to delay his attachment on individual property by the misrepresentations of a partnership creditor, thereby enabling the latter to make his attachment first, is no ground after postponing such attachment. *Bardwell v. Perry*, 19 Vt. 299; 47 Am. Dec. 687.

A partnership creditor, having levied a valid attachment upon the property of an insolvent firm, should be permitted to have such property, or the fruits thereof, preserved until his cause can be adjudicated, and for that purpose may have an injunction to restrain the sale of the property under execution. *Schuster v. Rader*, 13 Colo. 329.

2. *Filley v. Phelps*, 18 Conn. 294. 301; *Newson v. McLendon*, 6 Ga. 392; *Clayton v. May*, 68 Ga. 27; *Adams v. Sturges*, 55 Ill. 468; *Hamsmith v. Espy*, 13 Iowa 439; *Wilder v. Keeler*, 3 Paige (N. Y.) 167; *Averill v. Loucks*, 6 Barb. (N. Y.) 470; *Hubble v. Perrin*, 3 Ohio 287; *Smead v. Lacey*, 1 Disney (Ohio) 239; *Frow's Appeal*, 73 Pa. St. 459; *Stoney v. Shultz*, 1 Hill (S. Car.) 465; *Wardlaw v. Gray*, *Dudley Eq. (S. Car.)* 85; *White v. Dougherty*, *Mart. & Y. (Tenn.)* 309; *Bardwell v. Perry*, 19 Vt. 292; 47 Am. Dec. 687; *Pitts v. Spotts*, 96 Va. 71; *In re Lewis* 8 Nat. Bankr. Reg. 546; 2 *Hughes (U. S.)* 320; *In re May*, 17 Nat. Bankr. Reg. 192; *In re Sandusky*, 17 Nat. Bankr. Reg. 452. But see *Dean v. Phillips*, 17 Ind.

406; *House v. Thompson*, 3 Head (Tenn.) 512.

If an individual partner gives a mortgage to partnership creditors upon both individual and partnership property a separate creditor can require the latter security to be exhausted first. *Bass v. Estill*, 50 Miss. 300. But where the partnership creditor holds a mortgage upon individual property only, which is given to secure separate as well as firm debts the private creditor cannot claim priority in the proceeds, as there is but one fund. *Shakelford v. Clark*, 78 Mo. 491.

3. See *McIntire v. Yates*, 104 Ill. 491; *Hardy v. Overman*, 36 Ind. 549; *Pike v. Hart*, 30 La. Ann. pt. 2, 868; *Bass v. Estill*, 50 Miss. 300; *Tiffany v. Crawford*, 14 N. J. Eq. 278; *White v. Dougherty*, *Mart. & Y. (Tenn.)* 309; *Merchants' Nat. Bank v. Raymond*, 27 Wis. 567; *Meech v. Allen*, 17 N. Y. 300.

Where P. of W. and P. died, all the assets were turned over to W., who gave P.'s administrator a mortgage to secure an individual debt due to P. from W., and to secure the estate against the payment of partnership debts, and P.'s administrator foreclosed the mortgage, it was held, that the estate had a priority as to the individual debt, and that the creditors could not share in the proceeds of the foreclosure, the mortgage not having been given to secure them but to secure the estate. *Wimpee v. Mitchell*, 29 Ga. 276.

4. See *Scully v. Alter*, 16 N. J. L. 147; *Leach v. Milburn Wagon Co.*, 14 Neb. 106; *In re May*, 17 Nat. Bankr. Reg. 192; *In re Collie*, 3 Ch. Div. 481.

A joint creditor having also security upon the individual assets of a partner may prove his whole debt against partnership estate, even

gated to his claim against the joint estate to an extent equal to the amount paid.¹

2. As Between the Partners.—The realization and division or profits consisting of the excess of receipts over expenses, is the ultimate object of every partnership, the right to share the profits being one of the principal tests of its existence and one to which nearly all the other rights of partners are incidental;² and it follows as a correlative as well as from the doctrine of the right of contribution between co-principals and principal and agent, that each partner is bound to contribute ratably to indemnify each other against the losses and indebtedness of the firm.³ In an accounting between co-partners, therefore, each is entitled to be allowed, as against the others, everything that he has advanced or brought in as a partnership transaction, and to charge the others with what they have not brought in, or have taken out more than

though such partner owes no separate debts. *In re* Thomas, 8 Biss. (U. S.), 139; 17 Nat. Bankr. Reg. 54.

1. Kendall v. Rider, 35 Barb. (N. Y.) 100; Averill v. Loucks, 6 Barb. (N. Y.) 470; National Bank v. Cushing, 53 Vt. 321; *In re* Foot, 8 Ben. (U. S.) 228; 12 Nat. Bankr. Reg. 337. But see Harmon v. Clark, 13 Gray (Mass.) 114.

A separate judgment creditor of a partner is not entitled to be subrogated to the rights of a judgment creditor of the partnership who has obtained satisfaction out of such partner's estate, to enable such separate creditor to proceed against the other partner, where there is nothing to show the latter partner to be indebted to his co-partner whose property was taken to pay the firm debt. Sterling v. Brightbill, 5 Watts (Pa.) 229; 30 Am. Dec. 304.

2. Lindley on Part. 790, 791.

Where the defendant had received all payments to the firm, and the complainant had advanced certain money, and had left his share of the profits in the business, complainant is entitled to one-half of the net profits, and the money put in by him. Wingarden v. Verhage, 68 Mich. 14. And see Delamour v. Roger, 7 La. Ann. 153.

Where, upon a settlement between an insolvent partnership and its creditors, one of the partners demanded and received his proportion of the firm's statutory exemption, while the other, to expedite the settlement, waived his right to such exemption, the latter, on a subsequent accounting, can claim no interest in the amount so received by

his partner. Betts v. Letcher S. Dak. 1890, 46 N. W. Rep. 193.

3. See Sears v. Starbird, 78 Cal. 225; Lily v. Kroesen, 3 Md. Ch. 83; Archer v. Walker, 38 Ind. 472; Evans v. Clapp, 123 Mass. 165; Forbes v. Webster, 2 Vt. 58; Wright v. Hunter, 5 Ves. 792; McOwen v. Hunter, 1 Dr. & W. 347; Evans v. Yeathard, 2 Bing. 132; Lefroy v. Gore, 1 Jo. & Lat. 571; Gleadow v. Hull Glass Co., 13 Jur. 1020; Sedgwick's Case, 2 Jur. U. S. 949; Robinson's Case, 6 De G. M. & G. 572; Spotteswoode's Case, 6 De G. M. & G. 345; Lindley on Part. 760, 781, 782; Babb v. Mosby, 7 Lea (Tenn.) 105; Perkins v. Currier, 3 Woodb. & M. (U. S.) 69; Parker v. Parker, 65 Barb. (N. Y.) 205; White v. Colfax, 33 (N. Y.) Supr. Ct. 207; Maginnis v. Crosby, 11 La. Ann. 400.

Where the partnership contract provides that one partner is not to bear any part of the losses, he can compel his co-partner to reimburse him for the entire amount which he has paid. Geddes v. Wass, 2 Bli. 270; Gillian v. Morrison, 1 De G. & S. 421.

A nominal partner, if he has been compelled to pay losses, not being a proper party to an accounting, can recover them only by an action at law. Latham v. Kenniston, 13 N. H. 203.

In an action by two members of a former partnership against the third, for contribution of his part of a debt of the firm paid by them, the judgment roll in a former suit, brought by defendant against plaintiffs for a dissolution of the partnership, which shows an adjudication of the amounts invested in the partnership enterprise

they ought,¹ a mere debtor and creditor account between the complainants upon the one hand and the defendants upon the other being erroneous.² In taking an account attention must be paid not only to the terms of the partnership articles, but also to the manner in which they have been acted upon by the partners,³ the partnership books to which all have had access being compe-

by each partner, and that the debt in question is a firm liability, is competent to establish those facts. *Sears v. Starbird*, 78 Cal. 225.

1. *West v. Skip*, 1 Ves. Sr. 242; *Lord Hardwick J. Wingarden v. Verhage*, 68 Mich. 14. And see *Robertson v. Read*, 17 Gratt. (Va.) 544; *Hellebush v. Coughlin*, 37 Fed. Rep. 294; *Tennant v. Guy* (Supreme Ct.), 3 N. Y. Supp. 697; *Wells v. McGooch*, 71 Wis. 196; *Toulmen v. Copeland*, 3 Y. & C. Ex. 625.

On dissolution of a co-partnership existing under an agreement, whereby each member contributed equal capital, and was to share the profits and losses equally, advances made by one partner in excess of the amount agreed to be contributed by him must be repaid to him out of the partnership property remaining after paying partnership debts, before the surplus to be divided among the partners, or the loss to be apportioned can be ascertained. *Leserman v. Bernheimer*, 113 N. Y. 39.

A settlement of partnership accounts made by arbitrators, without concealment or fraud, will not be disturbed. *Abell v. Phillips* (Ky. 1890), 13 S. W. Rep. 109.

For examples of calculating, see *Raymond v. Putnam*, 44 N. H. 160; *White v. Bullock*, 18 Mo. 16; *Dixon v. Ford* (Ky. 1886), 1 S. W. Rep. 817; *Pitt v. Moore*, 99 N. Car. 85; *Ledyard v. Bull*, 119 N. Y. 62; *Winchester v. Glazier* (Mass. 1890), 25 N. E. Rep. 728; *Tennant v. Guy* (Supreme Ct.), 3 N. Y. Supp. 697; *Atherton v. Cochran* (Ky. 1889), 11 S. W. Rep. 301; *Wolff v. Shelton*, 51 Ala. 425; *Hume v. McNeese* (Ky. 1889), 10 S. W. Rep. 384; *Appeal of Plumley*, 24 W. N. C. (Pa.) 281; *Cox v. Pierce*, 22 Ill. App. 43; *Imeson v. Schriver* (Ky. 1889), 11 S. W. Rep. 598.

Where A is to put in assets of a former firm, which proved to be less than \$4,000, and B is to put in \$14,000, but actually puts in only \$12,000, profits and losses to be divided equally and each to draw a fixed weekly sum for his

own use, at dissolution the assets to be divided in proportion to the contribution of each, in accounting it was held that the capital B failed to put in is assets for which he is chargeable; that the excess drawn out by each for his own use, beyond the amount agreed upon, is assets and chargeable to each; that the amounts collected by each and retained by him is assets and chargeable to each; that the loss, no part of which either had paid back, was chargeable to each; that the amount one had drawn for his own use in excess of the other could not be charged against him, but must be returned; and that the assets contributed by A must be taken at their actual value. *Schulte v. Anderson*, 45 N. Y. Super. Ct. 489.

2. *Garrett v. Robinson*, 80 Ala. 192; *Smith v. Hazelton*, 34 Ind. 481; *Conwell v. Sandidge*, 8 Dana (Ky.) 273; *Schulte v. Anderson*, 45 N. Y. Super. Ct. 489; *Neudccker v. Kohlberg*, 3 Daly (N. Y.) 407; *Moore v. Wheeler*, 10 W. Va. 35.

In stating a partnership account after dissolution where one partner has had entire charge of the business, it is error to deduct the gross losses and expenses from the gross receipts and out of the balance restore to each his original capital calling the rest profits; such partners should be debited with the entire capital placed in his hands as well as with the proceeds of sales, and if part of the capital consisted of stock which was contributed at a valuation and it had been used in the business or disposed of and the proceeds charged against him he should be credited with the stock as a disbursement to the amount of its original valuation, the balance less the original capital and uncollectible assets is the profits, each being then entitled to his original capital and his share of the profits out of the balance. *Gunnell v. Bird*, 10 Wall. (U. S.) 304; and see *Keaton v. Mayo*, 71 Ga. 649.

3. See *Watney v. Wells*, 2 Ch. 250; *Bury v. Allen*, 1 Call 604; *Rowe v. Wood*, 2 J. & W. 556; *Winchester v. Glazier* (Mass. 1890), 25 N. E. Rep.

tent and *prima facie* evidence of the state of the partnership accounts.¹

a. PAYMENT OF LOSSES.—If one partner has paid more than his share of the losses, he can in case of the insolvency of one of his co-partners, compel indemnity from the remaining solvent ones,

728; Sample v. Upton, 74 Mich. 416; Van Horn v. Van Horn (N. J. 1890), 20 Atl. Rep. 826; Frank v. Webb, 67 Miss. 462; Julliard v. Orene, 70 Md. 465; Wells v. McLeod, 71 Wis. 196; and see also *infra*, this title, *Construction of Partnership Articles*.

Where the articles say nothing with reference to the amount of capital each is to contribute and no credit is given on the books to any partner for an excess of capital, and on dissolution they divide the assets equally between them, no decree will be entered in favor of one against another for capital in addition to his share, even though he in fact contributed the entire amount. Adams v. Gordon, 98 Ill. 598.

Where articles of partnership provide that in case of the dissolution of the partnership by the death or withdrawal of any of the partners, a general account shall be taken, and prescribe the manner in which the concern shall be settled and its assets distributed, an injunction will not lie, at the instance of the outgoing partners, against the remaining partner, until the latter has had an opportunity of closing up the concern under the articles of partnership. Gunhian v. English, 44 Mo. 46.

1. Glover v. Hembree, 82 Ala. 324; Carpenter v. Camp, 39 La. Ann. 1024; Spann v. Fox, 1 Ga. Dec. 1; Taunton Iron Works v. Richmond, 8 Met. (Mass.) 434; Kyle v. Kyle, 1 Gratt. (Va.) 526. And see Congden v. Aylsworth, 16 R. I. 281; Hume v. McNees (Ky. 1889), 10 S. W. Rep. 384; Burton v. Ferriss, Brayt. (Vt.) 28; Haller v. Williamowicz, 23 Ark. 566; Perry v. Banks, 14 Ga. 699; White v. Tucker, 9 Iowa 100; Sims v. Kirtley, 1 T. B. Mon. (Ky.) 79; Topliff v. Jackson, 12 Gray (Mass.) 565; Tucker v. Peaslee, 36 N. H. 167; Caldwell v. Leiber, 7 Paige (N. Y.) 483; Phillips v. Turner, 2 Dev. & B. Eq. (N. Car.) 123; Gregg v. Hord, 129 Ill. 613.

Entries made before the dissolution of the firm are evidence against both the partners; if not, they are evidence

against the party who made them. Kahn v. Boltz, 39 Ala. 66.

The fact that one of the partners of the firm remained in possession of the shop and stock of goods after a bill was filed for a dissolution of the partnership, and kept possession of the books, and refused to give them up, is no reason for excluding the books as *prima facie* evidence, at least of the affairs of the concern, there being no proof of the allegation that the books were altered or mutilated by him. Moon v. Story, 8 Dana (Ky.) 226.

Although partnership books, to which all the partners have had access, are *prima facie* evidence for and against each partner; yet they cannot be made exhibits, except to identify them, nor can either the court or the master be required to examine them in detail; they should be examined by experts, to ascertain balances, and to make out schedules of such items as may be in dispute, or tend to elucidate the contested matters of charge and discharge. Budeke v. Ratterman, 2 Tenn. Ch. 459.

The books of account of the firm are not admissible as against a person having no knowledge of such books. First Nat. Bank v. Conway, 67 Wis. 210; Turnipseed v. Goodwin, 9 Ala. 372.

Entries made by a deceased partner, in the regular course of business, are not admissible in evidence in a suit by the surviving partner against a debtor of the firm. Romer v. Jaecksch, 39 Md. 585.

In an action for a settlement of firm accounts, the charging of certain items in the firm books to profit and loss account, after dissolution, is not *prima facie* evidence that the firm is properly chargeable with the loss. Boyd v. Foot, 5 Bosw. (N. Y.) 110.

Where a partner is familiar with the books of a concern, he may testify from his own recollection, as invigorated by the books as to the amount of the advance of his co-partner beyond himself in the payment of the debts of the firm, without producing the books. Bank v. Donaldson, 6 Pa. St. 179.

thus distributing the loss equally among those able to meet it;¹ and so in case of a removal of a partner without the jurisdiction of the court,² that the capital has been impaired or wholly lost, not affecting the rule.³ Losses are required to be paid first out of the profits; next out of the capital and lastly by having recourse to the partners individually,⁴ and if after paying all partnership liabilities and advances by partners, there is not a sufficient surplus to repay to each partner his capital, the unpaid balance must be treated as a loss to be met and shared like any other loss.⁵ That the capital agreed to be advanced by the partners is unequal, or that one furnishes capital and the other services, does not alter the application of the rule, the party supplying the larger amount of capital being entitled to the return of his capital less the share of the loss he is to bear,⁶ though there are some

1. *Whitman v. Porter*, 107 Mass. 522; *Scott v. Bryan*, 96 N. Car. 286; *In re Dell*, 5 Sawy. (U. S.) 344; *Ex parte Moore*, 2 Gl. & J. 166; *Ex parte Plowden*, 2 Dea. 456; 3 Mont. & A. 402. And see *Allison v. Davidson*, 2 Dev. Eq. (N. Car.) 79; *Salmon v. Solomon*, 3 Ga. 18.

Where the partners have estimated the debts and apportioned the amounts, the courts, on finding that the debts exceeded the estimate, will adopt the apportionment made by the co-partners. *Edwards v. Remington*, 60 Wis. 33.

2. *Henry v. Jackson*, 37 Vt. 431; *Whitman v. Porter*, 107 Mass. 522.

3. *Sangston v. Hack*, 52 Md. 173; *Taylor v. Coffing*, 18 Ill. 422; *Harbrouck v. Childs*, 3 Bosw. (N. Y.) 105; *Jones v. Butler*, 87 N. Y. 613.

4. *Lindley on Part.* 806, citing *Crawshay v. Collins*, 2 Russ. 347; *Richardson v. Bank of England*, 4 M. & Cr. 173; and see also *Leach v. Leach*, 18 Pick. (Mass.) 68; *Luce v. Hartshorn*, 7 Lans. (N. Y.) 331; *Young v. Clute*, 12 Nev. 31.

Where plaintiff and defendant formed a partnership to deal in real estate, the profits to be equally divided between them, and defendant furnished the money to buy land, and plaintiff was to furnish the skill in selling the same, but the entire tract was not sold, and the amount received for the portion sold was less than the amount paid by defendant for the entire tract, plaintiff is not entitled to recover, although a profit may have been realized on the portion sold. *Coward v. Clanton*, 79 Cal. 23.

5. *Pearce v. Pearce*, 77 Ill. 284;

Jackson v. Crapp, 32 Ind. 422; *Raymond v. Putnam*, 44 N. H. 160; *Neudecker v. Kohlberg*, 3 Daly (N. Y.) 407; *Johnson v. Kelly*, 2 Hun (N. Y.) 139; 4 Thomp. & C. (N. Y.) 417; *Wood v. Scoles*, L. R., 1 Ch. App. 369; *Ex parte Maude*, L. R., 6 Ch. App. 51; *Nowell v. Nowell*, L. R., 7 Eq. 538; *Re Anglesea Colliery Co.*, L. R., 2 Eq. 371; 1 Ch. App. 555; *Foster v. Chaplin*, 19 Grant's Ch. (Up. Can.) 251. And see *Merriwether v. Hardeeman*, 51 Tex. 436; *Leach v. Leach*, 18 Pick. (Mass.) 68.

Debts of a deceased partner paid by one of the survivors by consent of all the heirs may be charged against his capital retained in the business. *Robinson v. Simmons*, 146 Mass. 167.

6. See *Richards v. Gunnell*, 63 Iowa 44; 50 Am. Rep. 727; *Hanks v. Baber*, 53 Ill. 292; *Brinkley v. Harkness*, 48 Tex. 225; *Carlisle v. Tenbrook*, 57 Ind. 529; *Olcott v. Wing*, 4 McLean (U. S.) 15; *Turner v. Turner* (Ky. 1887), 5 S. W. Rep. 457; *Taylor v. Coffing*, 18 Ill. 422; *Moley v. Brine*, 120 Mass. 324; *Meserve v. Andrews*, 106 Mass. 419; *Whitcomb v. Converse*, 119 Mass. 38; *Gill v. Geyer*, 15 Ohio St. 399; *Hellebush v. Coughlin*, 37 Fed. Rep. 294; *Yohe v. Barnet*, 3 W. & S. (Pa.) 81; *Emerick v. Moir*, 124 Pa. St. 498; *Nowell v. Nowell*, 7 Eq. 538; *Anglesea Colliery Co.*, 2 Eq. 379; *Ex parte Maude*, 6 Ch. 51; *Hellebush v. Coughlin*, 37 Fed. Rep. 294.

That one partner is an infant does not throw the burden of a loss of capital upon the rest. *Moley v. Brine*, 120 Mass. 394.

Where one partner is to furnish all the capital and the other is to furnish

cases holding that a partner who contributes his time and services as his capital, cannot be required to share the loss of his co-partner who furnished capital, in addition to the loss of his own.¹ If the partnership is in the profits only and nothing but the use of the capital is contributed by one partner any loss or impairment of the original capital falls upon its owner, as the firm never owned it, it owes nothing in relation to it.²

1. *Losses Caused by a Partner.*—Losses caused by culpable neglect of duty or bad faith, or breach of the partnership agreement, on the part of a partner, or by acts beyond his authority, will, upon accounting, be charged to him alone or deducted from his profits.³ Thus, where a partner invests partnership funds in a

experience and bear half of such losses as arise from or are incident to the business, a loss by the Chicago fire was held to fall within such provision, fire being a natural and ordinary peril, and that the firm and not the capitalist partner should bear it. *Savery v. Thurston*, 4 Ill. App. 55. And see *Taft v. Schwamb*, 80 Ill. 289.

1. *Everly v. Durborrow*, 8 Phila. (Pa.) 93; 1 Pa. Leg. Gaz. (Pa.) 127; *Cameron v. Watson*, 10 Rich. Eq. (S. Car.) 64. And see *Hasbrouck v. Childs*, 3 Bosw. (N. Y.) 105; *McCormick v. Stofer* (Ky. 1889), 12 S. W. Rep. 151; *Wood v. Scoles*, L. R., 1 Ch. App. 369.

In *Knapp v. Edwards*, 57 Wis. 191, where each of two partners was to put in an equal amount, but one of them put in more than was agreed, and the whole property was destroyed by fire, it was held that the other partner was not chargeable beyond his investment.

In *Yohe v. Barnett*, 3 W. & S. (Pa.) 81, it was held that in case of loss of capital, it was a question for the jury to determine whether or not the other partner should contribute to remunerate the partner by whom the capital was furnished.

2. *Whitcomb v. Converse*, 119 Mass. 38; 20 Am. Rep. 311; Appeal of Plumly (Pa. 1889), 16 Atl. Rep. 728. And see *Shaw v. Gandolfo* 9 La. Ann. 32; *Rau v. Boyle*, 5 Bush (Ky.) 253; *Tutt v. Land*, 50 La. 339; *Morris v. Neel*, 78 Ga. 797. And see also *infra*, this title, *Partnership Property*.

In a single adventure, particularly where one contributes the stock and the other the services, the latter's services are his capital and equivalent to the contribution of the other, and if the money or property is lost, he is not liable to repay any part of it. *Heran*

v. Hall, 1 B. Mon. (Ky.) 159; 35 Am. Dec. 178.

Where plaintiff and W were partners under an agreement which provided that the original amount put into the business, and the amounts received in the course of business should be the property of plaintiff, and that W should receive as his compensation one-half of the net profits, it was held that such agreement was binding on a creditor of W, who had full knowledge of it, and that plaintiff was entitled to recover of him funds other than the one-half of the profits, which W had turned over to him in payment of his own individual debt. *Campbell v. Pence*, 118 Ind. 313.

3. See *Hubbard v. Pace*, 34 Ark. 80; *Morrison v. Kramer*, 58 Ind. 38; *Carlin v. Donegan*, 15 Kan. 495; *Murphy v. Crafts*, 13 La. Ann. 519; *Walpole v. Renfro*, 16 La. Ann. 92; *Hellman v. Reis*, 1 Cin. Supr. Ct. Rep. 30; *Devall v. Burbridge*, 6 W. & S. (Pa.) 529; *Holmes v. Bigelow* 3 Desaus. (S. Car.) 497; *Cameron v. Watson*, 10 Rich. Eq. (S. Car.) 64; *Buford v. Ashcroft* (Tex.), 10 S. W. Rep. 346; *Soules v. Burton*, 36 Vt. 652; *Maher v. Bull*, 44 Ill. 97; *Gordon v. Moore*, 8 Pa. Co. Ct. Rep. 289.

Where a partner pays an unfounded claim his share will be charged with the amount. *In re Webb*, 2 J. S. Moore 500; *McIlreath v. Margetson*, 4 Doug. 278; *Moore's Appeal* (Pa. 1890), 19 Atl. Rep. 753. So if one partner compromises a debt without cause he will be charged for the difference. *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 506.

If one partner pays a debt of the firm knowing that the creditor is indebted to the firm without deducting the set-off he is chargeable with its

manner foreign to the scope of the business or contrary to the articles of co-partnership, or to an extent beyond that limited by the rules established for the management of their business he is liable for all losses caused thereby.¹ So he is responsible for any loss caused by his interference with another partner having the exclusive management of the business or its winding up,² or by his culpable neglect in the performance of a charge he has undertaken to perform.³

Unliquidated damages for malfeasance, misfeasance or non-feasance, by which loss is caused to the firm may also be allowed on accounting.⁴ And damages may be allowed for losses occa-

amount. *Cockrell v. Thompson*, 85 Mo. 510.

Where a partner agrees to furnish all the capital and the enterprise fails on account of his not doing so, he cannot call upon his partner for reimbursement. *Bonis v. Louvrier*, 8 La. Ann. 4. Nor can he claim a full share of the profits where he has failed to contribute his agreed share of the capital. *Smith v. Hazleton*, 34 Ind. 481. *Durbin v. Barber*, 14 Ohio 311.

Breaches of trust do not fall within this rule. *Ashurst v. Mason*, L. R., 20 Eq. 25.

1. *Honore v. Colnesnil*, 1 J. J. Marsh. (Ky.) 506; *Roberts v. Totten*, 13 Ark. 609; *Tomlinson v. Ward*, 2 Conn. 396; *Cooke v. Allison*, 30 La. Ann. 963; *Smith v. Loring*, 2 Ohio 440; *Reis v. Hellman*, 25 Ohio St. 180; *Looney v. Gillenwaters*, 11 Heisk. (Tenn.) 133; *Pierce v. Daniels*, 25 Vt. 624; *Thomas v. Atherton*, 10 Ch. Div. 187.

Losses caused by a partner's illegal act are chargeable to him. *Campbell v. Campbell*, 7 Cl. & Fin. 166.

When one partner signs the firm name as surety he must bear the loss whoever pays it. *Berryhill v. McKee*, 1 Humph. (Tenn.) 31; *Smith v. Loring*, 2 Ohio 440.

Where a managing partner borrows money agreeing to pay a large share of the profits in lieu of interest without authority, he can only be credited with the amount and legal interest. *Chandler v. Sherman*, 16 Fla. 99.

Where a partner uses the assets of the firm to pay the debts of a former firm without the incoming partner's consent, he is chargeable with the amount paid. *Wentworth v. Raiguel*, 9 Phila. (Pa.) 275.

If a partner, on dissolution, pays over such funds as are in his hands to the

acting partner, he is not liable for its loss upon the insolvency of the latter. But if, after final settlement, he leaves his share in the hands of the acting partner, it is at his own risk. *Allison v. Davidson*, 2 Dev. Eq. (N. Car.) 79.

2. *Haller v. Willamowicz*, 23 Ark. 566; *Richardson v. Wyatt*, 2 Desaus. (S. Car.) 471; *Weldon v. Beckel*, 10 Daly (N. Y.) 472.

A partner who is empowered to act as liquidating partner, and is given exclusive charge of winding up the affairs of the firm, is not chargeable with credits theretofore given to another partner without his knowledge and consent, though after notice by him of his intention to dissolve, and after an account is taken and a balance struck. *Leserman v. Bernheimer*, 113 N. Y. 39.

Where, at the expiration of the partnership in a hotel, one partner procured a renewal of a lease in his own name and for his own benefit, in consequence of which the sale upon decree of dissolution produced the value of the furniture only and nothing for the good will, he was charged with the value of the good will. *Mitchel v. Read*, 84 N. Y. 556.

3. *Pratt v. McHatton*, 11 La. Ann. 260; *Grove v. Miles*, 85 Ill. 85; *Bohrer v. Drake*, 33 Minn. 408. And see *Fordyce v. Shriver*, 115 Ill. 530.

Where a partner arbitrarily and illadvisably sells the entire assets of the firm at a low price, he will be charged with their real value, and an account of stock taken a short time before such dissolution will be considered an evidence of such value. *Crawford v. Spatz*, 11 Phila. (Pa.) 255.

4. *Boyd v. Mynatt*, 4 Ala. 79; *Nichol v. Stewart*, 36 Ark. 612; *Cox v. Pierce*, 22 Ill. App. 43; *Maher v. Bull*, 44 Ill. 97; *Morrison v. Kramer*, 58 Ind. 38; *Carlin v. Donegan*, 15 Kan. 495; *Sex-*

sioned by a partner's failure to furnish his agreed amount of capital.¹

A fair degree of care only, however, is required. An honest mistake of judgment or a trivial departure from the partnership agreement in cases of emergency will not impose the burden of the losses of the firm upon the deviating partner,² and where the affairs of the firm are in the hands of one partner for settlement and collection he is not chargeable for failure to collect if reasonable diligence has been used,³ though he has sole possession

ton v. Lamb, 27 Kan. 426; Bonis v. Louvrier, 8 La. Ann. 4; Richards v. Todd, 127 Mass. 167; Dunnell v. Henderson, 23 N. J. Eq. 174; Singer v. Heller, 40 Wis. 544; Bury v. Allen, 1 Coll. 604; Davidson v. Thirkell, 3 Grant's Ch. (Up. Can.) 330.

A defendant may claim indemnity for the misperformance or non-performance of duty by a co-partner by cross-bill in the action for accounting. Morrison v. Kramer, 58 Ind. 38; Richards v. Todd, 127 Mass. 167.

Such a claim may be enforced by an action at law. Maude v. Rhodes, 4 Dana (Ky.) 144; Eagle v. Bucher, 6 Ohio St. 295. It is doubtful, therefore, where such a claim forms the whole ground for relief and not merely an item in the account, whether it would be a matter of equitable cognizance. See Nichol v. Stewart, 36 Ark. 612; Singer v. Heller, 40 Wis. 544.

Where a member of a firm obtained indorsements from another member of the firm, of certain negotiable paper, upon a representation that he was to use such paper for the benefit of the firm, but in fact used it for his individual purposes, and afterwards became bankrupt, the firm remaining solvent, the amount so obtained by the bankrupt is a proper charge against him, and in favor of the firm. Warren v. Burnham, 32 Fed. Rep. 579.

1. Boyd v. Mynatt, 4 Ala. 79; Smith v. Hazelton, 34 Ind. 481; Sexton v. Lamb, 27 Kan. 426; Bonis v. Louvrier, 8 La. Ann. 4; Reid v. McQuesten, 61 N. H. 421.

Where none of the testimony before a referee is preserved in the record, and the trial court strikes out from the report of the referee an allowance for damages other than interest, for the failure of one partner to furnish his share of the partnership funds to carry on the business, such order and judgment will not be set aside or reversed, as ordinarily the only damage for

which he is liable is interest on the money due. Krapp v. Aderholt, 42 Kan. 247.

2. See Hall v. Sannoner, 44 Ark. 34; Tillotson v. Tillotson, 34 Conn. 335; Lyles v. Styles, 2 Wash. (U. S.) 224; Charlton v. Sloan, 76 Iowa 288; Starr v. Case, 59 Iowa 491; Morrison v. Smith, 81 Ill. 221; Morris v. Allen, 14 N. J. Eq. 144; Mayson v. Beazley, 27 Miss. 106; Thompson v. Rogers, 69 N. Car. 357; Peters v. M'Williams, 78 Va. 567; Cragg v. Ford, 1 Y. & C. Ch. Cas. 280; Knox v. Sprecher, 68 Pa. St. 415; Blair v. Johnston, 1 Head (Tenn.) 13.

One partner of a firm ordered goods to be removed from a cellar, fearing danger from rising water, the other countermanded the order, supposing in good faith that there was no danger, the goods were afterwards injured by the water, it was held that the latter was not chargeable with the loss, and that it would not be presumed that he intended to thwart his copartner. Caldwell v. Leiber, 7 Paige (N. Y.) 783.

In Stidger v. Reynolds, 10 Ohio 351, however, where the sole managing partner whose co-partner was a female, by whom all the capital had been contributed, accounted honestly for everything, he was held bound to explain the causes of his failure to make ordinary profits by proof, as he had incurred the obligation to render his trust profitable.

3. Wilder v. Morris, 7 Bush (Ky.) 420; Day v. Lockwood, 24 Conn. 185; Cunningham v. Smith, 11 B. Mon. (Ky.) 325; Wilder v. Morris, 7 Bush (Ky.) 420; Grove v. Fresh, 9 Gill & J. (Md.) 280; Hollister v. Barkley, 11 N. H. 501; Jessup v. Cook, 6 N. J. L. 434; McRae v. McKenzie, 2 Dev. & B. Eq. (N. Car.) 222; Phelan v. Hutchinson, Phil. Eq. (N. Car.) 116; 93 Am. Dec. 603; Richardson v. Wyatt, 2 De-saus. (S. Car.) 471.

of the books and accounts, there being no element of exclusion.¹

The partner failing in the performance of his duty, thereby causing loss is liable only to the extent of the actual loss caused by his delinquent acts;² and if the act was authorized or ratified, it is chargeable to the firm, and not to the partner.³ A partner who has received property of the firm, is chargeable with its value unless it is shown to have been disposed of for partnership purposes or pursuant to authority from the firm,⁴ though possession of the books does not charge the possessor with all credits contained in them nor fasten upon him the burden of proving their non-collectibility.⁵

In *Cunningham v. Smith*, 11 B. Mon. (Ky.) 325, it was said that one partner is not liable in the absence of culpable negligence. And see *Lazar-die v. Hewitt*, 7 B. Mon. (Ky.) 697.

A partner is not liable for depreciation of currency in his hands. *McMair v. Ragand*, 1 Dev. Eq. (N. Car.) 516. But see to the contrary *Succession of Wilder*, 21 La. Ann. 371, where a surviving partner took payment in Confederate notes. And see also *Garrett v. Bradford*, 28 Gratt. (Va.) 609.

A partner is not liable for losses by defalcation and disobedience of a clerk of the firm under his control. *Roberts v. Totten*, 13 Ark. 609. And see *Aiken v. Ogilvie*, 12 La. Ann. 353.

A partner who has agreed to bear all losses on sales to irresponsible parties is not liable if he is prevented by an injunction from making collections. *Maher v. Bull*, 44 Ill. 97.

Where a partner is appointed receiver, however, he is chargeable with debts lost by reason of his delay or neglect. *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 506.

1. *Story v. Moon*, 3 Dana (Ky.) 331; *Wilder v. Morris*, 7 Bush (Ky.) 420; *Grove v. Fresh*, 9 Gill & J. (Md.) 280; *Randle v. Richardson*, 53 Miss. 176; *McRae v. McKenzie*, 2 Dev. & B. Eq. (N. Car.) 232; *Richardson v. Wyatt*, 2 Desaus. (S. Car.) 471. But see to the contrary, *Lee v. Lashbrooke*, 8 Dana (Ky.) 214.

One partner should not be charged with a debt due to the partnership on the ground that through his neglect it was barred by the Statute of Limitations, where the other partner was familiar with the debts due the partnership, and could have enforced payment of the same. *Chalmers v. Chalmers*, 81 Cal. 81.

2. See *Tutt v. Land*, 50 Ga. 339; *Stallings v. Corbett*, 2 Spears (S. Car.) 613.

3. *Cameron v. Watson*, 10 Rich. Eq. (S. Car.) 64; *Murphy v. Crafts*, 13 La. Ann. 519; *Soules v. Burton*, 36 Vt. 652; *Cragg v. Ford*, 1 Y. & C., Ch. Cas. 285.

One partner cannot recoup on the ground of the bad habits of his co-partner when he did not dissolve the partnership until his co-partner had reformed. *Mills v. Fellows*, 30 La. Ann. 824.

The assent of one partner to the appropriation by his partner of partnership property to pay his private debt, does not defeat his right to be allowed the amount on settlement of the partnership affairs. *Currier v. Bates*, 62 Iowa 527. And the other partners do not, by attending the arbitration of damages claimed against the firm for the acts of one partner, ratify or agree to contribute to them. *Thomas v. Atherton*, 10 Ch. Div. 185.

4. *Laswell v. Robbins*, 39 Ill. 209; *Silverthorne v. Brands*, 42 N. J. Eq. 703. And see *Boyd v. Foot*, 5 Bosw. (N. Y.) 110.

The burden of proof to establish a disposition for partnership purposes rests with the receiving partner. *Silverthorne v. Brands*, 42 N. J. Eq. 703.

If one partner refuses to assist in winding up and the other attempts to discharge his duty, he is not to be made to account primarily for the assets or charged on mere probabilities, when to do so would make him more answerable than the other who refused to perform his duty. *Hall v. Clagett*, 48 Md. 223.

A surviving partner is not chargeable with the accounts not collected in winding up in the absence of proof of negligence or bad faith. *Miller v. Jones*, 39 Ill. 54.

5. *Story v. Moon*, 3 Dana (Ky.) 331; *Randle v. Richardson*, 53 Miss. 176;

b. RETURN OF PREMIUM.—The consideration for a premium paid by a person for the privilege of becoming a member of a partnership is not only the creation of a partnership between the person who takes and the one who parts with the money but also the continuance of that partnership.¹ In case of a partnership at will, therefore, if the recipient of the premium exercises his right to dissolve at once or shortly afterwards he will be compelled to refund the whole or a part of the amount so paid.² And an option in a partnership contract, to terminate it on notice is a right to dissolve only and not also a right to retain the premium.³

If the partnership is to endure for a certain time and the partner receiving the premium does anything which determines the partnership before that time has elapsed he precludes himself from insisting upon his right to retain it.⁴ And the same rule applies not only where the partner receiving the premium has so misconducted himself as to give the partner paying it a right to have the partnership dissolved;⁵ but also where the dissolution is caused by disagreements for which neither partner is to blame.⁶

Where the dissolution is voluntary on the part of the paying partner, however, or where he himself rescinds the partnership agreement, without excuse and before the term is ended, he cannot avail himself of his own wrong and demand back the premium.⁷ So death is a contingency subject to which all persons

Phelan v. Hutchinson Phil. Eq. (N. Car.) 116; 93 Am. Dec. 603; McCrae v. Robeson, 2 Murph. (N. Car.) 127.

In Bush v. Guyon, 6 La. Ann. 798, it was held that the partner having possession of the book of accounts will be charged with the claims as cash, unless he shows due diligence by himself or insolvency of the debtors.

1. Lindley on Part. 71.

2. Featherstonhaugh v. Turner, 25 Beav. 382; Burdon v. Barkus, 4 De G. F. & J. 42. And see Rooke v. Nisbet, 50 L. J. Ch. 588; 29 W. R. 842. But see Walker v. Harris, 1 Anstr. 245; Gaty v. Tyler, 33 Mo. App. 494.

In Carlton v. Cummings, 51 Ind. 478, where no definite time for the continuance of a partnership had been agreed upon, it was held it may be dissolved at any time, at the option of any member of the firm. The fact that, upon entering into the partnership, one of the partners paid a bonus for a good will established by the other partner, will not prevent the latter from dissolving the partnership at any time, or render him liable to the former for damages for such dissolution.

3. Rooke v. Nisbet, 50 L. J. Ch. 588; 29 W. R. 842.

Where the partner who received the premium has a right to retire on notice, however, leaving the payer in possession of the premises and good will, no return of premium will be deemed to have been contemplated. Bond v. Milbourne, 20 W. R. 97.

4. Atwood v. Maude, 3 Ch. 369; Pollock on Part. 101; Lindley on Part. 72. And see cases hereafter cited in this section.

The terms of dissolution both as to a return of premium and the amount to be returned rest very largely in the discretion of the court. Edmonds v. Robinson, 29 Ch. Div. 170; Lyon v. Tweedell, 17 Ch. Div. 529.

5. Bullock v. Crockett, 3 Giff. 507; Atwood v. Maude, 3 Ch. 369; Astle v. Wright, 23 Beav. 77.

6. Atwood v. Maude, 3 Ch. 369; Pease v. Hewitt, 31 Beav. 22; Astle v. Wright, 23 Beav. 77.

The claim for the apportionment of the premium where the partnership is for a fixed term and is prematurely terminated by the recipient, is founded upon breach of contract; but in other cases it is treated as being founded upon a partial failure of consideration. Edmonds v. Robinson, 29 Ch. Div. 170.

7. See Edmonds v. Robinson, 29 Ch.

entering into a partnership are deemed to contract, and in case of dissolution by death no part of the premium is to be returned.¹ And a dissolution by bankruptcy, when unaccompanied by concealment or misrepresentation practiced upon the incoming partner, does not entitle the latter to a return of any part of the premium.²

Where the recipient of the premium was in a dangerous state of health and knew of the probability of his death, however, and conceals the fact, the fraud renders the premium in whole or in part returnable.³ And if the recipient of the premium sues out a commission in bankruptcy against his co-partner, thus causing a dissolution, he will be compelled to repay all the premium advanced by the latter and deliver up the securities for future installments.⁴ Any false and fraudulent misrepresentations whereby a person has been deluded into becoming a partner and paying a premium, entitles the wronged partner to disaffirm the contract and obtain a return of the whole of the money he has paid.⁵ The guilty partners are jointly and severally liable to repay the amount;⁶ and the defrauded partner has a lien upon the assets of the firm for such repayment.⁷ That the payer of the pre-

Div. 170; *Bluck v. Capstick*, 12 Ch. Div. 863; *Atwood v. Maude*, L. R., 3 Ch. App. 369.

Where dissolution is had by mutual consent the agreement controls, and a stipulation for the return of the premium will not be deemed to have been intended to be included. See *Lee v. Page*, 7 Jur., N. S. 768; 30 L. J., N. S., Ch. 867; *Durham v. Hartlett*, 32 Ga. 22.

In *Pease v. Hewitt*, 31 Beav. 22, however, a dissolution by agreement was had, but an apportionment was ordered.

Where dissolution by consent is had after a suit to dissolve and wind up has been commenced, an apportionment of premium may be ordered. *Bury v. Allen*, 1 Coll. 589; *Wilson v. Johnstone*, L. R. 16 Eq. 606; *Astle v. Wright*, 23 Beav. 77.

1. *Whimcup v. Hughes*, L. R., 6 C. P. 78; *Farr v. Pearce*, 3 Madd. 74.

2. See *Freeland v. Stansfield*, 2 Sm. & G. 479; *Akehurst v. Jackson*, 1 Swanst. 85; *Hamill v. Stokes*, 4 Price 161.

If no partnership was ever consummated and the payer of the premium has not been held out as a partner his premium is a debt, for which he can prove in bankruptcy against the estate of his co-partner. *Ex parte Turquand*, 2 M. D. & D. 339. And so if he became a partner, but the partnership was afterwards rescinded and he is excluded,

he can prove against the continuing partner's estate upon his subsequent bankruptcy. *Bury v. Allen*, 1 Coll. 589. But see *Ex parte Broome*, 1 Rose 169.

If a firm is dissolved by the bankruptcy of the partner who received the premium the paying partner continuing the business, he has a lien upon the assets of his bankrupt copartner for such part of the premium as may be found due him, the same as for any other item in the general balance. *Freeland v. Stansfield*, 2 Sm. & G. 479; *Mycock v. Beatson*, 13 Ch. Div. 184.

3. *Mackenna v. Parkes*, 36 L. J., Ch. 366; 15 W. R. 217.

4. *Hamill v. Stokes*, 4 Price 161.

5. *Richards v. Todd*, 127 Mass. 167; *Boughner v. Black*, 83 Ky. 521; *Hamill v. Stokes*, 4 Price 161; *Dan. 20*; *Phillans v. Harkness*; Coll. 442; *Freeland v. Stansfield*, 2 Sm. & G. 479; *Mackenna v. Parkes*, 36 L. J. Ch. 366; 15 W. R. 217; *Jauncey v. Knowles*, 29 L. J. Ch. 95; *Mycock v. Beatson*, 13 Ch. Div. 384; *Newbigging v. Adam*, 34 Ch. Div. 582.

Incompetency will not bar the right to the return of any part of the premium unless it caused injury to the firm. *Atwood v. Maude*, L. R. 3 Ch. App. 369; *Doer v. Yorke*, L. T., N. S. 289.

6. *Newbigging v. Adam*, 34 Ch. Div. 582.

7. *Mycock v. Beatson*, 13 Ch. Div.

mium was also in fault will not deprive him of the right to a return.¹

To ascertain the amount of premium to be returned the general rule is to apportion the amount paid with reference to the agreed and the actual duration of the partnership.² But this is subject to the agreement of the parties the circumstances of the case and the cause of loss in business.³

c. ALLOWANCE FOR COMPENSATION.—While a partner is entitled to no compensation, in the absence of agreement, for the performance of his duties as such,⁴ an intention to make an extra allowance need not appear by express agreement but may be implied from the course of the business or the circumstances of the case;⁵ though some of the cases have stated the rule that no com-

384; *Freeland v. Stansfield*, 2 Sm. & G. 479.

1. *Astle v. Wright*, 23 Beav. 77; *Pease v. Hewett*, 31 Beav. 22; *Mycock v. Beatson*, 13 Ch. Div. 384; *Bury v. Allen*, 1 Coll. 589.

The misconduct of the paying partner unless it is gross, will not deprive him of the right to an apportionment, the question as to what constitutes gross misconduct being one of fact for the decision of the trial court. *Brewer v. Yorke*, 46 L. T., N. S. 289. See *Bluck v. Capstick*, 12 Ch. Div. 863.

2. See *Willson v. Johnstone*, L. R., 16 Eq. 606; *Atwood v. Maude*, L. R., 3 Ch. App. 369; *Bury v. Allen*, 1 Coll. 589; *Astle v. Wright*, 23 Beav. 77; *Pease v. Hewett*, 31 Beav. 22; *Freeland v. Stansfield*, 2 Sm. & G. 479; *Aiery v. Borham*, 29 Beav. 620. See *Bullock v. Crockett*, 3 Giff. 507; *Hamil v. Stokes*, 4 Price 161.

No interest is allowed upon the amount to be returned, debts between partners bear no interest until ordered paid. *Astle v. Wright*, 23 Beav. 77.

Where the agreed partnership term was seven years but it was shortened by subsequent agreement to six and one-half years the proportionate part of the premium to be returned was measured by the latter time. *Wilson v. Johnstone*, L. R., 16 Eq. 606.

3. *Bates' Law of Part.*, § 809. And see *Bullock v. Crockett*, 3 Giff. 507; *Hamil v. Stokes*, 4 Price 461; *Jauncey v. Knowles*, 29 L. J. Ch. 95; *Kaler v. Hare*, I. B. & P., N. R. 260.

Fraud or gross misconduct is sufficient grounds for a reduction of the amount. *Astle v. Wright*, 23 Beav. 77.

Incompetency on the part of the payer causing an injury to the business is sufficient to cause a reduction

of the amount. *Brewer v. Yorke*, 46 L. T., N. S. 289.

4. See *infra*, this title, *Duties and Liabilities of Partners*; *Powers and Rights of Partners after Dissolution*; *Surviving Partners*.

5. *Levi v. Karrick*, 13 Iowa 344; *Lewis v. Moffett*, 11 Ill. 392; *Gage v. Parmelee*, 87 Ill. 329; *Godfrey v. White*, 43 Mich. 171; *Gaston v. Kellogg*, 91 Mo. 104; *Cramer v. Bachman*, 68 Mo. 310; *Emerson v. Durand*, 64 Wis. 111. And see *Haller v. Williamowicz*, 23 Ark. 566; *Lee v. Davis*, 70 Ind. 464; *Caldwell v. Leiber*, 7 Paige (N. Y.) 483; *Marsh's Appeal*, 69 Pa. St. 30; 8 Am. Rep. 206; *Spence v. Whitaker*, 3 Port. (Ala.) 297; *Mann v. Flanagan*, 9 Oregon 425; *Wilson v. Limeberger*, 83 N. Car. 524.

Where a partnership was induced by fraud, and is rescinded by a decree as void in its inception, the innocent partner may recover compensation for his services in winding up. *Richards v. Todd*, 127 Mass. 167.

Where one partner who was not obliged by his partnership contract to render any services, renders services on request, which could not have been expected from a partner, an agreement for compensation will be inferred. *Lewis v. Moffett*, 11 Ill. 392; *Godfrey v. White*, 43 Mich. 171; *Bradford v. Kimberly*, 3 Johns. Ch. (N. Y.) 431.

But an agreement giving one partner a certain salary as managing partner, which he has relinquished, upon rescinding the personal management, does not apply to him in winding up as surviving partner, for he is then acting on his own accounting for his own interest. *Anderson v. Taylor*, 2 Ired. Eq. (N. Car.) 420.

An agreement not to withdraw from

pensation can be allowed except upon express agreement.¹ An allowance for compensation is a part of the expenses of the business to be borne by all, including the recipient, and not to be taken out of the shares of the other partners or of the estate.² And its amount will be fixed in view of the opinion of experts, taking into consideration the time spent, the ability of the partner performing the services and the results of the work.³

A subsequent promise of extra compensation, however, unless the services were performed by request, is founded upon a past consideration, and is therefore invalid.⁴ A partner may be allowed compensation for services rendered to the firm in a capacity other than that of partner, no duty resting upon him to perform them.⁵

Where the partnership agreement requires a partner to devote his entire time to the partnership business and he willfully abandons it, throwing its burdens upon his co-partners, his share may

the business more than a certain amount per annum, is not an agreement for salary or compensation, but is a mere limit upon the power to withdraw, fixed for the protection of the capital against diminution. *Trump v. Baltzell*, 3 Md. 295.

1. *Lee v. Lashbrooke*, 8 Dana (Ky.) 214; *Bennett v. Russell*, 34 Mo. 524; *Mann v. Flanagan*, 9 Oregon 425; *Forrer v. Forrer*, 29 Gratt. (Va.) 134; *Weaver v. Upton*, 7 Ired. (N. Car.) 458; and see *Funk v. Haskill*, 132 Mass. 580; *Fuller v. Miller*, 105 Mass. 103.

Where compensation is expressly provided for in the articles of copartnership or elsewhere, no other or further or different allowance will be made. *Denver v. Roane*, 99 U. S. 355.

2. *Couch v. Woodruff*, 63 Ala. 466; *Askew v. Springer*, 111 Ill. 662; *Cook v. Phillips*, 16 Ill. App. 446; *Funk v. Haskill*, 132 Mass. 580; *Hills v. Bailey*, 27 Vt. 548; *O'Lone v. O'Lone*, 2 Grant's Ch. (Up. Can.) 125.

But where it was provided that if one partner failed to furnish a certain amount of labor, \$100 per annum was to be deducted from his share, such sum was regarded as a forfeit and not to be shared by him, as it was supposed to be to pay for labor in lieu of his own. *Frederick v. Cooper*, 3 Iowa 171.

An agreement on dissolution, that a certain sum is due one of the partners and that collections shall be applied to pay it, that the balance shall go to the co-partnership, must be construed to mean that his copartner owes him that

sum, not that the firm owes it. *Corning v. Grohe*, 65 Iowa, 328.

In *Heath v. Waters*, 40 Mich. 457, it was held that a transfer by an executrix to the surviving partner of an asset as compensation for winding up, was an illegal disposition of the estate and the recipient was compelled to account for it.

3. *Lewis v. Moffett*, 11 Ill. 392. And see *Hite v. Hite*, 1 B. Mon. (Ky.) 177; *Featherstonhaugh v. Turner*, 25 Beav. 387.

4. *Paine v. Thacher*, 25 Wend. (N. Y.) 450; *Butner v. Lemley*, 5 Jones Eq. (N. Car.) 148; and see *McBride v. Stradley*, 103 Ind. 465.

A subsequent promise was held to be available in proof of a prior intention to allow extra compensation where the active partner kept on working in *Cramer v. Bachman*, 68 Mo. 310.

One of two partners having, by the excessive use of stimulants, voluntarily disabled himself from performing service in the firm affairs, and thus cast upon his co-partner more than a due share of labor, his agreement after dissolution, but before full settlement and final division of the assets, to allow his co-partner, out of the assets, a specific sum per month for a definite number of months for past service, is not without consideration, but is supported by a strong moral obligation, which under Code Ga. is sufficient to render the agreement obligatory as a contract. *Gray v. Hamil*, 82 Ga. 375.

5. *Newland v. Tate*, 3 Ired. Eq. (N. Car.) 226; *Duff v. Maguire*, 107 Mass. 87.

be charged with the value of the services he should have rendered.¹ But absence or incapacity, on account of sickness is not a breach of such an agreement.²

d. ALLOWANCE FOR EXPENSES AND OUTLAYS.—Each partner is to be credited on accounting with all proper items of expense incurred by him on behalf of the firm within the scope of its business and in the proper exercise of his powers, as a partner,³ and outlays of a permanent character made upon property by the partnership in expectation of its continuance will be allowed for in case if its unexpected

1. *Nichol v. Stewart*, 36 Ark. 612; *Morrison v. Kramer*, 58 Ind. 38; *Leighton v. Hosmer*, 39 Iowa 594; *Noel v. Bowman*, 2 Litt. (Ky.) 46; *Funk v. Leachman*, 4 Dana (Ky.) 24; *Hartman v. Woehr*, 18 N. J. Eq. 383; *Marsh's Appeal*, 69 Pa. St. 30; 8 Am. Rep. 206; *Airey v. Borham*, 29 Beav. 620; *Bury v. Allen*, 1 Coll. 589; but see *Henry v. Basset*, 75 Mo. 89; *Murray v. Johnson*, 1 Head (Tenn.) 353; *Robinson v. Anderson*, 20 Beav. 98; *Thornton v. Proctor*, 1 Anstr. 94; *Hutcheson v. Smith*, 5 Ir. Eq. 117; and see *Weeks v. McClintock*, 50 Ark. 193.

Where one partner agrees to raise a crop of fruit upon a farm belonging to the other and gather the crop upon shares, but neglects to gather it thereby compelling the other partner to incur expense in procuring it to be done, the expense is chargeable to the delinquent partner. *Stegman v. Berryhill*, 72 Mo. 307.

A sum fixed upon as the estimated value of a partner's services, and which it was agreed should be deducted from the share of profits, going to his estate, belongs to the partnership, and not to the surviving partners. *In Re Laney*, 2 N. Y. Supp. 443.

2. See *Beast v. Firth*, L. R., 4 C. B. 1; *Robinson v. Davison*, L. R., 6 Ex. 269.

3. *Nichol v. Stewart*, 36 Ark. 612; *Brownell v. Steere*, 128 Ill. 209; *King v. Hamilton*, 16 Ill. 190; *Savage v. Carter*, 9 Dana (Ky.) 408; *Atherton v. Cochran* (Ky. 1880), 11 S. W. Rep. 301; *Stegman v. Berryhill*, 72 Mo. 307; *Coddington v. Idell*, 29 N. J. Eq. 504; *Thornton v. Proctor*, 1 Anstr. 194; *Ex parte Chippendale*, 4 De G. M. & G. 19; *Burden v. Barkus*, 4 De G. F. & J. 42. And see *Newell v. Humphrey*, 37 Vt. 265; *Burleigh v. White*, 70 Me. 130; *Young v. Barras*, 74 Mich. 543; *Pratt v. McHatton*, 11 La. Ann. 260;

Sweeney v. Neeley, 53 Mich. 421; *In re Beck's Estate* (Oregon, 1890), 24 Pac. Rep. 1038; *Buford v. Ashcroft*, 72 Tex. 104; *Mangold v. Grange*, 70 Wis. 575; *Withers v. Withers*, 8 Pet. (U. S.) 355.

In *Richardson v. Wyatt*, 2 Desaus. (S. Car.) 471, a partner who kept the house was allowed his expenditures for boarding the hands employed by the firm.

The fact that defendant, plaintiff's partner, managed the firm business, while plaintiff gave it but little attention, does not authorize the entire salary of the firm's clerk to be charged against plaintiff. *Brownell v. Steere*, 128 Ill. 209.

In *Brigham v. Dana*, 29 Vt. 1, where one partner was sent out to dig gold, the expenses of his sickness on the way home are to be allowed, but he is not entitled to an allowance for his time while so delayed.

Compensation for the children of the partner who have acted as employees is to be allowed when reasonable. *Zimmerman v. Huber*, 29 Ala. 379. *Wilson v. Lineburger*, 83 N. Car. 524; *Lyman v. Lyman*, 2 Paine (U. S.) 11. Even though the partner who hires the children is receiving a salary as manager. *Wilson v. Lineburger*, 83 N. Car. 524.

Where a partner, in winding up, employs one of his own clerks at \$2 per day he cannot charge more because the clerk was worth \$4. *Porter v. Wheeler*, 37 Vt. 281. Nor can he charge more when he has settled with a debtor at the reduced price. *Boyd v. Foot*, 5 Bosw. (N. Y.) 110.

In *Mumford v. Murray*, 6 Johns. Ch. (N. Y.) 1, the expenses of a partner were disallowed where the agreed compensation he was to receive for the services in which they were incurred was very generous.

termination.¹ But expenses which are both unauthorized and unnecessary, cannot be charged to the firm,² though such an expense will be allowed if made at the request or with the assent of all the partners.³ Expenses incurred for the preservation of the partnership property will be allowed,⁴ and expenses necessarily incurred by a surviving or liquidating partner in winding up must be allowed him,⁵ as well as those of a partner continuing the

1. *Burden v. Barkus*, 3 Giff. 412. And see *Dunnell v. Henderson*, 23 N. J. Eq. 174.

The survivor of two partners is not to be charged in behalf of the decedent's estate for gains or losses resulting to the business from changes or improvements which had been entered upon with the consent and at the expense of both, but which one did not live to obtain the benefit of. *Chittenden v. Witbeck*, 50 Mich. 402.

2. *Zimmerman v. Huber*, 29 Ala. 379; *Rodes v. Rodes*, 6 B. Mon. (Ky.) 400; *Moore's Appeal* (Pa. 1890), 19 Atl. Rep. 753; *Buford v. Ashcroft*, 72 Tex. 104. And see *Messerve v. Andrews*, 106 Mass. 419; *Tillotson v. Tillotson*, 34 Conn. 335.

Even though by the custom of the house a partner could use its credit to secure his private debts, yet if he borrows money at excessive interest to redeem such credit he must bear the excess of such interest. *Tomlinson v. Ward*, 2 Conn. 396.

Where a surviving partner contracted a usurious obligation to another firm in which the estate of the deceased partner had an interest and the heir paid it, no objection having been interposed by the surviving partner, the latter was allowed to charge the estate with the usury to the extent that it received the benefit of it only. *Berry v. Folkes*, 60 Miss. 576.

In a suit for partnership accounting, if the services of an expert are necessary in the examination of the partnership books, he should be appointed by and act under the directions of the court, and neither party is entitled to charge as costs the expense of an expert privately employed. *Faulkner v. Hendy*, 79 Cal. 265.

3. *Gleadow v. Hull Glass Co.*, 13 Jur. 1020; *Onderdonk v. Hutchinson*, 6 N. J. Eq. 632; *Leserman v. Bernheimer*, 113 N. Y. 39. And see *Buford v. Ashcroft*, 72 Tex. 104.

Where, upon dissolution, one partner agrees to take all the real estate and

assume certain debts, all other debts to be paid out of collections, taxes on the real estate are a charge upon the joint fund. *Young v. Clute*, 12 Nev. 31.

4. *Conrad v. Buck*, 21 W. Va. 396; *Downs v. Jackson*, 33 Ill. 464. And see *Burden v. Barkus*, 4 De G. F. & J. 42; *Ex parte Chippendale*, 4 De G. M. & G. 19.

Expenses incurred by a partner for the purpose of restoring partnership property after its destruction, if against the will of the co-partners, will not be allowed. *Stebbins v. Willard*, 53 Vt. 665.

A member of a firm who pays out money for the purpose of buying an outstanding title, at the request of the other members, or in order to better protect the interests of the firm, under certain contracts for the prosecution of suits which the title effects, is entitled to contribution from the other members. *Burgess v. Badger*, 124 Ill. 288.

5. *Tillotson v. Tillotson*, 34 Conn. 335; *O'Reilly v. Brady*, 28 Ala. 530; *Washburn v. Goodman*, 17 Pick. (Mass.) 519; *Brownell v. Steere*, 29 Ill. App. 358; *affi.*, 128 Ill. 209; *Griffey v. Northcutt*, 5 Heisk. (Tenn.) 746; *Burden v. Burden*, 1 Ves. & B. 172.

The expenses and costs of an unsuccessful defense by a surviving partner to an action to collect a claim adjudged to be just should be allowed as a charge on the partnership estate, if he resisted in good faith and exercised ordinary prudence, but if he knew the claim was good and could have compromised it at less than the recovery he can only be allowed the lowest sum for which it could have been settled. *Lee v. Dolan*, 39 N. J. Eq. 193.

A partner who undertakes to wind up the firm business stands in the place of an executor and can establish disbursements only by vouchers properly authenticated. *Clements v. Mitchell*, Phill. Eq. (N. Car.) 3; 93 Am. Dec. 603.

business after dissolution, when incurred for the mutual benefit.¹ So, a partner is entitled to charge the firm with whatever he may have been compelled to pay in respect to its debts,² or in respect to obligations incurred by him alone at the request of the firm, which he is compelled to pay.³ A partner is required to make known the particulars of his outlays. He cannot charge the firm for secret service money.⁴

e. ALLOWANCE FOR INTEREST.—Partners are not as a general rule entitled to interest on the capital respectively contributed by them.⁵ Thus, if one partner is to contribute the entire capital and the other his time and skill only, no allowance for interest can be made him.⁶ Nor is one partner entitled to interest upon the excess of capital which he has contributed more than the other.⁷ Nor on additional capital subsequently contributed.⁸

1. Gyger's Appeal, 62 Pa. St. 73; 1 Am. Rep. 382; Mellersh v. Keen, 27 Beav. 236; Airey v. Borham, 29 Beav. 620.

2. Prole v. Masterman, 21 Beav. 61; and see Scott v. Bryan, 96 N. Car. 289.

Where a partner sacrifices a debt due to himself in order to enable the firm to obtain a debt due to it he should be allowed the amount sacrificed upon accounting. Lefroy v. Bore, 1 J. & L. 571.

3. Croxton's Case, 5 De G. & S. 432; Sedgwick's Case, 2 Jur., N. S. 949; Gleadow v. Hull Glass Co., 13 Jur. 1020. And see Hutchinson v. Onderdonk, 6 N. J. Eq. 277.

Debts of a deceased partner paid by one of the survivors by consent of all the heirs may be charged against his capital retained in the business. Robinson v. Simmons, 146 Mass. 167.

4. See Chandler v. Allen, 20 Hun (N. Y.) 424; Harvey v. Varney, 104 Mass. 436; Young v. Barras, 74 Mich. 343; East India Co. v. Blake, Finch 117; York etc. R. Co. v. Hudson, 16 Beav. 485.

Disbursements not made in the name of the firm must be affirmatively shown to have been beneficial to it. Rodes v. Rodes, 6 B. Mon. (Ky.) 400.

Upon a bill in equity between partners to wind up a partnership, one of them who neglects or refuses to account fully for business of the firm, done by himself in a foreign jurisdiction, cannot, as a penalty, be denied his reasonable expenses of doing it, or sums otherwise owing to him from the firm, or be charged with interest with annual rests on actual or estimated balances in his hands. Harvey v. Varney, 104 Mass. 436.

5. Lindley on Part. 786.

Where the evidence is conflicting as to what the agreement is as to interest and commissions the claim is properly disallowed. Clark v. Pierce, 74 Mich. 638.

Rent.—It is error after dissolution of the firm by the insolvency of plaintiff's assignor to charge defendants for rent of a mill contributed to the use of the firm by defendants, and which, by the articles, was to revert to them on dissolution. Tennant v. Guy (Supreme Ct.), 3 N. Y. Supp. 697.

6. Tirrell v. Jones, 39 Cal. 655; Day v. Lockwood, 24 Conn. 185; Osborn v. Green, 5 Mackey (D. C.) 189; Tutt v. Land, 50 Ga. 339; Lee v. Lashbrooke, 8 Dana (Ky.) 214; Jackson v. Johnson, 11 Hun (N. Y.) 509; Sanford v. Barney, 50 Hun (N. Y.) 108; Stevens v. Cook, 5 Jur., N. S. 1415; Rishton v. Grissell, L. R., 5 Eq. 326; Jardine v. Hope, 19 Grant's Ch. (Up. Can.) 76.

This rule is no doubt attributable to the old notions on the subject of usury; but although the usury laws are abolished, the rule remains, and the consequence is that interest is frequently not payable by law when in justice it ought to be. Lindley on Part. 786.

7. Dasha v. Smith, 20 Ala. 747.

Where two of three partners are to put in all the money the amount of which is not limited they cannot charge interest on money borrowed in their own names to put into the partnership business. Topping v. Paddock, 92 Ill. 92.

8. Cooke v. Benbow, De Gex & S. 1; but see Hartman v. Woehr, 18 N. J. Eq. 383; Jardine v. Hope, 19 Grant's Ch. (Up. Can.) 76.

But where one partner has brought in his stipulated amount and the other has not in the absence of agreement express or implied, the former is usually, though not always, allowed interest on his excess.¹

It is competent for the partners to agree, however, either in the articles or subsequently, that capital shall draw interest.² Such an agreement is not affected by the usury laws, and the agreement may therefore be for interest in excess of the legal rate.³ But such an agreement ceases to operate at dissolution, and the interest ceases at that time;⁴ though if there is unreasonable

So under ordinary circumstances a partner is not charged with interest on sums drawn out by him or advanced to him. *Cooke v. Benbow*, 3 De G. J. & Sm. 1. *Meymott v. Meymott*, 31 Beav. 145.

1. *Reynolds v. Mardis*, 17 Ala. 32; *Ligare v. Peacock*, 109 Ill. 94; *Montague v. Hayes*, 10 Gray (Mass.) 609; *Hartman v. Woehr*, 18 N. J. Eq. 383; and see *Turnipseed v. Goodwin*, 9 Ala. 372. See to the contrary *Clark v. Warden*, 10 Neb. 87; *Stokes v. Hodges*, 11 Rich. Eq. (S. Car.) 135; *Wilson v. McCarthy*, 25 Grant's Ch. (Up. Can.) 52.

An agreement for payment of interest on excess of contribution implies that interest shall be charged for a deficiency, and therefore the partners are entitled to share in the profits in proportion to their agreed contributions, subject to payment of interest on deficiency rather than in proportion to their actual contributions. *In Re Laney* (Supreme Ct.), 3 N. Y. Supp. 443.

2. See *Gilholly v. Hart*, 8 Daly (N. Y.) 176; *Millar v. Craig*, 6 Beav. 433; *Pim v. Harris*, Irish Rep. 10 Eq. 442; *Pratt v. McHatton*, 11 La. Ann. 260; *Lloyd v. Carrier*, 2 Lans. (N. Y.) 334; *Wells v. Babcock*, 56 Mich. 276.

Whether an agreement to allow interest on balances means interest on capital while used or interest on advances until they are repaid is a question of an intention of the parties. *Bradley v. Brigham*, 137 Mass. 545.

If the partner entitled to interest receives most of the proceeds of sales which are practically identical with his advances he will only be allowed interest upon the difference between the proceeds received and the amounts advanced. *Wells v. Babcock*, 56 Mich. 276.

A prior agreement to advance such sums as shall be necessary does not indicate an intention not to charge in-

terest where the intention was merely that the objects of the firm should not fail for want of money. *Berry v. Folkes*, 60 Miss. 576.

On partnership accounting, a finding that no agreement for payment of interest existed will be set aside where there was in evidence a written settlement up to a certain date between the parties by which they accepted the books, which showed an allowance of interest as correct. *Bullock v. Bemis* (Supreme Ct.), 3 N. Y. Supp. 390.

3. *Campbell v. Coquard*, 16 Mo. App. 552; *Cunningham v. Green*, 23 Ohio St. 296; *Coleman v. Garlington*, 2 Spears (S. Car.) 238.

Partners in the banking business agreed that each should be allowed six and one-half per cent. interest annually on the average amount of his deposits, and should be charged ten per cent. on the amount of his over-drafts. *Held* not usurious. *Payne v. Freer*, 91 N. Y. 43; 43 Am. Rep. 640.

4. *Bradley v. Brigham*, 137 Mass. 545; *Johnson v. Hartshorne*, 52 N. Y. 173; *Leserman v. Bernheimer*, 113 N. Y. 39; *Watney v. Wells*, L. R., 2 Ch. App. 250; *Barfield v. Loughborough*, L. R., 8 Ch. App. 1; *Pilling v. Pilling*, 3 De G. J. & Sm. 162; *Wilson v. McCarty*, 25 Grant's Ch. (Up. Can.) 152; and see *Turner v. Turner* (Ky. 1889), 5 S. W. Rep. 457.

Where partners having agreed that one contributing more than his share of the capital stock should be allowed interest on the amount so contributed, and, pursuant to a previous agreement, the partnership is continued after the death of one of the partners, his administrator may rightfully allow the excess which his intestate had in the business at the time of his death to remain at the stipulated rate of interest. *In re Laney* (Supreme Ct.), 2 N. Y. Supp. 443.

delay in winding up and repaying capital interest may be thereafter allowed.¹

Advances or loans made by one partner, however, are not capital, and bear interest the same as a loan from a third person.² And the same rule applies to advances made by the payment of debts after dissolution.³ But the mere fact of an advance is not enough, as the other partners may not wish to be borrowers, there must also be either an agreement, a usage or an understanding to entitle a partner to interest upon his advance.⁴ Profits ascertained and apportioned are not entitled to draw interest.⁵ While each case must stand upon its own peculiar circumstances,⁶ as a general rule no interest is allowed upon a partnership accounting prior to the final ascertainment of the balances due each partner, not even on money in one partner's hands,⁷ nor on sums

1. *Bradley v. Brigham*, 127 Mass. 545; *Johnson v. Hartshorn*, 52 N. Y. 173; and see *Reybold v. Dodd*, 1 Harr. (Del.) 401.

But where some of the partners had, with the consent of the others, so largely overdrawn as to impair the capital, and thus contributed to its insolvency, but with no such intent, all the partners supposing the firm to be prosperous, no interest was allowed. *McCormick v. McCormick*, 7 Neb. 440.

2. *Baker v. Mayo*, 129 Mass. 517; *Young v. Barras*, 74 Mich. 343; *Berry v. Folkes*, 60 Miss. 576; *Morris v. Allen*, 14 N. J. Eq. 44; *Coddington v. Idell*, 29 N. J. Eq. 504; *Lloyd v. Carrier*, 2 Lans. (N. Y.) 364; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587; *Hodges v. Parker*, 17 Vt. 242; 44 Am. Dec. 331; *Emerson v. Durand*, 64 Wis. 111; *Davidson v. Thirkell*, 3 Grant's Ch. (Up. Can.) 330; *In re Cleverdon*, 4 Ont. App. 185; *Ex parte Chippendale*, 4 De G. M. & J. 19; *Hart v. Clarke*, 6 De G. M. & G. 232; *In re Norwich Yarn Co.*, 22 Beav. 143; *Troup's Case*, 29 Beav. 353; *In re Bulah Park Estate*, L. R. 15 Eq. 43; and see *McMillan v. James*, 105 Ill. 195.

3. *Collender v. Phelan*, 79 N. Y. 336; *Dougherty v. Van Nostrand*, 1 Hoffm. Ch. (N. Y.) 68; *Sangston v. Hack*, 52 Md. 173; *Gyger's Appeal*, 62 Pa. St. 73; 1 Am. Rep. 382; *Edwards v. Remington*, 60 Wis. 33.

Where, on a bill for dissolution of partnership, the firm's condition was stated to be "for capital invested therein by complainants jointly \$33,416.57; for capital invested therein by James alone, \$20,295.70," but it

appeared that James paid the said sum to save the firm from foreclosure, it was held, that he was entitled to interest. *McMillan v. James*, 105 Ill. 194.

4. See *Prentiss v. Elliot*, 72 Ga. 154; *Godfrey v. White*, 43 Mich. 171; *Holloway v. Turner*, 61 Md. 217; *Miller v. Lord*, 11 Pick. (Mass.) 11; *Morris v. Allen*, 14 N. J. Eq. 44; *Jones v. Jones*, 1 Ired. Eq. (N. Car.) 332; *Lee v. Lashbrooke*, 8 Dana (Ky.) 214; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587.

In *Miller v. Lord*, 11 Pick. (Mass.) 11, the court by WILDE, J. said: "The general principle is that when there is no agreement to pay interest none can be charged until the principal sum falls due; for if interest is not included in the terms of the contract, it can only be claimed as damages for the detention of the debt."

5. *Dinham v. Bradford*, L. R. 5 Ch. App. 519; and see *Merriwether v. Hardeman*, 51 Tex. 436.

6. See *Buckingham v. Ludlum*, 29 N. J. Eq. 345; *Johnson v. Hartshorne*, 52 N. Y. 173; *Beacham v. Eckford*, 2 Sandf. Ch. (N. Y.) 116; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587; *Gyger's Appeal*, 62 Pa. St. 73; 1 Am. Rep. 382; *Dexter v. Arnold*, 3 Mason (U. S.) 284.

7. *Prentice v. Elliott*, 72 Ga. 154; *Taylor v. Peterson*, 1 Idaho, N. S. 513; *Moss v. McCall*, 75 Ill. 190; *Gage v. Parmelle*, 87 Ill. 329; *Cooper v. McNeill*, 14 Ill. App. 408; *Bowling v. Dobyns*, 5 Dana (Ky.) 434; *Taylor v. Young*, 2 Bush (Ky.) 428; *Hilligsberg v. Burthe*, 6 La. Ann. 170; *Sweeny v. Neely*, 53 Mich. 421; *Gregory v. Mene-*

withdrawn by consent and appropriated.¹ But as soon as the balances are ascertained the partner having an amount in excess of his share in his hands should pay it, and interest begins to run at once.²

The misconduct of the partner, however, charges him with interest even before the balance is struck; thus a partner who has delayed or neglected to compute the amount due or unreasonably neglects to proceed with the winding up or division is chargeable with the interest upon a balance in his hands,³ and is precluded from recovering interest upon a balance in the hands of

fee, 83 Mo. 413; *Buckingham v. Ludlum*, 29 N. J. Eq. 345; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587; *Holden v. Peace*, 4 Ired. Eq. (N. Car.) 223; *Brown's Appeal*, 89 Pa. St. 139; *Brown's Estate*, 11 Phila. (Pa.) 127; *McKay v. Overton*, 65 Tex. 82; *Waggoner v. Gray*, 2 Hen. & M. (Va.) 603; *Gilman v. Vaughan*, 44 Wis. 646; *Meymott v. Meymott*, 31 Beav. 445; *Cooke v. Benbow*, 3 De G. J. & Sm. 1; *Turner v. Burkinshaw*, L. R., 2 Ch. App. 488; *Stevens v. Cook*, 5 Jur. N. S. 1415; *Dexter v. Arnold*, 3 Mason (U. S.) 384.

Interest on a partner's share of the loss of capital invested in the partnership business is not demandable by the estate of a deceased partner until an account is stated of the partnership losses. *Juilliard v. Oren*, 70 Md. 465.

Where an agreement between partners on dissolution, by which B was to pay notes and accounts, contemplated that the sum which B stipulated to pay should be paid at once, he was not entitled to credit for sums paid as interest maturing after the making of the agreement. *Buford v. Ashcroft*, 72 Tex. 104.

1. *McCall v. Moss*, 112 Ill. 493; *Miller v. Lord*, 11 Pick. (Mass.) 11; *McCormick v. McCormick*, 7 Neb. 440; *In re Cleverton*, 4 Ont. App. 185; but see to the contrary *Gridley v. Conner*, 2 La. Ann. 87.

Where heirs were allowed to surcharge and falsify a partnership account between their intestate and the defendant interest was refused on the errors in the accounts, which were owing to the mistakes of both parties, there having been no want of good faith and no habit of charging interest between the parties. *Dexter v. Arnold*, 3 Mason (U. S.) 284.

2. *McCall v. Oliver*, 1 Stew. (Ala.) 510; *Clark v. Dunnam*, 46 Cal. 205;

Sanderson v. Sanderson, 20 Fla. 292; *Monrain v. Delamre*, 4 La. Ann. 78; *Hilligsberg v. Burthe*, 6 La. Ann. 170; *Beacham v. Eckford*, 2 Sandf. Ch. (N. Y.) 116; *Holden v. Peace*, Ired. Eq. (N. Car.) 223.

In *Sanderson v. Sanderson*, 20 Fla. 292, it was held that a surviving partner is chargeable with interest from the time the master ascertains the balance against him, although the suit is still progressing.

In *Stoughton v. Lynch*, 2 Johns. Ch. (N. Y.) 209, it was held that the date of dissolution is the time from which the balances should bear interest.

Where one partner is an alien and the settling partner pays his share into the treasury under confiscation acts he is not liable for interest upon it, whatever may be the effect upon the alien partner. *McMair v. Ragland*, 1 Dev. Eq. (N. Car.) 516.

Interest on an amount found due to one partner upon settlement of partnership transactions in a suit brought for the purpose should be allowed only from the beginning of the suit, there being many items in dispute, and no agreement having been made as to interest. *Carroll v. Little*, 73 Wis. 52.

A partner who upon dissolution of the firm is paid a sum on account of partnership profits, afterwards found to be more than is due him, is chargeable with interest on the excess from its receipt. *Atherton v. Cochran* (Ky. 1888), 9 S. W. Rep. 519.

3. *Russell v. Green*, 10 Conn. 269; *Derby v. Gage*, 38 Ill. 27; *Pearce v. Pearce*, 77 Ill. 284; *Scroggs v. Cunningham*, 81 Ill. 110; *Cooper v. McNeill*, 14 Ill. App. 408; *Hite v. Hite*, 1 B. Mon. (Ky.) 77; *Bowling v. Dobyns*, 5 Dana (Ky.) 434; *Honore v. Colmesnil*, 7 Dana (Ky.) 199; *Taylor v. Young*, 2 Bush (Ky.) 428; *Washburn v. Goodman*, 17 Pick. (Mass.)

his co-partner.¹ So if a partner mingles the assets with his own for his private benefit or has willfully misappropriated them, he is chargeable,² as well as where he willfully conceals or understates the amount due to his co-partner.³

When interest is allowed, whether on capital or advances, the interest will not be capitalized or compounded;⁴ though, in case

519; *Dunlap v. Watson*, 124 Mass. 305; *Crabtree v. Randall*, 133 Mass. 552; *Bradley v. Brigham*, 137 Mass. 545; *Wells v. Babcock*, 56 Mich. 276; *Buckingham v. Ludlum*, 29 N. J. Eq. 345; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587; *Dimond v. Henderson*, 47 Wis. 172; *Simpson v. Feltz*, 1 McCord Eq. (S. Car.) 213; *Hutcheson v. Smith*, 5 Irish Eq. 117. And see *Evans v. Coventry*, 8 De G. M. & G. 835.

Where both partners are equally remiss neither can demand interest. *Beacham v. Eckford*, 2 Sandf. Ch. 116; and see *Donahue v. McCosh* 70 Iowa 733.

Where one partner bought out the other at a price payable out of money to be realized out of the disposition of the assets, nothing being said as to interest, and one of them failed to try to convert the assets into money and the other made no demand no interest was allowed. *Whitney v. Burr*, 115 Ill. 289.

Where a partner has been compelled to pay creditors by reason of a delay caused by himself he has forfeited his right to interest upon the amount paid, though a mere delay to render accounts does not necessarily have this effect. See *Winsor v. Savage*, 9 Met. (Mass.) 346; *Boddan v. Ryley*, 1 Bro. C. C. 239.

1. *Forward v. Forward*, 6 Allen (Mass.) 494; *O'Lone v. O'Lone*, 2 Grant's Ch. (Up. Can.) 125.

In *Gilman v. Vaughan*, 44 Wis. 646, where a large number of machines had been sold by one partner and he had received and enjoyed the receipts for several years, but the other had had the proceeds of a few of them, and the delay in settlement was partly due to his neglect, it was held that the rule disallowing interest should be applied.

2. *Solomon v. Solomon*, 2 Ga. 18; *Sanders v. Scott*, 68 Ind. 130; *Turner v. Otis*, 30 Kan. 1; *Moon v. Story*, 8 Dana (Ky.) 226; *Crabtree v. Randall*, 133 Mass. 552; *Dunlap v. Watson*, 124 Mass. 305; *Coddington v. Idell*, 30 N. J. Eq. 504; *Buckingham v. Ludlum*, 29 N. J. Eq.

345; *Wilson v. McCarty*, 25 Grant's Ch. (Up. Can.) 152. And see *Lee v. Craig*, 1 A. K. Marsh. (Ky.) 177.

A mere deposit of the firm's money with his own funds may not be such misconduct as to preclude the depositor from claiming the agreed interest on balances in his favor. *Baker v. Mayo*, 129 Mass. 517.

Where one partner totally excludes another from the partnership business he is chargeable with interest on the balance due his co-partner. *Moon v. Story*, 8 Dana (Ky.) 226.

If a part of the co-partners refuse to concede to another partner the right to assign his interest in the firm, and exclude the assignee, and withhold the assets from him, they are chargeable with interest on the amount due him. *Marquand v. New York Mfg. Co.*, 17 Johns. (N. Y.) 525.

On a bill by one partner against another, for an account after a dissolution, it appeared that the complainant never advanced any capital; and that his whole interest consisted in his share of the profits of the concern, it was held that though the defendant continued the business after the dissolution as before, the share of the complainant not being paid to him, he should pay interest to the complainant on his share, and not a share of the profits which accrued subsequently to the dissolution. *Reybold v. Dodd*, 1 Harr. (Del.) 401.

3. *Dunlap v. Watson*, 124 Mass. 305; *Simpson v. Feltz*, 1 McCord Eq. (S. Car.) 213.

If a partner collects a sum of money after dissolution but does not use it for private purposes he cannot be charged with interest. *Hollaway v. Turner*, 61 Md. 217.

When a partner asks affirmative relief he may be required to pay interest as a condition of granting, if justice requires it. *Cooper v. McNeill*, 14 Ill. App. 408. And see *Perens v. Johnson*, 3 Sm. & G. 419.

4. *Colgin v. Cummins*, 1 Port. (Ala.) 148; *Sanderson v. Sanderson*, 17 Fla. 820; *McCall v. Moss*, 112 Ill. 493; *Sangston v. Hack*, 52 Md. 173; *Wells*

of bad faith, annual rests will be made, thus compounding the interest.¹ The rate of interest allowed is the ordinary and not the conventional one.²

f. SECRET PROFITS, OR PROFITS MADE AT THE EXPENSE OF THE FIRM.—If a partner uses the funds of the firm in his private speculations, or invests them in property for his own use, or acquires a private advantage by a misuse of the credit of the firm, he is accountable to his co-partners for any profits thereby acquired as well as for all losses suffered;³ and his partners may elect to follow and claim the property in which the funds are invested into the hands of any one but a *bona fide* purchaser.⁴ Any business carried on by a partner in competition with that of the firm, renders him accountable to them for all the profits thereby made.⁵

v. Babcock, 56 Mich. 276; Johnson *v.* Hartshorne, 52 N. Y. 173.

In the settlement of a partnership account, where one partner has advanced money to the firm, to be paid back with interest, the application of partial payments will be made in the same manner as in the other contracts, *i. e.*, first to the extinguishment of interest, and then to the principal. Stewart *v.* Stebbins, 30 Miss. 66.

1. Heath *v.* Waters, 40 Mich. 457; Pomeroy *v.* Benton, 77 Mo. 64; Stoughton *v.* Lynch, 1 Johns. Ch. (N. Y.) 467; Johnson *v.* Hartshorne, 52 N. Y. 173; and see Colgin *v.* Commins, 1 Port. (Ala.) 148.

A partner will not be charged with compound interest for a mere neglect or refusal to account. Harvey *v.* Varney, 104 Mass. 436.

2. Mourain *v.* Delamre, 4 La. Ann. 78; Pratt *v.* McHatton, 11 La. Ann. 260. And see Millandon *v.* Sylvestre, 8 La. 262.

3. Love *v.* Carpenter, 30 Ind. 234; Scruggs *v.* Russell, McCahon (Kan.) 39; Anderson *v.* Whitlock, 2 Bush (Ky.) 398; McAdams *v.* Hawes, 9 Bush (Ky.) 15; Brown *v.* Shackelford, 53 Mo. 122; Pomeroy *v.* Benton, 57 Mo. 531; 14 Am. Law Reg., N. S. 306; Shaler *v.* Trowbridge, 28 N. J. Eq. 595; Partridge *v.* Wells, 30 N. J. Eq. 176; Stoughton *v.* Lynch, 1 Johns. Ch. (N. Y.) 476; 2 Johns. Ch. (N. Y.) 209; Herrick *v.* Ames, 8 Bosw. (N. Y.) 115; Potter *v.* Moses, 1 R. I. 430.

Where one partner procures insurance on partnership property and with partnership funds in his own name, and for his own benefit he must account for it to the firm. Tebbetts *v.* Dearborn, 74 Me. 392.

In Murrell *v.* Murrell, 33 La. Ann. 1233, it was held that where one partner embarks firm assets in another firm, his co-partner is not entitled to profits but to damages only.

If one partner stipulates clandestinely with third parties for profits or advantages to himself, his co-partner is entitled to share therein. Kilbourn *v.* Latta, 5 Mackey (D. C.) 304; 60 Am. Rep. 373.

4. Shinn *v.* McPherson, 58 Cal. 596; Kayser *v.* Maugham, 8 Colo. 339; Smith *v.* Ramsey, 6 Ill. 373; Renfrow *v.* Pearce, 68 Ill. 125; Croughton *v.* Forrest, 17 Mo. 131; Evans *v.* Gibson, 29 Mo. 223; Catron *v.* Shepherd, 8 Neb. 308; Holdrege *v.* Gwynne, 18 N. J. Eq. 26; Shaler *v.* Trowbridge, 28 N. J. Eq. 595; Partridge *v.* Wells, 30 N. J. Eq. 176; Coder *v.* Huling, 27 Pa. St. 84; Howell *v.* Howell, 15 Wis. 55; Miller *v.* Price, 20 Wis. 117; Bergeron *v.* Richardotte, 55 Wis. 129; Kelley *v.* Greenleaf, 3 Story (U. S.) 93; Prentiss *v.* Brennan, 1 Grant's Ch. (Up. Can.) 484.

In Cheesemen *v.* Sturges, 6 Bosw. (N. Y.) 520, where one person conveyed property to another in trust, to erect an ice house on it, and carry on business in partnership with him, but not to dispose of it, except on mutual consent, and the trustee, on the mistaken supposition of consent, exchanged the property for stock in a corporation, the other partner is entitled to elect to affirm the transaction and receive a share of the stock on paying the trustee for the advance made by him, or to dissent and charge the trustee with the value of the property sold. But he cannot charge the trustee with the stock at its face value.

5. Kilbourn *v.* Latta, 5 Mackey (D.

While there is no presumption that dealings by a partner on his own account, which do not compete with the business of the firm, are upon its behalf,¹ when a partner has agreed to engage in no other business, he is liable in damages on accounting to his co-partner for so doing.² A continuance of the business with partnership assets or an embarking in new ventures with the capital of his associates by one partner, after dissolution, in whatever manner it may have been effected, renders him accountable to his co-partners,³ and all profits made on continuing con-

G.) 304; *Todd v. Rafferty*, 30 N. J. Eq. 254; *Bast's Appeal*, 70 Pa. St. 301; *McMahon v. McClernan*, 10 W. Va. 419.

Shipments made by one partner to another, who is at a distance, made in the ordinary course of business, will be deemed to be on their joint account, unless the contrary is conclusively shown. *The Francis*, 1 Gall. (U. S.) 618; *The San Jose Indiano*, 2 Gall. (U. S.) 268.

Where a number of the partners exclude another of their number, denying that he is a partner, subsequent purchases made by them inure to his benefit. *Settembre v. Putnam*, 30 Cal. 490.

In *Fletcher v. Ingram*, 46 Wis. 191, co-partners were held liable for conversion of money used by one partner to make purchases.

1. See *Drew v. Beard*, 107 Mass. 64; *Sanderson v. Sanderson*, 17 Fla. 820.

A partner is not bound to account for his share of commissions paid to another firm of which he is a member, on an employment made with the consent of his co-partners. *Freck v. Blakiston*, 83 Pa. St. 474.

2. *Moritz v. Peebles*, 4 E. D. Smith (N. Y.) 135; *Dean v. McDowell*, 8 Ch. Div. 345.

Where two attorneys are partners and sales of railroad stock on commission are included in their business by custom, each partner is entitled to share in the commissions earned by the other. *Sanderson v. Sanderson*, 20 Fla. 292.

Where, pursuant to a written contract of partnership, one partner furnishes the other with money to go to California to dig gold, and when he arrives there, he goes into a trading business from which profits are derived, it will be regarded as for their joint benefit, and he will be required to account for such profits. *Brigham v. Dana*, 29 Vt. 1.

3. *Bernie v. Vandever*, 16 Ark. 616; 17 C. of L.—78

Stephens v. Orman, 10 Fla. 9; *Shiddell v. Messick*, 4 B. Mon. (Ky.) 157; *Goodburn v. Stephens*, 5 Gill (Md.) 1; *Freeman v. Freeman*, 136 Mass. 260; *Chittenden v. Witbeck*, 50 Mich. 401; *Mayson v. Beazley*, 27 Miss. 106; *Long v. Majestre*, 1 Johns. Ch. (N. Y.) 305; *Ogden v. Astor*, 4 Sanf. (N. Y.) 311; *Skidmore v. Collier*, 8 Hun (N. Y.) 50; *Parker v. Broadbent*, 134 Pa. St. 322; *Fithian v. Jones*, 12 Phila. (Pa.) 201; *Brown's Appeal*, 89 Pa. St. 139; *Hay's Appeal*, 91 Pa. St. 265; *Potter v. Moses*, 1 R. I. 430; *Fitzpatrick v. Flannagan*, 106 U. S. 648; *In re Clapp* 2 Low. (U. S.) 168; *Mellersh v. Keen*, 27 Beav. 236; *Crawshaw v. Collins*, 15 Ves. 218; 1. *J. & W.* 267; 2. *Russ*, 325; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Turner v. Major*, 3 Giff. 442; *Parsons v. Hayward*, 31 Beav. 199; 4 *De G. F. & J.* 474; *Wedderburn v. Wedderburn*, 2 Keen 722; 4 *Myl. & Cr.* 41; *Nerot v. Bernard*, 4 Russ. 247; 2 *Bli.*, N. S. 215; *Brown v. De Tastet*, *Jacob* 284; 4 *Russ*, 126; *Yates v. Finn*, 13 Ch. Div. 839. See *Appeal of Plumly* (Pa. 1889), 16 Atl. Rep. 728.

Where partners, after dissolution, remain in possession of different parts of the assets in such a manner that it can be reasonably regarded as an agreed division, and no demand for settlement has been made, a rule requiring an accounting for profits will not be applied, but each will be charged with the value of what he has received. *Ligare v. Peacock*, 109 Ill. 94; *Randle v. Richardson*, 53 Miss. 176; *Barclay's Appeal*, (Pa. 1887), 8 Atl. Rep. 169.

Where a partner holds exclusive possession and excludes the other, he is responsible for the restoration of the excluded partner's interest and for its use, to be paid out of the property as a prior claim. *Adams v. Kable*, 6 B. Mon. (Ky.) 384; 44 *Am. Dec.* 772; *Jones v. Morehead*, 3 B. Mon. (Ky.) 377.

Property purchased on partnership

tracts completed by a liquidating or surviving partner, belong to the firm and must be accounted for,¹ even in partnerships at will,² and where a dissolution is afterwards set aside as fraudulent, if the business is continued in the meantime, the profits are to be accounted for.³

If one partner reinvests the receipts of a partnership adventure in similar ventures, a continuance of the partnership is presumed,⁴ though if the share of a deceased or retired partner is purchased by the surviving or continuing partners, mere non-payment of the debt gives no claim upon subsequent profits,⁵ and if from the nature of the business it is necessary to continue it in order to realize, and the survivors do so as a new firm, debiting themselves with the old assets, they are not accountable for the profits.⁶ A partner holding exclusive possession of the

account by one partner during the period of his exclusion of his co-partner, must be accounted for. *Settembre v. Putnam*, 30 Cal. 490.

A partner who is appointed a receiver of the firm, who speculates with the funds, is accountable for the profits, not to his co-partners, but to the court whose officer he is. *Whitesides v. Lafferty*, 3 Humph. (Tenn.) 150.

Where a partnership is continued by executors and afterwards terminated by them, the firm is no longer accountable for profits. *Colgate v. Colgate*, 23 N. J. Eq. 372.

1. *Tolan v. Carr*, 12 Daly (N. Y.) 520; *Newell v. Humphrey*, 37 Vt. 267; *Osment v. McElrath*, 68 Cal. 466; *Tyng v. Thayer*, 8 Allen (Mass.) 391; *Parnell v. Robinson*, 58 Ga. 26. And see *Collender v. Phelan*, 79 N. Y. 366; *McClellan v. Kinnard*, L. R., 9 Ch. App. 336; *Washburn v. Goodman*, 17 Pick. (Mass.) 519; *Freeman v. Freeman*, 136 Mass. 260.

Where a partner who took the assets to wind up the concern, appropriated to himself certain bonds, then worth 78 cents on a dollar, and which afterwards became worth more, he was held chargeable with the present value of those retained, and the value at the time of sale of those sold. *Richards v. Burden*, 59 Iowa 723.

Where the dissolution is caused by the bankruptcy of a partner, his interest in an unfinished contract must be estimated upon the value after it is performed and not as at date of bankruptcy, though the circumstances may be such as to make the latter the

proper criterion. *King v. Leighton*, 100 N. Y. 386.

2. *Holladay v. Elliott*, 8 Oregon 84; *Cole v. Moxley*, 12 W. Va. 730; *Pearce v. Ham*, 113 U. S. 585; and see *Airey v. Borham*, 21 Beav. 620; *Norris v. Rogers*, 107 Ill. 148.

3. See *Buford v. Neely*, 2 Dev. Eq (N. Car.) 481; *Cook v. Collingridge*, Jac. 617; *Brown v. Vidler*, cited in *Crawshay v. Collins*, 2 Russ. 325.

In *Cook v. Collingridge*, Jac. 617, the executors of a deceased partner sold their testator's share to the surviving partners, who resold it to one of the executors. The sale was set aside at the instance of one of the executors and an account of profits made subsequently to the death of the deceased partner was decreed, although the money paid for the testator's share was not continued in the business.

4. *Patterson v. Ware*, 10 Ala. 444. And see *Hourquebie v. Girard*, 2 Wash. (U. S.) 212; *Cameron v. Bickford*, 11 Ont. App. (Ca.) 52; *Townend v. Townend*, 1 Giff. 201.

5. *Demarest v. Rutan*, 40 N. J. Eq. 356; *Hourquebie v. Girard*, 2 Wash. (U. S.) 212.

A sale by the executors of a deceased partner to the surviving partners, followed by a resale by them to one of the executors, may be set aside, and an account ordered. *Stocken v. Dawson*, 9 Beav. 239; *Cook v. Collingridge*, Jac. 607; and see *Odgen v. Astor*, 4 Sandf. (N. Y.) 311.

6. See *Gyger's Appeal*, 62 Pa. St. 73; 1 Am. Rep. 382; *Stern's Appeal*, 95 Pa. St. 504; *Wedderburn v. Wedder-*

firm's premises after dissolution is chargeable with their rental value.¹

The profits to be accounted for are such as are directly attributable to the use or misuse of another's property, and not such as are the result of the skill of the wrongdoer,² and the use of a co-partner's funds in business with others renders the user responsible, not for the whole profit, but upon the basis of his share of the profits,³ the fact that a deceased or retiring partner was so indebted to the firm that his interest amounted to nothing, relieving the continuing partner from accountability if the subsequent profits arose from his prudence, skill or industry.⁴ The wronged

burn, 22 Beav. 84; *Pine v. Ormsbee*, 2 Abb. Pr., N. S. (N. Y.) 375.

1. *Ligare v. Peacock*, 109 Ill. 94; *Stoughton v. Lynch*, 2 Johns. Ch. (N. Y.) 209; *Holden v. Peace*, 4 Ired. Eq. (N. Car.) 223; and see *Tennant v. Guy* (Supreme Ct.), 3 N. Y. Supp. 697.

But a partner is not entitled to have rent due him from the firm, for premises occupied by it, paid out of proceeds of partnership goods taken from such premises on executions issued on judgments confessed by his partners for firm debts, as against such firm creditors. *Barr v. McFall*, 131 Pa. St. 304.

No allowances for rent will be made to the partner who owns the property on which the firm conducted its business while in operation; the use of the property will be regarded as a contribution of capital. *Lee v. Lashbrooke*, 8 Dana (Ky.) 214.

In *Carroll v. Alston*, 1 S. Car. 7, it was held that the surviving partner of a firm of barbers was not liable to account for subsequent profits.

2. *Featherstonhaugh v. Turner*, 25 Beav. 382; *Airey v. Borham*, 29 Beav. 620.

Where a member of a firm sells chattels belonging to the firm to another partnership, of which he is also a member, in payment of a pre-existing debt, his co-partners in each firm being ignorant of his connection with the other, the proper accounting between the two firms, on equitable principles, is to leave the transaction to stand as to such common members' interest in the property, but to cause the latter firm to account to the other members of the former for their interest in the same. *Gray v. Church*, 84 Ga. 125.

3. *Washburn v. Goodman*, 17 Pick. (Mass.) 519; *Vyse v. Foster*, 8 Ch. App. 309; and see *Hay's Appeal*, 91 Pa. St. 265; *Durbin v. Barber*, 14 Ohio

311; *Yates v. Finn*, 13 Ch. Div. 839. But see *Willett v. Blanford*, 1 Hare 253; and *Wedderburn v. Wedderburn*, 2 Keen 722; denying that aliquot shares of capital furnish either a just or a reasonable rule of measurement.

In *Crawshay v. Collins*, 2 Russ. 325, the firm was dissolved by the bankruptcy of one partner, whose share in the firm was three-eighths, the other partners continued the business without paying over his interest. They were held accountable to the assignees of the bankrupt for three-eighths of the profits, and although the bankrupt was indebted to the firm, the indebtedness was not allowed to diminish the proportion in reckoning profits; and although the continuing partners had, in the meantime, contributed a large amount of additional capital, as they had no right to diminish his proportion of the profits by increasing their own interest.

4. *Hyde v. Easter*, 4 Md. Ch. 80; *Gyger's Appeal*, 62 Pa. St. 73; 1 Am. Rep. 382; *Taylor v. Hutchinson*, 25 Gratt. (Va.) 536; 18 Am. Rep. 699; *Simpson v. Chapman*, 4 De G. M. & G. 154; *Wedderburn v. Wedderburn*, 2 Kan. 722; and see *Stern's Appeal*, 95 Pa. St. 504; *Phillips v. Reeder*, 18 N. J. Eq. 95.

In *Chittenden v. Witdeck*, 50 Mich. 401, where one of two partners in a leased hotel died, and the other proposed to remove the furniture, the court held that strictly he had no right to continue the use of the furniture for a single day, but that had he ceased to use it, the hotel must have been closed and his business destroyed, and that he was, therefore, liable not for a share but only for the deterioration of the furniture during his use of it and for interest on its value.

Where, owing to quarrels among the heirs, an administrator could not be

partner may elect to receive interest on the capital used instead of the profits actually earned.¹

XXIV. ACTIONS BY AND AGAINST PARTNERS.—Actions by and against partners are governed by the rules applicable to ordinary actions, the partnership relation altering or modifying them in few if any particulars, except with relation to parties, plaintiff or defendant as the case may be,² and in respect to the recovery of partnership property wrongfully disposed of by a partner, or other acts which estop or disqualify one or more of the partners to sue.³

1. Parties' Plaintiff.—The general rule is that all the partners must join as parties' plaintiff in an action to enforce a claim in favor of a partnership, whether the action is brought⁴ before or

appointed for a year after the death of a partner intestate, and the surviving partners had, with the consent of the heirs of five-sevenths of his estate, continued to employ his capital in their business, the profits made subsequent to his death should be divided between the heirs in proportion to their interests, after deducting so much as was attributable to the skill and services of the surviving partners. *Robinson v. Simmons*, 146 Mass. 167.

1. See *Bernie v. Vandever*, 16 Ark. 616; *Goodburn v. Stevens*, 5 Gill (Md.) 1; *Crabtree v. Randall*, 133 Mass. 552; *Brown's Appeal*, 89 Pa. St. 139; *Booth v. Parks*, 1 Moll. 465; *Toulmin v. Copeland*, 2 Ph. 711; *Clements v. Hall*, 2 De G. & J. 146.

Heirs may consent to a continuance of the partnership for a time and take a share of the profits, and may then terminate it, and elect whether to take profits or rent in the future, and if they elect to take rent instead of profits, the profits become the property of the surviving partner, and there is no lien upon them for the settlement of partnership accounts. *Berry v. Folkes*, 60 Miss. 576.

In *Carter v. Roland*, 53 Tex. 540, it was held, that a buyer of the interest of a partner upon exclusion is not entitled to an account of subsequent profits, but merely to a reasonable compensation for the use of his share, if the property is liable to deterioration.

Where surviving partners, wishing to settle with the heirs of their deceased partner, for his capital, have made an arrangement with some of them, and paid others a sum on account, and offered to submit to arbitration or any impartial method of determining what further sum, if any, is due to each, but they have refused all such offers and

continued litigation, they are not entitled to any share in the profits of the capital made after the offer, except as interest on the amount found due them at that time. *Robinson v. Simmons*, 146 Mass. 167.

2. See *Parties' Plaintiff and Parties' Defendant*.

Certificate of Names and Residence.—The provision of the *California Civil Code* that persons doing business as partners, contrary to the provisions of the article requiring the filing and publishing of a certificate showing the names and residences of all the members of the partnership, "shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name, in any court of this State, until they have first filed the certificate and made the publication herein required," does not preclude the assignees of such persons from maintaining an action therein. *Wing Ho v. Baldwin*, 70 Cal. 194.

3. See *infra*, this title, *Recovery of Property Wrongfully Disposed of by a Partner*.

Place of Trial.—Suits against co-partners may, under the *Georgia Constitution*, be tried in the county of the residence of either. *Sloan v. Cooper*, 54 Ga. 486.

4. *Cochran v. Cunningham*, 16 Ala. 448; *Matthews v. Paine*, 47 Ark. 54; *Hughes v. Boring*, 16 Cal. 81; *Gallot v. McCluskey*, 18 La. Ann. 259; *Snodgrass v. Broadwell*, 2 Litt. (Ky.) 353; *Day v. Swann*, 13 Me. 165; *Gannett v. Cunningham*, 34 Me. 56; *Fish v. Gates*, 133 Mass. 441; *Mudd v. Bast*, 34 Mo. 465; *Pearson v. Parker*, 3 N. H. 366; *Peaks v. Graves*, 25 Neb. 235; *Wright v. Williamson*, 3 N. J. L. 978; *Gage v. Rollins*, 10 Met. (Mass.) 348;

after the dissolution of the firm, and that partners can neither sue nor be sued in their co-partnership name, their individual names being required to be stated.¹ This rule applies to a dormant partner, as distinguished from one who is merely unknown to the other contracting party, however, only to the extent of making him a permissible, not an essential plaintiff,² and nominal

Dob v. Halsey, 16 Johns. (N. Y.) 34; *Holt v. Kenodle*, 1 Ired. Eq. (N. Car.) 199; *Slutts v. Chafee*, 48 Wis. 617; *McFerrin v. Woods*, 12 Heisk. (Tenn.) 242; *White v. Bascom*, 28 Vt. 268; *Sawyer v. Worthington*, 28 Vt. 733; *Brown v. Haven*, 37 Vt. 439. And see *Matherson v. Wilkinson*, 79 Me. 159; *Travis v. Tobias*, 8 How. Pr. (N. Y.) 333; *Parker v. Gregg*, 23 N. H. 416; *Pease v. Hirst*, 10 B. & C. 122; *McBirney v. Harran*, 5 Irish Law Rep. 428; *Phelps v. Lyle*, 10 A. & E. 113.

The debtor having contracted with the firm jointly, is entitled to have one action prosecuted against him, the firm cannot sever and sue separately. *Fish v. Gates*, 133 Mass. 441. One partner cannot sue for his share of a debt. *Vinal v. West Virginia Oil Co.*, 110 U. S. 215.

A contract with a partnership raises no cause of action in favor of one of the partners severally against the other contracting party, though the partnership was dissolved before full performance, and though, by arrangement between the partners, performance was completed, after dissolution, by that partner who has brought the suit. *Thompson v. McDonald*, 84 Ga. 5.

A bill in equity, in the name of a partnership which has been dissolved, is not demurrable on that account, if it gives the names of the partners, and describes the partnership as "the late partnership." *Tompkins v. Levy*, 87 Ala. 263.

1. *Davis v. Hubbard*, 4 Blackf. (Ind.) 50; *Hughes v. Walker*, 4 Blackf. (Ind.) 50; *Livingston v. Harvey*, 10 Ind. 218; *Holland v. Butler*, 5 Blackf. (Ind.) 255; *Smith v. Canfield*, 8 Mich. 493; *Barber v. Smith*, 41 Mich. 138; *Blackwell v. Reid*, 41 Miss. 102; *Weisz v. Davey*, 28 Neb. 566; *Tomlinson v. Burke*, 10 N. J. L. 295; *Seeley v. Schenck*, 2 N. J. L. 75; *Crandall v. Denny*, 2 N. J. L. 137; *Burns v. Hall*, 3 N. J. L. 984; *Faulkner v. Whitaker*, 15 N. J. L. 438; *Bentley v. Smith*, 3 Cai. (N. Y.) 170; *Porter v. Cresson*, 10 S. & R. (Pa.) 257; *Pate v. Bacon*, 6 Munf. (Va.) 219; *Marshall v. Hill*, 8 Yerg.

(Tenn.) 101; *Moore v. Burns*, 60 Ala. 269; *Banks v. Bosler*, 4 Bibb (Ky.) 573; *Armstrong v. Robinson*, 5 Gill & J. (Md.) 412; *Halliday v. Doggett*, 6 Pick. (Mass.) 259; *Cushing v. Marston*, 12 Cush. (Mass.) 431; *Reed v. Hanover Branch R. Co.*, 105 Mass. 303; *Mexican Mill v. Yellow Jacket S. Mine*, 4 Nev. 40; *Dunham v. Shindler*, 17 Oregon 256; *Choteau v. Riatt*, 20 Ohio 132; *Smith v. Walker*, 6 Rich. (S. Car.) 169; *Martin v. Kelly*, Cheves (S. Car.) 215. And see *Stirling v. Heintzman*, 42 Mich. 449; *Chance v. Chambers*, 2 N. J. L. 362. See also *infra*, this title, *Actions in Firm Name*.

Suit is properly brought in the name of the person with whom the contract is made, although the business may have been conducted under an assumed partnership name. *Wallhormfechtel v. Dobyms*, 32 Mo. 310; *Jones v. Goodrich*, 17 Ill. 380.

While a suit instituted by a partnership should be brought in the name of the members of the firm, and not in the firm name, its prosecution in the name of the firm as plaintiff is not reversible error, as *Rev. St. Missouri*, § 2775, prohibits the reversal of a judgment unless the error committed by the trial court materially affects the merits. *Conrades v. Spink*, 38 Mo. App. 309.

An objection that the individual names of the defendants as co-partners are not set out in the complaint, appearing for the first time at the close of plaintiff's evidence, is not seasonably made. *Simonton v. Rohm*, 14 Colo. 51. A bill brought by a co-partnership, in the firm name, is demurrable for want of certainty as to the complainants. *Lewis v. Cline*, (Miss. 1888), 5 So. Rep. 112. But see *Rogers v. Verlander*, 30 W. Va. 619.

The defect cannot be taken advantage of by appeal. *Gilman v. Cosgrove*, 22 Cal. 356. Or on motion for non-suit. *Martin v. Kelly*, Cheves (S. Car.) 215. It is cured by verdict. *Seitz v. Buffum*, 14 Pa. St. 69.

2. *Desha v. Holland*, 12 Ala. 513; 46 Am. Dec. 216; *Bank of St. Mary's v.*

partners need not, though they may be joined;¹ though if the contract consists of commercial paper in which the nominal partner is expressly named, he must, in the absence of statutory enactment, be a co-plaintiff.²

As a simple contract entered into by an agent may be sued on by the principal, so such a contract entered into by one partner should be sued on by all the partners, even though the debtor did not know that he was dealing with a member of a firm.³ But

St. John, 25 Ala. 566; *Monroe v. Ezzell*, 11 Ala. 603; *Phillips v. Pennywit*, 1 Ark. 59; *McCabe v. Morrison*, 2 Harr. (Del.) 66; *Goble v. Gale*, 7 Blackf. (Ind.) 218; 41 Am. Dec. 219; *Keane v. Fisher*, 9 La. Ann. 70; *Barstow v. Gray*, 3 Me. 409; *Mitchell v. Dall*, 2 Har. & G. (Md.) 159; *Robinson v. Mansfield*, 13 Pick. (Mass.) 139; *Wood v. O'Kelly*, 8 Cush. (Mass.) 406; *Wright v. Herrick*, 125 Mass. 154; *Wilkes v. Clarke*, 1 Dev. (N. Car.) 178; *Clarkson v. Carter*, 3 Cow. (N. Y.) 84; *Platt v. Halen*, 23 Wend. (N. Y.) 456; *Choteau v. Raitt*, 20 Ohio 132; *Morse v. Chase*, 4 Watts (Pa.) 456; *Wilson v. Wallace*, 8 S. & R. (Pa.) 53; *Speake v. Prewitt*, 6 Tex. 252; *Jackson v. Alexander*, 8 Tex. 109; *Garrett v. Muller*, 37 Tex. 589; *Boardman v. Keeler*, 2 Vt. 65; *Hilliker v. Loop*, 5 Vt. 116; 26 Am. Dec. 286; *Lapham v. Green*, 9 Vt. 407; *Curtis v. Belknap*, 21 Vt. 433; *Maynard v. Briggs*, 26 Vt. 94; *Waite v. Dodge*, 34 Vt. 181; *Bird v. Fake*, 1 Pinn. (Wis.) 290; *Lefeck v. Shafto*, 2 Esp. 468; 7 T. R. 361; *Cothay v. Fennell*, 10 B. & C. 671; *Briggs v. Bower*, 5 Up. Can., Q. B. 672. *Contra* *Howe v. Savery*, 49 Barb. (N. Y.) 403; 51 N. Y. 631. See *Child v. Wofford*, 3 Ala. 564.

It has been held that a dormant partner ought not to be joined for the reason that it might prejudice the defendant's right of set-off against the active partner. *Boardman v. Keeler*, 2 Vt. 65; *Wilson v. Wallace*, 8 S. & R. (Pa.) 53; *Mawman v. Gillott*, 2 Taunt. 324, note. But in *Vermont*, the right of set-off against an ostensible partner is now protected, although the dormant partner is joined. *Hilliker v. Loop*, 5 Vt. 116; 26 Am. Dec. 286.

Whether the contract sued upon was made with the firm or with the partner supposing him to be an individual, has been held to be the test of dormancy on the question of the joinder of a partner. *Bird v. Fake*, 2 Pinn. (Wis.) 290. And see *Curtis v. Belknap*, 21 Vt. 433.

1. *Phillips v. Pennywit*, 1 Ark. 59;

Enix v. Hays, 48 Iowa 86; *Bishop v. Hall*, 9 Gray (Mass.) 430; *Jones v. Howard*, 53 Miss. 707; *Campbell v. Hood*, 6 Mo. 211; *Hatch v. Wood*, 43 N. H. 633; *Benedict v. Hettrick*, 35 N. Y. Super. Ct. 405; *Waite v. Dodge*, 34 Vt. 181; *Wetherill v. McClosky*, 28 W. Va. 195; *Glossop v. Coleman*, 1 Stark 35; *Harrison v. Fitzhenry*, 3 Esp. 238; *Kell v. Nainby*, 10 B. & C. 20; *Cox v. Hubbard*, 4 C. B. 317; *Spurr v. Cass*, L. R., 5 Q. B. 656.

But a nominal partner should not be made a party in an action to recover back payments made on paper payable to him individually. *Harrison v. Fitzhenry*, 3 Esp. 238.

2. *Guidon v. Robson*, 2 Camp. 302; *Beckman v. Drake*, 9 M. & W. 79; *Spurr v. Cass*, L. R., 5 Q. B. 656.

Where one partner, who was agent of his co-partners, makes a contract in his own name, he can sue on the contract without joining his partners. *Ewing v. French*, 1 Blackf. (Ind.) 353.

Where, as in *New York*, the law requires actions to be brought by the parties in interest, a general and special partner in a *Virginia* partnership must both be joined as plaintiffs in a suit in a *New York* court, although in *Virginia* the general partner alone would sue. *Rosenberg v. Block*, 50 N. Y. Super. Ct. 357.

3. *Phillips v. Henshaw*, 5 Cal. 509; *Havana etc. R. Co. v. Walsh*, 85 Ill. 58; *Barns v. Barrow*, 61 N. Y. 39; *Wilson v. Wallace*, 8 S. & R. (Pa.) 53; *Chamberlin v. Hite*, 5 Watts (Pa.) 373; *Speake v. Prewitt*, 6 Tex. 252; *Hilliker v. Loop*, 5 Vt. 116; *Badger v. Daenieke*, 56 Wis. 678; *DeWit v. Sander*, 72 Wis. 120; *Spurr v. Cass*, L. R., 5 Q. B. 656; *Skinner v. Stocks*, 4 B. & Ald. 437; *Townsend v. Neale*, 2 Camp. 189; *Arden v. Tucker*, 4 B. & Ald. 817; *Bennett v. Scott*, 1 Cranch (C. C.) 339; *Garrett v. Handley*, 5 Dow. & R. 319; 4 B. & C. 664; 3 B. & C. 462; *Walton v. Dodson*, 3 C. & P. 162. And see *Gannett v. Cunningham*, 34 Me. 56;

this does not apply to matters outside of the scope of the partnership business, and that the co-partners assisted in carrying out the contract, does not make it a partnership matter,¹ though if the partnership can show that it was in fact the contracting party, the partners may maintain a joint action.² Where a partner has represented himself as acting on his own account he can sue alone, even though the contract was made in pursuance of a previous agreement with the firm.³ So, a bill or note made payable to a

Warner *v.* Griswold, 8 Wend. (N. Y.) 665; Jackson *v.* Bohrman, 59 Wis. 422.

An attorney in whose hands a single partner places a claim for collection, cannot be sued by such partner alone. Wiley *v.* Logan, 95 N. Car. 358; and see Webster *v.* Lawson, 73 Wis. 561.

Where real estate held in the name of one partner in trust for the firm has been appropriated for railroad purposes, the partners may recover its value in a joint action. Reed *v.* Hanover, Branch R. Co., 105 Mass. 303.

All the partners may sue a banker for refusing to pay a check drawn by a single partner in whose name the account is kept. Cooke *v.* Seeley, 2 Ex. 746.

But in an action against a firm where an attachment is sued out against one partner as a non-resident and levied upon partnership property, the attachment bond being made to such partner only, he alone can sue upon it. Faulkner *v.* Brigel, 101 Ind. 329. And see State *v.* Merritt, 70 Mo. 275. And where one of two co-sureties dies, and the other and the executor of the deceased become partners, and pay the debts out of partnership funds, each can bring his separate action for his moiety against the principal debtor, the remaining surety and the executor not being co-sureties. Gould *v.* Gould, 6 Wend. (N. Y.) 263.

1. Conklin *v.* Cobanne, 9 Mo. App. 579; Sloan *v.* Bangs, 11 Rich. (S. Car.) 97.

A contract in the name of individuals, though they are described as partners, is their individual promise, and the third partner, whether dormant or otherwise, need not be a co-plaintiff in the action upon it. Hilliker *v.* Francisco, 65 Mo. 598.

In an action by plaintiffs claiming as partners, it is a good defense under the general issue to show that the debt is due to one of them only. The statute of Alabama, dispensing with the

proof of a partnership, unless put in issue by plea in abatement, does not apply to such case. Kenan *v.* Starke, 6 Ala. 773.

2. See Higdon *v.* Thomas, 1 Har. & G. (Md.) 139; Gage *v.* Rollins, 10 Met. (Mass.) 348; Illinois Cent. R. Co. *v.* Owens, 53 Ill. 391; Creel *v.* Bell, 2 J. J. Marsh. (Ky.) 309; Hilliker *v.* Loop, 5 Vt. 117; Alexander *v.* Barker, 2 Cr. & J. 133; 2 Tyrw. 140; Sims *v.* Bond, 5 B. & Ad. 389; Sims *v.* Brittain, 4 B. & Ad. 375; Robson *v.* Drummond, 2 B. & Ad. 303, Cothay *v.* Fennell, 10 B. & C. 671.

In Taylor *v.* Steamboat Robert Campbell, 20 Mo. 254, however, it was held that a contract of shipment of personal property made in the name of one partner could be sued upon by him alone.

If the other partners desire to take advantage of a contract which the contracting partner has expressly declared to be his individual matter, they must do so in the mode in which it was made, and cannot, therefore, sue jointly. Lucas *v.* Delau, Cour. 1 M. & S. 243.

3. Phillips *v.* Pennywit, 1 Ark. 59; Mynderse *v.* Snook, 53 Barb. (N. Y.) 234; 1 Lans. (N. Y.) 488; Cookingham *v.* Lasher, 1 Abb. App. Dec. (N. Y.) 436; Lucas *v.* De La Cour, 1 M. & S. 249; Thacker *v.* Shepherd, 2 Chit. 652; Brand *v.* Boulcott, 2 B. & P. 235. And see McMicken *v.* Webb, 6 How. (U. S.) 262; Frayser *v.* Moore, 22 Kan. 115. So if it was for his benefit. Ajacio *v.* Forbes, 14 Moo. P. C. 160.

One partner may sue upon a contract in writing made with him alone where it does not appear that he was acting for the firm. Skinner *v.* Stocks, 4 B. & Ald. 437.

Where a contract under seal is entered into which is void for fraud of the other party, the contracting partner may recover back the advance in his own name. Lefevre *v.* Boyle, 3 B. & Ad. 877.

single partner, can be sued upon by him, and by him only;¹ and a sealed instrument entered into with one partner confers a right to sue upon him only, and if with more than one, all those joining in its execution must join in a suit upon it.² A covenant to a firm in its firm name will support an action by all the partners.³

One partner cannot acquire the right to sue alone upon a partnership contract by taking an assignment from his co-partner,⁴

1. *Mynderse v. Snook*, 53 Barb. (N. Y.) 234; 1 Lans. (N. Y.) 488; *Wenreich v. Johnston*, 78 Cal. 254; *Bawden v. Howell*, 3 Man. & G. 638; *Driver v. Burton*, 17 Q. B. 989. And see *Doremus v. Selden*, 19 Johns. (N. Y.) 213; *Trott v. Irish*, 1 Allen (Mass.) 481; *Walgamood v. Randolph*, 22 Neb. 493.

Under statutes requiring an action to be brought in the name of the real party in interest, a new firm composed of old and new members can sue upon a note made to the old firm. *Pease v. Rush*, 2 Minn. 107.

One of three partners, to whom his companions have on settlement assigned their interest in a note due the firm, may sue in his own name. *Canebox v. Anderson*, 22 Mo. 347.

A firm may indorse a note to one partner to enable him to sue upon it, even though such indorsement was made by that partner himself. See *Manegold v. Dulau*, 30 Wis. 541; *Russell v. Swan*, 16 Mass. 314; *Burnham v. Whittier*, 5 N. H. 334; *Kirby v. Cogswell*, 1 Cai. (N. Y.) 505.

Where a partner in a dissolved firm settles with a debtor of the firm, and takes his note payable to himself alone for the amount which he claims is coming to him, thus ignoring his co-partner's rights, and sues out an attachment brought upon the note, and attaches all the debtor's property, his co-partner is entitled to come in as a party to the suit, that he may assert his interest in such note. *Snow v. Burnett* (Ky. 1886), 1 S. W. Rep. 634.

2. *Lindley on Part.* 475. And see *Ex parte Peele*, 6 Ves. 602; *Ex parte Williams*, Buck 13; *Harrison v. Fitzhenry*, 3 Esp. 238; *Cabell v. Vaughan*, 1 Saund. 291; *Auderson v. Martindale*, 1 East 497.

A person named in and assenting to a sealed contract, however, may be joined as a co-plaintiff, even though he did not seal. *Vernon v. Jeffrys*, Str. 1146. Though the contrary is held where

the covenant is expressly in favor of those whose hands and seals are set to it. *Metcalf v. Rycroft*, 6 M. & S. 75.

Judgments.—All of the partners may maintain a bill to set aside a conveyance by a debtor in fraud of creditors, in order to permit a judgment to become a lien which was rendered in favor of a part of the partners only. *Fuller v. Nelson*, 35 Minn. 213.

3. *Armstrong v. Robinson*, 5 Gill & J. (Md.) 412; *De Greiff v. Wilson*, 30 N. J. Eq. 435; *Brown v. Bostian*, 6 Jones (N. Car.) 1; *Seymour v. Western R. Co.* 106 U. S. 320.

Where a note is made to all the partners and a mortgage is given to one only for the purpose of securing the note, all must sue to foreclose the mortgage, as the security follows the debt. *Noyes v. Sawyer*, 3 Vt. 160.

In *Pease v. Hirst*, 10 B. & C., 122, it was held that incoming partners cannot join in an action upon a sealed contract and made in the name of the firm, even though it was intended to bind them.

4. *Howell v. Reynolds*, 12 Ala. 128; *Molen v. Orr*, 44 Ark. 486; *Oliver v. Walsh*, 6 Cal. 456; *White v. Savery*, 50 Iowa 515; *Dougherty v. Smith*, 4 Metc. (Ky.) 279; *Gaittrier v. Caldwell*, 1 Dev. & B. Eq. (N. Car.) 504; *Horbach v. Huey*, 4 Watts (Pa.) 455; *Mosgrove v. Golden*, 101 Pa. St. 605; *De Groot v. Darby*, 7 Rich. (S. Car.) 18; *Brougham v. Balfour*, 3 Up. Can. C. P. 72; *American Cent. R. Co. v. Miles*, 52 Ill. 174.

A partner who takes all the assets, even though by assignment, in order to wind up, may use the names of his co-partners for the purpose of suing. *Moler v. Orr*, 44 Ark. 486.

If credits are divided absolutely, however, each partner can sue separately for his own, *Evans v. Silverlock*, 1 Peake 31.

Where a debtor of the firm pays certain partners their exact proportion, a remaining partner can regard

unless conferred by the assent of or a new promise by the debtor.¹ Under statutes requiring an action to be brought in the name of the real party in interest, however, a partner or partners to whom such an assignment has been made may sue alone,² and under the old practice the assent of the debtor to the substitution of a new creditor may be shown by the conduct of the parties and the circumstances of the case.³

After the dissolution of a firm by the bankruptcy or insolvency of a partner, actions must be brought in the names of the solvent partner and the assignee of the bankrupt,⁴ the solvent partner being entitled to use the name of the assignee upon giving him indemnity against loss.⁵ And where the partners are too numerous to be brought upon the record, one may sue for all,⁶ though

this as a severance, and sue the debtor alone. *Garet v. Taylor*, 1 Esp. 117.

1. See *Eaton v. Whitcomb*, 17 Vt. 641; *Skannel v. Taylor*, 12 La. Ann. 773; *Barker v. Blake*, 11 Mass. 16; *Averill v. Lyman*, 18 Pick. (Mass.) 346; *Blair v. Snover*, 10 N. J. L. 153; *Anderson v. Holmes*, 14 S. Car. 162; *Simonds v. Pierce*, 51 Vt. 467; *Waldeck v. Brande*, 61 Wis. 579.

A contract made with a person before he formed a partnership should not be declared on by the firm as a contract made with it. *Carr v. Wilkins*, 44 Tex. 424.

Where an attorney was retained and he afterwards formed a partnership with another attorney, however, and the firm performed the services, the firm can sue for them, although the contracting attorney could have been sued alone. *Maynard v. Briggs*, 26 Vt. 94.

2. *Walker v. Steel*, 9 Colo. 388; *Farwell v. Davis*, 66 Barb. (N. Y.) 73; *West v. Citizens' Ins. Co.*, 27 Ohio St. 1; *Viles v. Bangs*, 36 Wis. 131; *Swails v. Coverdill*, 17 Ind. 337; *Cook v. Beech*, 10 Humph. (Tenn.) 412. But see *Horbach v. Huey*, 4 Watts (Pa.) 455.

Partners cannot appoint a person to sue for them even for contributions thereafter to be made. *Fortune v. Brazier*, 10 Ala. 791.

3. See *Armsby v. Farnam*, 16 Pick. (Mass.) 318; *Baker v. Jewell*, 6 Mass. 460; *Blair v. Snover*, 10 N. J. L. 153; *Whitlock v. McKecknie*, 1 Bosw. (N. Y.) 427; *Anderson v. Holmes*, 14 S. Car. 162; *Eaton v. Whitcomb*, 17 Vt. 641; *Austin v. Walsh*, 2 Mass. 401; *Bunn v. Morris*, 3 Cai. (N. Y.) 54; *Thrall v. Seward*, 37 Vt. 573.

Misrepresentation by a Partner.—To an action brought by three partners

for an indebtedness to the firm, defendants pleaded that two of the partners had represented to defendants that they alone composed the firm, and upon the strength of such representations the indebtedness sued for was contracted. *Held*, that such plea could not defeat the action where the third partner neither authorized nor knew of such misrepresentations. *Rush v. Thompson*, 112 Ind. 158.

4. *Peel v. Ringgold*, 6 Ark. 546; *Sims v. Ross*, 8 Smed. & M. (Miss.) 557; *Halsey v. Norton*, 45 Miss. 703; 7 Am. Rep. 745; *Murray v. Murray*, 5 Johns. Ch. (N. Y.) 70; *Ex parte Owen*, 13 Q. B. D. 113.

A pending action is not defeated by an individual assignment for the benefit of creditors by one of the plaintiffs, as such an assignment does not extend to partnership assets. *Cunningham v. Munroe*, 15 Gray (Mass.) 471.

Foreign assignees of a foreign bankrupt cannot join the home assignees of the bankrupt; only the home assignees will be recognized, and they must collect the debts. *Bird v. Caritat*, 2 Johns. (N. Y.) 342.

In an action on a debt due a partnership, the assignee of an insolvent partner need not, under *Massachusetts* statutes, be joined as plaintiff in place of the insolvent partner, at least where he makes no objection to the maintenance of the action by the partners. *Wonson v. Pew*, 148 Mass. 299.

5. *Ex parte Owen*, 13 Q. B. D. 113; *Whitehead v. Hughes*, 2 Cr. & M. 318; 4 Trywh. 92.

6. *Pope v. Bateman*, 1 Iowa 369; *Goldman v. Page*, 59 Miss. 404; *Lloyd v. Loaring*, 6 Ves. 773. *Contra*, *Brainerd v. Bertram*, 5 Abb. N. Cas. (N. Y.) 102.

trustee cannot sue in such a case in his own name.¹ The statutory provisions existing in many States that a non-consenting joint claimant may be made a co-defendant are applicable to partners.²

In actions for tort where a joint damage accrues to the several partners from the wrongful act of the wrongdoer, they ought all to join in an action founded upon it;³ but in such an action joint damages only are recoverable and not damages for the private injury, injury to the feelings suffered by each partner.⁴ A tort against one partner may in a proper case, constitute a cause of action in favor of the firm.⁵ On the other hand, each partner can maintain a separate action for such damages growing out of a tort as are per-

The court will not, however, entertain a bill filed by an elder of a church, in its name and right as an elder, to secure the title to a church lot granted to the church of which he is a member and elder. The petition should be filed in the name of the church, and in the presence of an incorporation it should set forth the name of all the members of the association. *McConnell v. Gardner, Morris* (Iowa) 359.

McConnell v. Gardner, Morris (Iowa) 272; *Niven v. Spickerman*, 12 N. Y. (N. Y.) 401.

Hill v. Marsh, 46 Ind. 218; *Pogson v. Owen*, 3 Desaus. (S. Car.) 31; *Donan v. Orton*, 31 Wis. 265. See also *Nightingale v. Scannell*, 6 Cal. 11; *Cole v. Reynolds*, 18 N. Y. 74; *Hol Kirk v. Hol Kirk*, 4 Mad. 50.

Donnan v. Orton, 31 Wis. 265, the court by DIXON, C. J., said: "It has been inquired what remedy a man has, who has a good cause of action, where no severance lies, with another who will not consent to prosecute. It is folly, saith the law, to be concerned with such a man. But as any one of the parties interested in a personal action may release it, if it was released, the releaser would be accountable to his partners in the contract for damages they had sustained. And one of the parties should unreasonably refuse to join in the prosecution in action, which might well be maintained, perhaps the other parties might have a remedy by a special action on the case. But of this we give no opinion here, the point is not before us."

Forster v. Lawson, 3 Bing. 453; *Moo*, 360; *Beardsley v. Tappan*, 1 Mich. (U. S.) 588; *Titus v. Follet*, 1 Hill (N. Y.) 318; *Le Fanu v. Malcolmson*, 1 H. L. C. 637; *Irish L. R.* 418; *Howe v. Reynolds*, 68 Mich. 344;

Taylor v. Church, 1 E. D. Smith (N. Y.) 279; 8 N. Y. 452; *Cook v. Batchelor*, 3 B. & P. 150; *Ward v. Smith*, 6 Bing. 749; 4 C. & P. 302; *Mainland v. Goldney*, 2 East 426; *Duffy v. Gray*, 52 Mo. 558; *Williams v. Beaumont*, 10 Bing. 260.

The deceit of a vendor in the purchase of real estate for partnership purposes, creates a joint injury, and partners should join in an action for it. *Medbury v. Watson*, 6 Met. (Mass.) 246; 39 Am. Dec. 726.

Where one firm makes a false statement to another as to the solvency of a person about to buy goods whereby the value of the goods is lost, the action should be brought by the plaintiffs jointly against the defendants jointly. *Patten v. Gurney*, 17 Mass. 181.

Donnell v. Jones, 13 Ala. 490; 48 Am. Dec. 59; *Duffy v. Gray*, 52 Mo. 528; *Haythorn v. Lawson*, 3 C. & P. 196; *Robinson v. Marchant*, 7 Q. B. 918; *LeFanu v. Malcolmson*, 1 H. L. C. 637; 8 Irish L. R. 418.

In case of a malicious attachment of the property of the firm, only the natural and proximate injury, or special damages specially alleged to the joint business can be recovered in a joint action. *Donnell v. Jones*, 13 Ala. 490; 48 Am. Dec. 59. And see *Alexander v. Jacoby*, 23 Ohio St. 358.

In Taylor v. Church, 1 E. D. Smith (N. Y.) 279; 8 N. Y. 452, it was held that on a charge of dishonesty against one partner, all were entitled to recover.

Words imputing dishonesty to a clerk, however, do not import injury to the firm by whom he was employed, without special averments of damage. *Smith v. Hollister*, 32 Vt. 605.

A charge that one partner is insolvent, is not actionable by the firm, as it

sonal to himself alone,¹ but in such action no damages suffered by the firm, as special damages to the firm's business, can be recovered.² An action brought by one partner, or by any number of the partners less than all, may be amended by the addition of the names of the omitted partners,³ and on the death *pendente lite* of a partner plaintiff, the action proceeds upon the mere suggestion of death without amendment.⁴

2. Parties Defendant.—In actions against partnerships on partnership liabilities all of the partners who were such at the time when the liability was incurred, must be joined as parties defendant.⁵ Under statutory provisions making partners jointly and

does not go to the particular business of the firm, but rather to the general mercantile character of the individual. *Davis v. Ruff*, Cheves (S. Car.) 17. And see *Solomon v. Medex*, 1 Stark 191.

1. *Odiorne v. Bacon*, 6 Cush. (Mass.) 185; *Fidler v. Delavan*, 20 Wend. (N. Y.) 57; *Robinson v. Marchant*, 7 Q. B. 918; *Harrison v. Bevington*, 8 C. & P. 708.

Where language spoken or written concerning partners in their partnership business is actionable *per se*, either partner may sue separately for the injuries sustained by him. *Noonan v. Orton*, 32 Wis. 106.

A joint judgment procured by partners in business in a slander suit is no bar to a several suit by one of the partners on the same cause of action. *Duffy v. Gray*, 52 Mo. 528.

A nominal partner cannot maintain a separate action for a slander upon the firm. *Davis v. Ruff*, Cheves (S. Car.) 17.

2. *Duffy v. Gray*, 52 Mo. 528; *Robinson v. Marchant*, 7 Q. B. 918.

In *England*, the present rule is that separate and joint claims may be pursued in a single action. *Booth v. Briggs*, 2 Q. B. D. 496.

3. *Molen v. Orr*, 44 Ark. 486; *Lockwood v. Doane*, 107 Ill. 235; *Dixon v. Dixon*, 19 Iowa 512; *Hodges v. Kimball*, 49 Iowa 577; *Davis v. Chouteau*, 32 Minn. 548; *Pitkin v. Roby*, 43 N. H. 138; *Martin v. Young*, 85 N. Car. 156; *Roberson v. McIlhenny*, 59 Tex. 615. *Contra*, *Ball v. Strohecker*, 2 Spears (S. Car.) 364. And see *Miller v. Chappel*, 39 La. Ann. 881.

Where a number of partners commenced a suit and an amendment was afterwards allowed making the rest of the partners parties plaintiff, it was held not to vitiate an attachment.

Henderson v. Stetter, 31 Kan. 56; or a replevin. *Fay v. Dugan*, 135 Mass. 242.

In *Masters v. Freeman*, 17 Ohio St., 323, however, it was held that where several brought suit as partners, and a separate right of action in each was proved, the defect was fatal and could not be cured by amendment, as the cause of action established was different from that alleged.

Non Joinder can be taken advantage of only under a plea in abatement. *Garner v. Tiffany*, Minor (Ala.) 167.

4. *Phoenix Ins. Co. v. Moog*, 81 Ala. 335; *Atlanta v. Dooby*, 74 Ga. 702; *McCandless v. Hadden*, 9 B. Mon. (Ky.) 186; *Sprawles v. Barnes*, 1 Smed. & M. (Miss.) 629; *Dunman v. Coleman*, 59 Tex. 199.

Where a judgment recovered by two partners has been satisfied as to one and not as to the other, and the latter dies, the action may be continued in the name of his legal representative. *Hackett v. Belden*, 10 Abb. Pr., N. S. (N. Y.) 124.

5. *Harrison v. McCormick*, 69 Cal. 616; *Exchange Bank v. Ford*, 7 Colo. 314; *Roberts v. Rowan*, 2 Harr. (Del.) 314; *Richardson v. Smith*, 21 Fla. 336; *Page v. Brant*, 18 Ill. 37; *Pettis v. Atkins*, 60 Ill. 454; *Armstrong v. Robinson*, 5 Gill & J. (Md.) 412; *Kent v. Holliday*, 17 Md. 387; *Smith v. Cooke*, 31 Md. 174; *Loney v. Bailey*, 43 Md. 10; *Smith v. Canfield*, 8 Mich. 493; *Blackwell v. Reid*, 41 Miss. 102; *Revis v. Lamme*, 2 Mo. 207; *Tinkum v. O'Neale*, 5 Nev. 93; *Kamm v. Harker*, 3 Oregon 208; *Laird v. Umberger*, 1 Phila. (Pa.) 518; *Davis v. Willis*, 47 Tex. 154; *Pate v. Bacon*, 6 Munf. (Va.) 219; *Slutts v. Chafee*, 46 Wis. 617; *Lippincott v. Shaw Carriage Co.*, 25 Fed. Rep. 577; *Adams v. May*, 27 Fed. Rep. 907; *Bell v. Donahoe*, 8 Sawy.

severally liable, however, an action may be maintained against one or more as well as against all.¹ While a dormant partner may be joined if discovered,² not having been a nominal party to the contract, his non-joinder cannot be objected to,³ and where the creditor contracted with the debtor, not knowing or having reason to suppose that there were partners other than those known to

(U. S.) 435; 17 Fed. Rep. 710; and see *Alexander v. Alexander*, 85 Va. 353; *Bailey v. Inglee*, 2 Paige (N. Y.) 278.

Though some of the partners are non-residents, they must be joined with the resident partners as co-defendants. *Wiley v. Sledge*, 8 Ga. 532; *Boorum v. Ray*, 72 Ind. 151; *Curtis v. Hollingshead*, 14 N. J. L. 402; *Cowdin v. Hurford*, 4 Ohio 132; *Simonds v. Speed*, 6 Rich. (S. Car.) 390. But see *Kimbro v. Bullitt*, 22 How. (U. S.) 256.

In *Williams v. Donaghe*, 1 Rand. (Va.) 300, however, it was held that if one partner lives out of the State, the remedy is in equity.

In an action against co-partners upon a written contract executed by one of them, in his own name, a few days before their articles of co-partnership were signed, it is proper to instruct the jury to the effect that if the defendants had a discussion as to forming a co-partnership before such contract was executed, and if the partner who did not sign the contract consented to it as a firm contract, and if the firm afterwards used the money received on account of such contract, then both defendants are liable on the contract. *Buzzard v. McAnulty*, 77 Tex. 438. See *Callaway v. Woodward*, 28 Mo. App. 320.

1. *Green v. Pyne*, 1 Ala. 235; *Alexander v. Jones*, 90 Ala. 474; *McCulloch v. Judd*, 20 Ala. 703; *Hall v. Cook*, 69 Ala. 87; *Hamilton v. Buxton*, 6 Ark. 24; *Burgen v. Dwinal*, 11 Ark. 314; *Hicks v. Maness*, 19 Ark. 701; *Kent v. Wells*, 21 Ark. 411; *Nutt v. Hunt*, 4 Smed. & M. (Miss.) 702; *Miller v. Northern Bank*, 34 Miss. 412; *Putnam v. Ross*, 55 Mo. 116; *Gates v. Watson*, 54 Mo. 585; *Speyers v. Fisk*, 3 Hun (N. Y.) 706; *Logan v. Wallis*, 76 N. Car. 416; *Gratz v. Stump*, *Cooke* (Tenn.) 494.

Under statutes rendering partners jointly and severally liable, an individual claim may be joined with a partnership debt in an action against one partner. *Logan v. Wallis*, 76 N. Car. 416.

Under the *Alabama Code*, § 2605,

which declares that any one of a firm may be sued for the obligations of all his associates, a partnership creditor can sue one of the firm on an account stated, and declare on the demand as his individual liability. *Clark v. Jones*, 87 Ala. 474.

Joint and Several Note.—A partner who signs the firm name to a joint and several note, can be sued alone. *Sherman v. Christy*, 17 Iowa 322; *Snow v. Howard*, 35 Barb. (N. Y.) 55.

Partition of Partnership Property.—An action for the partition of certain lots as partnership property should be brought against the devisee of a deceased partner, claiming the absolute ownership of the land, and not against his personal representative. *Jones v. Smith* 31 S. Car. 527.

2. See *infra*, this title, *Dormant Partners*.

3. *Page v. Brant*, 18 Ill. 37; *Hopkins v. Kent*, 17 Md. 72; *Sylvester v. Smith*, 9 Mass. 119; *Wright v. Herrick*, 125 Mass. 154; *Pinschower v. Hanks*, 18 Nev. 99; *Elliot v. Stevens*, 38 N. H. 311; *Chase v. Deming*, 42 N. H. 274; *New York Dry Co. v. Treadwell*, 19 Wend. (N. Y.) 525; *Arnold v. Morris*, 7 Daly (N. Y.) 498; *Cookingham v. Lasher*, 2 Keyes (N. Y.) 454; 1 Abb. App. Dec. (N. Y.) 436; 38 Barb. (N. Y.) 656; *Leslie v. Wiley*, 47 N. Y. 648; *North v. Bloss*, 30 N. Y. 374; *Scott v. Conway*, 58 N. Y. 619; *Lynberg v. Cohen*, 67 Tex. 220; *Boardman v. Keeler*, 2 Vt. 65; *Goddard v. Brown*, 11 Vt. 278; *Cleveland v. Woodward*, 15 Vt. 302; 40 Am. Dec. 682; *Hicks v. Cram*, 17 Vt. 447; *Blin v. Pierce*, 20 Vt. 25; *Hagar v. Stone*, 20 Vt. 106; *DeMautort v. Saunders*, 1 B. & Ad. 398; *Cox v. Hickman*, 8 N. L. Cas. 268.

The plaintiff's knowledge at the time of contracting, fixes his rights, and his discovery of the fact of partnership afterwards, but before suing, does not make the non-joinder a defect, even though the partnership was open and notorious if not known to him. *North v. Bloss*, 30 N. Y. 374; *Hagar v. Stone*, 20 Vt. 106.

In *Alexander v. McGinn*, 3 Watts

him, such other partners may be treated by him as dormant.¹ As a judgment against the ostensible partners alone binds the entire partnership interest, the debt remains joint and has priority over separate debts, the same as if all had been sued.² So, a nominal partner need not be made a co-defendant,³ and in case of the death of a partner defendant *pendente lite* the liability survives against the survivors and no revivor is necessary.⁴

(Pa.) 220, however, it was held if the other partners are not dormant partners, the plaintiff's ignorance of a partnership is no excuse for their non-joinder.

Common Law.—In an action upon the obligation of a firm, contracted while one of the members was a *feme sole*, but who had since married, her husband was properly joined, as a party defendant. *Keller v. Hicks*, 22 Cal. 457.

1. *Sylvester v. Smith*, 9 Mass. 119; *Ward v. Leviston*, 7 Blackf. (Ind.) 466; *Chase v. Deming*, 42 N. H. 274; *Clark v. Holmes*, 3 Johns. (N. Y.) 348; *New York Dry Dock Co. v. Treadwell*, 19 Wend. (N. Y.) 525; *Hurlbut v. Post*, 1 Bosw. (N. Y.) 28; *Brown v. Birdsall*, 29 Barb. (N. Y.) 549; *Farwell v. Davis*, 66 Barb. (N. Y.) 73; *North v. Bloss* 30 N. Y. 374; *Cookingham v. Lasher*, 2 Keyes (N. Y.) 454; 1 Abb. Dec. (N. Y.) 436; 38 Barb. (N. Y.) 656; *Reab v. Pool*, 30 S. Car. 140; *Goddard v. Brown*, 11 Vt. 278; *Hicks v. Cram*, 17 Vt. 449; *Blin v. Pierce*, 20 Vt. 25; *DeMautort v. Saunders*, 1 B. & Ad. 398. And see *Bishop v. Austin*, 66 Mich. 515.

Where a co-partner sells the property of the firm without disclosing its ownership, which is unknown to the vendee, the latter can sue him for fraud in the sale. *Leslie v. Wiley*, 47 N. Y. 648. Or for breach of his warranty. *Clark v. Holmes*, 3 Johns. (N. Y.) 148; *Cookingham v. Lasher*, 2 Keyes (N. Y.) 454; 38 Barb. (N. Y.) 656.

Defendant was sued by an alleged special partnership. *Held*, that to sustain his counter-claim against the active member, he could attack the special partnership as fraudulent, and as a sham to protect the active partner's property from creditors. *Rosenberg v. Block*, 102 N. Y. 255.

Written Contracts With One Partner.

—So where a written contract is expressly made with one of several partners, though the other party to the

contract knows that it is made for the benefit of the co-partnership, his cause of action lies only against the partner named in the contract. *Clark v. Amoskeag Mfg. Co.*, 62 N. H. 612.

2. *Wright v. Herrick*, 125 Mass. 154; *Pinschower v. Hanks*, 18 Nev. 99; *Elliot v. Stevens*, 38 N. H. 311; *VanValen v. Russell*, 13 Barb. (N. Y.) 590; *Carey v. Bright*, 58 Pa. St. 70; *Trynberg v. Cohen*, 67 Tex. 220.

If one creditor attaches partnership property making the ostensible partner alone a defendant, and afterwards another creditor discovered the concealed partner and attaches the same property, making both partners defendants, the former attachment will not be postponed to the latter on that account. *Wright v. Herrick*, 125 Mass. 154. And see *Lord v. Baldwin*, 6 Pick. (Mass.) 348.

3. *Hatch v. Wood*, 43 N. H. 663. And see *Cowles v. Robinson*, 11 Colo. 587.

Where a partner retires without notice of dissolution and a new one takes his place, the old name being retained, a former dealer to whom the firm becomes indebted can hold either the original partners by estoppel or the new firm as the actual debtors, but cannot hold both. *Scarf v. Jardine*, L. R. 7. App. Cas. 745.

4. *Troy Iron etc. Factory v. Winslow*, 11 Blackf. (Ind.) 513; *King v. Bell*, 13 Neb. 409; *Hammond v. St. John*, 4 Yerg. (Tenn.) 107; *Townes v. Birchett*, 12 Leigh (Va.) 173. And see *Gaines v. Beirne*, 3 Ala. 114.

The administrator of a partner who died *pendente lite* may obtain leave to file a separate answer and contest, but in order to recover against him, the plaintiff must file a supplemental bill showing the survivor to be insolvent. *Sherman v. Kreul*, 42 Wis. 33.

Under a statute providing that in actions against partners if service is made on part of the defendants only, the case may proceed to judgment in the same manner as if they were sole

The non-joinder of a partner as a party defendant must be taken advantage of by a plea in abatement, and cannot be urged under the general issue or at the trial,¹ and such defect may be supplied by amendment,² or if third persons are improperly made co-defendants they may be struck out by amendment.³

3. Appeals.—It is permissible for one partner or any number less than all the partners to appeal or prosecute a writ of error, and a reversal as to those appealing is a reversal as to all.⁴ In

defendants and bind the joint property, and the several property of those served, upon the death of one of those served, a revivor against his administrator may be had. *Ross v. Everitt*, 12 Ga. 30. A judgment against the firm, however, is erroneous. *Bowen v. Troy Portable Mill Co.*, 31 Iowa 460.

Distribution of the Proceeds of Real Estate.—The representatives of a partner who dies during the pendency of an action for the distribution of the proceeds of real estate in the sheriff's hands between joint and separate creditors, should be made parties. *Norwalk Nat. Bank v. Sawyer*, 38 Ohio St. 339.

Bankruptcy of a Partner.—If one partner is adjudged a bankrupt, the cause proceeds to judgment as against the rest. *Hogendobler v. Lyon*, 12 Kan. 276; *Lomme v. Kintzing*, 1 Mont. 290; *Tinkum v. O'Neale*, 5 Nev. 93.

1. *Puschel v. Hoover*, 16 Ill. 340; *Page v. Brant*, 18 Ill. 37; *Kent v. Holliday*, 17 Md. 387; *Smith v. Cooke*, 31 Md. 174; *Mershon v. Hobensack*, 22 N. J. L. 372; *Sage v. Sherman*, 2 N. Y. 417; *Coffee v. Eastland*, *Cooke (Tenn.)* 159; *Davis v. Willis*, 47 Tex. 154; *Hardy v. Cheney*, 42 Vt. 417; *Rutter v. Sullivan*, 25 W. Va. 427.

If the declaration discloses a partnership and only one partner is made a party, it is demurrable unless the absence of the other party is accounted for. *Kent v. Holliday*, 17 Md. 387; and in *Pettis v. Atkins*, 60 Ill. 454, it was held that a judgment must be reversed if some of the partners were not made parties.

In an action on an instrument made by one C plaintiff joined other defendants with C who, he alleged, were "doing business under the firm name of C." The attachment writ was sued out against C only. The other defendants pleaded that they did not make the writing, and denied partnership with C. *Held*, that the

court erred in excluding evidence tending to show their liability, as by pleading they had put that question in issue, and had waived any objection on account of the omission of their names from the attachment. *Smith v. Cromer*, 66 Miss. 157.

2. *Kamm v. Harker*, 3 Oregon 208.

A co-partner's request to be let in to defend, will always be granted as he is an interested party. *Peck v. Parchen*, 52 Iowa 46.

So a special lien holder has a right to intervene in an action between partners for dissolution for the purpose of asserting his lien. *Jacobson v. Landolt*, 73 Wis. 142.

But where R R is sued as doing business under the name of R R & Son, the action is against R R only, and no other parties can be added as co-partners by amendment. *Maritime Bank v. Rand*, 24 Conn. 9.

3. *Engelhardt v. Clanton*, 83 Ala. 336; *Kamm v. Harker*, 3 Oregon 208; *Cunningham v. Smithson*, 12 Leigh (Va.) 32; *Cowan v. McIntyre*, 19 Up. Can. Q. B. 607; and see *Wheeler v. Bullard*, 6 Port. (Ala.) 352; *Guzzan v. Bebee*, 8 Port. (Ala.) 49.

Where an action is brought against a firm alleged to consist of five persons, and the evidence shows that the firm contracted the debt, but that three of said persons were not then members of the firm, judgment cannot be rendered against the three persons as members of the firm. *Adams v. Powers*, 82 Va. 612.

4. *Smith v. Bryan*, 60 Ga. 628; *Wood v. Cullen*; 13 Minn. 394; *Dickson v. Burke*, 28 Tex. 117.

If the other partners are not liable, a reversal may be had as to the one liable and a dismissal as to the rest. *Cunningham v. Smithson*, 12 Leigh (Va.) 32.

It has been held that both parties must appeal or at least the bill must be in the name of both. *Curry v. Stokes*, 12 R. I. 52; *Dunns v. Jones*, 4

case of the death of an appealing partner, while the proceeding could be continued in the name of the survivor alone, the court will, on application of the survivor, make the deceased partner's representative a party.¹

4. Removals to United States Courts.—A cause cannot be removed to the Federal courts merely because a part of the partners are citizens of another State,² but a removal may be had if the only defendants served are non-residents.³

5. Recovery of Property Wrongfully Disposed of by a Partner.—There is a substantial conflict of authority as to the effect of a wrongful disposition by one partner of the property of the firm in payment of his individual debt or otherwise, a large number of cases holding that as such disposition disqualifies the disposing partner to maintain an action for its recovery, thus repudiating his own act, he cannot do so by joining others with him,⁴ while an equally large number adopt the theory that such an act is an illegal conversion and passes no title to the creditor, and that the partnership is therefore at liberty to reassert its title to it in the hands of such

Dev. & B. (N. Car.) 154; *Wilkinson v. Gilchrist*, 5 Ired. (N. Car.) 228; *Tu- pery v. Lafitte*, 19 La. Ann. 296.

1. *Gunter v. Jarvis*, 25 Tex. 581.

2. *Blum v. Thomas*, 60 Tex. 158; *Stone v. South Carolina*, 117 U. S. 430; *Woodrum v. Clay*, 33 Fed. Rep. 897.

Under the act of Congress (25 St. U. S. 434) providing that, when an action is between citizens of different States, it may be brought "in the district of the residence of the plaintiff or defendant," an action by a non-resident against a partnership, whose members are residents of different States and districts, may be brought in the district of the residence of one of them. *Rawitzer v. Wyatt*, 40 Fed. Rep. 609.

3. *Davis v. Cook*, 9 Nev. 134.

Where the action in the state courts is in the firm name under a statute, the application for removal must state the names and citizenship of each member, as it cannot be carried on in the firm name in the Federal courts. *Adams v. May*, 27 Fed. Rep. 907.

A bill by one partner against others, praying an account of the proceeds of partnership property sold by some of the partners to a corporation, also a defendant, on which sale it avers that part of the purchase money is still due, and prays that defendant partners be enjoined from selling, and defendant corporation from permitting the transfer on its books of certain stocks of the corporation belonging to the firm, and the appointment of a receiver,

does not present a separable controversy between the corporation and any of the parties, and is not, therefore, under act Cong. March 3, 1887, § 2, removable at the instance of the non-resident corporation. *Yearian v. Horner*, 36 Fed. Rep. 130.

4. *Wallace v. Kelsall*, 7 M. & W. 264; *Jones v. Yates*, 9 B. & C. 532; *Cochran v. Cunningham*, 16 Ala. 448; 50 Am. Dec. 186; *Church v. First Nat. Bank*, 87 Ill. 68; *Brewster v. Mott*, 5 Ill. 378; *Casey v. Carver*, 42 Ill. 225; *Blodgett v. Sleeper*, 67 Me. 499; *Myrick v. Dame*, 9 Cush. (Mass.) 248; *Homer v. Wood*, 11 Cush. (Mass.) 62; *Farley v. Lovell*, 103 Mass. 387; *Greeley v. Wyeth*, 10 N. H. 15; *Fellows v. Wyman*, 33 N. H. 351; *Weaver v. Rogers*, 44 N. H., 112; *Craig v. Hulschizer*, 34 N. J. L. 363; *Wells v. Mitchell*, 1 Ired. (N. Car.) 484; *Cornells v. Stanhope*, 14 R. I. 97; *Estabrook v. Messersmith*, 18 Wis. 545.

This rule applies to the extent of preventing partners from becoming petitioning creditors in bankruptcy. *Richmond v. Heapy*, 1 Stark 202.

Release by One Partner.—It is upon the same theory that the release of a debtor of the firm by one partner is generally held to be a bar to a suit by the firm against the debtor, upon the theory that as one partner has disqualified himself to prosecute the action, the promise being joint the others cannot sue alone. *Cochran v. Cunningham*, 16 Ala. 448; 50 Am. Dec. 186.

creditor.¹ The defrauded partner cannot, in any event, maintain an action at law in his own name for the recovery of property thus disposed of,² though he may maintain a bill in equity against the guilty partner and his grantee;³ and under the former rule where the sole ownership has devolved upon the innocent partner, either, by purchase⁴ or by the death of the guilty one,⁵ he has been held entitled to sue, as has also an assignee for the benefit of creditors or a vendee of the claim.⁶ So, the firm has been held en-

M'Lane v. Sharpe, 2 Harr. (Del.) 481; *Dyer v. Sutherland*, 75 Ill. 583; *Myrick v. Dame*, 9 Cush. (Mass.) 248; *Morse v. Bellows*, 7 N. H. 549; 28 Am. Dec. 372; *Salmon v. Davis*, 4 Binn. (Pa.) 375; 5 Am. Dec. 410; *Richmond v. Heapy*, 1 Stark, 202; *Johnson v. Peck*, 3 Stark. 66; *Sparrow v. Chisman*, 9 B. & C. 241.

1. *Rogers v. Batchelor*, 12 Pet. (U. S.), 221; *Burwell v. Springfield*, 15 Ala. 273; *Brewster v. Mott*, 5 Ill. 378; *Daniel v. Daniel*, 9 B. Mon. (Ky.) 195; *Johnson v. Crichton*, 56 Md. 108; *Minor v. Gaw*, 11 Smed. & M. (Miss.) 322; *Buck v. Mosley*, 24 Miss. 170; *Stegall v. Coney*, 49 Miss. 761; *Ackley v. Staehlin*, 56 Mo. 558; *Forney v. Adams*, 74 Mo. 138; *Billings v. Meigs*, 53 Barb. (N. Y.) 272; *Thomas v. Pennrick*, 28 Ohio St. 55; *Purdy v. Powers*, 6 Pa. St. 492; *Binns v. Waddill*, 32 Gratt. (Va.), 588; *Liberty Sav. Bank v. Campbell*, 75 Va. 534; *Viles v. Bangs*, 36 Wis. 131; *Cotzhausen v. Judd*, 43 Wis. 213; 28 Am. Rep. 539; and see *Grubb v. Cottrell*, 62 Pa. St. 23; *Leonard v. Winslow*, 2 Grant's Cas. (Pa.) 139.

In *Viles v. Bangs*, 36 Wis. 131, the theory was adopted that the firm sues in order to enforce a valid demand, and not to declare the act of a partner void, and that the plaintiff is not required to show as part of its case the fraudulent act of one of the partners, but that this is matter of defense for the defendant to prove in order to defeat the action, which he will not be permitted to do if he had knowledge at the time of the misappropriation.

2. *Hewes v. Bayley*, 20 Pick. (Mass.) 96; *Fenton v. Block*, 10 Mo. App. 536; *Craig v. Hulschizer*, 34 N. J. L. 363; *Miller v. Price*, 20 Wis. 117; *Piercy v. Fynney*, L. R., 12 Eq. 69.

In *Hager v. Graves*, 25 Mo. App. 164, it was held that if the non-joinder is not objected to, the innocent partner may recover.

3. *Halstead v. Shepard*, 23 Ala. 558;

Church v. First Nat. Bank, 87 Ill. 68; *Gordon v. Tyler*, 53 Mich. 629; *Craig v. Hulschizer*, 34 N. J. L. 363; *Piercy v. Fynney*, L. R., 12 Eq. 69.

Where the debtor of a firm paid one of the partners partly in cash and partly by giving his note to a private creditor of such partner, the cash payment will be held to be a good credit, but not so with the note; but in order to protect the maker of the note, monies collected and due to the guilty partner may be applied to pay the innocent one before resorting to him. *Granger v. McGilvra*, 24 Ill. 152.

4. *Brewster v. Mott*, 5 Ill. 378; *Gram v. Cadwall*, 5 Cow. (N. Y.) 489.

Common Partner in Two Firms.—

Where two firms having a common partner, were engaged in the warehouse business, each having wheat stored with them, and the common partner sold his own wheat, but surreptitiously removed and converted a part of it and delivered to the buyer some of the wheat of one of the firms of which he was a member, thus using some of their property to pay his private debt, it was held that the firm was entitled to recover their wheat from the buyer. *Wright v. Ames*, 2 Keyes (N. Y.) 221; 4 Abb. App., Dec. (N. Y.) 644.

5. *Todd v. Lorah*, 75 Pa. St. 155; *Sims v. Smith*, 12 Rich. (S. Car.) 685; *Strong v. Fish*, 13 Vt. 277.

6. *Thomas v. Stetson*, 62 Iowa 537; 49 Am. Rep. 148; *Williams v. Barnett*, 10 Kan. 455; *Cadwallader v. Kroesen*, 22 Md. 200; *Fellows v. Wyman*, 33 N. H. 351; *Everghim v. Ensworth*, 7 Wend. (N. Y.) 326; *Thomas v. Pennrich*, 28 Ohio St. 55; *Cotzhausen v. Judd*, 43 Wis. 213; 28 Am. Rep. 539; *Heilbut v. Nevill*, L. R., 4 C. P. 354.

Where one partner gave a bill of sale of a horse belonging to his partnership which was deeply involved, to his creditor, and subsequently gave a bill of sale of the same horse to a partnership creditor, the latter was held entitled to

titled to sue and collect from a debtor, notwithstanding the transfer in payment of a partner's debt, of a chose in action constituting his indebtedness,¹ and the transaction may be treated as a sale and the recipient sued for the price as for goods sold.² This rule is only applicable when the firm is acting on the aggressive and does not prevent it from pleading such a payment to an individual creditor as a counter-claim in action against it by such creditor,³ nor does the disqualification extend to creditors of the firm, they being entitled to pursue the fund if the recipient knew it was partnership property.⁴

That the creditor thus paid was ignorant of the misappropriation does not deprive the firm of a remedy.⁵ Such a payment

retain the horse, the former conveyance being fraudulent. *Yale v. Yale*, 13 Conn. 185; 33 Am. Dec. 393. And see *Shaw v. McDonald*, 21 Ga. 395.

1. *Nall v. McIntyre*, 31 Ala. 532; *Gordon v. Tyler*, 53 Mich. 629; but see *Kull v. Thompson*, 38 Mich. 685; *Walker v. Kee*, 16 S. Car. 76; 14 S. Car. 142.

Where the payee of the individual note of a partner procures its discount by a bank to whom such partner pays the note with the firm's money, the firm cannot recover of the payee, as the bank and not he received the partnership funds. *Moriarty v. Bailey*, 46 Conn. 592.

Where a firm of factors transferred a warehouse receipt without authority, to pay their own debt, their active partner being also a member of the firm which had consigned the goods, it was held that he acted as factor in making the transfer and not as owner. *Allen v. St. Louis Bank*, 120 U. S. 20.

2. *Daniel v. Daniel*, 9 B. Mon. (Ky.) 195; *Ackley v. Staehlin*, 56 Mo. 558; *Forney v. Adams*, 74 Mo. 138; *Dob v. Halsey*, 16 Johns. (N. Y.) 34; 8 Am. Dec. 293.

3. *Davis v. Smith*, 27 Minn. 390; 29 Minn. 201; *Allen v. St. Louis Bank*, 120 U. S. 20; *Cornells v. Stanhope*, 14 R. I. 97.

In *Liberty Sav. Bank v. Campbell*, 75 Va. 534, it was held that a creditor can set off such part of the amount he had loaned to the guilty partner as was actually used to pay partnership debts even though borrowed for his own accommodation.

4. *Johnson v. Hersey*, 70 Me. 74; 35 Am. Rep. 303; 8 Am. Law. Rec. 720; 73 Me. 291; *Johnson v. Crichton*, 56 Md. 108; *French v. Lovejoy*, 12 N. H. 458; *Caldwell v. Scott*, 54 N. H. 414;

Hartley v. White, 94 Pa. St. 31; *McNaughton's Appeal*, 101 Pa. St. 550; *Sauntry v. Dunlap*, 12 Wis. 364.

The contrary has been held where it does not appear that there was any objection to the misappropriation by the other partner. See *Fenton v. Block*, 10 Mo. App. 536; *Russell v. Converse*, 7 N. H. 343; *Crozier v. Shants*, 43 Vt. 478; *Huntoon v. Dow*, 29 Vt. 215.

Where one member of a firm received stolen property, knowing that such property had been stolen, and in order to prevent a prosecution for the felony, he paid the value of the stolen goods out of the partnership funds, unknown to his co-partner, the innocent co-partner can not maintain an action against the person receiving the money to recover such money back. He is affected by the act of his co-plaintiff in the suit. *Johnson v. Byerly*, 3 Head (Tenn.) 194.

5. *Brewster v. Mott*, 5 Ill. 378; *Minor v. Gaw*, 11 Smed. & M. (Miss.) 322; *Buck v. Mosley*, 24 Miss. 170; *Ackley v. Staehlin*, 56 Mo. 558; *Bank v. Harvey*, 12 Mo. App. 588; *Caldwell v. Scott*, 54 N. H. 414; *Chase v. Bean*, 58 N. H. 183; *Geery v. Cockroft*, 38 N. Y. Super. Ct. 146; *Purdy v. Powers*, 6 Pa. St. 492; *Goode v. McCartney*, 10 Tex. 193; *Young v. Read*, 25 Tex. Supp. 113; *Powell v. Messer*, 18 Tex. 401; *Binns v. Waddill*, 32 Gratt. (Va.) 588; *Liberty Sav. Bank v. Campbell*, 75 Va. 434; *Johnson v. Crichton*, 56 Md. 108; *Rodgers v. Batchelor*, 12 Pet. (U. S.) 221; *Kendal v. Wood*, L. R., 4 Ex. 243; *Heilbut v. Nevill*, L. R., 4 C. P. 354; L. R., 5 C. P. 478; *Snaith v. Burridge*, 4 Taunt. 684. *Contra*, *Locke v. Lewis*, 124 Mass. 1.

In *Williams v. Brimhall*, 13 Gray (Mass.) 462, it was held that the creditor has the burden of proof to show

made in money would appear to stand on a different basis, money having no earmarks,¹ though if the creditor knew that money paid him by a partner belonged to the firm, the firm can recover it.²

XXV. ACTIONS IN THE FIRM NAME.—In several of the States and in England, statutes have been enacted, authorizing actions by and against partnerships to be brought in certain specified cases in the firm name.³ Such statutes recognize a firm as a distinct legal entity apart from the members composing it,⁴ but they are not exclusive, creditors being permitted to proceed against the individual members if they so elect,⁵ and claims arising at times when the firm was composed of different members cannot be

that he acted in good faith and without notice of the fraud on the firm, the mere facts of such application of the property being *prima facie* fraudulent. And see *Chase v. Bean*, 58 N. H. 183. So the burden rests upon the creditor to show authority. *Johnston v. Prich-ton*, 56 M. D. 108.

1. *Wiley v. Allen*, 26 Ga. 568; *Dob v. Halsey*, 16 Johns. (N. Y.) 34; 8 Am. Dec. 293. But see *Moriarty v. Bailey*, 46 Conn. 592; *Kendall v. Wood*, L. R., 6 Eq. 243.

In *Davis v. Smith*, 27 Minn. 390, where a creditor of one partner drew upon him and a bank received the draft and the partner paid it by a check upon the firm's deposit in that bank it was held that the bank's knowledge of the misappropriation was the creditor's knowledge and that the firm could not use it as a counter-claim against the creditor on its own debt, but in the same case reported in 29 Minn. 201, it was held that as money deposited in a bank is the bank's money, the bank paid the draft out of its own money and the creditor was not liable for any part of it.

2. *Foster v. Fifield*, 29 Me. 136; *Kendall v. Wood*, L. R., 6 Eq. 243; *Heilbut v. Nevill*, L. R., 4 C. P. 354.

The burden of proof rests upon the creditor who has received payment of an individual debt of a partner in the money of the firm to show that such payment had been authorized by the other partners. *Davis v. Smith*, 27 Minn. 390; *Crowin v. Suydam*, 24 Ohio St. 209; *Kendal v. Wood*, L. R., 6 Ex. 243.

In *Billings v. Meigs*, 53 Barb. (N. Y.) 272, where a bank transferred partnership funds to the separate account of one partner knowing that he

would appropriate them it was held liable to the firm.

3. *Bates' Law of Partnership*, § 1059. And see *Johnson v. Smith*, 1 Morr. (Iowa) 105; *Abernathy v. Latimore*, 19 Ohio 286; *Atlantic Glass Co. v. Paulk*, 83 Ala. 404, and other cases cited in this section.

4. *Fitzgerald v. Grimmell*, 64 Iowa 261; *Newlon v. Heaton*, 42 Iowa 593; *Leach v. Milburn Wagon Co.*, 14 Neb. 106; *Whitman v. Keith*, 18 Ohio St. 134. And see *Liverpool etc. Nav. Co. v. Agar*, 14 Fed. Rep. 615; *Wilson v. King*, *Morris* (Iowa) 105; *Hefferman v. Brenham*, 1 La. Ann. 146. And see *infra*, this title, *The Firm as an Entity*.

The object of the action not being to enforce a personal liability, if one partner is a married woman, the plea of coverture is no defense. *Yarborough v. Bush*, 69 Ala. 170.

But when one partnership is sued by another, the latter may offset the claim by a debt due one of its members by plaintiff. *Ellis v. Fisher*, 10 La. Ann. 479.

5. *Markham v. Buckingham*, 21 Iowa 494; *Whitman v. Keith*, 18 Ohio St. 134. But see *Liverpool etc. Nav. Co. v. Agar*, 14 Fed. Rep. 615.

Comp. L. of *Michigan*, § 5307, permits a partnership suit to be instituted in the firm name if the names of the partners are not known, and allows amendment at any time before the pleadings are closed, by inserting the names of the partners. *Held*, that this can only apply in cases of actual partnership; and where a writ of replevin was issued in a partnership name, and the amendment showed that there was only one plain-

united in the same action.¹ An individual may be sued under these statutes in the firm name under which he is doing business, but his right to sue in such name is doubtful.² For jurisdictional purposes, a firm must be regarded as having a residence in every county in which it has a place of business wherever its members may live.³

Being remedial in their nature, these statutes are to be liberally construed,⁴ though their provisions should be substantially and literally followed; thus a service of the summons upon the individual members separately will be set aside when the statute requires the service to be made at the place of business,⁵ though in the absence of such a provision, such a service is good,⁶ and the summons may run against the individuals.⁷ So, a pleading is demur-

tiff, the action failed. *Stirling v. Heintzman*, 42 Mich. 449.

1. *Dyas v. Dinkgrave*, 15 La. Ann. 502. And see *Ex parte Blain*, 12 Ch. D. 522; *Shorter v. Hightower*, 48 Ala. 526.

Attachment Suits.—Under Code *Alabama*, § 2904, a suit by original attachment, as well as by summons and complaint, may be commenced against a partnership by the firm name without naming the individuals composing the firm. *McCaskey v. Pollock*, 82 Ala. 174.

2. See *Stirling v. Heintzman*, 42 Mich. 449; *Rosenbaum v. Hayden*, 22 Neb. 744; *Lee v. Hayden*, 22 Neb. 750; *Munster v. Cox*, 11 Q. B. D. 435.

In *Alabama*, the statute formerly applied to actions brought against a firm only, and not to actions brought by the firm. *Sims v. Jacobson*, 51 Ala. 186.

3. *Fitzgerald v. Grimmell*, 64 Iowa 261.

The provision of the *Alabama* Code, § 2904, authorizing an action against a partnership by its firm name, does not relate to proceedings in a court of equity. The court has no jurisdiction of unknown persons engaged in business together, under a name which is not the name of an individual or of a body corporate, and cannot render a decree against them. *Opelika v. Daniel*, 59 Ala. 211.

4. *Whitman v. Keith*, 18 Ohio St. 134; *Phelps Mfg. Co. v. Enz*, 19 Conn. 58. To the contrary see *Burlington etc. R. v. Dick*, 7 Neb. 242.

An action may be brought against a firm in its firm name even though it has been dissolved, upon a cause of action which accrued before dissolution. *Davis v. Morris*, 10 Q. B. D. 436. But

see *Ex parte Blain*, 12 Ch. D. 522; *Ex parte Young*, 19 Ch. D. 124.

A firm may be garnished under these statutes for a debt due to the defendant. *Whitman v. Keith*, 18 Ohio St. 124.

In England a foreign partnership may be sued in its firm name. *Pollexfen v. Sibson*, 16 Q. B. D. 435.

To recover compensation for that which a firm did, although outside the scope of the partnership business, it may sue as a firm. *Tiernan v. Doran*, 19 Neb. 492.

5. See *Shafer v. Hockheimer*, 36 Ohio St. 215; *Whitman v. Keith*, 18 Ohio St. 134; *Clark v. Evans*, 64 Mo. 258.

Where a firm engaged in the dairy business brought an action for services in herding cattle, the defendant cannot defend upon the ground that the firm was not in the business of herding and that, therefore, the services were not rendered by the plaintiff as a firm, for the reason that the land fee, etc., belong to the firm, and the compensation would also belong to it. *Tiernan v. Doran*, 19 Neb. 492.

6. *Gilbert v. Walter*, 74 Ga. 291; *Ladiga v. Saw Mill Co. v. Smith*, 78 Ala. 108.

7. *Ladiga Saw Mill Co. v. Smith*, 78 Ala. 108; *Hefferman v. Brenham*, 1 La. Ann. 146; *Pollexfen v. Sibson*, 16 Q. B. D. 792.

Where a writ issued against R. & Co., however, and an appearance was entered by R. for R. & Co., and a verdict and judgment were rendered against him in that name, the judgment cannot be amended so as to run against R. & Co. in order to permit an execution to issue against a subsequently discovered partner. *Munster v. Cox*, 10 App. Cas. 680.

able for want of capacity, if facts showing the right to sue or the liability to be sued in the firm name are not alleged,¹ and the judgment cannot be separately entered against a part of the partners who are in default, but must be against the firm and in the firm name.² Execution upon such a judgment is in the nature of a proceeding *in rem*, and can be levied only upon partnership property,³ a judgment being a lien on such property only;⁴ but the contrary has been held where the summons was served upon all the partners.⁵

An action improperly brought in the firm name may be amended by inserting the names of the individual partners, together with proper allegations of partnership.⁶ So, the omission of the

1. Sweet *v.* Ervin, 54 Iowa 101; Byington *v.* Mississippi etc. R. Co., 11 Iowa 502; Haskins *v.* Alcott, 13 Ohio St. 210.

The use of a firm name has been held equivalent to an averment that the defendant is a partnership doing business under that name. Love *v.* Blair, 72 Ind. 281.

An action against partners in which the complaint states their individual names, and alleges that they are doing business under their firm name, stating it, is not an action against them in the firm name. Davidson *v.* Knox, 67 Cal. 143; Smith *v.* Gregg, 9 Neb. 212.

2. Marsh *v.* Mead, 57 Iowa 535; Fitzgerald *v.* Grimmell, 64 Iowa 261; Storm *v.* Roberts, 54 Iowa 677; Adkins *v.* Arthur, 33 Tex. 431; Jackson *v.* Litchfield, 8 Q. B. D. 474. To the contrary see Nevada, Gillig *v.* Lake Bigler Road Co., 2 Nev. 214.

A dismissal as to one partner who was not served, is a dismissal of the whole case. Storm *v.* Roberts, 54 Iowa 677.

Entering judgment against all the partners instead of the firm in the firm name, however, is a mere irregularity, and the judgment, as against the partners actually served is not void or subject to collateral attack. Marsh *v.* Mead, 57 Iowa 535.

3. Watts *v.* Rice, 75 Ala. 289; Yarrowborough *v.* Bush, 69 Ala. 170; Haralson *v.* Campbell, 63 Ala. 278; McCoy *v.* Watson, 51 Ala. 463; Wyman *v.* Stewart, 42 Ala. 163; Levally *v.* Ellis, 13 Iowa 544; Davis *v.* Buchanan, 12 Iowa 575; and see Clayton *v.* May, 68 Ga. 27.

4. York Bank's Appeal, 36 Pa. St. 458; McCoy *v.* Watson, 51 Ala. 466; and see Lathrop *v.* Brown, 23 Iowa 40; Markham *v.* Buckingham, 21 Iowa

494; Appeal of Fox (Pa. 1887), Atl. Rep. 228.

A party obtaining such a judgment against a firm, is not a judgment creditor of an individual partner in such a sense that he can attack a conveyance by such partner of individual property in fraud of creditors. McCoy *v.* Watson, 51 Ala. 466.

But such a judgment docketed in the name of the judgment creditors is a lien upon the debtors' land, and notice to purchasers. Dearborn *v.* Patton, 3 Oregon 420.

5. Stout *v.* Baker, 32 Kan. 113.

6. Sims *v.* Jacobsen, 51 Ala. 186; Rohrbough *v.* Reed, 57 Mo. 292; Dobell *v.* Loker, 1 Handy (Ohio) 574; and see Maritime Bank *v.* Rand, 24 Conn. 9; Marienthal *v.* Amburgh, 2 Disney (Ohio) 586.

In Mexican Mill *v.* Yellow Jacket S. Mine, 4 Nev. 40, it was held that there could be no amendment, because there was no plaintiff to amend.

In Ward *v.* Pine, 50 Mo. 38, the court allowed an amendment changing an allegation that the plaintiff was a corporation to one, that it was a partnership, and see Anglo-American Packing etc. Co. *v.* Turner Casing Co., 34 Kan. 340.

An action commenced in the firm name after the death of one of the partners may be amended by the substitution of the surviving partners as plaintiffs. Cragin *v.* Gardner, 64 Mich. 399.

A mere entry of an amendment adding the names of parties or inserting allegations showing the right to sue in that form, on the record is not sufficient; the amendment is not complete until personal service of the summons. Marienthal *v.* Amburgh, 2 Disney (Ohio) 586.

statutory averments showing the right to sue as a firm is cured by verdict and judgment,¹ and a failure to raise the question of the capacity of a non-resident firm to maintain such an action is a waiver of the objection,² and, generally, all objections to the manner of bringing the action, or to the statement of the facts authorizing the maintenance of the action in this form must be taken before judgment,³ but a judgment by default will be set aside if the record and papers do not show the debtor, by whom he has been sued;⁴

After a judgment has been obtained against a firm in its firm name, an action against the individual partners may be maintained upon it,⁵ or to bring them in as parties to the judgment,⁶ but the pleadings must show that the partnership property was not sufficient to satisfy the judgment because of the priority of separate creditors in the separate estate.⁷

In an action against a firm of three members, where the complaint is against two only, by their individual names, and the summons is in the firm name only, while other papers contain the names of all three, and the defendants subsequently appear by their own proper names, the discrepancy is immaterial, under the provision of Supp. Rev. St. *Wisconsin*, § 2612a, that a partnership may be sued by its firm name, and the names of its members substituted when disclosed. *Schweppe v. Wellauer*, 76 Wis. 19.

1. *Wendall v. Osborne*, 63 Iowa, 99.

2. *Cady v. Smith*, 12 Neb. 628. And see *Wilson v. King*, Morris (Iowa) 105; *Abernathy v. Latimore*, 19 Ohio 286.

Action for Libel.—Under Code Alabama 1886, § 2605, which provides that partners may be sued by the firm name, an action for a libel may be maintained against a partnership by the firm name, without giving the names of the partners, where the wrong was done by all the partners, or by one in the course of the partnership business. *Atlantic Glass Co. v. Paulk*, 83 Ala. 404.

3. *Pate v. Bacon*, 6 Munf. (Va.) 219; *Fowler v. Williams*, 62 Mo. 403; *Davis v. Kline*, 76 Mo. 310; *Totly v. Donald*, 4 Murf. (Va.) 430; *Downer v. Morrison*, 2 Gratt. (Va.) 250. But see to the contrary, *Burlington etc. R. Co. v. Dick*, 7 Neb. 242; *Seely v. Schenck*, 2 N. L. J. 75.

4. *Lanford v. Patton*, 44 Ala. 584; *Seely v. Schenck*, 2 N. J. L. 75; *Burden v. Cross*, 33 Tex. 685.

5. *Cox v. Harris*, 48 Ala. 538; *Wa-*

terman v. Lipman, 67 Cal. 26; *Leach v. Milburn Wagon Co.*, 14 Neb. 106; *Ruth v. Lowery*, 10 Neb. 260; *Haskins v. Alcott*, 13 Ohio St. 210.

The judgment obtained in this form of action is joint and several, and a single partner can be sued upon it. *Cox v. Harris*, 48 Ala. 538. And as the right to sue the partners existed before the judgment, it is an extension of the remedy, and the Statute of Limitations applicable to actions upon ordinary judgments does not apply. *Hawkins v. Lasley*, 40 Ohio St. 37; *Asht v. Guie*, 97 Pa. St. 493; 39 Am. Rep. 818.

Where a firm did business in two different States under different names and judgments were obtained against it in each name, the two judgments may be joined in one action against the individual members of the firm. *Ruth v. Lowery*, 10 Neb. 260.

6. *Waterman v. Lippman*, 67 Cal. 26; *Hawkins v. Lasley*, 40 Ohio St. 37.

A judgment against a partnership in its firm name alone will support an action against an individual member of the firm to enforce his individual liability for the firm debts. *Cox v. Harris*, 48 Ala. 538.

7. *Ruth v. Lowery*, 10 Neb. 260; and see *Leach v. Milburn Wagon Co.*, 14 Neb. 106.

Where the firm was doing business in different States, an averment of execution returned *nulla bona* in one State is not sufficient. *Leach v. Milburn Wagon Co.*, 14 Neb. 106.

Where the action on the judgment is brought in the same State as the original action, the omission in the second

XXVI. ACTIONS AT LAW BETWEEN PARTNERS.—In actions between partners not involving any partnership account or any interference with persons, against whom no relief is sought, the principles applicable to actions generally must be observed;¹ but such an action can be maintained only where the cause of action is so distinct from the partnership accounts as not to involve their consideration,² or where there has been a final settlement of the affairs of the concern including the collection of its assets, the discharge of its liabilities and the statement of balances.³ Upon the same principle a matter involving the partnership accounts cannot be set off or pleaded as a counter-claim in an action be-

suit to make proper averments showing the right to maintain the action in the firm name, is immaterial, as that was established in the original action. *Haskins v. Olcott*, 13 Ohio St. 210.

Neither the pleadings nor the judgment in the original action, however, can be amended in the action on the the judgment. *Waterman v. Lipman*, 67 Cal. 26.

1. *Lindley on Part.* 877.

2. See *Freeman v. Finnall*, 1 Smed. & M. Ch. (Miss.) 623; *Fleming's Appeal*, 67 Pa. St. 18; *Newby v. Harrell*, 99 N. Car. 149; *Hall v. Logan*, 34 Pa. St. 331; *Crater v. Bining*, 45 N. Y. 945; *Cochrane v. Quackenbush*, 29 Minn. 376; *Smith v. Moore*, 129 Mass. 222; *Milburn v. Codd*, 7 B. & C. 421; *Goddart v. Hodges*, 1 Cr. & M. 33; *Smith v. Barrow*, 2 T. R. 476; *Bovill v. Hammond*, 6 B. & C. 151; *Scott v. McIntosh*, 2 Camp. 138.

The same rule applies to the assignor of a partner's interest upon suit by the assignee, and the remaining partners. *Learned v. Ayres*, 41 Mich. 677.

A partnership continues after its dissolution for the purpose of collecting its claims, paying its debts, and adjusting its affairs; and an action by one partner against another for money due arising from transactions relating to the partnership transpiring after dissolution is one in equity. *Bender v. Markle*, 37 Mo. App. 234.

An action for slanderous words, spoken of plaintiff by a mutual aid association of which he was a member when the alleged tort was committed, will not lie against the association sued as a partnership; but the redress, if any, is against the wrong-doers in their individual or non-partnership capacity. Nor does it make any difference in this respect that, in consequence of this slander, plaintiff was suspended from

the benefits of membership for a term of years, and that the action was brought pending this term of suspension. *Gilbert v. Crystal Fountain Lodge*, 80 Ga. 284.

3. *Morrow v. Riley*, 15 Ala. 710; *Broda v. Greenwald*, 66 Ala. 538; *Houston v. Brown*, 23 Ark. 333; *Russell v. Byron*, 2 Cal. 86; *Ross v. Cornell*, 45 Cal. 133; *Fisher v. Sweet*, 67 Cal. 228; *Beaton v. Wade*, 14 Colo. 4; *Wetmore v. Woodbridge*, Kirby (Conn.) 164; *Beach v. Hotchkiss*, 2 Conn. 425; *Mickle v. Peet*, 43 Conn. 65; *Price v. Drew*, 18 Fla. 670; *Chadsey v. Harrison*, 11 Ill. 151; *Burns v. Nottingham*, 60 Ill. 531; *Briggs v. Daugherty*, 48 Ind. 247; *Krutz v. Craig*, 53 Ind. 561; *Lang v. Oppenheim*, 96 Ind. 47; *Page v. Thompson*, 33 Ind. 137; *Williamson v. Haycock*, 11 Iowa 40; *Simrall v. O'Bannons*, 7 B. Mon. (Ky.) 608; *Austin v. Vaughan*, 14 La. Ann. 43; *Succession of Powell*, 14 La. Ann. 427; *Seelye v. Taylor*, 32 La. Ann. 1115; *Learned v. Ayers*, 41 Mich. 667; *Miner v. Lorman*, 56 Mich. 212; *White v. Waide*, Walk (Miss.) 263; *Ivy v. Walker*, 58 Miss. 253; *Hoff v. Rogers*, 67 Miss. 208; *Scott v. Caruth*, 50 Mo. 120; *Mulhall v. Cheatham*, 1 Mo. App. 476; *Perley v. Brown*, 12 N. H. 493; *Wright v. Cobleigh*, 21 N. H. 339; *Towle v. Meserve*, 38 N. H. 9; *Harris v. Harris*, 39 N. H. 45; *Young v. Brick*, 3 N. J. L. 664; *Niven v. Spickerman*, 12 Johns. (N. Y.) 401; *Halsted v. Schmelzel*, 17 Johns. (N. Y.) 80; *Casey v. Brush*, 2 Cai. (N. Y.) 293; *Pattison v. Blanchard*, 6 Barb. (N. Y.) 537; *Buell v. Cole*, 54 Barb. (N. Y.) 353; *Emrie v. Gilbert*, Wright (Ohio) 764; *Singizer's Appeal*, 28 Pa. St. 524; *Ferguson v. Wright*, 61 Pa. St. 258; *Dowling v. Clarke*, 13 R. I. 134; *Spear v. Newell*, 13 Vt. 288; *Warren v. Wheelock*, 21

tween partners based upon independent transactions.¹ Thus, one partner cannot recover at law for the price of goods sold by him to the firm,² nor for labor or services rendered by him in relation to the partnership business,³ even though the compensation is fixed

Vt. 323; *Newbrau v. Snider*, 1 W. Va. 153; *Lamalere v. Caze*, 1 Wash. (U.S.) 435; *Ozeas v. Johnson*, 4 Dall. (U.S.) 434; 1 Bin. (U.S.) 191; *Contra*, *Johnson v. Kelly*, 4 Thomp. & C. (N.Y.) 417. And see *Duck v. Abbott*, 24 Ind. 349; *Shalter v. Caldwell*, 27 Ind. 376; *Heavilon v. Heavilon*, 29 Ind. 509.

It is a good defense to a claim filed against an estate of a deceased person, that its items grew out of a partnership between the claimant and the intestate, which is still unsettled. *Bowzer v. Stroughton*, 119 Ill. 47.

That the defendant partner has absconded does not confer a right to sue at law when such right does not otherwise exist. *Stowe v. Sewall*, 3 Stew. & P. (Ala.) 67.

In case of the insolvency or fraud of the plaintiff, suit at law may be stayed until an accounting through equitable relief may be had. *Leabo v. Renshaw*, 61 Mo. 292; *Jones v. Shaw*, 67 Mo. 667; *Foulks v. Rhodes*, 12 Nev. 225; *Ives v. Miller*, 19 Barb. (N.Y.) 196; *Love v. Rhyne*, 86 N. Car. 576; *Neil v. Greenleaf*, 26 Ohio St. 567; *Linderman v. Disbrow*, 31 Wis. 465. So in case of the non-residence of the plaintiff. *Pool v. Delaney*, 11 Mo. 570.

1. *Scott v. Campbell*, 30 Ala. 728; *Burney v. Boone*, 32 Ala. 486; *Case v. Maxey*, 6 Cal. 276; *Haskell v. Moore*, 29 Cal. 437; *Taylor v. Hardin*, 38 Ga. 577; *Johnson v. Willson*, 54 Ill. 419; *Borry v. Powell*, 18 Ill. 98; *Wilt v. Bird*, 7 Blackf. (Ind.) 258; *Austin v. Vaughan*, 14 La. Ann. 43; *Sample v. Griffith*, 5 Iowa 376; *Starbuck v. Shaw*, 10 Gray (Mass.) 492; *Hess v. Final*, 32 Mich. 515; *Elder's Appeal*, 39 Mich. 474; *Gardiner v. Fargo*, 58 Mich. 72; *Finney v. Turner*, 10 Mo. 207; *Wright v. Jacobs*, 61 Mo. 19; *Leabo v. Renshaw*, 61 Mo. 292; *Ordiorne v. Woodman*, 39 N. H. 541; *Hewitt v. Kuhl*, 25 N. J. Eq. 24; *Ives v. Miller*, 19 Barb. (N.Y.) 196; *Cummings v. Morris*, 25 N. Y. 625; *Love v. Rhyne*, 86 N. Car. 576; *Neil v. Greenleaf*, 26 Ohio St. 567; *Roberts v. Fittler*, 13 Pa. St. 265; *Klase v. Bright*, 71 Pa. St. 186; *Wharton v. Douglass*, 76 Pa. St. 273; *Linderman v. Disbrow*, 31 Wis. 465; *Tomlinson v.*

Nelson, 49 Wis. 679; *Contra*, *Irish v. Snelson*, 16 Ind. 365; *Greathouse v. Greathouse*, 60 Tex. 597.

That a suit for an accounting is already pending and that a cross demand may arise out of it will not confer the right to make an equitable off-set. *Hewitt v. Kuhl*, 25 N. J. Eq. 24.

A set-off is inadmissible in any suit, unless it is in the same right and between the same parties; therefore an unsettled claim against a firm cannot be set off in an action by one of the partners for his individual debt, even though they arose out of the same transaction. *Milliken v. Gardner*, 37 Pa. St. 456.

But where co-partners are summoned as trustees in a trustee process, they may set-off a claim due from the defendant to one of the partners. *Robinson v. Furbush*, 34 Me. 509. And see *Chamberlain v. Stewart*, 6 Dana (Ky.) 32.

Surviving Partners.—See *infra*, this title, *Actions by and Against Surviving Partners*.

2. *Bullard v. Kinney*, 10 Cal. 60; *Dale v. Thomas*, 67 Ind. 570; *Marks v. Stein*, 11 La. Ann. 509; *Marx v. Bloom*, 21 La. Ann. 6; *Course v. Prince*, 1 Mill (S. Car.) 413.

Where a trustee under a deed of trust executed by one partner on partnership property as security for an individual debt, has recovered the property in replevin against the partner executing the deed, who was in possession of the property, the other partner must resort to equity in order to recover it from the trustee, as one part owner cannot maintain an action at law against his co-owner for the joint property. *Hoff v. Rogers*, 67 Miss. 208.

3. *Robinson v. Green*, 5 Harr. (Del.) 115; *O'Brien v. Smith*, 42 Kan. 49; *Causten v. Burke*, 2 Har. & G. (Md.) 295; *Clonan v. Thornton*, 21 Minn. 380; *Younglove v. Liebhardt*, 13 Neb. 557; *Warren v. Wheelock*, 21 Vt. 323; *Lower v. Denton*, 9 Wis. 268; *Drew v. Ferson*, 22 Wis. 651; *Holmes v. Higgins*, 1 B. & C. 74; *Milburn v. Codd*, 7 B. & C. 419; *Lucas v. Beach*, 1 M. & G. 417; *Goddard v. Hodges*, 1 Cr. & M. 33; *Taylor v. Smith*, 3 Cranch (C. C.) 241.

by agreement or provided for by the articles.¹ So, one partner cannot maintain an action at law to recover his share of partnership funds received or appropriated by his co-partners,² nor for the recovery of the agreed rent of premises owned by him and occupied by the firm,³ nor for advances or loans made by him to the firm,⁴ nor to reimburse himself, or for contribution for debts of

In *Hills v. Bailey*, 27 Vt. 548, where an agreement was entered into that one partner should furnish all the capital, and the other be the active partner, the one to pay the other a fixed sum per year in consideration for his services, it was held that this contract must be construed with reference to the subject-matter and the situation of the parties and that in that view it must be deemed to mean that such compensation is payable by the firm and not by one partner, and that the other could not therefore maintain an action at law for its recovery.

A and B were partners and A owned a steamboat. The partnership furnished materials and labor to repair and furnish the boat. B, as surviving partner, instituted proceedings *in rem* against the boat to procure compensation. *Held*, that such a proceeding could not be sustained in such a case. *Thompson v. Steamboat Julius D. Morton*, 2 Ohio St. 26.

1. *Duff v. Maguire*, 99 Mass. 300; *Holyke v. Mayo*, 50 Me. 385; *Wright v. Troop*, 70 Me. 346; *Causten v. Burke*, 2 Har. & G. (Md.) 295; *Wood v. Cullen*, 13 Minn. 394; *Hills v. Bailey*, 27 Vt. 548. *Contra* *Lassiter v. Jackman*, 88 Ind. 118; *Covington v. Leak*, 88 N. Car. 133. And see *Robinson v. Green*, 5 Harr. (Del.) 115.

2. *Burney v. Boone*, 32 Ala. 486; *Russell v. Byron*, 2 Cal. 86; *Root v. Stevenson*, 24 Ind. 115; *Dana v. Gill*, 5 J. J. Marsh. (Ky.) 242; 20 Am. Dec. 255; *Stanton v. Buckner*, 24 La. Ann. 391; *Pray v. Mitchell*, 60 Me. 340; *Riari v. Wilhelm*, 3 Gill (Md.) 356; *Homer v. Wood*, 11 Cush. (Mass.) 62; *Howard v. Patrick*, 38 Mich. 795; *Gardiner v. Fargo*, 58 Mich. 72; *Stothert v. Knox*, 5 Mo. 112; *Springer v. Cabell*, 10 Mo. 640; *McKnight v. McCutchen*, 27 Mo. 436; *Smith v. Smith*, 33 Mo. 557; *Wright v. Cobleigh*, 21 N. H. 339; *Towle v. Meserve*, 38 N. H. 9; *Young v. Brick*, 3 N. J. L. 664; *Graham v. Holt*, 3 Ired. (N. Car.) 300; *Kutz v. Dreiblebis*, 126 Pa. St. 335; *Cook v. Garrett*, 1 Brev. (S. Car.) 388; *Fromont v. Coupland*, 2 Bing. 170; *Lewis*

v. Edwards, 7 M. & W. 300; *Bovill v. Hammond*, 6 B. & C. 148; *Lyon v. Haynes*, 5 M. & G. 504.

Not even after dissolution, but before settlement. *Belanger v. Dana*, 52 Hun (N. Y.) 39.

An action at law will not lie in favor of one partner, against his co-partner, to recover the profits made by the latter on sale of property formerly belonging to the firm, but procured to be transferred by defendant from the firm to himself, through a third person, and afterwards by him sold at an advance, where no settlement of the partnership accounts and transactions has been had. *Devore v. Woodruff* (N. Dak. 1890), 45 N. W. Rep. 701.

3. *Pico v. Cuyas*, 47 Cal. 174, 180; *Johnson v. Wilson*, 54 Ill. 419; *Hayes v. Fish*, 36 Ohio St. 498; *Kinloch v. Hamlin*, 2 Hill Eq. (S. Car.) 19; *Estes v. Whipple*, 12 Vt. 373. But see *Allen v. Anderson*, 13 Ill. App. 451.

One partner cannot maintain a suit to recover possession of property owned by him upon which the firm transacts its business, from the other partner for non-payment of rent. *Pico v. Cuyas*, 47 Cal. 180.

In *Kinney v. Robison*, 52 Mich. 389, however, it was held that such a rent claim stands on the same footing as if in favor of a third person where the other partner and not the firm is to pay it.

4. *Houston v. Brown*, 23 Ark. 333; *Mickle v. Peet*, 43 Conn. 65; *Price v. Drew*, 18 Fla. 670; *Elliott v. Deason*, 64 Ga. 63; *Wilson v. Soper*, 13 B. Mon. (Ky.) 331; 56 Am. Dec. 573; *Bracken v. Kennedy*, 4 Ill. 558; *Hennegin v. Wilcoxon*, 13 La. Ann. 576; *Crottes v. Frigerio*, 18 La. Ann. 283; *Springer v. Cabell*, 10 Mo. 640; *Seighortner v. Weissenborn*, 20 N. J. Eq. 172; *Gridley v. Dole*, 4 N. Y. 486; *Payne v. Freer*, 91 N. Y. 43; 43 Am. Rep. 640; 25 Hun (N. Y.) 124; *Haskell v. Vaughan*, 5 Sneed (Tenn.) 618; *O'Neill v. Brown*, 61 Tex. 34; *Peering v. Hone*, 4 Bing. 28; *Richardson v. Bank of England*, 4 Myl. & Cr. 165; *Colley v. Smith*, 2 M. & R. 96.

the firm paid by him out of his private estate.¹ And that such payment of the firm's debt was compulsory does not alter the rule.²

1. Matters Distinct from the Partnership Accounts—*a.* TRANSACTIONS INDEPENDENT OF THE PARTNERSHIP RELATION.—With reference to transactions outside the partnership, partners deal with each other as strangers, and one partner may maintain an action at law against another for damages in respect to a demand which had nothing to do with the partnership business,³ an action for damages for the breach of an express agreement lying if the damages when recovered would have belonged to the plaintiff

Question When to be Raised.—Where an action at law has been brought by one partner against another, which action has been transferred to a court of equity, referred to a commissioner for a settlement of the partnership, an account taken, and a settlement made, it is too late to raise the question of the right of plaintiff to bring the action in the mode adopted. *Squiar v. Ford* (Ky. 1888), 7 S. W. Rep. 152.

1. *Phillips v. Lockhart*, 1 Ala. 521; *De Jarnette v. McQueen*, 31 Ala. 230; *Ross v. Cornell*, 45 Cal. 133; *Bishop v. Bishop*, 54 Conn. 232; *Price v. Drew*, 18 Fla. 670; *Crossley v. Taylor*, 83 Ind. 337; *Lawrence v. Clark*, 9 Dana (Ky.) 257; 35 Am. Dec. 133; *Camblat v. Tupery*, 2 La. Ann. 10; *Hennegin v. Wilcox*, 13 La. Ann. 576; *Kennedy v. McFadon*, 3 Har. & J. (Md.) 194; *Haskell v. Adams*, 7 Pick. (Mass.) 59; *Myrick v. Dame*, 9 Cush. (Mass.) 248; *Wright v. Harlow*, 5 Gray (Mass.) 463; *Phillips v. Blatchford*, 137 Mass. 510; *Glynn v. Phetteplace*, 26 Mich. 383; *Morin v. Martin*, 25 Mo. 360; *Scott v. Caruth*, 50 Mo. 120; *Bond v. Bemis*, 55 Mo. 524; *Wright v. Jacobs*, 61 Mo. 19; *Cockrell v. Thompson*, 85 Mo. 510; *Younglove v. Liebhardt*, 13 Neb. 557; *Tucker v. Peaslee*, 36 N. H. 167; *Harris v. Harris*, 39 N. H. 45; *Murray v. Bogert*, 14 Johns. (N. Y.) 318; *Westerlo v. Everton*, 1 Wend. (N. Y.) 531; *Ives v. Miller*, 19 Barb. (N. Y.) 196; *Torrey v. Twombly*, 57 How. Pr. (N. Y.) 149; *Booth v. Farmers' etc. Bank*, 74 N. Y. 228; 11 Hun (N. Y.) 258; *Leidy v. Messinger*, 71 Pa. St. 177; *Fessler v. Hickernell*, 82 Pa. St. 150; *Fulton's Appeal*, 95 Pa. St. 323; *Kelly v. Rauffman*, 18 Pa. St. 351; *Merriwether v. Hardeman*, 51 Tex. 436; *Lockhart v. Lytle*, 47 Tex. 452; *Warren v. Wheelock*, 21 Vt. 323; *Kendrick v. Tarbell*, 27 Vt. 512; *Drew v.*

Person, 22 Wis. 651; *Sprout v. Crowley*, 30 Wis. 187; *Tomlinson v. Nelson*, 49 Wis. 679; *Small v. Riddle*, 31 Up. Can. C. P. 373; *Robson v. Curtis*, 1 Stark. 78; *Goddard v. Hodges*, 1 Cr. & M. 33; *Pearson v. Skelton*, 1 M. & W. 504; *Brown v. Tapscott*, 6 M. & W. 119; *Halderman v. Halderman*, Hempst. (U. S.) 559;

Where a note was given to a partnership creditor signed by one partner as maker and by the other as surety, and the latter has to pay the whole note, he cannot sue the other at law as his payment was on account of the firm. *Polard v. Stanton*, 5 Ala. 451.

2. *Dewit v. Staniford*, 1 Root (Conn.) 270; *Lawrence v. Clark*, 9 Dana (Ky.) 257; *Kennedy v. M'Fadon*, 3 Har. & J. (Md.) 194; *Stothert v. Knox*, 5 Mo. 112; *Murray v. Bogert*, 14 Johns. (N. Y.) 318; *Westerlo v. Everton*, 1 Wend. (N. Y.) 532; *Booth v. Farmers' etc. Bank*, 74 N. Y. 228; 11 Hun. (N. Y.) 258; *Appeal of Andriessen*, 123 Pa. St. 303; *Fessler v. Hickernell*, 82 Pa. St. 150; *Fulton's Appeal*, 95 Pa. St. 323; *Sadler v. Nixon*, 5 B. & Ad. 936; *Pearson v. Skelton*, 1 M. & W. 504; *Scripture v. Gordon*, 7 Up. Can. C. P. 164.

But where the dealings between two partners embrace but a few items, and there are no such transactions as to make a settlement difficult, and all the partnership matters are settled except only an accounting between them, the claim of one partner for contribution for the payment of a joint note, given in the partnership business, can be maintained at law. *Clarke v. Mills*, 35 Kan. 393.

3. See *Haller v. Williamowicz*, 23 Ark. 566; *Paine v. Moore*, 6 Ala. 129; *Battaille v. Battaille*, 6 La. Ann. 682; *Elder v. Hood*, 38 Ill. 533; *Chamberlain v. Walker*, 10 Allen (Mass.) 429;

alone.¹ One partner may sue another at law for money lent or upon an absolute promissory note made by the one to the other,² and if one partner as agent for the other collects rents or receives money belonging to him individually, he is liable in an

Bierman v. Braches, 14 Mo. 24; *Seaman v. Johnson*, 46 Mo. 111; *Tunis v. Leutze*, 1 Mo. App. 211; *Carpenter v. Wells*, 65 Ill. 451; *Hamilton v. Hamilton*, 18 Pa. St. 20.

Where a carpenter employed to work on a house belonging to a partnership in which it conducts its business, buys a partner's interest when the work is nearly finished and finishes it afterwards, he may sue the other partner for his share of the work, it not being a partnership transaction. *Boyd v. Brown*, 2 La. Ann. 218. And see *Mullany v. Keenan*, 10 Iowa 224.

Where a partner sold out his interest in a firm and the buyer became a partner in his stead, and assumed all the seller's liabilities, and the buyer afterwards acquired a note made by the firm before he became a member, it was held that he could sue any of the makers other than the retiring partner upon it. *Penn v. Stone*, 10 Ala. 209.

A partnership between debtor and creditor does not merge the debt. *Haskell v. Moore*, 29 Cal. 437; *Gulick v. Gulick*, 16 N. J. L. 186; *Mitchell v. Dobson*, 7 Ired. Eq. (N. Car.) 34; *Cunningham v. Ihmsen*, 63 Pa. St. 351; *Whitaker v. Bledsoe*, 34 Tex. 401.

1. See *Robinson v. Bullock*, 58 Ala. 618; *Morgan v. Nunes*, 54 Miss. 308; *Terry v. Carter*, 25 Miss. 168; *Foulks v. Rhodes*, 12 Nev. 225; *Whitehall v. Shickle*, 43 Mo. 538; *Moritz v. Peebles*, 4 E. D. Smith (N. Y.) 135; *Wills v. Simmonds*, 8 Hun (N. Y.) 189; *Glover v. Tuck*, 24 Wend. (N. Y.) 153; *Kinloch v. Hamlin*, 2 Hill Eq. (S. Car.) 19; *Hunt v. Reilly*, 50 Tex. 99.

A suit at law may always be maintained for a breach of partnership articles, where the business of the partnership has not been commenced, and there are no accounts in dispute between the partners, and where some of the parties have sold out their interest before the matter in controversy arose, they need not be made parties. *Vance v. Blair*, 18 Ohio 532; 51 Am. Dec. 467.

Though a contract concerns the partnership affairs, and is in furtherance of the joint undertaking, if it is

the individual contract of the partners who are parties to it and is made by them in their own names an action may be maintained thereon by one against the other during the continuance of the partnership. *Wright v. Michie*, 6 Gratt. (Va.) 364.

2. *Huyck v. Meador*, 24 Ark. 191; *Perkins v. Young*, 16 Gray (Mass.) 389; *Sturges v. Swift*, 32 Miss. 239; *Jones v. Shaw*, 67 Mo. 667; *Miller v. Talcott*, 54 N. Y. 114; *Cummings v. Morris*, 25 N. Y. 625; *Corner v. Thompson*, 4 Up. Can., Q. B. (O. S.) 256. See *Foulks v. Rhodes*, 12 Nev. 225.

An action may be maintained for the recovery of money loaned, even though the amount lent was to be used to pay partnership debts. *Chamberlain v. Walker*, 10 Allen (Mass.) 429.

A recovery may be had upon a note given by one partner to another, even though the note was given for an estimated balance. *McSherry v. Brooks*, 46 Md. 103; *Merrill v. Green*, 55 N. Y. 270; *Kidder v. McIlhenny*, 81 N. Car. 123; *McKay v. Overton*, 65 Tex. 82; *Burnes v. Scott*, 117 U. S. 582; *Powell v. Graves*, 9 La. Ann. 435.

A note made by one partner to another for the use of the partnership may be recovered on at law for the use of the partnership, on the ground that the promise was thereby separated from the partnership accounts. *Mahan v. Sherman*, 7 Blackf. (Ind.) 378; *Bonnaffe v. Fenner*, 6 Smed. & M. (Miss.) 212; 45 Am. Dec. 278; *Van Ness v. Forrest*, 8 Cranch (U. S.) 30; *Anderson v. Robertson*, 32 Miss. 241; *Grigsby v. Nance*, 3 Ala. 347. See also *Jemison v. Walsh*, 30 Ind. 167.

A note by one partner to another in advance of an accounting is without consideration and void. See *Martin v. Stubbings*, 27 Ill. App. 121; *Chadsey v. Harrison*, 11 Ill. 151; *Sewell v. Cooper*, 21 La. Ann. 583. But see to the contrary *Rockwell v. Wilder*, 4 Met. (Mass.) 556.

Burden of Proof.—The financial manager of a partnership executed a note of the firm to himself, which, after his death, was found among his papers. *Held*, in an action on the note by his

action at law for the amount.¹ Where one sells land to the other he is liable to an action at law for the price,² and a partner who is an executor who deposits money belonging to the estate with his firm, may recover the amount in an action at law from his co-partners.³ If a note is signed by all the partners in their individual names, for a partnership debt, however, which is paid by one partner, while the debt is extinguished, he cannot enforce distribution apart from a general accounting,⁴ and a note or other obligation made by the firm itself to one of the partners is subject to the objection that in an action upon it by the payee he must appear both as plaintiff and defendant and recover a judgment in his own favor, but against himself, and an action at law cannot therefore be maintained upon it;⁵ and the same rule applies if the note is made to a third person but afterwards transferred to one of the partners,⁶ and if a note is made by a partner to his firm,

executor against the other members of the firm, that, because of the confidential relation of the parties, the burden was upon the executor to show that the firm received the proceeds of the note. *Feurt v. Ambrose*, 34 Mo. App. 360.

1. *Paine v. Moore*, 6 Ala. 129; *Seaman v. Johnson*, 46 Mo. 111; *Windham v. Patterson*, 1 Stark. 144; *Smith v. Barrow*, 2 T. R. 476.

2. *Burt v. Wilson*, 28 Cal. 632; *Elder v. Hood*, 38 Ill. 533.

Land sold by one partner to another may be recovered for at law even though it be land upon which they are to pursue their partnership business after becoming partners. *Burden v. Cleveland*, 4 Ala. 225; *Reid v. McQuestion*, 61 N. H. 421.

3. *McCracken v. Milhous*, 7 Ill. App. 169.

4. *De Jarnette v. McQueen*, 31 Ala. 230; *Conilliard v. Eaton*, 139 Mass. 105; *Kendrick v. Tarbell*, 27 Vt. 512; *Small v. Riddle*, 31 Up. Can. C. P. 373; and see *Jones v. Shaw*, 67 Mo. 667; *McHale v. Oertel*, 15 Mo. App. 583; *Buell v. Cole*, 54 Barb. (N. Y.) 353.

Where a note is signed by all the partners but one in their individual names and indorsed by that one, if he has to pay it he can neither enforce contribution at law nor hold the judgment against the others. *Booth v. Farmers' etc. Bank*, 74 N. Y. 228.

5. *Smyth v. Strader*, 9 Port. (Ala.) 446; *Hazlehurst v. Pope*, 2 Stew. & P. (Ala.) 259; *Nevins v. Townsend*, 6 Conn. 5; *Miller v. Andres*, 13 Ga. 366; *Gammon v. Huse*, 9 Ill. App. 557; *Simrall v. O'Bannons*, 7 B. Mon. (Ky.) 608;

Portland Bank v. Hyde, 11 Me. 196; *Pitcher v. Barrows*, 17 Pick. (Mass.) 361; 28 Am. Dec. 306; *Fulton v. Williams*, 11 Cush. (Mass.) 108; *Temple v. Seaver*, 11 Cush. (Mass.) 314; *Thayer v. Buffum*, 11 Met. (Mass.) 398; *Davis v. Merrill*, 51 Mich. 480; *Hill v. McPherson*, 15 Mo. 204; *Smith v. Lusher*, 5 Cow. (N. Y.) 688; *Blake v. Wheaton*, 2 Hayw. (N. Car.) 109; *Wescott v. Price*, *Wright* (Ohio) 220; *McFadden v. Hunt*, 5 W. & S. (Pa.) 468; *Crow v. Green*, 111 Pa. St. 637; *Waterman v. Hunt*, 2 R. I. 298; *Glenn v. Caldwell*, 4 Rich. Eq. (S. Car.) 168; *Walker v. Wait*, 50 Vt. 668; *Neale v. Turton*, 4 Bing. 149; *Teague v. Hubbard*, 8 B. & C. 345; 2 M. & Ry. 369; *In re Chaffy*, 30 Up. Can., Q. B. 64; *Smyth v. Strader*, 4 How. (U. S.) 404.

In *Carpenter v. Greenop*, 74 Mich. 664, however, where L took a note from a firm of which he was a member, for money loaned to it, it was held that, as payment of the note was not by its terms, nor by the nature of the transaction, to be postponed until the dissolution of the firm and final accounting, L had a remedy at law against the firm on the note before the accounting; and, L having indorsed the note to the plaintiff during the continuance of the firm, though after the maturity of the note, the latter had the same right of action against the firm. *SHERWOOD, C. J.*, dissenting.

6. *Lindell v. Lee*, 34 Mo. 103; *Wescott v. Price*, *Wright* (Ohio) 220. And see *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404; *Thompson v. Steamboat Julius D. Morton*, 2 Ohio St. 26; 59 Am. Rep. 658; *Crow v. Green*, 111 Pa.

the note is valid,¹ but the firm cannot sue upon it for the same reason.² Such paper may be indorsed to a third person, however, and such third person may recover in an action at law;³ and this is true even though the indorsement and transfer were made after maturity, the defect being in the remedy and not affecting the validity of the paper.⁴ So, the agreed compensation for serv-

St. 637; *Glenn v. Caldwell*, 4 Rich. Eq. (S. Car.) 168.

In *Decreet v. Burt*, 7 Cush. (Mass.) 551, it was held that if a firm which is the payee of a note, indorsed it over to a third person, and he indorsed it afterwards to one of the firm, such holder cannot sue his immediate indorser, as he is, as a member of the firm, a prior indorser to the last.

In *Buchanan v. Meisser*, 105 Ill. 638; it was held that a firm which was a creditor of a corporation could not enforce the individual liability of one of the partners as stockholder. See also *Bailey v. Bancker*, 3 Hill (N. Y.) 188.

1. *Baring v. Lyman*, 1 Story (U. S.) 396.

2. *Burley v. Harris*, 8 N. H. 233; 29 Am. Dec. 650; *Mainwaring v. Newman*, 2 B. & P. 120; *De Tastet v. Shaw*, 1 B. & Ald. 664; *Richardson v. Bank of England*, 4 M. & Cr. 165.

In *Jemison v. Walsh*, 30 Ind. 167, it was held that if the fact that the maker of a note payable to a firm, was one of the firm at the time of its execution, is a defense to an action thereon against the maker by one of the late firm, to whom the other members, except the maker, have assigned their interest in the note, it only goes to the amount of recovery. The action may be maintained, though there has been no final settlement of partnership accounts, and there are outstanding credits and liabilities.

3. *Hazlehurst v. Pope*, 2 Stew. & P. (Ala.) 259; *Smyth v. Strader*, 9 Port. (Ala.) 446; *Brown v. Tarver*, Minor (Ala.) 370; *Nevins v. Townsend*, 6 Conn. 5; *Roberts v. Ripley*, 14 Conn. 543; *Reid v. Goodwin*, 43 Ga. 527; *Gammon v. Huse*, 9 Ill. App. 557; *Thompson v. Lowe*, 111 Ind. 272; *Parsons v. Tillman*, 95 Ind. 452; *Davis v. Briggs*, 39 Me. 304; *Pitcher v. Barrows*, 17 Pick. (Mass.) 361; 28 Am. Dec. 306; *Thayer v. Buffum*, 11 Met. (Mass.) 398; *Fulton v. Williams*, 11 Cush. (Mass.) 108; *Temple v. Seaver*, 11 Cush. (Mass.) 314; *Richards v. Fisher*, 2 Allen (Mass.) 527; *Miller's River Nat. Bank v. Jefferson*, 138

Mass. 111; *Smith v. Lusher*, 5 Cow. (N. Y.) 688; *Blake v. Wheaton*, 2 Hayw. (N. Car.) 109; *Waterman v. Hunt*, 2 R. I. 298; *Walker v. Waite*, 50 Vt. 668; *Smyth v. Strader*, 4 How. (U. S.) 404; *Baring v. Lyman*, 1 Story (U. S.) 396. *In re Chaffy*, 30 Up. Can., Q. B. 64.

The indorsee of a note made by one or more partners to the firm can prove against the separate estate of the makers. *Union Nat. Bank v. Bank of Commerce*, 94 Ill. 271.

An assignment by a partner of a claim against his firm to a third person for the mere purpose of enabling him to sue on it for the benefit of the partner, cannot be upheld, and is good defense to an action upon such claim. *Tipton v. Vance*, 4 Ala. 194; *Davis v. Merrill*, 51 Mich. 480.

If the firm is insolvent, one who is not a *bona fide* holder for value or the assignee for the benefit of the creditor of the payee partner cannot prove it against the estate of the partnership in competition with partnership creditors. *Portland Bank v. Hyde*, 11 Me. 196; *Cutting v. Daigneau*, 151 Mass. 297.

4. See *Smyth v. Strader*, 9 Port. (Ala.) 446; *Nevins v. Townsend*, 6 Conn. 5; *Temple v. Seaver*, 11 Cush. (Mass.) 314; *Thompson v. Hale*, 6 Pick. (Mass.) 259. But see to the contrary *Lanier v. McCabe*, 2 Fla. 32; 48 Am. Dec. 173; *Simrall v. O'Bannons*, 7 B. Mon. (Ky.) 608; *Hill v. McPherson*, 15 Mo. 204.

In *Morrison v. Stockwell*, 9 Dana (Ky.) 172, it was held that a firm note void as to the payee but binding on the partner who signed the firm name to it, as the law cannot apportion a debt, the payee cannot be recovered upon.

In *Russell v. Minnesota Outfit*, 1 Minn. 162, some of the partners in a steamboat having employed her and became thereby indebted to the firm, it was held that one partner could assign his claim as well as any other and that the assignee could sue the debtor partners at law. See also *Kious v. Day*, 94 Ind. 500. But in *Vilas v. Far-*

ices rendered by one partner to another before the commencement of the partnership relation is recoverable at law.¹

Partners may by agreement separate any part of the partnership business from the remainder and transform it into a separate and individual obligation as between each other, and in such case the liability can be enforced at law independent of the state of the partner accounts, the real test being, not whether the action can be tried without a consideration of the partnership accounts, but whether the defendant has bound himself personally to the plaintiff.² Thus, where a partner lends money to the firm, being under no legal obligation to do so, on condition that it shall be paid in a particular manner, he can enforce the condition at law;³ and if one partner agrees with another to pay a partnership debt out of his private means or to indemnify the other from liability for such debt, an action at law may be maintained for breach of the agreement.⁴ If one partner personally promises extra

well, 9 Wis. 460, where a person subscribed to shares to form an association, but died before paying and the survivors sold out the property and all claims and demands, it was held that the claim against his estate could not be transferred so as to sustain an action by the transferee independent of an accounting.

1. *Boyd v. Brown*, 2 La. Ann. 218; *Lucas v. Beach*, 1 M. & G. 417.

2. *Ryder v. Wilcox*, 103 Mass. 24; *Bedford v. Brutton*, 1 Bing. N. Cas. 399. And see *Strong v. Stapp* 74 Cal. 280; *Schmidt v. Glade*, 126 Ill. 485; *Davis v. Fingley*, 116 Pa. St. 113; *Currier v. Hale*, 5 Allen (Mass.) 561; *Carpenter v. Greenop*, 74 Mich. 664.

An action at law may be maintained on a promise by one partner to declare and pay over dividends as they accrue. *Wadley v. Jones*, 55 Ga. 329.

3. *Lyon v. Malone*, 4 Port. (Ala.) 497; *Elliott v. Deason*, 64 Ga. 63; *Battaille*, 6 La. Ann. 682; *Chamberlain v. Walker*, 10 Allen (Mass.) 429; *Hess v. Final*, 32 Mich. 515; *Elwood v. Western Union Teleg. Co.*, 45 N. Y. 549; *Gridley v. Dole*, 4 N. Y. 486; *Van Ness v. Forrest*, 8 Cranch (U. S.) 30; *Coffee v. Brian*, 3 Bing. 54. But see *Robsen v. Curtis*, 1 Stark. N. P. 78; *Perring v. Hone*, 4 Bing. 28. And see *Tibbetts v. Magruder*, 9 Dana (Ky.) 79.

But where one partner who was to loan money to the firm to be repaid out of the profits, to the other partner, died before the enterprise was begun, the stipulated mode of payment being impracticable, the loan was allowed to be

proved as a claim against his estate. *Bierman v. Braches*, 14 Mo. 24.

4. *Clark v. Clark*, 4 Port. (Ala.) 9, *Hogan v. Calvert*, 21 Ala. 195; *Peacey v. Peacey*, 27 Ala. 683; *Faust v. Burgevin*, 25 Ark. 170; *Lathrop v. Atwood*, 21 Conn. 117; *Schmidt v. Glade*, 126 Ill. 485; *Adams v. Funk*, 53 Ill. 219; *Shennelfield v. Dutton*, 85 Ill. 503; *Mullendore v. Scott*, 45 Ind. 113; *Warbritton v. Cameron*, 10 Ind. 302; *Farnsworth v. Boardman*, 131 Mass. 115; *Cilley v. Patten*, 58 Mich. 404; *Whitehill v. Shickle*, 43 Mo. 537; *Haliday v. Carman*, 6 Daly (N. Y.) 422; *Frow's Estate*, 73 Pa. St. 459; *Coleman v. Coleman*, 12 Rich. (S. Car.) 183; *Hupp v. Hupp*, 6 Gratt. (Va.) 310; *Jewell v. Ketchum*, 63 Wis. 628; *Hood v. Spencer*, 4 McLean (U. S.) 168; *White v. Ansdell*, Tyr. & Gra. 785; *Want v. Reece*, 1 Bing. 18; *Saltoun v. Houstoun*, 1 Bing. 433; *Wilson v. Cutting*, 10 Bing. 436; *Barker v. Allen*, 5 H. & N. 61; *Haddon v. Ayers*, 1 E. & E. 118; *Gray v. McMillan*, 22 Up. Can., Q. B. 456.

One partner who has paid over to the other his share toward the payment of debts, and is afterwards compelled to pay the amount over again to the creditor, can recover it from his co-partner. *Warring v. Hill*, 89 Ind. 497.

Where, after the dissolution of a partnership, all its available assets were collected and applied to the payment of its debts, and one of the members paid the balance of the indebtedness of the firm, he can sue the other member of the firm to charge

compensation to the other out of his share of the income, not dependent upon partnership accounts, an action at law will lie for its recovery;¹ and, if on dissolution, debts due to the firm are divided between the partners or all are assigned to one partner, and another partner collects or receives payment on such debts, an action at law may be maintained against him for the amount so collected;² and where each has assumed the payment of certain debts, if one partner has to pay debts assumed by the other, he can recover at law on the latter.³ Where a partner retires selling his interest to the continuing partners, who assume the debts, he can sue them at law for the purchase price, as well as for the amount of any debt he has been compelled to pay,⁴ and a recovery may be had at law for the purchase price of the whole or a part of a partner's interest or his interest in specific property of the partnership which he has sold to one or more of his co-partners, or upon an obligation given therefor.⁵

b. TRANSACTIONS CONNECTED WITH THE PARTNERSHIP, BUT DISTINCT FROM ITS ACCOUNTS.—One partner may sue another at law in respect to matters which, though relating to the partnership business is separate and distinct from all other matters in question between the partners, and can be determined without

him with his share of the indebtedness so paid, although no balance had been struck between them. *Jepsen v. Beck*, 78 Cal. 540.

1. *Alexander v. Alexander*, 12 La. Ann. 588; *Aldrich v. Lewis*, 60 Miss. 229; *Paine v. Thacher*, 25 Wend. (N. Y.) 450; *Emery v. Wilson*, 79 N. Y. 78.

2. *Rowland v. Boozer*, 10 Ala. 690; *Roberts v. Ripley*, 14 Conn. 543; *Leonard v. Robbins*, 13 Allen (Mass.) 217; *Russell v. Grimes*, 46 Mo. 410; *Wicks v. Lippman*, 13 Nev. 499; *Crosby v. Nichols*, 3 Bosw. (N. Y.) 450; *Ross v. West*, 2 Bosw. (N. Y.) 360; *Shafer's Appeal*, 106 Pa. St. 49; and see *Adams v. Funk*, 53 Ill. 219.

Where a firm of three owned a thrashing machine, one-third each, and it was agreed that one of them might use it at usual rates, less one-third for his interest, and the latter refused to pay for using the machine, an action at law for its recovery was sustained upon the ground that the partners had severed their interest in the property for the purposes of the contract. *Davis v. Skinner*, 58 Wis. 638; 46 Am. Rep. 65. And see *Russell v. Minnesota Outfit*, 1 Minn. 162.

3. *Martin v. Good*, 14 Md. 398; *Coleman v. Coleman*, 12 Rich. (S. Car.) 183.

In *Smith v. Riddell*, 87 Ill. 165, how-

ever, where one partner agreed to make certain payments individually, but afterwards paid them out of the partnership funds, it was held that the other was injured by such payment only as it unfavorably affected his interest as a partner, and that he could not therefore recover more than nominal damages until an accounting and settlement was had.

4. *Clark v. Fowler*, 57 Cal. 142; *Edens v. Williams*, 36 Ill. 252; *Reynolds v. Patrick*, 52 Mich. 590.

In *Blunt v. Williams*, 27 Ark. 374, it was held that a person who sells out one-half his interest to another, payable on time, can sue the other for the payments, although they have become partners.

5. *Caswell v. Cooper*, 18 Ill. 532; *Wells v. Carpenter*, 65 Ill. 447; *Purvines v. Champion*, 67 Ill. 459; *Hunt v. Morris*, 44 Miss. 314; *Bether v. Franklin*, 57 Mo. 466; *Dakin v. Graves*, 48 N. H. 45; *Koningsburg v. Launitz*, 1 E. D. Smith (N. Y.) 215; *Neil v. Greenleaf*, 26 Ohio St. 567; *Collamer v. Foster*, 26 Vt. 754; *Linderman v. Disbrow*, 31 Wis. 465; *Jackson v. Stopherd*, 2 Cr. & M. 361; *Wells v. Wells*, 1 Vent. 40.

Conversion of the property into the separate property of one partner, and the promise of a defendant to pay must be clearly to the plaintiff indi-

going into the partnership accounts.¹ Thus contracts between the partners entered into in order to launch the partnership, as agreements with reference to contributions, are enforceable at law.² And if one partner advances for the other all or a portion of the capital which he had agreed to contribute, he can recover the amount in an action at law against his co-partner;³ And promise by one partner to the other to contribute capital or to contribute property or labor, is likewise enforceable at law.⁴ If

vidually, and not to the firm. *Bates' Law of Part.* 893; And see *Ivy v. Walker*, 58 Miss. 253.

A promise on buying out a partner to pay him one-half the invoice price, is not a promise to account for it on settlement. *Edens v. Williams*, 36 Ill. 252.

1. *Lindley on Part.* 1027.

Even though property is occupied by the firm, if it is owned by them as tenants in common and not as partnership property, and is sold and the purchase money comes into the possession of one of them, or if it takes fire and one collects the insurance money, the other can compel him to pay over his share by an action at law. *Coles v. Coles*, 15 Johns. (N. Y.) 159; 8 Am. Dec. 231; *Howard v. France*, 43 N. Y. 593.

A Receiver of a partnership may sue a partner for an amount due the firm, although ultimately the partner may have a share in the balance. *Lathrop v. Knapp*, 37 Wis. 307.

2. See *Scott v. Campbell*, 30 Ala. 728; *Bailey v. Starke*, 6 Ark. 191; *Blunt v. Williams*, 27 Ark. 374; *Mullany v. Keenan*, 10 Iowa 224; *Thomas v. Pyke*, 4 Bibb (Ky.) 418; *Kinney v. Robison*, 52 Mich. 389; *Morgan v. Nunes*, 54 Miss. 308; *Wills v. Simmonds*, 8 Hun (N. Y.) 189; 51 How. Pr. (N. Y.) 48; *Collamer v. Foster*, 26 Vt. 754; *Madge v. Puig*, 13 Hun (N. Y.) 15; *Townsend v. Goewey*, 19 Wend. (N. Y.) 424; *Sprout v. Crowley*, 30 Wis. 187; *Venning v. Leckie*, 13 East 7; *Gale v. Leckie*, 2 Stark 107.

One partner can sue another whom he has taken into partnership for the premium promised to him by the latter for the privilege of becoming a member. *Walker v. Harris*, 1 Anstr. 245.

If one partner pays more than his share of the purchase money for land purchased for the partnership, he can sue the other at law for reimbursement. *Soule v. Frost*, 76 Me. 119; *Howe v. Howe*, 99 Mass. 71; *Sykes v. Works*, 6 Gray (Mass.) 433.

Where a contract was entered into between A and B whereby A conveyed to B a one-half interest in a mill, in which they became partners, in consideration for which B agreed to build a flume and convey one-half of it to A, B's liability to A for a breach of his contract is not affected by the fact that they became partners in the mill and were to become partners in the flume. *Foules v. Rhodes*, 12 Nev. 225.

3. *Bumpass v. Webb*, 1 Stew. (Ala.) 19; 18 Am. Dec. 34; *Grisby v. Nance*; 3 Ala. 347; *Bull v. Coe*, 77 Cal. 54; *Williams v. Henshaw*, 11 Pick. (Mass.) 79; 22 Am. Dec. 366; *Marshall v. Win*; slow, 11 Me. 58; 25 Am. Dec. 264; *Wright v. Eastman*, 44 Me. 220; *Wetherbee v. Potter*, 99 Mass. 354; *Mitchell v. Wells*, 54 Mich. 127; *Cinamond v. Greenlee*, 10 Mo. 578; *Currier v. Webster*, 45 N. H. 226; *Currier v. Rowe*, 46 N. H. 72; *Gordon v. Boppe*, 55 N. Y. 665; *Terrill v. Richards*, 1 Nott & M. (S. Car.) 20; *Helme v. Smith*, 7 Bing. 709; *Venning v. Leckie*, 13 East 7.

The same rule applies when one partner advances all the labor. *Lawson v. Glass*, 6 Colo. 134.

Money furnished by one partner to another, to enable the latter to meet his obligations to the firm, is a personal claim, and has nothing to do with the final accounting, unless by some special dealing made to relate to it. *Bates v. Lane*, 62 Mich. 132.

4. *Boyd v. Mynatt*, 4 Ala. 79; *Wadsworth v. Manning*, 4 Md. 59; *Williams Henshaw*, 11 Pick. (Mass.) 79; *Pillsbury v. Pillsbury*, 20 N. H. 90; *Townsend v. Goewey*, 19 Wend. (N. Y.) 424; *Glover v. Tucker*, 24 Wend. (N. Y.) 153; *Terrill v. Richards*, 1 Nott & M. (S. Car.) 20; *Collamer v. Foster*, 26 Vt. 754; *Wright v. Michie*, 6 Gratt. (Va.) 364; *Jowers v. Baker*, 57 Ga. 184; *Robinson v. Bullock*, 58 Ala. 618; *Brown v. Tapscott*, 6 M. & W. 119; *Elgie v. Webster*, 5 M. & W. 518;

the partnership adventure has been finished, however, without calling upon the delinquent partner to fulfill his contract, it is then too late, and must be made the subject of an account.¹ So a partner is entitled to a legal remedy for breach of a contract to form a partnership, or to enter into or for admission to a firm,² as well as for an exclusion of a partner from participation in the partnership business from the beginning,³ the excluded partners being entitled to sue either jointly or severally.⁴ An action at law will lie for a premature dissolution in violation of the partnership agreement;⁵ but to sustain such an action the claim

Graves v. Cook, 2 Jur. N. S. 475. And see *Benson v. Tilton*, 54 N. H. 174; *Gordon v. Boppe*, 55 N. Y. 665; *Sprout v. Crowley*, 30 Wis. 187.

Where B agreed to put into the nursery business, in which they became partners, fifty thousand trees at as low a price as they were selling them and put them in at \$50 per thousand, when the selling price was \$35 only, and T put in an equivalent amount and B then procured T to buy him out, T was allowed to set off the breach of contract upon B's suing T for the purchase price. *Truitt v. Baird*, 12 Kan. 420. And see *Wadsworth v. Manning*, 4 Md. 59.

1. *Buckmaster v. Gowen*, 81 Ill. 153; *Gordon v. Boppe*, 55 N. Y. 665.

The mere fact that one partner purchased and paid for the entire stock of goods, does not imply a promise by his co-partners, to contribute before final settlement. *Williams v. Henshaw*, 11 Pick. (Mass.) 79.

2. *Stone v. Dennis*, 3 Port. (Ala.) 231; *Crosby v. McDermitt*, 7 Cal. 146; *Powell v. Maguire*, 43 Cal. 11; *Mann v. Bowen*, 85 Ga. 616; *Goodson v. Coolley*, 19 Ga. 599; *Wilson v. Campbell*, 10 Ill. 383; *Ellison v. Chapman*, 7 Blackf. (Ind.) 224; *Byrd v. Fox*, 8 Mo. 574; *Vance v. Blair*, 18 Ohio, 532; 51 Am. Dec. 467; *Reis v. Hellman*, 25 Ohio St. 180; *Lane v. Roche*, *Riley Eq. (S. Car.)* 215; *Terrill v. Richards*, 1 Nott & M. (S. Car.) 20; *Hill v. Palmer*, 56 Wis. 123; 43 Am. Rep. 703; *Gale v. Leckie*, 2 Stark 107; *McNeill v. Reid*, 2 Bing. 68; *Scott v. Raymond*, L. R., 7 Eq. 112; *Goldsmith v. Sachs*, 17 Fed. Rep. 726; 8 Sawy. (U. S.) 110. And see *Lower v. Denton*, 9 Wis. 268.

But where the parties signed an instrument embodying the terms of a proposed commercial partnership, with the understanding that it should not operate as a present contract, but should become such only upon the ful-

fillment of certain conditions, and for that reason the instrument was retained by the scrivener who drafted it, it was held that no action will lie for the refusal of one of the parties to consummate the partnership, as there was no delivery of the instrument, and hence no contract. *Hill v. Webb*, 43 Minn. 545.

3. *Stone v. Dennis*, 3 Port. (Ala.) 231; *Crosby v. McDermitt*, 7 Cal. 146; *Gray v. Portland Bank*, 3 Mass. 364; *Reis v. Hellman*, 25 Ohio St. 180; *Hill v. Palmer*, 56 Wis. 123; 43 Am. Rep. 703.

One partner cannot, by wrongfully terminating the contract of partnership, and seizing and appropriating the joint property, create a right to compel an accounting in equity with reference to the operations, after possession taken, or as to the avails of property wrongfully converted. *McGraw v. Dole*, 63 Mich. 1.

An action at law may also be maintained for damages for a partial exclusion from the partnership. *Kerrigan v. Kelly*, 17 Mo. 275.

4. See *Vance v. Blair*, 18 Ohio 532; 51 Am. Dec. 467; *Crosby v. McDermitt*, 7 Cal. 146; *Capen v. Barrows*, 1 Gray (Mass.) 376; *Dunham v. Gillis*, 8 Mass. 462; *Hill v. Palmer*, 56 Wis. 123; 43 Am. Rep. 703.

Where a person having an established business made a contract of partnership whereby he admitted two others, and afterwards absconded, each were permitted to bring independent actions against him for the resulting injury. *Child v. Swain*, 69 Ind. 230.

Partners who have received more than their share are not jointly but severally bound to repay. *Rhiner v. Sweet*, 2 Lans. (N. Y.) 386.

5. *Bates Law of Part.*, §873; *Dart v. Laimbeer*, 107 N. Y. 664.

The measure of damages in an action for a breach of a partnership agreement is the value of the contract

must be not for the recovery of any share of profits or agreed compensation due him from the firm, but for the wrong done him personally, as distinguished from a breach of duty owing to the firm.¹ This rule applies to the violation of all other stipulations in the articles, the damages resulting from which belong exclusively to the other partner, and can be assessed without an accounting.² So a breach of contract to make a settlement at a designated time upon certain terms, is remediable by an action at law,³ and omitted or incorrect items in a settlement may be

broken, according to its value, separate from and independent of any former contract. *Addams v. Tutton*, 39 Pa. St. 447; and see *Dart v. Laimbeer*, 107 N. Y. 664.

1. *Stone v. Dennis*, 3 Port. (Ala.) 231; *Stone v. Fouse*, 3 Cal. 292; *Crosby v. McDermitt*, 7 Cal. 146; *Jones v. Morehead*, 3 B. Mon. (Ky.) 377; *Wadsworth v. Manning*, Md. 59; *Dunham v. Gillis*, 8 Mass. 462; *Capen v. Barrows*, 1 Gray (Mass.) 376; *Gomersall v. Gomersall*, 14 Allen (Mass.) 60; *Ryder v. Wilcox*, 103 Mass. 24; *Terry v. Carter*, 25 Miss. 168; *Bagley v. Smith*, 10 N. Y. 489; 61 Am. Dec. 756; 19 How. Pr. (N. Y.) 1; *Addams v. Tutton*, 39 Pa. St. 447; *Hunter v. Land*, 81½ Pa. St. 296; *Reiter v. Morton*, 96 Pa. St. 229; *Brassfield v. Brown*, 4 Rich. (S. Car.) 298; *Ball v. Britton*, 58 Tex. 57; *Lower v. Denton*, 9 Wis. 268; *Greenham v. Gray*, 4 Irish C. L. 501.

Where one partner who was to contribute land warrants in which the firm was to deal sold them, thus disabling himself to carry out the contract, an action at law for damages was held to be proper. *McArthur v. Ladd*, 5 Ohio 514. See also *Madge v. Puig*, 12 Hun (N. Y.) 16.

2. *Dana v. Gill*, 5 J. J. Marsh. (Ky.) 242; 20 Am. Dec. 255; *Aldrich v. Lewis*, 60 Miss. 229; *Stone v. Wendover*, 2 Mo. App. 247; *Wills v. Simmonds*, 8 Hun (N. Y.) 189; *Moritz v. Peebles*, 4 E. D. Smith (N. Y.) 135; *Taylor v. Holeman*, 1 Mill (S. Car.) 172; *Kinloch v. Hamlin*, 2 Hill Eq. (S. Car.) 19; 27 Am. Dec. 441; *Hunt v. Reilly*, 50 Tex. 99; *Dunham v. Gillis*, 8 Mass. 462; *Collamer v. Foster*, 26 Vt. 754; *Hill v. Palmer*, 56 Wis. 123; 43 Am. Rep. 703. And see *Ridgway v. Grant*, 17 Ill. 117; *Appeal of Andriesen*, 123 Pa. St. 303; *Kemble v. Mills*, 9 Dowl. 446.

Where by the articles the condition is on dissolution to pay the retiring

partner a specified sum, the latter may recover it at law, even though on adjustment of accounts, he would be debtor to the firm. *Read v. Nevitt*, 41 Wis. 348.

Where each partner was to supply horses for parts of the stage route, and in case of default, a penalty was to be paid by the defaulter which was to be divided among the rest, it was held that one partner might sue alone for the penalty. *Radenhurst v. Bates*, 3 Ring. 463.

In *Stone v. Fouse*, 3 Cal. 292, however, where, by the articles, the co-plaintiffs were to make a ditch and the defendants to convey water into it, and on breach by either \$1,500 was to be paid as liquidated damages, it was held that this could not be obtained without seeking an accounting and dissolution.

A breach of agreement in not giving his entire time and attention to the partnership business, and in being negligent and careless, is not a ground for an action at law. *Bracken v. Kennedy*, 4 Ill. 558.

3. *Holyoke v. Mayo*, 50 Me. 385; *Gillen v. Peters*, 39 Kan. 489; *Wilby v. Phinney*, 15 Mass. 116; *Ferguson v. Baker*, 116 N. Y. 257; *Owston v. Ogle*, 13 East 538. And see *McKernan v. Collins*, 37 Ind. 376; *Rose v. Roberts*, 9 Minn. 119.

If the estate is insolvent, intermediate fluctuating balances cannot be recovered. *Snyder v. Baber*, 74 Ind. 47.

A mere undertaking to wind up, involving the exercise of discretion upon the part of the contracting partner, is not a contract upon which suit at law may be maintained. *Lyon v. Haynes*, 5 M. & G. 594. And see *Paul v. Edwards*, 1 Mo. 30.

When, on the dissolution of a firm, it is agreed that there shall be an accounting after the claims are collected and the debts are paid, a bill in equity

made cognizable at law without going over the rest of the account,¹ and a mistake in carrying out a settlement after it has been arrived at, unlike a mistake in the accounting itself, can be corrected at law.²

c. TORTS.—One partner may maintain an action at law against another upon matters connected with the partnership business where such connection was occasioned solely by the wrongful conduct of a partner, as if a partner gives a firm note for his private debt,³ or appropriates the individual property of his co-partner to the use of the partnership.⁴

So, if there is collusion between a third person and a partner to injure the firm the injured partners may jointly sue either or both

is an appropriate proceeding therefor. *Converse v. Hobbs*, 64 N. H. 42.

Where an agreement for dissolution of partnership binds the parties to settle the partnership accounts by a specified date, an accounting and adjustment of the partnership dealings must be had before damages for the breach can be recovered at law. *McPherson v. Robertson*, 82 Ala. 459.

1. See *Mussetter v. Timmerman*, 11 Colo. 201; *Frink v. Ryan*, 4 Ill. 322; *Metcalf v. Fouts*, 27 Ill. 110; *McSherry v. Brooks*, 46 Md. 103; *Dakin v. Graves*, 48 N. H. 45; *Watts v. Adler* (Supreme Ct.), 7 N. Y. Sup. 564; *Edwards v. Remington*, 51 Wis. 336; *Ganger v. Pautz*, 45 Wis. 449.

Where a partner buys out his co-partner, giving him a note for the face value of the notes and accounts due, subject to rebate for loss and collections, the deficiencies may be set off in defense to an action on the note. *Bethel v. Franklin*, 57 Mo. 466.

Where, on settlement between partners, notes or accounts are turned over to one partner on which his co-partner secretly received and appropriated part or all of the amount, it may be recovered from him by an action at law. *Russell v. Grimes*, 46 Mo. 410; *Wicks v. Lippman*, 13 Nev. 499.

In *Kellogg v. Moore*, 97 Ill. 282, the continuing partner was allowed to recover at law from the retiring one for a deficit in the collection of certain credits which were retained as a guaranty account, everything else having been settled on the retirement of the partner, such partner having agreed to pay his share of any such deficit.

2. *Chase v. Garvin*, 19 Me. 211; *Bond v. Hays*, 12 Mass. 34.

If there is fraud or mistake in the settlement itself, it can be rectified

only by reopening the account, which can be done in equity only. *Hanks v. Baber*, 53 Ill. 292; *Johnson v. Wilson*, 54 Ill. 419; *Chase v. Garvin*, 19 Me. 211; *Holyoke v. Mayo*, 50 Me. 385. Even though the mistake be in the omission of a single item, it must be recovered in equity, unless it is separated, adjusted, and promised to be paid. *Holyoke v. Mayo*, 50 Me. 385.

3. *Fuller v. Percival*, 126 Mass. 381; *Calkins v. Smith*, 48 N. Y. 614; *Osborne v. Harper*, 5 East 225; *Cross v. Cheshire*, 7 Ex. 43; *Graham v. Robertson*, 2 T. R. 282.

If the note is in the hands of a participant in the fraud the innocent partner may maintain a suit for its cancellation; if it is in the hands of a bona fide holder he can pay it at once and begin an action at against the guilty partner. *Fuller v. Percival*, 126 Mass. 381.

Where partnership property is condemned or the firm is rendered liable to a third person for a loss to him by the fraud of one partner, the other partners can recover at law against the guilty one. *Hadfield v. Jameson*, 2 Munf. (Va.) 53.

If payment is made out of a joint fund the action should be a joint one, but if made from their private means each must recover separately. *Osborne v. Harper*, 5 East 225; *Graham v. Robertson*, 2 T. R. 282.

4. *Smith v. Barrow*, 2 T. R. 476. And see *Paine v. Moore*, 6 Ala. 129; *Seaman v. Johnson*, 46 Mo. 111.

If one partner, in negotiating a loan for the partnership, deceives his co-partner, without the privity of the lender, by inserting in the security a private debt of his own, the remedy of such co-partner is against the fraudu-

of the wrongdoers in an action at law.¹ If one person lures another into a contract of partnership by false representations or deceit he is liable at law to his injured co-partner;² but in such case the guilty partner only is liable and a dormant partner, not a party to the fraud should not be made a party to the action.³ One partner may sue another at law for injury to property used by the firm, but belonging exclusively to him.⁴ Or for malicious attachment of the property of the firm.⁵

2. Final Balances.—Where all the partnership affairs have been wound up and a final balance struck, and nothing remains but to pay over the amounts to the partners respectively entitled thereto an action at law will lie for the recovery of such balance,⁶ and

lent partner only. *Dowdall v. Lenox*, 2 Edw. Ch. (N. Y.) 267.

1. *Emery v. Parrott*, 107 Mass. 95; *Sweet v. Morrison*, 103 N. Y. 235; *Longman v. Pole*, Moo. & M. 223.

In *Calkins v. Smith*, 48 N. Y. 614, however, it was held that the remedy at law against a partner who indorsed the firm name to pay his private debts was not in favor of the non-consenting partners jointly, it being a separate fraud on each for which each must bring a separate action, although the note was paid out of partnership assets.

Where, by an award of arbitrators, one of two partners was to pay certain of the firm debts, but failed to do so, and made a fraudulent conveyance to his wife, and the other partner paid the debts, the latter may maintain a bill to set aside the conveyance. *Swan v. Smith*, 57 Miss. 548.

2. *Rice v. Culver*, 32 N. J. Eq. 601. And see *Greenwald v. Rathfon*, 81 Ind. 547; *Morse v. Hutchins*, 102 Mass. 439; *Hale v. Wilson*, 112 Mass. 444; *Child v. Swain*, 69 Ind. 230.

There may be a right to rescission or dissolution with indemnity and a return of premium, even though the misrepresentations are not sufficient to sustain an action for deceit. *Newbigging v. Adam*, 34 Ch. Div. 582.

If in the suit in chancery for rescission, the chancellor finds the contract void in its inception, he may compel the guilty partner to repay to the complainant his capital with a reasonable compensation for his services and indemnify him against debts. *Richards v. Todd*, 127 Mass. 167; *Davidson v. Thurkill*, 3 Grant's Ch. (Up. Can.) 330.

3. See *Chamberlain v. Prior*, 2 Keyes (N. Y.) 539; 1 Abb. App. Dec. (N. Y.) 338; *Perry v. Hale*, 143 Mass.

540; *Stainbank v. Fernley*, 9 Sim. 556; *More v. Rand*, 60 N. Y. 208.

If the injured partner, upon being informed of the facts does not repudiate the partnership agreement he can neither rescind nor sue for damages. *St. John v. Hendrickson*, 81 Ind. 350.

4. *Haller v. Willamoicz*, 23 Ark. 566.

Where co-partners having an established business sold an interest to a third person and took him into the partnership and afterwards by their fraudulent conduct destroyed their business, the trade compelling the concern to close its doors, it was held that the new partner could set up damages thus caused as a counter-claim in an action against him for the purchase price of his interest. *Boughner v. Black*, 83 Ky. 521.

5. *Pierce v. Thompson*, 6 Pick. (Mass.) 193.

6. See *Gulick v. Gulick*, 14 N. J. L. 578; *Clark v. Dibble*, 16 Wend. (N. Y.) 601; *Robinson v. Williams*, 8 Met. (Mass.) 454; *Ridgway v. Grant*, 17 Ill. 117; *Pope v. Randolph*, 13 Ala. 214; *Wilby v. Phinney*, 15 Mass. 116; *Fanning v. Chadwick*, 3 Pick. (Mass.) 420; *M'Coll v. Oliver*, 1 Stew. (Ala.) 510; *McGehee v. Dougherty*, 10 Ala. 836; *Martin v. Solomons*, 5 Harr. (Del.) 344; *Wycoff v. Purnell*, 10 Iowa 332; *Lane v. Tyler*, 49 Me. 252; *Nims v. Bigelow*, 44 N. H. 376; *Hanks v. Barber*, 53 Ill. 292; *Wood v. Merrow*, 25 Vt. 340; *Warren v. Dickson*, 30 Ill. 363; *Byrd v. Fox*, 8 Mo. 574; *Bethell v. Wilson*, 1 Dev. & B. Eq. (N. Car.) 610.

Equity and not assumpsit is the appropriate remedy for one whose membership and consequent rights in the profits of a partnership are denied and to whom no portion of the profits have

no express promise to pay such balance is necessary.¹ There must have been such an adjustment, however, that a recovery of the balance would be a final winding up of the partnership affairs.² And to constitute such a final balance as to support an action, it must have received the assent of the partners so as to bind them to an admission of its correctness.³ Partial balances or settlements separated from the rest of the partnership accounts will not, as a general rule, sustain an action at law unless

been set apart. *Pray v. Mitchell*, 60 Me. 430.

Such an action can be maintained before a justice of the peace, where the amount claimed does not exceed three hundred dollars, and there are only a limited number of transactions, involving no complications to be inquired into. *Clarke v. Mills*, 36 Kan. 393.

1. *McCull v. Oliver*, 1 Stew. (Ala.) 510; *McGehee v. Dougherty*, 10 Ala. 863; *Dean v. Gregg*, 7 Colo. 499; *Martin v. Solomons*, 5 Harr. (Del.) 344; *Price v. Drew*, 18 Fla. 670; *Purvines v. Champion*, 67 Ill. 459; *Riari v. Wilhelm*, 3 Gill (Md.) 356; *Wilby v. Phinney*, 15 Mass. 116; *Fanning v. Chadwick*, 3 Pick. (Mass.) 420; 15 Am. Dec. 233; *Williams v. Henshaw*, 11 Pick. (Mass.) 79; 22 Am. Dec. 336; *Scott v. Caruth*, 50 Mo. 120; *Holman v. Nance*, 84 Mo. 674; *Cochrane v. Allen*, 58 N. H. 250; *Jaques v. Hulit*, 16 N. J. L. 38; *Mackey v. Auer*, 8 Hun (N. Y.) 180; *VanAmringe v. Ellmaker*, 4 Pa. St. 281; *Knerr v. Hoffman*, 65 Pa. St. 126; *McNichol v. McEwen*, 3 Up. Can., Q. B. (O. S.) 485; *Rackstraw v. Imber*, Holt N. P. 368; *Brierly v. Cripps*, 7 C. & P. 709; *Wray v. Milestone*, 5 M. & W. 21; *Lamalere v. Caze*, 1 Wash. (U. S.) 435. And see *Pope v. Randolph*, 13 Ala. 214; *Mount v. Chapman*, 9 Cal. 294; *Wycoff v. Purnell*, 10 Iowa 332; *Treadway v. Ryan*, 3 Kan. 437; *Dana v. Barrett*, 3 J. J. Marsh. (Ky.) 8; *Robinson v. Williams*, 8 Met. (Mass.) 454; *Hunt v. Morris*, 44 Miss. 314; *Wright v. Jacobs*, 61 Mo. 19; *Wicks v. Lippman*, 13 Nev. 499; *Goodwin v. Armstrong*, 19 Ohio 44; *Andrews v. Allen*, 9 S. & R. (Pa.) 241; *Yohe v. Barnet*, 3 W. & S. (Pa.) 81; *Brierly v. Cripps*, 7 C. & P. 709; *Halderman v. Halderman*, Hempst. U. S. 559.

The contrary doctrine that an express promise to pay the final balance is necessary was laid down in a number of the earlier cases. See *Burns v. Nottingham*, 60 Ill. 531; *Nims v. Bigelow*, 44 N. H. 376; *Gulick v. Gulick*, 14

N. J. L. 578; *Murray v. Bogart*, 14 Johns. (N. Y.) 318; 7 Am. Dec. 466; *Clark v. Dibble*, 16 Wend. (N. Y.) 601; *Koehler v. Brown*, 31 How. Pr. (N. Y.) 235; *Killam v. Preston*, 4 W & S. (Pa.) 14; *Foster v. Allanson*, 2 T. R. 479; *Morivia v. Levy*, 2 T. R. 483; *Goldsborough v. McWilliams*, 2 Cranch (C. C.) 401. 2. See *Shattuck v. Lawson*, 10 Gray (Mass.) 405; *DeJarnett v. McQueen*, 31 Ala. 230; *Ross v. Cornell*, 45 Cal. 133; *Burns v. Nottingham*, 60 Ill. 531; *Judd v. Wilson*, 6 Vt. 185.

Proof of an award of arbitrators who settled the partnership, will not sustain an action on a balance; the award itself should have been declared upon. *Wood v. Deutchman*, 80 Ind. 524.

An adjustment after dissolution of all accounts so far as then occurring to the partners with an agreement to meet again to divide some partnership lumber and finish the settlement, but which was never done, is not such a final settlement as to bar a suit for an accounting. *Gleason v. Van Aernan*, 9 Oregon 343.

Where a partnership of three persons had been dissolved and all the debts paid and a division made of the assets and one of the partners died having possession of a bond which he had purchased in his own name with partnership funds, it was held in an action by one of the survivors against the administrator of the deceased partner for one-third of the proceeds of the bond that a general settlement had not been made. *Arnold v. Arnold*, 90 N. Y. 580.

3. *Bates' Law of Part.*, § 860. And see *Morrow v. Riley*, 15 Ala. 710; *Hill v. Clarke*, 7 Allen (Mass.) 414; *Harris v. Harris*, 39 N. H. 45; *Andrews v. Allen*, 9 S. & R. (Pa.) 241; *Knerr v. Hoffman*, 65 Pa. St. 126; *Yohe v. Barnet*, 3 W. & S. (Pa.) 81; *Judd v. Wilson*, 6 Vt. 185; *Pool v. Perdue*, 44 Ga. 454; *Beach v. Hotchkiss*, 2 Conn. 425; *Bloss v. Chittenden*, 2 Thomp. & C. (N. Y.) 11; *Lamalere v. Craze*, 1 Wash. (U. S.) 435.

supported by an express promise to pay them.¹ If the partnership business consists of a single venture or transaction, however, which is closed up and finished, and there are no accounts with third persons to adjust or debts to be provided for, an action at law may be maintained for the adjustment of the partnership affairs, though no final balance has been struck;² and where the partnership affairs have been fully adjusted by the parties, except

If the items have all been mutually ascertained and nothing remains but a simple computation from the agreed figures or the mere correction of a footing, it is a sufficient adjustment. *Treadway v. Ryan*, 3 Kan. 437; *Jaques v. Hulit*, 16 N. J. L. 38.

A balance fixed by a decree of a court of chancery is sufficient to sustain an action. *Thrall v. Waller*, 13 Vt. 231; 37 Am. Dec. 592; *Henley v. Soper*, 8 B. & C. 16. And see *Logan v. Trayser*, 77 Wis. 877.

A balance struck by a book-keeper at the request of the partners is *prima facie* evidence of an adjustment. *Goodin v. Armstrong*, 19 Ohio 44.

Where an action at law is brought before settlement, and settlement is had and a balance found before trial, it will be presumed to have been had with a view to the pending action, and will be evidence to sustain such action. *Stowe v. Seewell*, 3 Stew. & P. (Ala.) 67.

1. *Burns v. Nottingham*, 60 Ill. 531; *Davenport v. Gear*, 3 Ill. 495; *Curry v. Allen*, 55 Iowa 318; *Currier v. Hale*, 5 Allen (Mass.) 561; *Murdock v. Martin*, 12 Smed. & M. (Miss.) 661; *Harris v. Harris*, 39 N. H. 45; *Wright v. Cobleigh*, 21 N. H. 339; *Westerlo v. Evertson*, 1 Wend. (N. Y.) 532; *Merriwether v. Hardeman*, 51 Tex. 436. But see *Blakely v. Graham*, 111 Mass. 8; *Sturges v. Swift*, 32 Miss. 239; *Gibson v. Moore*, 6 N. H. 547; *Foster v. Rison*, 17 Gratt. (Va.) 321; *Brierly v. Cripps*, 7 C. & P. 709; *Carr v. Smith*, 5 Q. B. 128.

Where a balance is agreed on as a final balance, but without an express promise to pay and the business is afterwards continued, no action can be maintained for such balance. *Allen v. Garvin*, 4 Up. Can. Q. B. 242; *Fromont v. Coup-land*, 2 Bing. 170. Though an express promise might have effected its conversion into individual property. *Carr v. Smith*, 5 Q. B. 128.

A note made by one partner to the other for a balance is enforceable at law, although the business is still carried on. *McSherry v. Brooks*, 46 Md. 103; *Rockwell v. Wilder*, 4 Met. (Mass.) 556; *Sturges v. Swift*, 32 Miss. 239; *Van Amringe v. Ellmaker*, 4 Pa. St. 281; *Preston v. Strutton*, 1 Anstr. 50.

2. *Myers v. Winn*, 16 Ill. 135; *Crossley v. Taylor*, 83 Ind. 337; *Pettingill v. Jones*, 28 Kan. 749; *Jenkins v. Howard*, 21 La. Ann. 597; *Byrd v. Fox*, 8 Mo. 574; *Buckner v. Reis*, 34 Mo. 357; *Silver v. St. Louis etc. R. Co.*, 5 Mo. App. 381; *McCormick v. Largey*, 1 Mont. 158; *Foster v. Vanauken*, 4 N. J. L. 409; *Musier v. Trumbour*, 5 Wend. (N. Y.) 274; *Galbreath v. Moore*, 2 Watts (Pa.) 86; *Wright v. Crumpsty*, 41 Pa. St. 102; *Meason v. Kaine*, 63 Pa. St. 335; *Fry v. Potter*, 12 R. I. 542; *Lawrence v. Clark*, 9 Dana (Ky.) 257; 35 Am. Rep. 133; *Knerr v. Hoffman*, 65 Pa. St. 126; *Finlay v. Stewart*, 56 Pa. St. 183; *Bovill v. Hammond*, 6 B. & C. 151; *Wann v. Kelly*, 5 Fed. Rep. 584; 2 *McCary* (U. S.) 628. *Contra*, *Price v. Drew*, 18 Fla. 670; *Halsted v. Schmelzel*, 17 Johns. (N. Y.) 80; *Leidy v. Messinger*, 71 Pa. St. 177; *Ozeas v. Johnson*, 4 Dall. (U. S.) 434; 1 *Bin.* (U. S.) 191; *Scott v. McIntosh*, 2 Camp. 238.

A partner may sue his co-partner at law for a contribution, if the partnership property has been disposed of and the firm has no credits and owes no debts, so that an accounting in equity is not necessary. *Clarke v. Mills*, 36 Kan. 393.

Jurisdiction.—In an account for a balance alleged to be due from the defendant by reason of their dealings as co-partners, the amount of the unadjusted accounts of the respective partners with the firm is the amount of the "money in controversy," within the meaning of a statute limiting the jurisdiction of the court to a certain specified amount. *McNab v. Noonan*, 28 Wis. 434.

as to a single matter or item, the controversy as to this may be settled at law.¹

After a balance has been struck if assets of the partnership in excess of his share are in the hands of one partner the claims of his co-partners against him are several and not joint, and a joint action cannot be maintained upon them.²

3. Common Law Action of Account.—The old common law action of account, though it is practically obsolete,³ has to some slight extent found its way into the United States,⁴ and the same or a somewhat similar action is still in vogue in parts of New England.⁵ In *Massachusetts*, at a time when there were no courts of equity, actions at law for partnership accounting were sustained,⁶ and when equity was re-established, it was given jurisdiction

1. *Whetstone v. Shaw*, 70 Mo. 575; *Jepson v. Beck*, 78 Cal. 540; *Purvines v. Champion*, 67 Ill. 459; *Dale v. Thomas*, 67 Ind. 570; *Moran v. Le Blanc*, 6 La. Ann. 113; *Feurt v. Brown*, 23 Mo. App. 332; *Gibson v. Moore*, 6 N. H. 547; *Hall v. Lannin*, 30 Up. Can. C. P. 204.

Where one partner on dissolution gave his note to the other for the balance due him, but subsequently had to pay an outstanding debt, he was allowed to set it off against the note and require contribution. *Farwell v. Tyler*, 5 Iowa 535.

Where one partner had made an assignment for the benefit of creditors, a partner who had paid a debt was allowed to recover contribution at law, more than six years having elapsed since assignment, and there being nothing to show that the partnership accounts were still open. *Brown v. Agnew*, 6 W. & S. (Pa.) 235.

2. *Riari v. Wilhelm*, 3 Gill (Md.) 356; *Farrar v. Pearson*, 59 Me. 561; *Masters v. Freeman*, 17 Ohio St. 323.

A claim against a partner for fraud, however, belongs to the co-partners jointly, and all must join in an action upon it. *Maude v. Rodes*, 4 Dana (Ky.) 144.

A stipulation in the articles, unless otherwise expressed, will be deemed to be a joint one in favor of all the co-partners. *Capen v. Varren*, 1 Gray (Mass.) 376.

3. *Lindley on Part.* 1022.

4. See *Travers v. Dyer*, 16 Blatchf. (U. S.) 178; *Bracken v. Kennedy*, 4 Ill. 558; *Lee v. Abrams*, 12 Ill. 111; *Stewart v. Kerr*, *Morris* (Iowa) 240; *Neal v. Keel*, 4 T. B. Mon. (Ky.) 162; *Wilhelm v. Caylor*, 32 Md. 151; *Hunt v. Gorden*, 52 Miss. 195; *Jessup v.*

Cook, 6 N. J. L. 434; *Rickey v. Bowne*, 18 Johns. (N. Y.) 131; *Appleby v. Brown*, 24 N. Y. 143; *Griffith v. Willing*, 3 Binn. (Pa.) 317; *James v. Browne*, 1 Dall. (U. S.) 339; *Spear v. Newell*, 2 Paine (U. S.) 267.

In *Wheeler v. Arnold*, 30 Mich. 304, where one partner had died and there were no assets left after the payment of all debts, the surviving partner who had paid more than his share was allowed to sue the administrator at law for contribution. See also *Bierman v. Braches*, 14 Mo. 24; *Hall v. Lanin*, 30 Up. Can. C. P. 204.

5. See *Day v. Lockwood*, 24 Conn. 185; *Sawyer v. Proctor*, 2 Vt. 580; *Loomis v. Barrett*, 4 Vt. 450; *Wood v. Johnson*, 13 Vt. 191; *Wood v. Merrow*, 25 Vt. 340; *Green v. Chapman*, 27 Vt. 236; *Porter v. Wheeler*, 37 Vt. 281; *Hydeville Co. v. Barnes*, 37 Vt. 588.

6. *Bond v. Hays*, 12 Mass. 34; *Wilby v. Phinney*, 15 Mass. 116; *Fanning v. Chadwick*, 3 Pick. (Mass.) 420; *Brinley v. Kupfer*, 6 Pick. (Mass.) 179; *Williams v. Henshaw*, 11 Pick. (Mass.) 79; *Vinal v. Burrill*, 16 Pick. (Mass.) 401; *Dickinson v. Granger*, 18 Pick. (Mass.) 315; *Rockwell v. Wilder*, 4 Met. (Mass.) 556; *Shepard v. Richards*, 2 Gray (Mass.) 424; *Sikes v. Work*, 6 Gray (Mass.) 433; *Shattuck v. Lawson*, 10 Gray (Mass.) 405; *Wiggins v. Cummings*, 8 Allen (Mass.) 353; *Wheeler v. Wheeler*, 111 Mass. 247.

If there were outstanding debts, however, he could not sustain his action by offering to assume them. *Williams v. Henshaw*, 12 Pick. (Mass.) 378; 23 Am. Dec. 614. Though it might be maintained if the plaintiff will give credit for the debt on his judgment. *Vinal v. Burrill*, 16 Pick. (Mass.) 401.

of such accounts as could not conveniently be adjusted at law only.¹

4. Provisional Remedies Between Partners.—In States in which attachments are allowed in all civil actions, a suit for an accounting being a civil action founded on contract, the complainant may have an attachment against the defendant where the grounds therefor exist;² and in an equitable action for an accounting, a third person who has sued the defendant partner may be garnished on the ground of non-residence and insolvency.³ But a partner cannot arrest a co-partner on an allegation of the fraudulent removal of partnership property.⁴

XXVII. ACTIONS BETWEEN FIRMS HAVING COMMON MEMBERS.—As the same party cannot be both plaintiff and defendant in an action, one firm cannot maintain an action at law against another firm where the two firms have common members,⁵ and the fact that the claim is a single demand and not a general balance makes

1. Pub. Stats. 1882, p. 837, ch. 151, §§ 1-4.

2. *Goble v. Howard*, 12 Ohio St. 165; *Humphreys v. Mathews*, 11 Ill. 471; *Curry v. Allen*, 55 Iowa 318; *Stone v. Boone*, 24 Kan. 337; *Treadway v. Ryan*, 3 Kan. 437; *Pierce v. Thompson*, 6 Pick. (Mass.) 193; *Com. v. Sumner*, 5 Pick. (Mass.) 360. But see to the contrary, *Johnson v. Short*, 2 La. Ann. 277; *Brinegar v. Griffin*, 2 La. Ann. 154; *Ketchum v. Ketchum*, 1 Abb. Pr., N. S. (N. Y.) 157.

When no action at law can be maintained, no attachment can be had. *Wheeler v. Farmer*, 38 Cal. 203.

3. *Ramsey v. Barbaro*, 12 Smed. & M. (Miss.) 292. But see to the contrary, *Kennard v. Adams*, 11 B. Mon. (Ky.) 102.

4. *Soule v. Hayward*, 1 Cal. 345; *Cary v. Williams*, 1 Duer (N. Y.) 667; *Smith v. Small*, 54 Barb. (N. Y.) 223.

Each partner is a joint owner as well of capital as of property purchased with it. If the capital be misappropriated, no remedy is furnished by action at law unless a balance be struck and a promise made to pay the same, such an action would be upon the promise and not upon the misappropriation and would be contract and not tort nor fraud or for breach of trust. *Smith v. Small*, 54 Barb. (N. Y.) 223.

5. *Tindal v. Bright*, Minor (Ala.) 103; *Schneely v. Cutler*, 22 Ill. App. 87; *Haven v. Wakefield*, 39 Ill. 509; *Blaisdell v. Pray*, 68 Me. 269; *Denny v. Metcalf*, 28 Me. 389; *Portland Bank v. Hyde*, 11 Me. 196; *Calvit v. Mark-*

ham, 3 How. (Miss.) 343; *Morris v. Hillery*, 7 How. (Miss.) 61; *Calhoun v. Albin*, 48 Mo. 304; *Englis v. Furniss*, 4 E. D. Smith (N. Y.) 587; 2 Abb. Pr. (N. Y.) 333; *Rogers v. Rogers*, 5 Ired. Eq. (N. Car.) 31; *Beacannon v. Liebe*, 11 Oregon 443; *Tassey v. Church*, 6 W. & S. (Pa.) 465; 40 Am. Dec. 575; *Pennock v. Swayne*, 6 W. & S. (Pa.) 239; *Griffith v. Chew*, 8 S. & R. (Pa.) 17; *Banks v. Mitchell*, 8 Yerg. (Tenn.) 111; *Green v. Chapman*, 27 Vt. 236.

Under the statutes of Pennsylvania actions at law may be maintained between two firms having a common partner. See *Freck v. Blakiston*, 83 Pa. St. 475; *Grubb v. Cottrell*, 62 Pa. St. 23; *Allen v. Erie City Bank*, 57 Pa. St. 129; but such statutes do not go to the extent of allowing a partner to maintain an action at law against his firm. *Miller v. Knauff*, 2 Clark (Pa.) 11.

If, in an action against a firm, another firm indebted to the former in which there is a common partner, is garnished, it must be dismissed, as the one firm has no legal right to recover of the other. *Denny v. Metcalf*, 28 Me. 389.

The death of the common partner removes the impediment, and a surviving partner can sue at law. *Lacy v. Le Bruce*, 6 Ala. 904. But see to the contrary, *Bosanquet v. Wray*, 6 Taunt. 597.

As a partition suit is not necessarily an adversary suit, it has been doubted whether the reason for denying relief at law would apply. *Blaisdell v. Pray*, 68 Me. 269.

no difference.¹ But where the claim is for a fixed amount, after assignment by the creditor firm, the assignee may recover in an action at law.² So, where all notes are considered as joint and several, the one firm may sue the other upon such a claim by omitting to make the common partner a party defendant,³ and the rule does not apply to a promise or obligation given by a firm to a member of another firm having other members common to both firms.⁴

In equity, however, and under the codes which administer legal and equitable remedies without distinction, such actions may be maintained, though there are common partners, in much the same way as though they were distinct legal bodies,⁵ and in bankruptcy or insolvency proceedings the solvent partners of the creditor firm may prove their claims and realize upon them as though there were no common partners.⁶

1. *Haven v. Wakefield*, 39 Ill. 509; *Tindal v. Bright*, Minor (Ala.) 103; *Calvit v. Markham*, 3 How. (Miss.) 343; *Calhoun v. Albin*, 48 Mo. 304, *Foster v. Ward*, 1 Cab. & E. 168.

In *Cole v. Reynolds*, 18 N. Y. 74, however, an action upon an account stated between firms having a common partner was sustained on the ground that under the code it could be treated as an equity action.

2. *Beacannon v. Liebe*, 11 Oregon 443; *Pitcher v. Barrows*, 17 Pick. (Mass.) 361. And see *Russell v. Leland*, 12 Allen (Mass.) 349; *Cole v. Reynolds*, 18 N. Y. 74.

Where the creditor firm winds up its business and distributes its assets, if the claim against the debtor firm is allotted to other than the common partner, the one to whom it is so allotted may sue at law. *Scott v. Green*, 89 N. Car. 278.

If after assignment the claim again comes into the hands of the creditor firm the old disability to sue re-attaches. *Calhoun v. Albin*, 48 Mo. 304.

3. *Morris v. Hillery*, 7 How. (Miss.) 61.

Under Code *Alabama*, § 2605, providing that any one of the partners may be sued for the obligation of all, a partnership may sue an individual for a debt created by a former partnership composed of defendant and a member of plaintiff's firm. *Alexander v. Jones*, 90 Ala. 474.

4. *Moore v. Gano*, 12 Ohio 300. And see *Mahan v. Sherman*, 7 Blackf. (Ind.) 378; *Herriott v. Kersey*, 69 Iowa 111.

The debtor only can object to the sale by his creditor's firm of notes held as collateral to his indebtedness to another firm having a common partner. *Howry v. Eppinger*, 34 Mich. 29.

5. *Cole v. Reynolds*, 18 N. Y. 74; *Englis v. Furniss*, 4 E. D. Smith (N. Y.) 587; 2 Abb Pr. (N. Y.) 333; *Kingsland v. Braisted*, 2 Lans. (N. Y.) 17; *Haven v. Wakefield*, 39 Ill. 509; *Frye v. Sanders*, 21 Kan. 26; *Gibson v. Ohio Farina Co.*, 2 Disney (Ohio) 499; *Douglass v. Neil*, 37 Tex. 528; *Calvit v. Markham*, 3 How. (Miss.) 343; and see *Scott v. Green*, 89 N. Car. 278; *Green v. Chapman*, 27 Vt. 236; *In re Buckhause*, 2 Low. (U. S.) 331; 10 Nat. Bankr. Reg. 206; *Bosanquet v. Wray*, 6 Taunt. 597; *Eastman v. Wright*, 6 Pick. (Mass.) 320; *Mainwaring v. Newman*, 2 B. & P. 120; *Griffith v. Chew*, 8 S. & R. (Pa.) 17.

In *Rogers v. Rogers*, 5 Fred. Eq. (N. Car.) 31, it is held that it is necessary to take an account between the partners as well as between the firms, so that the amount the common partner owes the creditor firm may be deducted. But in *Phillips v. Blatchford*, 137 Mass. 510, the court held that charging the debt on the books against the common partner so as to give him a claim against his co-partners in the debtor firm, is not a payment.

6. See *M'Caully v. M'Farland*, 2 Desaus. (S. Car.) 239; *In re Buckhause*, 2 Low. (U. S.) 331; *Ex parte Thompson*, 3 Deac. & Ch. 612; *Hayes v. Bement*, 3 Sandf. (N. Y.) 394; *Hayes v. Heyer*, 35 N. Y. 326; *McArthur v. Chase*, 13 Gratt. (Va.) 683; *Ex parte Brenchley*, 2 Gl. & J. 127.

XXVIII. ACTIONS IN EQUITY BETWEEN PARTNERS.—The remedial justice administered by courts of equity is far more complete, extensive, and various than that administered by courts of law, adapting itself to the peculiar nature of the grievance and granting relief in the most beneficial and effective manner where no redress whatsoever or very imperfect redress could be obtained at law,¹ it being often necessary in order to do justice between the parties, in partnership cases, that an account should be taken, that a dissolution should be decreed, that assets should be called in and protected, that a sale of partnership property should be ordered, and that an equitable distribution of the proceeds should be made, none of which ends can be fully attained by common law process and some of which cannot be attained at all,² hence there has arisen a necessity for an equitable remedy based on the inability of the common law courts to answer the requirements of justice.³

1. Actions for an Accounting.—When necessary to effect a complete adjustment of partnership concerns, equity will entertain an action for an accounting, whether an action of account at law would or would not lie between the parties.⁴ That probate courts have jurisdiction to settle partnership affairs in case of the death of a partner, does not deprive equity of its power to wind up,⁵ and courts of admiralty have no jurisdiction over matters of

Where an action is by a partnership against a single defendant, and his property is attached in the action, another attachment creditor cannot set up, to defeat the prior attachment, the extrinsic facts that one of the plaintiffs is a partner with defendant, and that the debt sued for is a partnership obligation. *Alexander v. King*, 87 Ala. 642.

1. Story's Eq. Jur. 666.

Chancery has jurisdiction of the question of the existence of a partnership. *McReynolds v. McReynolds*, 74 Iowa 89.

It is a case of partnership, within the equity jurisdiction of the court, where the bill alleges that one, not a partner, or representing a partner's interest, has taken goods belonging to a partnership, which goods such person denies to be partnership property. *Reed v. Johnson*, 24 Me. 322.

2. *Bispham's Eq. Jur.*, § 505. And see *Christy's Appeal*, 92 Pa. St. 157.

3. *Bispham's Eq. Jur.*, § 505. And see *Epping v. Aiken*, 71 Ga. 682.

In matters of difficulty or controversy between partners, it is most usual, and by far the most convenient to resort to a court of equity for their final adjudication and settlement. *Bracken v. Kennedy*, 4 Ill. 558.

4. *Gillett v. Hall*, 13 Conn. 426; *Niles v. Williams*, 24 Conn. 279; *Bennett v. Woolfolk*, 15 Ga. 213; *Lilliendhal v. Stegmair*, 45 N. J. Eq. 648; *Reed v. Johnson*, 24 Me. 322; *Krutz v. Paola Town Co.*, 20 Kan. 397; *Glenn v. Hebb*, 12 Gill & J. (Md.) 271. See *Huyler v. Westervelt*, 7 Paige (N. Y.) 155.

Where partnership articles provide that the partnership shall expire by limitation, but the business was allowed to run on until a later date, when a new firm was formed, leaving out one of the original partners and bringing in another, it was held that the partner who was dropped has a right to an accounting from the members of the new firm. *Near v. Lowe*, 49 Mich. 482.

A stipulation in articles of copartnership that any dispute between the parties should be settled by arbitration, does not deprive a court of equity of jurisdiction of a bill for a partnership accounting. *Waugh v. Schlenk*, 23 Ill. App. 433.

A Surviving Partner cannot deprive equity of jurisdiction by admitting the correctness of an account presented by the administrator of his deceased partner. *Personette v. Pryme*, 34 N. J. Eq. 26.

5. *Griggs v. Clark*, 23 Cal. 427; *Scott*

account between co-partners or part owners, though the parties are engaged in maritime adventures under admiralty jurisdiction.¹ Nor is the jurisdiction local, even though real property is included in the assets; and the action may be maintained even though a part of the property is in another county,² or in another State,³ and though some of the partners are non-residents.⁴

Great difficulty, or even actual impossibility of making an accurate statement of accounts between the parties is no ground for refusing relief,⁵ though it will be refused if unnecessary, or if no real cause for complaint exists,⁶ and it is a general rule that a decree for an account will not be made save with a view to the final determination of all questions and cross-claims between the

v. Buffum, 52 N. H. 345; *Perrin v. Lepper*, 49 Mich. 347.

As a general rule probate courts have no jurisdiction to settle partnership affairs. See *Roulston v. Washington*, 79 Ala. 529; *Vincent v. Martin*, 79 Ala. 540; *Culley v. Edwards*, 44 Ark. 423; *Tiner v. Christian*, 27 Ark. 306; *Theller v. Sutt*, 57 Cal. 447; *Anderson v. Beebe*, 22 Kan. 768; *Blake v. Ward*, 137 Mass. 94; *Booth v. Todd*, 8 Tex. 137. But see to the contrary *Ensworth v. Curd*, 68 Mo. 282.

The fact that the surviving partner is appointed the administrator of his deceased co-partner and must therefore settle the individual estate in probate court, does not give it jurisdiction over the partnership accounting. *Vincent v. Martin*, 79 Ala. 540; *Roulston v. Washington*, 79 Ala. 529.

1. *Steamboat Orleans v. Phoebus*, 11 Pet. (U. S.) 175; *The Brothers*, 7 Fed. Rep. 878; *Schooner Ocean Bell*, 6 Ben. (U. S.) 253; *Ward v. Thompson*, 22 How. (U. S.) 330; *Grant v. Poillon*, 20 How. (U. S.) 162; *Verderwater v. Mills*, 19 How. (U. S.) 82.

In *Andrews v. Wall*, 3 How. (U. S.) 568, however, it was held that a contract of consortium between two wrecking vessels to share salvage is a maritime contract enforceable in admiralty.

Justices' Courts.—A justice cannot take jurisdiction of a purely equitable action; and on an appeal from a justice to the district court, the district court can take jurisdiction of only such matters as were within the jurisdiction of the justice. *Berroth v. McElvain*, 41 Kan. 269.

2. *Jones v. Fletcher*, 42 Ark. 422; *Godfrey v. White*, 43 Mich. 171.

3. *Greggs v. Clark*, 23 Cal. 427; *Lyman v. Lyman*, 2 Paine (U. S.) 11.

4. *Wright v. Ward*, 65 Cal. 525;

Towle v. Pierce, 12 Met. (Mass.) 329; 46 Am. Dec. 679; *Wells v. Collins*, 11 Lea (Tenn.) 213; *Henry v. Jackson*, 37 Vt. 431; *Harris v. Fleming*, 13 Ch. D. 208. And see *Santa Clara Min. Assoc. v. Quicksilver Min. Co.*, 17 Fed. Rep. 657; 8 Sawy. (U. S.) 330.

5. *Evans v. Montgomery*, 50 Iowa 325; *Bevans v. Sullivan*, 4 Gill (Md.) 383. And see *Martin v. Smith*, 52 N. Y. Super. Ct. 277; *Langdell v. Langell*, 17 Oregon 220.

But if all the partners have been so negligent as to have lost all funds of the partnership concern, or have so confused the partnership accounts that the court cannot see what decree to make, relief will be refused. *Rick v. Neitzky*, 1 Mackey (D. C.) 21; *Hall v. Clagett*, 48 Md. 223; *Langell v. Langell*, 17 Oregon 220; *Slater v. Arnett*, 81 Va. 432. And see *Davidson v. Wilson*, 3 Del. Ch. 307.

6. *Ligare v. Peacock*, 109 Ill. 94; *Harvey v. Pennypacker*, 4 Del. Ch. 445; *Adams v. Gaubert*, 69 Ill. 585; *McKaig v. Hebb*, 42 Md. 227; *Demarest v. Rutan*, 40 N. J. Eq. 356.

A suit by a surviving partner against the administrator of his deceased co-partner for an accounting will not be entertained merely because the survivor has possession, in order to wind up. *McKay v. Joy*, 70 Cal. 581.

The surviving partner's ignorance of book-keeping is no reason for the interference of the court, and where the assistance of the court is necessary in some particulars and not in others, it will be granted where necessary only. *Harvey v. Pennypacker*, 4 Del. Ch. 445.

If the business consists in carrying out an uncompleted contract the court may allow the partners to complete it, if most beneficial before taking the

partners, and to a dissolution of the partnership,¹ an account may be directed without a dissolution of the partnership, however, to enable a partner to obtain his share of profits arising from his co-partner's secret transactions, from the benefits of which he has been excluded,² or where one partner excludes or expels another for the purpose of driving him to a dissolution before the expiration of the agreed term,³ as well as where the partnership agreement calls for periodical settlements or the settlement of distinct transactions,⁴ and a limited account may be had when the part-

final account. *McChan v. Klenard*, L. R., 9 Ch. Div. 336.

1. *Clark v. Gridley*, 41 Cal. 119; *Nisbet v. Nash*, 52 Cal. 540; *Thompson v. Lowe*, 111 Ind. 272; *Davis v. Davis*, 60 Miss. 615; *McMahon v. Thornton*, 4 Mont. 46; *Baird v. Baird*, 1 Dev. & B. Eq. (N. Car.) 524; *McRae v. McKenzie*, 2 Dev. & B. Eq. (N. Car.) 232; *Coville v. Gilman*, 13 W. Va. 314; *Glynn v. Phetteplace*, 26 Mich. 383; *Phillips v. Blatchford*, 137 Mass. 510. And see *Roberts v. Eldred*, 73 Cal. 394.

The reason alleged for this doctrine was the impossibility of doing complete justice without winding up the whole concern, and ascertaining the final balances due to or from the partners, respectively. *Lindley on Part.* 947.

The rule was formerly invariable that no accounting without a prayer for dissolution, could be had, and a bill framed on any other theory was demurrable. *Foreman v. Homfray*, 2 Ves. & B. 329; *Knebell v. White*, 2 Y. & C. Ex. 15; *Loscombe v. Russell*, 4 Sim. 8.

No specific prayer for dissolution is necessary where the pleading is based on the theory that a dissolution has been had. *Ambler v. Whipple*, 20 Wall. (U. S.) 546. And a general prayer for relief may be interpreted as a prayer for dissolution. *Coville v. Gilman*, 13 W. Va. 314; *Werner v. Leisen*, 31 Wis. 169; *Loscombe v. Russell*, 4 Sim. 8.

After setting aside a conveyance of property by a firm as fraudulent as against creditors, the court can order a sale and distribution without dissolving or settling accounts. *Farmers' Bank v. Smith*, 26 W. Va. 541.

Where an attachment and execution have been levied upon the interest of a partner in favor of a separate creditor, and proceedings thereunder have been enjoined on behalf of the other part-

ners, for the purpose of determining the amount of his interest an accounting without dissolution may be granted. *Cropper v. Coburn*, 2 Curt. (U. S.) 465.

2. *Hitchens v. Congreve*, 1 R. & M. 150; *Fawcett v. Whitehouse*, 1 R. & M. 132; *Beck v. Kantorowicz*, 3 K. & J. 230; *Society etc v. Abbott*, 2 Beav. 559.

Where one partner wrongfully takes title to the firm's land in his own name his co-partner can maintain a bill to establish its partnership character, and compel a conveyance of an undivided half without resorting to a suit for dissolution. *Davis v. Davis*, 60 Miss. 615; *Traphagen v. Burt*, 67 N. Y. 30.

Though there are unpaid judgments against a firm, one partner may have an accounting and recover his share of the net surplus in the hands of the other, who holds all the assets. *Smith v. Fitchett*, 56 Hun. 473.

3. *Harrison v. Armitage*, 4 Mad. 143; *Blisset v. Daniel*, 10 Hare 493; *Richards v. Davies*, 2 R. & M. 347; and see *Inglis v. Floyd*, 33 Mo. App. 565.

That the guilty partners may be compelled to submit to repeated bills for an accounting in the case of the continuance of the exclusion is no defense. *Richard v. Davies*, 2 R. & M. 347; *Fairthorn v. Weston*, 3 Hare 387.

In case of the denial of the existence of the partnership, a suit to establish it may be maintained, and if the partnership is proved, an accounting of past transactions may be had. *Knowler v. Haughton*, 11 Ves. 168.

4. *Patterson v. Ware*, 10 Ala. 444. And see *Wadley v. Jones*, 55 Ga. 329; *Attorney Gen. v. State Bank*, 1 Dev. & B. Eq. (N. Car.) 145.

Where, by the agreement of dissolution of a firm of lawyers, fees were to be divided and the partnership was to continue as to old business, and the business was being wound up by a surviving partner, it was held that the

nership has proved a failure and the partners are too numerous to be made parties to the action, and justice can thereby be done to all concerned.¹

The matters to be considered on such an accounting, are the partnership accounts only, personal accounts and demands not being subject to consideration,² even though there are but two partners;³ though personal matters growing out of the business or forming part of transactions relating to it have been considered,⁴ and personal demands in favor of a partner may be set off against a final balance found due his co-partner.⁵

personal representative of the deceased partner was not required to wait until thy entire business was closed, but could compel a division of fees so far as they were collected. *Denver v. Roane*, 99 U. S. 355.

On an accounting between partners, where defendant pleads in avoidance of the action a full and complete settlement between them of all their partnership affairs, he will not be permitted to introduce evidence going behind such settlement to establish a fact embraced therein. *Inglis v. Floyd*, 33 Mo. App. 565.

1. See *Coville v. Gilman*, 13 W. Va. 314; *Walworth v. Holt*, 4 M. & C. 619; *Deeks v. Stanhope*, 14 Sim. 57; *Richardson v. Hastings*, 7 Beav. 323; *Sheppard v. Oxonford*, 1 K. & J. 491; *Clements v. Bowes*, 17 Sim. 467; *Coope v. Webb*, 15 Sim. 454; *Apperley v. Page*, 1 Ph. 779; *Wilson v. Stanhope*, 2 Coll. 269.

Where the right to a partial accounting did not exist when the bill was filed a decree awarding profits afterwards earned is erroneous. *Wadley v. Jones*, 55 Ga. 329.

A receiver may be appointed and an injunction granted in such a case if necessary. *Walworth v. Holt*, 4 M. & C. 619; *Sheppard v. Oxonford*, 1 K. & J. 491.

Consent to Dissolution.—Where defendants by their answer to a bill for dissolution of a partnership, consent to the dissolution, the court may proceed to a distribution of the assets without a formal decree of dissolution, and without proof of the special grounds set out in the bill. *Burns v. Rosenstein*, 135 U. S. 449.

2. *Turnipseed v. Goodwin*, 9 Ala. 372; *Jones v. Jones*, 23 Ark. 212; *Nims v. Nims*, 23 Fla. 69; *Hanks v. Baber*, 53 Ill. 292; *Rosensteil v. Gray*, 112 Ill. 288; *Fletcher v. Reed*, 131 Mass. 312; *Gordon v. Gordon*, 49 Mich. 501;

Wells v. Babcock, 56 Mich. 276; *Brown v. Haynes*, 6 Jones Eq. (N. Car.) 49; *Evans v. Bryan*, 95 N. Car. 174; *Looney v. Gillenwaters*, 11 Heisk. (Tenn.) 133; *O'Lone v. O'Lone*, 2 Grant's Ch. (Up. Can.) 125. And see *Gandolfo v. Appleton*, 40 N. Y. 533; *Dimond v. Henderson*, 47 Wis. 172.

If partners have treated their real estate as if owned in common, as by selling their moieties separately, a balance due from them on their original purchase is not a partnership debt to be settled in an account. *Smith v. Wood*, 1 N. J. Eq. 74.

On a bill to wind up a partnership, the defendant cannot, by cross-bill or otherwise, have an account of a previous and distinct partnership, unless on some independent equity, such as an equitable set-off, etc. *Carey v. Williams*, 1 Lea (Tenn.) 51.

3. *Rosensteil v. Gray*, 112 Ill. 282; *Evans v. Byan*, 95 N. Car. 174; *Looney v. Gillenwaters*, 11 Heisk. (Tenn.) 133; *O'Lone v. O'Lone*, 2 Grant's Ch. (Up. Can.) 125. But see *Adams v. Cable*, 6 B. Mon. (Ky.) 384; 44 Am. Dec. 772.

In *Gorham v. Farson*, 119 Ill. 425, it was held that the court has no jurisdiction of the private property of any of the partners in an action for an accounting.

4. *Royster v. Johnson*, 73 N. Car. 474; *Monroe v. Hamilton*, 47 Ala. 217; *Cruikshank v. McVicar*, 8 Beav. 106. But see *Wells v. Babcock*, 56 Mich. 276.

Where the complainant sold the defendant one-half of his mill to be paid for out of the profits and then went into partnership with him, it was held in an action for an accounting that the claim for half the mill and the vendor's lien should be considered. *Gleason v. Van Aernam*, 9 Oregon 343.

5. *Jones v. Jones*, 23 Ark. 212; *Sarchet v. Sarchet*, 2 Ohio 320; and see *Mack v. Woodruff*, 87 Ill. 570.

a. WHO MAY MAINTAIN THE ACTION.—A partner may maintain a bill for an accounting, upon the proper grounds, irrespective of the amount due him, or the state of the partnership accounts.¹ So, it can be maintained by any one representing the share of a partner as an executor or administrator of a deceased partner,² and an assignee, purchaser or mortgagee of the interest of a partner is entitled to such relief against the remaining partners if they refuse to render an account.³

As a general rule, however, the widow, legatees, distributees or creditors of the general estate of a deceased partner, cannot

As to set-off of personal claims against a final balance in case of insolvency the local law as to set-off controls. See *Berry v. Powell*, 18 Ill. 98; *Mack v. Woodruff*, 87 Ill. 570; *Moffatt v. Thomson*, 5 Rich. Eq. (S. Car.) 155; 57 Am. Dec. 737.

The equitable lien of a partner not covering a private account between the partners, the debtor partner may claim an exemption in his balance on partnership accounting against the creditor partner on an individual debt. *Evans v. Bryan*, 95 N. Car. 174.

1. *Sharp v. Hibbins*, 42 N. J. Eq. 543; and see *Harvey v. Varney*, 98 Mass. 118.

One partner in a firm which is a partner in another firm can maintain a bill for an accounting against the members of the latter firm. *Simonton v. McLain*, 37 Ala. 663.

A partner is entitled to ask for an account even though losses have been caused by his own violation of the partnership agreement to such an extent as to require him to make good the losses. *Clarke v. Gridley*, 41 Cal. 119.

A partner who has sold his interest is entitled to an accounting if he sold at a price which has not yet been ascertained. *Quinlivan v. English*, 42 Mo. 362.

A dormant partner may maintain an action for an accounting even though his connection with the firm had been concealed in order to evade his creditors. *Harvey v. Barney*, 98 Mass. 118.

2. *McLaughlin v. Simpson*, 3 Stew. & P. (Ala.) 85; *Costley v. Towles*, 46 Ala. 600; *Tate v. Tate*, 35 Ark. 289; *Miller v. Jones*, 39 Ill. 54; *Atkinson v. Rogers*, 14 La. Ann. 643; *Freeman v. Freeman*, 136 Mass. 260; *Cheeseman v. Wiggins*, 1 Thomp. & C. (N. Y.) 595; *Pitt v. Moore*, 99 N. Car. 85;

Grim's Appeal, 105 Pa. St. 375; *Tillinghast v. Champlin*, 4 R. I. 173; *Watkins v. Fakes*, 5 Heisk. (Tenn.) 185; *Jennings v. Chandler*, 10 Wis. 21; *Wickliffe v. Eve*, 17 How. (U. S.) 468; *Denver v. Roane*, 99 U. S. 355; *In re Clap*, 2 Low. (U. S.) 168; *Ileyne v. Middlemore*, 1 Ch. Rep. 138; *Hockwell v. Eustman*, Cro. Jac. 410.

Where the sole surviving partner and a third person are the administrators of a deceased partner, however, a bill by the survivor against the other administrator is demurrable. *Smith v. Bryson*, Phil. Eq. N. Car. 267; *Griffith v. Van Heythuysen*, 9 Hare 85.

In case of the death of an administrator the right to apply for an accounting devolves upon his representative. *Hutton v. Laws*, 55 Iowa, 710; *Worthy v. Brower*, 93 N. Car. 344; *Newell v. Humphrey*, 37 Vt. 268,

3. *Farley v. Moog*, 79 Ala. 148; *Nichol v. Stewart*, 36 Ark. 612; *Miller v. Brigham*, 50 Cal. 615; *Strong v. Clawson*, 10 Ill. 346; *Gyger's Appeal*, 62 Pa. St. 73; 1 Am. Rep. 382; *Stiness v. Pierce*, 13 R. I. 452; *Driggs v. Morely*, 2 Pinn. (Wis.) 403; 2 Chand. (Wis.) 59; *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. (N. Car.) 103; 18 Am. Dec. 577; *Fellows v. Greenleaf*, 43 N. H. 421; *Marx v. Goodnough*, 16 Oregon 26; *Clagett v. Kilbourne*, 1 Black (U. S.) 346; *Mathewson v. Clarke*, 6 How. (U. S.) 122; *Fourth Nat. Bank v. Carrollton R. Co.*, 11 Wall. (U. S.) 624; *Fawcett v. Whitehouse*, 1 R. & M. 132; *Redmayne v. Forster*, L. R., 2 Eq. 467.

In an action by the assignee of one partner for an accounting with his co-partners, defendants are not concluded by an allegation made by them in another action as to the amount contributed to the firm by plaintiff's assignor. *Tennant v. Guy* (Supreme Ct.), 3 N. Y. Supp. 697.

maintain an action for an accounting;¹ but where the relation between the executors and surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate such a bill will be upheld.² Thus, in case of fraud or collusion between the representative and the surviving partner, a person entitled to an accounting of the separate estate may follow the assets and pursue the same remedy against the surviving partner,³ and if the executor is also surviving partner a person entitled to an accounting of the private estate can sue him in both capacities,⁴ and in compelling the executor to account for the separate estate, the account between it and the partnership estate may be inquired into in order to make the separate account complete and entire.⁵

An employee who is to be paid in whole or in part by a share of the profits is also entitled to an account and discovery,⁶ but he cannot compel a sale of partnership property.⁷

A purchaser on execution sale of a partner's interest is entitled to an accounting, to ascertain what that interest is.⁸ And a

1. *Tate v. Tate*, 35 Ark. 289; *Hutton v. Laws*, 55 Iowa 710; *Rosenzweig v. Thompson*, 66 Md. 593; *Hyer v. Burdett*, 1 Edw. Ch. (N. Y.) 325; *Ludlow v. Cooper*, 4 Ohio St. 1; *Vienne v. McCarty*, 1 Dall. (Pa.) 154; *Harrison v. Righter*, 11 N. J. Eq. 389; *Stainton v. Carron Co.*, 18 Beav. 146; *Davies v. Davies*, 2 Keen 539.

The heir and distributee of a deceased partner cannot maintain a bill for account of the partnership affairs against the administrator of the deceased partner and the surviving partners. *Rosenzweig v. Thompson*, 66 Md. 593.

2. *Tarvis v. Milne*, 9 Hare 141; *Stainton v. Carron Co.*, 18 Beav. 146. And see *Rosenzweig v. Thompson*, 66 Md. 593; *Forward v. Forward*, 6 Allen (Mass.) 494; *Law v. Law*, 2 Coll. 41; *Gedge v. Traill*, 1 Russ. & M. 281.

A mere refusal of the executor to sue the surviving partners is not sufficient to give the legatee or a private creditor a right to do so. *Yeatmen v. Yeatmen*, 7 Ch. Div. 210. But see to the contrary *Ravenscraft v. Pratt*, 22 Kan. 20. The question was raised but not decided in *Dampf's Appeal*, 106 Pa. St. 72.

Willfull negligence in permitting the business to be continued with the assets of the estate is a sufficient cause, though there was no fraud or collusion. *Bausher v. Kirby*, 1 Russ. & M. 277.

3. *Newland v. Champion*, 1 Ves. Sr. 105; *Seeley v. Boehm*, 2 Madd. 176.

4. *Hyer v. Burdett*, 1 Edw. Ch. (N. Y.) 325; *Fiske v. Hills*, 11 Biss. (U. S.) 294; *Boyle v. Boyle*, 4 B. Mon. (Ky.) 570; *Pointon v. Pointon*, L. R., 12 Eq. 547; *Cropper v. Knappman*, 9 G. & C. Ex. 338. And see *Sanderson v. Sanderson*, 17 Fla. 820; *Forward v. Forward*, 6 Allen (Mass.) 494.

5. *Harrison v. Righter*, 11 N. J. Eq. 389; *Hamersley v. Lambert*, 2 Johns. Ch. (N. Y.) 508; *Newland v. Champion*, 1 Ves. Sr. 105.

The widow of a deceased partner whose husband held her separate estate as trustee for her and mingled it with the partnership funds is entitled to an accounting by the surviving partners. *Dent v. Slough*, 40 Ala. 518.

6. *Hallett v. Cumston*, 110 Mass. 32; *Hargrave v. Conroy*, 19 N. J. Eq. 281; *Osbrey v. Reimer*, 51 N. Y. 630; *Bentley v. Harris*, 10 R. I. 434; 14 Am. Rep. 695; *Channon v. Stewart*, 103 Ill. 541; *Killock v. Greg*, 4 Russ. 285; *Rishton v. Grissell*, L. R., 5 Eq. 326; *Harrington v. Churchward*, 29 L. J. Ch. 521; 6 Jur., N. S. 567; 8 Weekly Rep. 302; *Turney v. Bayley*, 4 De G. J. & Sm. 332; *Killock v. Greg*, 4 Russ. 285. But see *Mulholland v. Rapp*, 50 Mo. 42.

7. *Rishton v. Grissell*, L. R., 5 Eq. 326.

8. *Farley v. Moog*, 79 Ala. 148; *Commercial Bank v. Mitchell*, 58 Cal. 42; *Witter v. Richards*, 10 Conn. 37; *Newhall v. Buckingham*, 14 Ill. 405; *Hubbard v. Curtis*, 8 Iowa 1; *Barrett*

judgment creditor of one partner has been allowed to sustain a bill in the nature of a bill to martial liens and sell before sale under his execution.¹ So, a mortgagee of a partner's interest may ask for an accounting to determine his mortgagor's interest in his action to foreclose instead of first foreclosing and afterwards asking for an accounting.² And while the general rule is that a general creditor who has no lien is not entitled to an accounting, an injunction or a receiver,³ some courts have regarded a surviving partner as a trustee, and have therefore given the creditor the right of a lien-holder to file a bill to compel a winding up of the partnership affairs.⁴

b. PARTIES DEFENDANT.—All the partners, whether ostensible or dormant, must be made parties, either plaintiff or defendant, in actions for an accounting,⁵ and the purchaser of a partner's

v. McKenzie, 24 Minn. 20; *Treadwell v. Brown*, 41 N. H. 12; *Clement v. Foster*, 3 Ired. Eq. (N. Car.) 213; *Nixon v. Nash*, 12 Ohio St. 647; *Cogswell v. Wilson*, 17 Oregon 31; *Knerr v. Hoffman*, 65 Pa. St. 126; *Durborrow's Appeal*, 84 Pa. St. 404; *Lincoln Sav. Bank v. Gray*, 12 Lea (Tenn.) 459; *Claggett v. Kilbourne*, 1 Black (U. S.) 346; *Chapman v. Koops*, 3 B. & P. 289; *Duton v. Morrison*, 17 Ves. 193.

A debtor partner whose interest has been sold under execution has also a right to an accounting, as he may still have an interest in the partnership. *Habershon v. Blurton*, 1 De G. & S. 121.

1. See *Wilson v. Strobach*, 59 Ala. 488; *Commercial Bank v. Mitchell*, 58 Cal. 42; *Witter v. Richards*, 10 Conn. 37; *Treadwell v. Brown*, 41 N. H. 12; *Clement v. Foster*, 3 Ired. Eq. (N. Car.) 213; *Nixon v. Nash*, 12 Ohio St. 647.

2. *Churchill v. Proctor*, 31 Minn. 129; *Smith v. Evans*, 37 Ind. 526; *Huston v. Neil*, 41 Ind. 504; *Mechanics Bank v. Godwin*, 5 N. J. Eq. 334; *Bentley v. Bates*, 4 Y. & C. Ex. 182.

An assignee though he holds the interest for security only is entitled to an accounting in connection with a suit to foreclose. *Buford v. Neely*, 2 Dev. Eq. (N. Car.) 481; *Wallace's Appeal*, 104 Pa. St. 559; but such an assignment is not a dissolution, and the assignor would also be entitled to an accounting. *Dupont v. McLaran*, 61 Mo. 502.

In *Dayton v. Wilkes*, 5 Bosw. (N. Y.) 655, it was held that the assignor cannot also be made a party. But see *Nichol v. Stewart*, 36 Ark. 612; *Gyger's Appeal*, 62 Pa. St. 73; 1 Am. Rep. 382.

The assignee of an assignee is also

entitled to an account. *Pendleton v. Wambersie*, 4 Cranch (U. S.) 73.

3. *Reese v. Bradford*, 13 Ala. 837; *Freeman v. Stewart*, 41 Miss. 138; *Young v. Frier*, 9 N. J. Eq. 465; *Mittnacht v. Smith*, 17 N. J. Eq. 259; *Greenwood v. Brodhead*, 8 Barb. (N. Y.) 593; *Clement v. Foster*, 3 Ired. Eq. (N. Car.) 213.

4. *Pearson v. Keedy*, 6 B. Mon. (Ky.) 128; 43 Am. Dec. 160; *Jones v. Lusk*, 2 Metc. (Ky.) 356; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb. 489; *Washburn v. Bank of Bellows Falls*, 19 Vt. 278; *Bardwell v. Perry*, 19 Vt. 292; 47 Am. Dec. 687; *Fitzpatrick v. Flannagan*, 196 U. S. 648; *In re Clap*, 2 Low. (U. S.) 68; *Fiske v. Gould*, 12 Fed. Rep. 372; *Fiske v. Hills*, 11 Biss. (U. S.) 294; *Johnson v. Strauss*, 4 Hughes (U. S.) 621; *Fink v. Patterson*, 21 Fed. Rep. 602.

In *Conroy v. Woods*, 13 Cal. 626, the same rule was applied to a partner who bought out his co-partners' agreeing to pay the debts.

A mere allegation of insolvency and inability or unwillingness to pay, or of an apprehension of misuse of the assets, is not sufficient. *Jones v. Lusk*, 2 Metc. (Ky.) 356; *Guyton v. Flack*, 7 Md. 398.

5. *Settembre v. Putnam*, 30 Cal. 490; *Young v. Hogan*, 52 Cal. 466; *Wells v. Strange*, 5 Ga. 22; *Johnston v. Preer*, 51 Ga. 313; *Derby v. Gage*, 38 Ill. 27; *Stevenson v. Mathers*, 67 Ill. 123; *Westphal v. Henney*, 49 Iowa 542; *Dozier v. Edwards*, 3 Litt. (Ky.) 67; *Pratt v. McHatton*, 11 La. Ann. 260; *Francis v. Lavine*, 21 La. Ann. 265; *Fuller v. Benjamin*, 23 Me. 255; *Grove v. Fresh*, 9 Gill & J. (Md.) 280; *Mc-*

interest,¹ the assignee of a bankrupt partner,² and the representatives of a deceased partner,³ are necessary parties to such an action.

Kaig v. Hebb, 42 Md. 227; *Jenness v. Smith*, 58 Mich. 280; *Wicksham v. Davis*, 24 Minn. 167; *Raymond v. Putnam*, 44 N. H. 160; *Raymond v. Came*, 45 N. H. 201; *Cummings v. Morris*, 25 N. Y. 625; *Arnold v. Arnold*, 90 N. Y. 580; *Allison v. Davidson*, 2 Dev. Eq. (N. Car.) 79; *Waggoner v. Gray*, 2 Hen. & M. (Va.) 603; *Fourth Nat. Bank v. Carrollton R.Co.*, 11 Wall. (U. S.) 624; *Gray v. Larrimore*, 2 Abb. (U. S.) 542; *Hills v. Nash*, 1 Ph. 594. See *Geheebe v. Stanby*, 1 La. Ann. 17.

Though the title to the property of the partnership is in a single partner, all of the partners are necessary parties. *Wells v. Strange*, 5 Ga. 22; *Stevenson v. Mathers*, 67 Ill. 123.

Where the question was whether certain real estate was partnership property or was the homestead of one partner, it was held that such partner's wife was a necessary party. *Rhodes v. Williams*, 12 Nev. 20.

When the partners are too numerous to be brought on the record, a decree can nevertheless be made, the rule requiring all partners to be parties, being a matter of policy and convenience rather than of jurisdiction. *Stimpson v. Lewis*, 36 Vt. 91.

A partner who is abroad is a necessary party, although his whereabouts are unknown. *Wright v. Ward*, 65 Cal. 525. But see *Fuller v. Benjamin*, 23 Me. 255. But if the non-resident has received his share, he need not be joined. *Towle v. Pierce*, 12 Met. (Mass.) 329; 426 Am. Dec. 679.

The Decree.—As all the partners are actors or in effect plaintiffs, the decree may be in favor of the defendant if the account so stands as well as in favor of the plaintiff. *Saunders v. Wood*, 15 Ark. 24; *Felder v. Wall*, 26 Miss. 596; *Scott v. Pinkerton*, 3 Edw. Ch. (N. Y.) 70.

Sale of Part of an Interest.—Where a partner's interest, not in the entire partnership, but in certain specified articles belonging to it, is levied on and sold, on an execution against him individually his interest in the rest remains untouched, and he is a necessary party to a suit by such purchaser for an accounting and division of the property. *Gerard v. Bates*, 124 Ill. 150.

Non-resident partners who are insolvent are not necessary parties to an action for contribution for payment of the firm's indebtedness. *Scott v. Bryan*, 96 N. Car. 289.

1. *Gerald v. Bates*, 124 Ill. 150; *Settembre v. Putnam*, 30 Cal. 490; *Rosensteil v. Gray*, 112 Ill. 282; *White v. White*, 4 Md. Ch. 418; *Glynn v. Phetteplace*, 26 Mich. 383; and see *Hayes v. Hever*, 4 Sandf. Ch. (N. Y.) 485; *Buford v. Neely*, 2 Dev. Eq. (N. Car.) 481.

So a partner who has assigned his interest is a necessary party, as he may be found indebted to the firm, and a discovery may be required from him whether his assignee is plaintiff or defendant. *Wright v. Ward*, 65 Cal. 525; *Settembre v. Putnam*, 30 Cal. 490; *Bracken v. Kennedy*, 4 Ill. 558; *Ogden v. Arnot*, 29 Hun (N. Y.) 146; *Raigul's Appeal*, 80 Pa. St. 234; *Fourth Nat. Bank v. Carrollton R.Co.*, 11 Wall. (U. S.) 624. And see *Bartlett v. Parks*, 1 Cush. (Mass.) 182.

In *Jones v. Clark*, 42 Cal. 180, it was held that a retired partner who had not retained his lien to have the assets applied to the debts is not a necessary though he may be a proper party. See also *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376.

In a controversy between several partners who have contracted to sell their shares for a distribution of the purchase money, the other partners who are not affected by the result are not proper parties. *Butterfield v. Beardsley*, 20 Mich. 412.

2. *Fuller v. Benjamin*, 23 Me. 255.

A lien claimant has the right to intervene in a suit for a partnership accounting, in which a receiver is appointed, for the purpose of asserting his lien. *Jacobson v. Landolt*, 73 Wis. 142.

3. *Burchard v. Boyce*, 21 Ga. 6; *Pearce v. Bruce*, 38 Ga. 444; *Frederick v. Cooper*, 3 Iowa 171; *Fuller v. Benjamin*, 23 Me. 255; *Jenness v. Smith*, 58 Mich. 280; *Whitney v. Cotten*, 53 Miss. 689; *Walkenshaw v. Perzel*, 4 Robt. (N. Y.) 426; 32 How. Pr. (N. Y.) 233.

Heirs and distributees, however, are not necessary and usually not proper

Creditors of the firm are not as a general rule either necessary or proper parties.¹ But, in a suit for dissolution on the ground of a fraudulent sale by a partner to a third person, the third person may be made a party in order to avoid circuitry of action.² A partner who has been induced to sell his interest by fraudulent representations, however, in seeking to set aside the sale, need join as parties defendant only such persons as participated in the fraud or as are in possession of the property out of which he was defrauded.³ And a purchaser of part of the interest of a partner

parties defendant. *Moore v. Huntington*, 17 Wall. (U. S.) 417.

The surviving partner is a proper co-defendant in a bill in equity which seeks to enjoin the administrator of a deceased partner from suing the complainant at law upon notes given in unsettled dealings between complainant and the deceased partner, relating to partnership affairs, and to compel an accounting in respect to those dealings. *Scott v. Scott*, 33 Ga. 102.

1. See *Gridley v. Connor*, 2 La. Ann. 87; *Hoxie v. Carr*, 1 Sumn. (U. S.) 173; *Duden v. Maloy*, 37 Fed. Rep. 98; *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376; *Bissell v. Ames*, 17 Conn. 121; *Warren v. Warren*, 56 Me. 360; *Lyons v. Murray*, 95 Mo. 23. But see *Pitt v. Moore*, 79 N. Car. 80, as to mortgagees of a surviving partner.

The creditors may be allowed to come into court and establish their claims, jurisdiction being taken in order to settle all matters, although the creditors could not have gone into equity in the first instance. *Grossini v. Perazzo*, 66 Cal. 545; *Washburn v. Goodwin*, 17 Pick. (Mass.) 519; *Updike v. Doyle*, 7 R. I. 446. Or the claims of creditors may be filed with the receiver. *Holloway v. Turner*, 61 Md. 217.

The creditors have such an interest in the proceeding that the plaintiff and defendant cannot dismiss it without their consent, though they may be enjoined from proceeding at law to collect their debts. *Updike v. Doyle*, 7 R. I. 446. Even though the defendant has not in his answer claimed that a balance will be found due him, or filed a counter-claim. *Hutchinson v. Paige*, 67 Wis. 206. Or even though he is in default. *Fisher v. Stovall*, 85 Tenn. 316. But see *Dale v. Kent*, 58 Ind. 584.

In *Worthington v. White*, 42 Mo. 462, however, it was held that the plain-

tiff has a right to dismiss his suit unless it is manifestly prejudicial to the defendant, where the referee's report shows that a full settlement has been had.

The finding by the referee of the amount due the creditors is not a personal judgment upon which an action for debt will lie. *Seligman v. Kalkman*, 17 Cal. 152; *Wallace v. Milligan*, 110 Ind. 498. And after appointment of a receiver, creditors cannot, by pursuing a remedy at law, acquire a priority on distribution. *Rhodes v. Amisnck*, 38 Md. 345; *Holmes v. McDowell*, 15 Hun (N. Y.) 585; *Singerly v. Fox*, 75 Pa. St. 112; *Watkins v. Fakes*, 5 Heisk. (Tenn.) 185. But in jurisdictions where the partners are permitted to dismiss the case and discharge the receiver, creditors may sue at law and acquire a priority up to the time of the decree. *Naglee v. Minturn*, 8 Cal. 540; *Adams v. Hackett*, 7 Cal. 187; *Adams v. Woods*, 8 Cal. 152; *Ross v. Titsworth*, 37 N. J. Eq. 333.

2. *Palmer v. Tyler*, 15 Minn. 106; *Penniman v. Jones*, 58 N. H. 447; *Webb v. Helton*, 3 Robt. (N. Y.) 625; *Wade v. Rusher*, 4 Bosw. (N. Y.) 537. And see *Bartlett v. Parks*, 1 Cush. (Mass.) 82; *Chalk v. Bank*, 87 N. Car. 82.

But in an action by the wife of a surviving partner against a receiver of the firm who has sold real estate as partnership property and has the proceeds in court, to recover one-sixth of such proceeds, on the ground that the real estate was owned by her husband and his deceased partner as tenants in common, the purchasers of such property are neither proper nor necessary parties. *Newcome v. Wiggins*, 78 Ind. 306.

3. *Hirsch v. Adler*, 21 Ark. 338; *Lockhart v. Harrell*, 6 La. Ann. 531; *Berkey v. Judd*, 22 Minn. 287. And see *Newcome v. Wiggins*, 78 Ind. 306.

One confederating with a member of a firm to defraud the firm is properly

seeking merely to ascertain and obtain a conveyance of what he had purchased need only make his vendor a party.¹

The court will not, as a general rule, entertain a bill to settle the accounts of several different firms when the members of the several firms are not identical.² The addition of unnecessary or improper parties, however, does not render a bill demurrable, as it can be dismissed as to such parties and relief granted as to the other.³

c. DEFENSES—(1) Statutes of Limitations.—Upon the principle that laches or lapse of time which will bar relief in equity will be measured by the analogous time under the statute in similar cases at law, the courts have generally held that the time prescribed in the Statutes of Limitations for an action of account at law will bar the right to an accounting in equity.⁴ As no right

joined as a co-defendant in a suit in equity for an account of the partnership moneys converted. *Penniman v. Jones*, 58 N. H. 447. And see *Williams v. Nicholson*, 25 Ga. 560.

1. *Settembre v. Putnam*, 30 Cal. 490.

2. See *Corner v. Gilman*, 53 Md. 364; *White v. White*, 5 Gill (Md.) 359; *Sanborn v. Dwinell*, 135 Mass. 236; *Brewer v. Norcross*, 17 N. J. Eq. 219; *Crooks v. Smith*, 1 Grant's Ch. (Up. Can.) 356; *Rheam v. Smith*, 2 Ph. 726.

Several partnerships between the same persons may be settled by the same bill. *Adams v. Kable*, 6 B. Mon. (Ky.) 384; 44 Am. Dec. 772. And see *Brewer v. Norcross*, 17 N. J. Eq. 219; *Burchard v. Boyce*, 21 Ga. 6; *Chapin v. Chapin*, 2 Dev. & B. Eq. (N. Car.) 255; *Jeffreys v. Smith*, 3 Russ. 158; *Hunt v. Semonin*, 79 Ky. 270.

In *Warthen v. Brantley*, 5 Ga. 571, the managing partner of two successive firms whose assets had been mingled, was required to account for the profits of both.

3. *Hoard v. Clum*, 31 Minn. 186; *Bass v. Taylor*, 34 Miss. 342.

If one partner is omitted as plaintiff, and made a party defendant with another person not a partner, and not representing the interests of one, the court will not have equity jurisdiction in respect to the latter. *Reed v. Johnson*, 24 Me. 302.

Intervention by Creditor.—Where, upon suit between parties for a dissolution, the partnership property comes into the hands of a receiver, before one claiming a special lien levies his attachment upon it, and such claimant desires to vacate the order appointing the receiver, he must proceed by filing a peti-

tion setting forth the facts upon which he relies to obtain a vacation of the appointment. A summary proceeding by motion is not the appropriate method. *Jacobson v. Landolt*, 73 Wis. 142.

4. *Bradford v. Spyker*, 32 Ala. 134; *Strange v. Graham*, 56 Ala. 614; *Brewer v. Browne*, 68 Ala. 210; *Wells v. Brown*, 83 Ala. 161; *McGuire v. Ramsey*, 9 Ark. 518; *Crane v. Barry*, 60 Ga. 362; *Pierce v. McClellan*, 93 Ill. 245; *Quayle v. Guild*, 91 Ill. 378; *Bonney v. Stoughton*, 18 Ill. App. 562; *McCament v. Gray*, 6 Blackf. (Ind.) 233; *Taylor v. Morrison*, Dana (Ky.) 241; *King v. Wartelle*, 14 La. Ann. 750; *Succession of Parker*, 17 La. Ann. 28; *Wilhelm v. Caylor*, 32 Md. 151; *McKaig v. Hebb*, 42 Md. 227; *Johnson v. Ames*, 11 Pick. (Mass.) 173; *Jenny v. Perkins*, 17 Mich. 28; *McClung v. Capehart*, 24 Minn. 17; *Prewett v. Buckingham*, 28 Miss. 92; *Coudrey v. Gillam*, 60 Mo. 86; *Cowart v. Perrine*, 18 N. J. Eq. 454; *Todd v. Rafferty*, 30 N. J. Eq. 254; *Arnett v. Finney*, 41 N. J. Eq. 147; *Weisman v. Smith*, 6 Jones Eq. (N. Car.) 124; *Blackwell v. Claywell*, 75 N. Car. 213; *Keyes' Appeal*, 65 Pa. St. 196; *McKelvy's Appeal*, 72 Pa. St. 409; *Manchester v. Mathewson*, 3 R. I. 237; *Allen v. Woonsocket, Co.* 11 R. I. 288; *Leavitt v. Gooch*, 12 Tex. 95; *Lockhart v. Lytle*, 47 Tex. 452; *Coalter v. Coalter*, 1 Rob. (Va.) 79; *Godden v. Kimmell*, 99 U. S. 201; *Barber v. Barber*, 18 Ves. 286; *Knox v. Gye*, L. R., 5 H. L. 656; *Taylor v. Taylor*, 28 L. T. 189; *Noyes v. Crawley*, 10 Ch. Div. 31; *McFadgen v. Stewart*, 11 Grant's Ch. (Up. Can.) 272; *Knox v. Gye*, L. R., 5 H. L. 656.

Where after dissolution by death and

to demand an account exists until dissolution,¹ the statute has been held to begin to run from that time.² But there is a large class of cases holding that it does not begin to run until a sufficient time has elapsed after dissolution to raise the presumption that all matters with relation to the debtors and creditors of the concern are settled.³

a division of the stock on hand, the surviving partner agrees to collect the debts and pay over the decedent's share, the claim for such share is founded upon the parol promise and not upon the partnership agreement and is barred therefore by the statute applicable to parol promises. *Codman v. Rogers*, 10 Pick. (Mass.) 112.

The statutory provisions existing in England and several of the States, limiting the time within which to bring an action of account except such accounts as concern trade or merchandise between merchant and merchant, do not apply to actions between partners for the settlement and recovery of balances. *Codman v. Rogers*, 10 Pick. (Mass.) 112; *Wilhelm v. Caylor*, 32 Md. 151; *McKelvy's Appeal*, 72 Pa. St. 409; *Leavitt v. Gooch*, 12 Tex. 95; *Coster v. Murray*, 5 Johns. Ch. (N. Y.) 522; *Coalter v. Coalter*, 1 Rob. (Va.) 79; *Spring v. Gray*, 6 Pet. (U. S.) 151.

The contrary rule that where the Statute of Limitations fixes no time within which an action must be brought, an accounting is barred by lapse of time only when loss of papers or witnesses or failure of memory will prevent a settlement, has been adopted to some extent. See *Rencher v. Anderson*, 95 N. Car. 208; *Miller v. Harris*, 9 Baxt. (Tenn.) 101; *Bolton v. Dickens*, 4 Lea (Tenn.) 569; *McEwin v. Gillespie*, 3 Lea (Tenn.) 204; *Spear v. Newell*, Vt. 288; *Chouteau v. Barlow*, 110 U. S. 238.

In *Eakin v. Knox*, 6 Rich. (S. Car.) 14, where a firm dissolved in 1861 and only a partial settlement was made, and in 1863 one of the partners paid a debt of the firm without mentioning it to the other, and in 1870 brought an action for contribution, it was held that the statute was not applicable, as the plaintiff was not chargeable with laches tending to prejudice the defendant.

1. See *Askew v. Springer*, 111 Ill. 662; *Chandler v. Chandler*, 4 Pick. (Mass.) 78; *Harris v. Hillegass*, 54 Cal. 463.

In the absence of a dissolution or the exclusion of a partner, the statute does not begin to run from the time of a mere discontinuance of the business. *Allen v. Woonsocket Co.*, 11 R. I. 288.

The delay may be such, however, as to amount to a dissolution in fact though not declared to be such by the partners. *Harris v. Hillegass*, 54 Cal. 463.

2. *Haynes v. Short*, 88 Ala. 562; *Horne v. Ingraham*, 125 Ill. 198; *Pierce v. McClellan*, 93 Ill. 245; *McKaig v. Hebb*, 42 Ill. 227; *McKelvy's Appeal*, 72 Pa. St. 409; *Allen v. Woonsocket Co.*, 11 R. I. 288. *Knox v. Gye*, L. R., 5 H. L. 656; and see *Coalter v. Coalter*, 1 Rob. (Va.) 79.

Where the surviving partner is also the executor of the deceased partner, the Statute of Limitations to bar an accounting does not begin to run until his administration is terminated. *Whiting v. Leakin*, 66 Md. 255.

3. *Hammond v. Hammond*, 20 Ga. 556; *Prentice v. Elliott*, 72 Ga. 154; *Richards v. Grinnell*, 63 Iowa 44; 50 Am. Rep. 727; *Holloway v. Turner*, 61 Md. 217; *McClung v. Capehart*, 24 Minn. 17; *Todd v. Rafferty*, 30 N. J. Eq. 254; *Patterson v. Lilly*, 90 N. Car. 82; *Montgomery v. Montgomery*, Rich. Eq. Cas. (S. Car.) 64; *Marsteller v. Weaver*, 1 Gratt. (Va.) 391; *Foster v. Rison*, 17 Gratt. (Va.) 321; *Jordan v. Miller*, 75 Va. 442; *Sandy v. Randall*, 20 W. Va. 244; *Boggs v. Johnson*, 26 W. Va. 821; *Storm v. Cumberland*, 18 Grant's Ch. (Up. Can.) 245. And see *Brewer v. Browne*, 68 Ala. 210; *Massey v. Tingle*, 29 Mo. 437; *Coudrey v. Williams*, 60 Mo. 86.

Under this doctrine, the Statute of Limitations does not begin to run where there are valid claims of debit or credit due by or to the firm unsettled. *Jordan v. Miller*, 75 Va. 442; *Sandy v. Randall*, 20 W. Va. 244. See *Richards v. Grinnell*, 63 Iowa, 44; 50 Am. Rep. 727; *Askew v. Springer*, 111 Ill. 662.

Nor does it apply to bar an accounting where the plaintiff had recovered a judgment against a debtor of the firm within two years. *Prentice v. Elliott*,

The liquidating or surviving partner being deemed to act for all the partners, his position is not deemed adverse so long as it is consistent with a faithful discharge of his duties.¹ A final statement of accounts, however, terminates the relation and the adverse claim then begins.² In case of fraud or concealment the statute does not begin to run until discovery,³ and the right to land bought with partnership funds by a partner in his own name is not barred by the loss of the right to an accounting,⁴ and subsequent acknowledgment of liability to account and continued recognition of a co-partner's right to a settlement are as effective to prevent the bar of the statute as in case of ordinary debt.⁵

Independent of the Statutes of Limitations the equity rule that

72 Ga. 154. Or where good debts due the firm were outstanding within five years. *Marsteller v. Weaver*, 1 Gratt. (Va.) 291.

A demand for a settlement is not necessary and its omission has no effect except as to the costs of the action. *Lawrence v. Rokes*, 61 Me. 38; *McClung v. Capehart*, 24 Minn. 17.

But in *Richards v. Grinnell*, 63 Iowa, 44; 50 Am. Rep. 727, a demand for a settlement was regarded as necessary to put the Statute of Limitations in operation.

What is a reasonable time within which to make a demand must depend upon the circumstances, but when no cause for delay is shown, it seems reasonable to require it to be made within the time limited by statute for bringing the action. *Codman v. Rogers*, 10 Pick. (Mass.) 112; *Clements v. Lee*, 8 Tex. 374.

Mere delay does not constitute laches under this rule. *Hammond v. Hammond*, 20 Ga. 556; *Askew v. Springer*, 111 Ill. 662; *Marsteller v. Weaver*, 1 Gratt. (Va.) 391.

1. *Juilliard v. Orem*, 70 Md. 465; *Near v. Lowe*, 49 Mich. 489; *Coudrey v. Gilliam*, 6 Mo. 86; *Patterson v. Lilly*, 90 N. Car. 82; *Carroll v. Evans*, 27 Tex. 262; *Riddle v. Whitehill*, 135 U. S. 621. And see *Spann v. Fox*, 1 Ga. Dec. 1.

In *Massachusetts*, a surviving partner's claim against the executor of the deceased co-partner for an accounting is barred in four years. *Burditt v. Grew*, 8 Pick. (Mass.) 108. But if the partner's death occurs after dissolution, his administrator has additional time for filing a bill for an accounting. *Chandler v. Chandler*, 4 Pick. (Mass.) 78.

2. *Coudrey v. Gilliam*, 60 Mo. 86; *Montgomery v. Montgomery*, Rich.

Eq. Cas. (S. Car.) 64; *Boggs v. Johnson*, 26 W. Va. 821.

3. *Todd v. Rafferty*, 30 N. J. Eq. 254; and see *Sanderson v. Sanderson*, 17 Fla. 820.

A partner who has abstracted funds of the partnership is as to them a trustee, and the Statute of Limitations, does not run against his co-partner's right to follow them. *Partridge v. Wells*, 30 N. J. Eq. 176.

4. *Brewer v. Browne*, 68 Ala. 210; *McGuire v. Ramsey*, 9 Ark. 518; *Baird v. Baird*, 1 Dev. & B. Eq. 1. (N. Car.) 524.

On a partial settlement, the statute begins to run upon the items embraced in it from the time of settlement. *Coudrey v. Gilliam*, 60 Mo. 86; *Foster v. Rison*, 17 Gratt. (Va.) 321.

Though the Statute of Limitations has barred a right to an accounting, money subsequently received on partnership account may be reached without resort to prior which items have been barred. *Taylor v. Morrison*, 7 Dana (Ky.) 241; *Knox v. Gye*, L. R., 5 H. L. 655.

5. See *Shelmire's Appeal*, 70 Pa. St. 281. *Congdon v. Aylsworth*, 16 R. I. 281.

A mere agreement to submit differences to arbitrators, however, without limit as to time, cannot keep any claim that might have been included in it alive for the purpose of an action for an accounting. *Cowart v. Perrine*, 18 N. J. Eq. 454. And see *Burden v. McElmoyle*, *Bailey Eq. (S. Car.)* 375.

An interlocutory order referring matters to an auditor to take an account but not stating any right or declaring any principle upon which it is to be stated, leaves the whole case open and does not affect the statute. *Wilhelm v. Caylor*, 32 Md. 151.

the court will not entertain stale demands is applicable;¹ and although the Statutes of Limitations may not have run against the account an accounting may be refused for laches which has caused the loss of the defendant's evidence.² The death of witnesses, the destruction of books and the loss of evidence are important elements in determining whether lapse of time constitutes a bar.³

(2.) *Account Stated*.—An account of partnership dealings and transactions already stated and a settlement of balances constitutes a good defense to an action for an accounting.⁴ An account stated, to be a good defense, must be in writing, but need not be signed by the parties, if shown to have been acquiesced in by

1. See *Harris v. Hillegass*, 54 Cal. 463; *Groenendyke v. Coffeen*, 109 Ill. 325; *Taylor v. Morrison*, 7 Dana (Ky.) 241; *Phillippi v. Phillippi*, 61 Ala. 41; *Hall v. Clagett*, 48 Md. 223; *Gover v. Hall*, 3 Har. & J. (Md.) 43; *Codman v. Rogers*, 10 Pick. (Mass.) 112; *Arnett v. Finney*, 41 N. J. Eq. 147; *Ray v. Bogart*, 2 Johns. Cas. (N. Y.) 432; *Atwater v. Fowler*, 1 Edw. Ch. (N. Y.) 417; *Burden v. McEmoye*, Bailey Eq. (S. Car.) 375; *Haggart v. Allen*, 4 Grant's Ch. (Up. Can.) 36.

A mere lapse of time less than that required by the statute is not alone sufficient to bar an account. *Foster v. Rison*, 17 Gratt. (Va.) 321.

Where a liquidating partner became bankrupt and the assignees took the assets, and the other partner demanded a right to administer as sole solvent partner for the first time ten years after the bankruptcy, it was held to be too late. *Tracy v. Walker*, 1 Flip. (U. S.) 41.

Where a surviving partner continued the business with the old assets with the acquiescence of the administrator and of parties interested in the estate, no objection having been made for seven years, it was held to be too late to require the administrator and the assignee to account. *Hoyt v. Sprague*, 103 U. S. 613.

2. *Bates' Law on Part.* 952. And see cases cited in the above note. See also *Winslow v. Leland*, 128 Ill. 304.

The doctrine of stale demands applies only to delay after dissolution, unless the delay is such that a dissolution in fact may be presumed so long before that the bill is stale. *Harris v. Hillegass*, 54 Cal. 463.

3. *Taylor v. Morrison*, 7 Dana (Ky.) 241; *Lawrence v. Rokes*, 61 Me. 38; *Hall v. Clagett*, 48 Md. 223; *Codman v. Rogers*, 10 Pick. (Mass.) 112.

In *Sangston v. Hack*, 52 Md. 173, however, where a partner died in 1851, and the surviving partner formed a new firm, and failed three years later, and after eighteen years the representatives of the deceased partner filed a bill for an accounting, when all the books of the firm except the cash book and ledger had been sold, an accounting was taken from these books.

4. *Wagner v. Wagner*, 50 Cal. 76; *Cayton v. Walker*, 10 Cal. 450; *Gage v. Parmelee*, 87 Ill. 329; *Hanks v. Barber*, 53 Ill. 292; *Wood v. Fox*, 1 A. K. Marsh. (Ky.) 451; *Wells v. Ernestine*, 24 La. Ann. 317; *Silver v. St. Louis etc. R. Co.*, 5 Mo. App. 381; *Bassett v. Henry*, 34 Mo. App. 548; *Ledyard v. Bull*, 119 N. Y. 62; *Kidder v. McIlhenry*, 81 N. Car. 123; *Boyle v. Hardy*, 21 Mo. 62; *Davies v. Atkinson*, 124 Ill. 474. And see other cases cited in this section.

A statement of accounts stated between partners binds their representatives as well as themselves. *Groenendyke v. Coffeen*, 109 Ill. 325; *Dial v. Rogers*, 4 Desaus. (S. Car.), 175.

A receipt showing a settlement of accounts is presumed to include an adjustment of all matters relating to the partnership business. *Levi v. Karriek*, 13 Iowa 344. Such presumption, however, is disputable. *Denton v. Erwin*, 6 La. Ann. 317.

Waiver.—Where a plaintiff sued upon a balance on account stated, and the defendant denied the settlement, and prayed an accounting, it was held that the plaintiff's assent to taking the account was an abandonment of his former claim, and the action becomes an ordinary equitable one for a final accounting. *Auld v. Butcher*, 2 Kan. 135; *Neil v. Greenleaf*, 26 Ohio St. 567. See also *Edgar v. Baca*, 1 N.

them.¹ So, partial settlements between the partners either of particular branches of the business or the entire business up to a certain time are also conclusive and an accounting will be permitted of the unsettled parts only.² A settlement of accounts by a majority has been held to be binding on the minority.³ The general rule is that settlements will not be set aside or re-opened in the absence of fraud, collusion or mistake,⁴ the intentional

Mex. 613; *Dignan v. Dignan* (N. J. 1888), 14 Atl. Rep. 887.

1. *Wood v. Gault*, 2 Md. Ch. 433; *Jessup v. Cook*, 6 N. J. L. 434; *Martin v. Smith* (N. J. 1888), 13 Atl. Rep. 398; *Main v. Howland*, Rich Eq. Cas. (S. Car.) 352; *Hunt v. Belcher*, 2 De G. J. & Sm. 194; *Morris v. Harrison*, Colles 157; *Willis v. Jernegan*, 2 Atk. 251; *Coventry v. Barclay*, 3 De G. J. & Sm. 320; *Ex parte Barber*, L. R., 5 Ch. App. 687; *Walker v. Consett*, *Forrest* 157. And see *Raymond v. Vaughn*, 128 Ill. 256; *Groenendyke v. Coffeen*, 109 Ill. 325; *Hopley v. Wakefield*, 54 Iowa 711; *Warden v. Marcus*, 45 Cal. 594; *Rhyne v. Love*, 98 N. Car. 486; *Zerano v. Wilson*, 8 Cush. (Mass.) 424.

Statements made by the party who has possession of the books to the other are not accounts stated, such as will deprive the latter of his right to judicial examination. *Mourain v. Delamre*, 4 La. Ann. 78. But these may become final by being affirmatively acquiesced in. *Irwin v. Young*, 1 Sim. & S. 333.

The mere fact that new books were opened every ten years, and that a balance against a partner is struck, when not carried over into his personal account in the new books, does not make it an account stated. *Buckingham v. Ludlum*, 29 N. J. Eq. 345.

The summing up of results, the calculations of interest and the division of profits, without a surrender of vouchers, releases or receipts in full, will not bar an accounting. *Lynch v. Bitting*, 6 Jones Eq. (N. Car.) 238.

Where the court, upon a bill to settle a partnership business, finds that there has been a full settlement between the parties, it cannot properly proceed on a cross-bill, claiming a balance due defendant, to ascertain the amount due and enforce its payment. *Correll v. Freeman*, 29 App. 39.

2. *Clark v. Gridley*, 41 Cal. 119; *Stretele v. Talmadge*, 65 Cal. 510;

Horne v. Ingraham, 125 Ill. 198; *Parkhurst v. Muir*, 7 N. J. Eq. 307; *Moore v. Wheeler*, 10 W. Va. 35; *Foster v. Rison*, 17 Gratt. (Va.) 321; *Newen v. Wetten*, 31 Beav. 315; *Milford v. Milford*, McCl. & Y. 150. And see *Holyoke v. Mayo*, 50 Me. 385; *Eakin v. Knox*, 6 Rich. (S. Car.) 14; *Thompson v. Walker*, 39 La. Ann. 892; *Thomas v. Gaboury*, 80 Ga. 443.

The omission of a few doubtful items will not prevent an account from being final or invalidate it. *Sim v. Sim*, 11 Irish Ch. 310.

A plea of full and final settlement is not sustained by evidence of only a partial settlement. *Thompson v. Walker*, 40 La. Ann. 676.

3. See *Klase v. Bright*, 71 Pa. St. 186; *Robinson v. Thompson*, 1 Vern. 465; *Kent v. Jackson*, 2 De G. M. & G. 46; *Stupart v. Arrowsmith*, 3 Sm. & G. 176.

4. *Nickels v. Mooring*, 16 Fla. 76; *Billingslea v. Ware*, 32 Ala. 415; *Wells v. Erstine*, 24 La. Ann. 317; *Riggs v. Hawley*, 116 Mass. 596; *Stettheimer v. Killip*, 75 N. Y. 282; *Main v. Howland*, Rich. Eq. Cas. (S. Car.) 352; *Hoyt v. McLaughlin*, 52 Wis. 280; *Taylor v. Shaw*, 2 Sm. & Stu. 12; *Edno v. Caleham*, You. 306.

More cogent reasons are required where the parties have had due opportunity to investigate in reaching the settlement than where such opportunities do not exist. *Murray v. Elston*, 24 N. J. Eq. 310; *Gage v. Parmalee*, 87 Ill. 329. And if there is a relation or trust and confidence, more latitude will be allowed than in an ordinary case. *Brownell v. Brownell*, 2 Bro. C. C. 62; *Matthews v. Wallwyn*, 4 Ves. 118.

A managing partner may be treated as a trustee so far as the degree of fidelity and fairness which he exercises is concerned. *Pomeroy v. Benton*, 57 Mo. 531.

But the mere fact that one has the best of the bargain is not usually a ground for setting aside a settlement, even though one of the parties is an ad-

though improper omission of an item or its improper treatment not being sufficient.¹

But a settlement of accounts may be opened for a mistake,² and in correcting the account errors of law will be rectified as well as those of fact,³ though no relief will be granted for a mere error of judgment.⁴ So where fraud has entered into the settlement, as where a partner is induced by the artifice of his co-partner to sell his interest at less than its real value without obtaining information at his command, the account will be opened,⁵ as well as in all cases where one partner sells his interest to another, and either the buyer or seller is misled as to value by the false representations or omissions or false entries of the other.⁶

ministrator of a partner. *Farnham v. Brooks*, 9 Pick. (Mass.) 212.

1. *Maund v. Allies*, 5 Jur. 860; *Laing v. Campbell*, 36 Beav. 3. And see *Nicholson v. Janeway*, 16 N. J. Eq. 285; *Stetthemier v. Killip*, 75 N. Y. 282.

2. *Herty v. Clark*, 46 Ga. 649; *Johnston v. Freer*, 51 Ga. 313; *Steadwell v. Morris*, 61 Ga. 97; *Waggoner v. Minster*, 7 J. J. Marsh. (Ky.) 173; *Pettett v. Crawford*, 51 Miss. 43; *Rehill v. McTague*, 114 Pa. St. 82; *Roach v. Ivey*, 7 S. Car. 434; *McLucas v. Durham*, 20 S. Car. 302; *Burdine v. Shelton*, 10 Yerg. (Tenn.) 41; *Gething v. Keighley*, 9 Ch. Div. 547. But see *Belt v. Mehen*, 2 Cal. 159.

And even though the parties had agreed that the account should not be open for error, yet for an important error, not being a mere mistake, they may be opened even after a long time or after death. *Pettett v. Crawford*, 51 Miss. 43.

Errors in calculation, as in addition and subtraction, will be corrected. *Donehue v. McCosh*, 70 Iowa 733.

To rescind for mistake after sale of partnership property, the complainant must offer to put the selling partner in *statu quo* by restoration of the purchase money and paying damages for his quitting the business. *Steadwell v. Morris*, 61 Ga. 97. And see *Quinlin v. Keiser*, 66 Mo. 603.

3. *Roberts v. Cuffin*, 2 Atk. 112; *Cobb v. Cole*, 44 Minn. 278. And see *Evans v. Clapp*, 123 Mass. 165; *Smith v. Ayrault*, 71 Mich. 475.

If the settlement is made in the belief that certain assets are good, relief will be granted unless the risk is assumed. *Bankhead v. Allaway*, 6 Coldw. (Tenn.) 56.

A settlement made on the assumption that a person for whom the firm

is security is solvent, and one partner is afterwards compelled to pay his account, will be opened. *Clouch v. Moyer*, 23 Kan. 404; *Eakin v. Knox*, 6 Rich. (S. Car.) 14.

4. See *Bispham v. Price*, 15 How. (U. S.) 162.

Values fixed upon each contribution of property at the formation of partnership which had been acted upon in settling, will not be readjusted in the absence of fraud. *Mayo v. Bosson*, 6 Ohio 525.

Items omitted by mutual mistake will not be afterwards inserted. *Britt v. Clay*, 6 Beav. 503.

5. *Berkey v. Judd*, 22 Minn. 287.

Errors arising from misrepresentations will be corrected though innocently made. *Stephens v. Orman*, 10 Fla. 9.

Where the perpetrator of the fraud is a managing partner and his co-partner has smaller opportunities for investigation and reposes a degree of confidence in the manager, a settlement induced by him or a sale to him induced by fraud, will be re-opened, and want of vigilance on the part of the selling partner will be no defense. *Pomeroy v. Benton*, 57 Mo. 531; 14 Am. L. Reg. (N. S.) 306. See *Merriwether v. Hardeman*, 51 Tex. 436.

6. *Roberts v. Totten*, 13 Ark. 60; *Reed v. King*, 23 Iowa 500; *Levin v. Vannevar*, 137 Mass. 532; *McGunn v. Hanlin*, 29 Mich. 476; *Welland v. Huber*, 8 Nev. 203; *Holmes v. Hubbard*, 60 N. Y. 183; *Case v. Cushman*, 3 W. & S. (Pa.) 544; 39 Am. Dec. 47; *Rehill v. McTague*, 114 Pa. St. 82; *Kintrea v. Charles*, 12 Grant's Ch. (Up. Can.) 123. See also *Appeal of Iredell* (Pa. 1888), 13 Atl. Rep. 752.

In *Hunt v. Hadiwick*, 68 Ga. 100, where the representations were based

Specific acts of fraud and particular mistakes must be shown, however, and the proof must be clear and satisfactory, particularly after the lapse of considerable time to warrant opening an account.¹ And a settlement fairly made between the partners must be repudiated within a reasonable time in order to be opened, and will not be disturbed after a long time and after the death of a party.²

If an account is opened at all, it may, if justice requires it, be opened as to all its items and as to all the parties so as to restore them to all their original rights to have a full accounting instead of a mere correction of erroneous items.³ Fraud in the settlement is a sufficient ground for such a re-opening.⁴ But if mere errors are to be relieved against,⁵ or if the loss of books makes a

wholly on what a clerk stated as to values, and the other partner knew it, it was held that rescission would be refused if he correctly reported the clerk.

Misrepresentations or omissions of an agent are those of his principal. *McGunn v. Hanlin*, 29 Mich. 476.

1. *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 506; *Winter v. Wheeler*, 7 B. Mon. (Ky.) 25; *Loesser v. Loesser*, 81 Ky. 139; *Bry v. Cook*, 15 La. Ann. 493; *Harrison v. Dewey*, 46 Mich. 173; *Thornton v. McNeill*, 23 Miss. 369; *Wilde v. Jenkins*, 4 Paige (N. Y.) 481; *Chubbuck v. Vernam*, 42 N. Y. 432; *Augsbury v. Flower*, 68 N. Y. 620; *Mahnke v. Neale*, 23 W. Va. 57; *Birkett v. Hird*, 55 Wis. 650; *Taylor v. Haylin*, 2 Bro. C. C. 310; *Dawson v. Dawson*, 1 Atk. 1; *Kinsman v. Barker*, 14 Ves. 579; *Parkinson v. Hanbury*, L. R., 2 H. L. 1.

Where a sum is agreed upon as due to one partner subject to reduction for sums received by him and not accounted for, and to increase for sums omitted by the other partners, the burden is upon them to prove amounts received and not accounted for and upon him to prove sums omitted by the other partners. *Lambert v. Griffith*, 44 Mich. 65. See *Johnson v. Curtis*, 2 Bro. C. C. 311, note.

Stating facts in the pleadings showing fraud, is sufficient without a direct averment of fraud. *Farnham v. Brooks*, 9 Pick. (Mass.) 212.

2. *Pond v. Clark*, 24 Conn. 370; *Steadwell v. Morris*, 61 Ga. 97; *Groenendyke v. Coffeen*, 109 Ill. 325; *Coleman v. Marble*, 9 La. Ann. 476; *McGunn v. Hanlin*, 29 Mich. 476; *Gover v. Hall*, 3 Har. & J. (Md.) 43; *Atwater v. Fowler*, 1 Edw. Ch. (N. Y.)

417; *Roach v. Ivey*, 7 S. Car. 434; *Ross v. McLauchlan*, 7 Gratt. (Va.) 86.

A mistake will not be corrected after the expiration of a long period of time, even though it was not discovered, if the claimant had the books and was therefore negligent in failing to discover it. *Hite v. Hite*, 1 B. Mon. (Ky.) 177.

But in *Kent v. Chapman*, 18 W. Va. 485, it was held that a mistake in a judgment against a firm in including a debt of one partner though not opened until after fourteen years, is in equity to be considered in a partnership settlement. See *Duncan v. Rawls*, 16 Tex. 478.

3. *Roberts v. Totten*, 13 Ark. 609; *Black v. Merrill*, 65 Cal. 90; *Bailey v. Moore*, 25 Ill. 306; *Hunt v. Stuart*, 53 Md. 225; *Leonard v. Leonard*, 1 W. & S. (Pa.) 342; *Gething v. Keighley*, 9 Ch. Div. 547.

In a suit brought to set aside a partnership settlement for error, auditors are properly appointed by the court to determine whether there were errors in the settlement; and defendant, in moving to homologate the report of the auditors, does not waive his right to stand upon the original settlement. *Keough v. Foreman*, 33 La. Ann. 1434.

4. *Botifeur v. Weyman*, 1 McCord Eq. (S. Car.) 156; *Gray v. Washington*, 3 Cooke (Tenn.) 321; *Vernon v. Vawdrey*, 2 Atk. 119; *Matthews v. Wallwyn*, 4 Ves. 118; *Middleditch v. Sharland*, 5 Ves. 87; *Stainton v. Carron Co.*, 24 Beav. 346; *Allfrey v. Allfrey*, 1 Mac. & G. 87. See also *Wharton v. May*, 5 Ves. 27; *Beaumont v. Boulton*, 5 Ves. 485; 7 Ves. 599.

5. *Chubbuck v. Vernam*, 42 N. Y.

full accounting difficult or impossible,¹ the court may, instead of opening the whole account, permit the complaining party to surcharge and falsify it as to particular items only.²

3. *Pendency of Another Action*.—The pendency of another action for an accounting is a bar to another suit for the same purpose, even though different or more extended relief is asked in the second suit,³ and if two suits are filed at the same time and provisional remedies are granted in each, the one first granted and served will prevail.⁴

(d.) PRACTICE—(1) *The Direction to Account*.—Preliminary matters in bar of an accounting should be first disposed of,⁵ and the finding of the fact of partnership should precede the order for an

432; *Burdine v. Shelton*, 10 Yerg. (Tenn.) 41; *Pitt v. Cholmondeley*, 2 Ves. Sr. 565; *Vernon v. Vawdry*, 2 Atk. 119.

In a suit for an accounting between partners, manifest mistakes in an appraisal of the partnership property, made pursuant to an agreement between them, may be corrected, and only the true valuation of the appraisers will be held binding on them. *Van Horn v. Van Horn*, 52 N. J. L. 284.

1. *Millar v. Craig*, 6 Beav. 433; *Branch v. Cooper*, 82 Ga. 512.

Where a referee has taken an account of partnership transactions covering four years, and the books are made part of the case, but not handed up, and no requests were made for findings as to disputed items, and it is practically impossible to re-examine the accounts without great danger of making more mistakes than would be corrected, that will not be done, but the findings of the referee will be affirmed. *Smith v. Fitchett*, 56 Hun (N. Y.) 473; and see *Appeal of Varner* (Pa. 1888), 16 Atl. Rep. 98.

2. See *Millar v. Craig*, 6 Beav. 433; *Brownell v. Brownell*, 2 Bro. C. C. 61; *Leroy v. Lowber*, 1 Abb. Pr. (N. Y.) 67.

A party at whose instance an account is opened, may be restricted to the correction of particular items. *Toogood v. Swanston*, 6 Ves. 485; *Maund v. Allies*, 5 Jur. 860.

3. *Ward v. Gore*, 37 How. Pr. (N. Y.) 119; *Clarke's Appeal*, 107 Pa. St. 436; *Wallace v. Robinson*, 52 N. H. 286.

But where the managing partner of a firm was appointed conservator for an insane partner, his discharge by the county court, upon rendering his final account there as conservator, is no bar

to a suit for the partnership accounting. *Raymond v. Vaughan*, 128 Ill. 256.

Probate proceedings for discovery do not bar an otherwise proper suit in equity for winding up the concerns of the partnership; delays caused by them can be allowed for in the progress of the chancery suit. *Perrin v. Lepper*, 49 Mich. 347. And see *Goldthwait v. Day*, 149 Mass. 185.

4. *McCarthy v. Peake*, 18 How. Pr. (N. Y.) 138.

The pending of an action by a creditor to have the estate of a deceased partner administered for the benefit of the separate creditors, and in which a decree for an account has not been rendered, will not abate an action to administer the partnership property for the benefit of the partnership creditors. *Robinson v. Allen*, 85 Va. 751.

Action at Law.—The neglect of a defendant to enjoin a suit at law against him, by a co-partner, in respect to their partnership dealings—as here, in the ownership of a steamboat—does not preclude such defendant from filing, after the judgment, a bill for account, and enjoining the collection of so much thereof as is shown to be inequitable. *Gregg v. Brower*, 67 Ill. 525.

5. *Auld v. Butcher*, 2 Kan. 135; *Dampf's Appeal*, 106 Pa. St. 72.

In *Kennedy v. Shilton*, 1 Hilt. (N. Y.) 546; 9 Abb. Pr. (N. Y.) 157, it was held not proper to order an account before determining the truth of a plea that the parties had fully accounted and made no new contracts since. But the contrary was held in *Smith v. Barringer*, 74 N. Car. 665.

In a suit for an accounting between partners, it appearing on a preliminary

account.¹ The court may direct an issue out of chancery to try a disputed question,² and when the partnership and dissolution are admitted, the decree for an accounting may be a mere order that an account be taken, referring the cause for that purpose.³

(2) *Taking the Account.*—The master should ascertain the beginning, end and extent of the partnership business, and examine the terms of the partnership agreement, even though they are not in issue, to enable him to correctly state the account,⁴ and it is the duty of the parties to produce before him all the partnership books and accounts;⁵ by reason of the mutual agency and

report of a referee that there are assets of the firm not disposed of, an interlocutory judgment is proper, appointing a receiver and directing that, after passing his final account, the trial be resumed before the same referee. *Smith v. Fitchett*, 56 Hun (N. Y.) 473.

1. *Nims v. Nims*, 20 Fla. 204; *Armstrong v. Crocker*, 10 Gray (Mass.) 269; *Collyer v. Collyer*, 38 Pa. St. 257; *Askew v. Poyas*, 2 Desaus. (S. Car.) 145; *Drew v. Drew*, 2 Ves. & B. 159.

A dismissal of the cause will be set aside if a bill was filed before the term of the partnership expired asking dissolution for misconduct, and it expired during the pendency of the suit. *Curyea v. Beveridge*, 94 Ill. 424.

But where an account is ordered before the existence of the firm is established, if no exception is taken, the account will not be set aside if the court finds the fact to exist, the referee having reserved the question. *McPeters v. Ray*, 85 N. Car. 462.

2. *Carlin v. Donegan*, 15 Kan. 495; *French v. Wall*, 2 Tex. 288; *Setzer v. Beale*, 19 W. Va. 274.

Where there is an issue as to the terms of the partnership, the court may submit the question to one jury for reference to state the amount, and may submit the question of damages to another jury even though the court could have tried the issues itself. *Carlin v. Donegan*, 15 Kan. 495.

3. *Morgan v. Adams*, 37 Vt. 233; *Newen v. Wetter*, 31 Beav. 315. And see *Bliffins v. Wilson*, 113 Mass. 248. But see *Smith v. Barringer*, 74 N. Car. 665.

The master cannot charge one partner with losses caused by his wrongful act or mismanagement, unless required by the order or the issues in the case, but the decree can order allowances to be made stating the facts upon which

such allowances are based. *Fordyce v. Shriver*, 115 Ill. 530; and see *Crawshay v. Collins*, 2 Russ. 347.

Where, in a suit between partners for an accounting, the evidence shows facts which make the relation between the partners a fiduciary one—such as the exclusion of one partner by the others from the business, the books, and all knowledge thereof by the other partners—the proper decree against the partners found liable is a joint and several one. *Bloomfield v. Buchanan*, 14 Oregon 181.

Where a dissolution has already taken place, a clause in a decree dissolving the firm is not ground for a reversal, as it does no harm. *Babcock v. Hermance*, 48 N. Y. 683.

4. *Bernie v. Vandever*, 16 Ark. 616. And see *Killefer v. McLain*, 70 Mich. 508; *Eaton's Appeal*, 66 Pa. St. 483.

Notice to appear between 8 and 12 o'clock at night given upon the same day is not a reasonable notice of the time and place of taking an account. *Bernie v. Vandever*, 16 Ark. 616.

In *Brockman v. Aulger*, 12 Ill. 277, a notification of the completion of the account was recommended for the purpose of enabling the parties to hear it read and to suggest corrections and make exceptions.

5. *Brockman v. Aulger*, 12 Ill. 277; *Montanye v. Hatch*, 34 Ill. 394; *Succession of Andrew*, 16 La. Ann. 197; *Kelly v. Eckford*, 5 Paige (N. Y.) 548; *Stebbins v. Harmon*, 17 Hun (N. Y.) 445; *Galloway v. Tate*, 1 Hen. & M. (Va.) 9. And see *Clark v. Gridley*, 49 Cal. 105. This rule has no application to the private books of a partner, as such books are not evidence either against the other partner or in favor of the partner offering them. *Adams v. Funk*, 53 Ill. 219. And see *Wheatley v. Wheeler*, 34 Md. 62.

their mutual right of access, and the probability of their having availed themselves of it, the books being presumed to contain true statements and to be correct,¹ though proof of want of opportunity to inspect, whether from absence or exclusion, is sufficient to rebut the presumption,² and even though due opportunity to inspect was had, they are but *prima facie* evidence, and may still be shown to be incorrect.³ Every reasonable pre-

Burden of Proof.—In a suit for a partnership accounting, where there are issues as to the existence of the partnership, and the state of its affairs and business, or state of the accounts between the partners, the burden of proof is on the plaintiff; and, if he cannot furnish sufficient evidence to enable the court to state a partnership account, his suit necessarily fails to that extent. But, if necessary to close up the business, the court will determine that the accounts are closed, and that neither party shall recover anything against the other on account thereof, and that the property of the firm be sold, and, after paying the costs, the proceeds be divided according to the interests of the members of such firm. *Ashley v. Williams*, 17 Oregon 441; and see *Maupin v. Daniel*, 3 Tenn. Ch. 223.

In a suit for an accounting between partners, where it is undisputed that, as to particular items, defendant became indebted to complainant or to the firm, the burden of showing payment or discharge of his indebtedness is on defendant. *Van Horn v. Van Horn*, 52 N. J. L. 284.

1. *Desha v. Smith*, 20 Ala. 747; *Kahn v. Boltz*, 39 Ala. 66; *Haller v. Willamowicz*, 23 Ark. 566; *Hale v. Brennan*, 23 Cal. 511; *Pond v. Clark*, 24 Conn. 370; *Stuart v. McKichan*, 74 Ill. 122; *Albee v. Wachter*, 74 Ill. 173; *O'Brien v. Hanley*, 86 Ill. 278; *Kitner v. Whitlock*, 88 Ill. 513; *Eden v. Lingenfelter*, 39 Ind. 19; *Hunter v. Aldrich*, 52 Iowa 442; *Cunningham v. Smith*, 11 B. Mon. (Ky.) 325; *Carpenter v. Camp*, 39 La. Ann. 1024; *Parker v. Jonte*, 15 La. Ann. 290; *Foster v. Fifield*, 29 Me. 136; *Wheatley v. Wheeler*, 34 Md. 62; *Topliff v. Jackson*, 12 Gray (Mass.) 565; *Lambert v. Griffith*, 44 Mich. 65; *Tucker v. Peaslee*, 36 N. H. 167; *Dunnell v. Henderson*, 23 N. J. Eq. 174; *Heartt v. Corning*, 3 Paige (N. Y.) 566; *Allen v. Coit*, 6 Hill (N. Y.) 318; *Fairchild v. Fairchild*, 64 N. Y. 471; *Cheever v. Lamar*, 19 Hun (N. Y.) 130; *Philips v. Turner*, 2 Dev. & B. Eq. (N.

Car.) 123; *Boire v. McGinn*, 8 Oregon 466; *Richardson v. Wyatt*, 2 Desaus. (S. Car.) 471; *Myers v. Bennett*, 3 Lea (Tenn.) 184; *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea (Tenn.) 258; *Saunders v. Duval*, 19 Tex. 467; *Fletcher v. Pollard*, 2 Hen. & M. (Va.) 544; *Brickhouse v. Hunter*, 4 Hen. & M. (Va.) 363; *Shackleford v. Shackleford*, 32 Gratt. (Va.) 481; *Withers v. Withers*, 8 Pet. (U. S.) 355; *U. S. Bank v. Binney*, 5 Mason (U. S.) 176.

The presumption that the books are correct obtains even though they are badly kept and unreliable. *Topliff v. Jackson*, 12 Gray (Mass.) 565; *Foster v. Fifield*, 29 Me. 136. And even though one partner had expelled the rest and taken exclusive possession of the books and business. *Moon v. Story*, 8 Dana (Ky.) 226. And if some of the books have been lost or destroyed the accounts may be taken from those remaining. *Sangston v. Hack*, 52 Md. 173.

If the statements are in the nature of an account stated, as in case of annual statements or charges acquiesced in for a long time, the presumption of correctness is much stronger. *Desha v. Smith*, 20 Ala. 747; *Pond v. Clark*, 24 Conn. 370; *Kitner v. Whitlock*, 88 Ill. 513; *Gage v. Parmalee*, 87 Ill. 329; *Richardson v. Wyatt*, 2 Desaus. (S. Car.) 271.

The books are evidence themselves without proving the items by vouchers or otherwise. *Powers v. Dickie*, 49 Ala. 81; *Brickhouse v. Hunter*, 44 Hen. & M. (Va.) 363; *Fletcher v. Pollard*, 2 Hen. & M. (Va.) 544.

2. *Haller v. Willamowicz*, 23 Ark. 566; *Wheatley v. Wheeler*, 34 Md. 62; *Philips v. Turner*, 2 Dev. & B. Eq. (N. Car.) 123; *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea (Tenn.) 358; *Saunders v. Duval*, 19 Tex. 467; *Layton v. Hall*, 25 Tex. 404; *Withers v. Withers*, 8 Pet. (U. S.) 355; *U. S. Bank v. Binney*, 5 Mason (U. S.) 176. And see *Taylor v. Herring*, 10 Bosw. (N. Y.) 447; *Sutton v. Mandeville*, 1 Cranch (C. C.) 2.

3. *Hunter v. Aldrich*, 52 Iowa, 442; *Topliff v. Jackson*, 12 Gray (Mass.)

sumption will be entertained, however, against a claim of error in the books preferred by the partner whose duty it was to keep them,¹ and if he willfully destroys or refuses to produce the books, everything consistent with facts otherwise established will be presumed against him.² So, if a partner has appropriated the firm's notes or securities, or collected accounts without making any return, he should be charged with their face value,³ and in case of the appropriation of the firm's goods, the appropriating partner will be charged with their value as ascertained by appraisal.⁴ If the books have been irregularly kept, other evidence may be resorted to.⁵

565; *Lambert v. Griffith*, 44 Mich. 65; *Boire v. McGinn*, 8 Oregon 466; *Heartt v. Corning*, 3 Page (N. Y.) 566; *Scott v. Shipherd*, 3 Vt. 104.

1. *Van Ness v. Van Ness*, 32 N. J. Eq. 669; *Gage v. Parmalee*, 87 Ill. 329; *McCabe v. Franks*, 44 Iowa 208; *Leftwitch v. Leftwitch*, 6 La. Ann. 346; *Hall v. Claggett*, 48 Md. 223; *Bevans v. Sullivan*, 4 Gill (Md.) 383; *Harvey v. Varney*, 104 Mass. 436; *Brown v. Haynes*, 6 Jones (N. Car.) 49; *Moon v. Story*, 8 Dana (Ky.) 226; *Dimond v. Henderson*, 47 Wis. 172.

If no partner has the specific charge of the accounts, and each keeps a memorandum of his own transactions, each will be held to the strictest account for the non-performance of his duty. *Pierce v. Scott*, 37 Ark. 308.

2. See *Gray v. Haig*, 20 Beav. 219; *Walmsley v. Walmsley*, 3 Jo. & Lat. 556; *Pomeroy v. Benton*, 77 Mo. 64; *Johnson v. Garrett*, 23 Minn. 465; *Wallace v. Berger*, 14 Iowa 183; *Churchman v. Smith*, 6 Whart. (Pa.) 146; *White v. Magann*, 65 Wis. 86.

A partner who has failed in his duty to properly keep the books may be required to account for all sums put into the business by his co-partner, on its appearing that no losses had been sustained. *Robertson v. Gibb*, 38 Mich. 165.

A partner having charge of the books who had fraudulently failed to make entries or suppressed the books, cannot hold his co-partner to the usual degree of proof. *Askew v. Odenheimer*, *Baldw.* (U. S.) 380.

The presumption against a partner who had willfully destroyed or suppressed the books will not, however, supply the entire absence of proof. *Gage v. Parmalee*, 87 Ill. 329.

3. *Gillett v. Hall*, 13 Conn. 426; *Evans v. Montgomery*, 50 Iowa 325; *Webb v.*

Fordyce, 55 Iowa 11; *Laswell v. Robbins*, 39 Ill. 209.

If the books fail to show what profits have been made, the partner thus negligently keeping them may be charged with interest on the capital invested by his co-partners in lieu of profits. *Pearce v. Pearce*, 77 Ill. 284; *Walmsley v. Walmsley*, 3 Jo. & Lat. 556.

4. *Gillett v. Hall*, 13 Conn. 426; *Russell v. Green*, 10 Conn. 269; *Laswell v. Robbins*, 39 Ill. 209; *Webb v. Fordyce*, 55 Iowa 11; *Randle v. Richardson*, 53 Miss. 176; *Miller v. Howard*, 26 N. J. Eq. 166.

The burden of proof to establish disputed items when no books of account are kept rests with the party claiming them. *McCabe v. Franks*, 44 Iowa 208.

Neglect to keep strict accounts arising from confidence between the parties who are relatives, may be viewed with more leniency. *Theall v. Lacey*, 5 La. Ann. 548; *Wiswall v. Ayres*, 51 Mich. 324.

Failure to keep proper books through incompetency which was known to the other partners will not charge the incompetent partner when he has done the best he could and acted in good faith. *Knapp v. Edwards*, 57 Wis. 191.

5. *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 506; and see *Maddox v. Stephenson*, 60 Ga. 125; *McCabe v. Franks*, 44 Iowa 208; *Jessup v. Cook*, 6 N. J. L. 434; *Barry v. Barry*, 3 Cranch (C. C.) 120; *Randle v. Richardson*, 53 Miss. 176; *Seltzer v. Brundage* (Pa. 1889), 17 Atl. Rep. 9; *Boire v. McGinn*, 8 Oregon 466.

Conjectural evidence, however, cannot be resorted to when the books furnish the required information. *Cunningham v. Smith*, 11 B. Mon. 325. And see *Flannigan v. Maddin*, 81 N. Y. 623.

Entries made after dissolution, as before, may be evidence on an accounting when the other partners had free access to them,¹ but the liquidating partner may be required to establish his disbursements by properly authenticated vouchers, rather than by entries in his own books.²

Entries in the books of a partnership are not evidence against any one to show that he is a member of the firm,³ but the terms of a partnership,⁴ and any alteration or particular construction of the articles may be established as conclusively by the books as by any other method.⁵

(3) *The Master's Report*.—The master's report should show what the firm owes each partner and what each owes the firm, the capital of each, and the profits credited and the losses charged to each,⁶ and dispose of the uncollected debts.⁷ No personal decree should be rendered until the assets are converted

The opinions of others engaged in a similar business are not competent. *Boire v. McGinn*, 8 Oregon 466. Nor is the appraisements made by a former receiver as to the value of the stock at that time. *Miller v. Howard*, 26 N. J. Eq. 166.

The admission of a creditor of the firm that he had been paid is not competent in favor of the partner claiming to have paid it. *Maddox v. Stephenson*, 60 Ga. 125.

1. *Routen v. Bostwick*, 59 Ala. 360; *Cameron v. Watson*, 10 Rich. Eq. (S. Car.) 64.

2. *Clements v. Mitchell*, Phil. Eq. (N. Car.) 3.

Entries made after dissolution by some of the partners of items of loss are not even *prima facie* evidence that they are properly chargeable to the firm. *Boyd v. Foot*, 5 Bosw. (N. Y.) 110.

3. *Abbott v. Pearson*, 130 Mass. 191; *Robins v. Warde*, 111 Mass. 244; *Folk v. Wilson*, 21 Md. 538; *Setzer v. Beale*, 19 W. Va. 274; *Lindsay v. Guy*, 57 Wis. 200. And see *Langdon v. Hughes*, 107 Mass. 272.

A balance carried over into the new books after taking in a new partner may be shown to have been entered for convenience, and that the new firm was merely an agent to collect it for the old one. *Armsby v. Farnam*, 16 Pick. (Mass.) 318.

Entries made by one partner, however, in the presence of the others, are competent to prove a partnership between them. *Howard v. Patrick*, 38 Mich. 795.

4. *Stewart v. Forbes*, 1 Hall & T. 461.

5. *Gage v. Parmelee*, 87 Ill. 329;

Robinson v. Gilfillan, 15 Hun (N. Y.) 267; *Southmayd's Appeal* (Pa. 1887), 8 Atl. Rep. 72.

The fact that a partner who had agreed to pay certain private bills of his own with goods of the firm had previously placed similar charges upon the books is evidence of the assent of his co-partners, and of authority to make such a contract. *Perry v. Butt*, 14 Ga. 69; *Grant v. Masterton*, 55 Mich. 161.

6. *Snyder v. Hall*, 10 Ill. App. 235; *McRae v. McKenzie*, 2 Dev. & B. Eq. (N. Car.) 232; *Paine v. Paine*, 15 Gray (Mass.) 299; *Philips v. Turner*, 2 Dev. & B. Eq. (N. Car.) 123.

In a suit to settle the affairs of a partnership, it is the duty of the trial court, upon approval of the report of the referee, to so dispose of the assets of the firm, by order of sale or partition in kind, or otherwise, as to make a complete and final settlement between the parties. *Filbrun v. Ivers*, 92 Mo. 388.

The report need not find by whom the firm was dissolved, or that the defendant refused to account, or who was the managing partner, or facts admitted by the pleadings, or who shall pay the costs. *Green v. Castleberg*, 77 N. Car. 164.

7. *Zimmerman v. Huber*, 29 Ala. 379.

It is error for the master to divide the uncollected debts between the partners. *McRae v. McKenzie*, 2 Dev. & B. Eq. (N. Car.) 232.

The whole case should be disposed of at one trial. *Smith v. Knight*, 77 Iowa 540.

into money, any excess of receipts being merely chargeable against the receiving partner on the final balance,¹ even though all debts have been paid except what is owing one partner by another;² though property or money of the firm in the hands of a partner, whether secretly appropriated or otherwise, will be directed to be turned over to or paid into the court.³ A decree finding the existence of a partnership and directing a dissolution, or finding the fact of dissolution and settling the interests of the partners, referring the cause to take the account, is a final decree for the purposes of appeal,⁴ the ac-

1. *Rosenstiel v. Gray*, 112 Ill. 282; *McGillivray v. Moser*, 43 Kan. 219; *Buckingham v. Ludlum*, 29 N. J. Eq. 345; *Bouton v. Bouton*, 42 How. Pr. (N. Y.) 11; *Moore v. Wheeler*, 10 W. Va. 35; *In re Smith*, 16 Bankr. Reg. 113; *Mills v. Hanson*, 8 Ves. 68; *Foster v. Donald*, 1 Jac. & W. 252; *Richardson v. Bank of England*, 4 Myl. & Cr. 165; *Crawshaw v. Collins*, 2 Russ. 325. And see *Shearer v. Francis* (Ky. 1887), 5 S. W. Rep. 558.

A report directing one partner to pay a certain sum to the other without stating the account is improper and should be re-committed. *Paine v. Paine*, 15 Gray (Mass.) 299.

Where no objection appears, a personal judgment before sale will be regarded as an agreement that one partner may retain the property. *Johnson v. Mantz*, 69 Iowa 710.

Upon a partnership bill praying for an account, a decree for the payment of the balance found due may be rendered. *Taylor v. Peterson*, 1 Idaho, N. S. 513.

2. *Johnson v. Mantz*, 69 Iowa 710; *Bouton v. Bouton*, 42 How. Pr. (N. Y.) 11; *Allison v. Davidson*, 2 Dev. Eq. (N. Car.) 79; *Moore v. Wheeler*, 10 W. Va. 35.

Where a personal judgment is to be docketed in a case where no part of the amount will be returned to the debtor partner, the judgment should be in favor of the receiver and not the creditor. *Geery v. Geery*, 79 N. Y. 565. And see *Jordan v. Miller*, 75 Va. 442; *Lathrop v. Knapp*, 37 Wis. 307; though a receiver cannot enforce the individual liability of partners on behalf of its creditors as it is not a partnership asset, the creditors themselves must sue it. *Wallace v. Milligan*, 110 Ind. 498.

Where one partner admits that he owes the firm more than it owes him,

he may be directed to pay over the balance. *Towlman v. Copland*, 3 Young & C. Ex. 643; *White v. Barton*, 18 Beav. 192. And see *London Syndicate v. Lord*, 8 Ch. Div. 84.

3. *Geery v. Geery*, 79 N. Y. 565; *White v. Barton*, 18 Beav. 192; *Foster v. Donald*, 1 Jac. & W. 252; *Jerves v. White*, 6 Ves. 738; *Birley v. Kennedy*, 6 New Rep. 395; *Costeker v. Horrox*, 3 Young & C. Ex. 530. And see *Rosenstiel v. Gray*, 112 Ill. 282.

If a party refuses to deliver property to the receiver, the decree may be for its value. *Robbins v. Laswell*, 27 Ill. 365.

Where, by the terms of the partnership one partner is to receive periodical dividends, and these remain unpaid, the court may decree payment by the debtor partners before final winding up, if the rights of creditors are not thereby prejudiced. *O'Conner v. Stark*, 2 Cal. 153. But this cannot be done if the debts are not provided for. *Carker v. Hawkins*, 8 W. Va. 291.

4. *Clark v. Dunham*, 46 Cal. 205; *Candler v. Stange*, 53 Mich. 479; *Rhodes v. Williams*, 12 Nev. 20; *Wiegand v. Copeland*, 14 Fed. Rep. 118; 7 Sawy. (U. S.) 442. *Contra*, *Gray v. Palmer*, 9 Cal. 616.

A decree will not be disturbed for erroneous allowances if balanced by errors of equal magnitude in favor of the other party. *Robertson v. Gibb*, 38 Mich. 165. And there will be no reversal after the admission of irrelevant testimony if there is sufficient valid evidence. *Powers v. Dickie*, 49 Ala. 81. And see *Laswell v. Robbins*, 39 Ill. 209.

The court may for the purpose of obviating the necessity for a new trial restate the account if the referee has stated it on a wrong principle. *Knapp v. Edwards*, 57 Wis. 191.

counting and sale being merely ministerial to carry the decree into effect.¹

(4) *Costs*.—It is left to the discretion of the court to apportion the costs according to the equity and justice of each case,² and it will, as a general rule, charge them upon the fund, either where the suit is necessary or beneficial to both parties, or where both are in fault;³ but they may be imposed upon one party only as a punishment if he has been guilty of misconduct, or if he has rendered resort to suit necessary.⁴ Costs are to be paid out of the assets after paying debts,⁵ and no part of the funds will be ap-

The report of the referee in the accounting between partners is not treated as a verdict, but is subject to review either by the trial or the appellate court. *Holt v. Simmons*, 16 Mo. App. 97. But the referee's finding of no partnership is binding on appeal unless the facts as found necessarily constitute a partnership. *St. Denis v. Saunders*, 36 Mich. 309.

1. *Evans v. Dunn*, 26 Ohio St. 439.

The Statute of Limitations does not run, however, upon amounts found in favor of one partner against another until the referee's report after sale and ascertainment of the amount. *White v. Conway*, 66 Cal. 383.

Appeal Practice.—In a suit to dissolve a partnership and for an accounting, where the cause has been referred to a master, who has filed a report which has been confirmed by the court, it is not the practice of the appellate court to re-examine every item of account between the parties during the existence of the partnership, but to re-examine only those that rest upon some disputed or controverted question of fact or law. *Rohr v. Pearson*, 16 Oregon 325.

2. *McGillvray v. Moser*, 43 Kan. 219; *Lampton v. Nichols*, 1 Cin. Super. Ct. Rep. (Ohio) 166; *Gyger's Appeal*, 62 Pa. St. 73; 1 Am. Rep. 382; *Gilman v. Vaughan*, 44 Wis. 646.

Costs of settling partnership accounts in a suit in equity are chargeable to both parties equally in the absence of exceptional circumstances. *Gordon v. Moore*, 8 Pa. Co. Ct. Rep. 289.

Costs in such an action, like other equitable actions, may be awarded to the successful party. *Warren v. Burnham*, 32 Fed. Rep. 579.

3. *Chandler v. Sherman*, 16 Fla. 99; *Jones v. Morehead*, 3 B. Mon. (Ky.) 377; *Pratt v. McHatton*, 11 La. Ann.

260; *Johnson v. Garrett*, 23 Minn. 565; *Campbell v. Coquard*, 16 Mo. App. 552; *Knott v. Knott*, 6 Oregon 142; *Zell's Appeal*, 126 Pa. St. 329; *Woolans v. Vansickle*, 17 Grant's Ch. (Up. Can.) 451.

That there is nothing found due to the complainant or to either party is no reason either for a dismissal or for the imposition of costs upon the complainant. *Knapp v. Edwards*, 57 Wis. 191.

Mere delay in the liquidating partner to wind up is not sufficient if not willful to charge him with costs. *Lee v. Page*, 7 Jur. N. S. 768.

Where a partner appointed to wind up, accounted on a basis which was set aside and he was compelled to settle on a different basis, the accounts being difficult and intricate and there being the utmost good faith, the additional costs were charged upon the funds. *Gyger's Appeal*, 62 Pa. St. 73; 1 Am. Rep. 382.

4. *Moon v. Story*, 8 Dana (Ky.) 226; *Taylor v. Cawthorne*, 2 Dev. Eq. (N. Car.) 221; *Knapp v. Edwards*, 57 Wis. 191; *Hamer v. Giles*, 11 Ch. Div. 942; *O'Lone v. O'Lone*, 2 Grant's Ch. (Up. Can.) 125. And see *Demarest v. Rutan*, 40 N. J. Eq. 356; *Price's Estate*, 81 Pa. St. 263; *Bingham v. Shaw*, 16 Grant's Ch. 373.

But though repeated demands have been made on a surviving partner to settle, and he fails to do so, and suit is brought for a settlement, the costs of suit will be taxed and charged to the partnership. *Burke v. Fuller*, 41 La. Ann. 740.

5. *Austin v. Jackson*, 11 Ch. D. 942; *Hamer v. Giles*, 11 Ch. D. 942; *Potter v. Jackson*, 13 Ch. D. 845.

Costs are to be borne in the same proportion that profits are shared. *Hamer v. Giles*, 11 Ch. Div. 142.

propriated to an allowance to an attorney for one of the parties, at least before final judgment.¹

e. SALE AND DISTRIBUTION.—Each partner or his representatives, in the absence of agreement to the contrary, may insist upon a sale of the assets, whatever they may consist of, in order to ascertain their value;² and even though the articles provide for a different disposition, if impossible or impracticable, a sale will be ordered,³ the bill being required to be for an accounting and not for a partition, as no partition can be had until all debts are paid and balances and cross-demands settled,⁴ the settlement of equities in land not being permitted to be separated from the rest of the partnership matters.⁵ If all the debts are paid, however, and real estate is to be divided, it may, none of the parties objecting, be partitioned instead of being sold and the proceeds divided,⁶ and a specific division of assets after the

1. *Struthers v. Christal*, 3 Daly (N. Y.) 327.

2. *Hall v. Lonkey*, 57 Cal. 80; *Sigourney v. Munn*, 7 Conn. 11; *Dickinson v. Dickinson*, 29 Conn. 600; *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 198; *Jackson v. Deese*, 35 Ga. 84; *Carter v. Bradley*, 58 Ill. 101; *Penneybacker v. Leary*, 65 Iowa 220; *Johnson v. Manty*, 69 Iowa 710; *Freeman v. Freeman*, 136 Mass. 260; *Godfrey v. White*, 43 Mich. 171; *Sheppard v. Boggs*, 9 Neb. 257; *Tarbell v. West*, 86 N. Y. 280; *Dougherty v. Van Nostrand*, Hoffm. Ch. (N. Y.) 68; *Comstock v. White*, 31 Barb. (N. Y.) 301; *Pierce v. Trigg*, 10 Leigh (Va.) 406; *Taylor v. Hutchinson*, 25 Gratt. (Va.) 536; 18 Am Rep. 699; *Olcott v. Wing*, 4 McLean (U. S.) 15; *Lyman v. Lyman*, 2 Paine (U. S.) 11; *Malbec de Montjoc v. Sperry*, 95 U. S. 401; *Wiegand v. Copeland*, 14 Fed. Rep. 118; *7 Sawy. (U. S.)* 442; *Thornton v. Dixon*, 3 Brown's Ch. Cas. 199; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Cook v. Collingridge*, Jac. 607; *Syers v. Syers*, 4 De G. F. & J. 42; *Darby v. Darby*, 3 Drew, 495; *Wild v. Milne*, 26 Beav. 504; and see *Levi v. Karrick*, 8 Iowa 159; *Lannan v. Clavin*, 3 Kan. 17; *Harper v. Lamping*, 33 Cal. 641; *Canada v. Barksdale*, 76 Va. 899.

If the trouble and expense of collecting accounts would render them less productive than an immediate sale, or if they are desperate and of little value, they may be sold instead of collected. *Pratt v. McHatton*, 11 La. Ann. 260.

Where some of the assets cannot be sold, as in case of emoluments of an office, or an inalienable government

contract, the holder will be allowed to retain them and be charged with their value. *Smith v. Mules*, 9 Hare 556; *Ambler v. Bolton*, L. R., 14 Eq. 427.

The book debts will be sold with the good will, as this being the best way to introduce the buyer to the old customers, more will probably be realized for it. *Johnson v. Hellely*, 34 Beav. 63.

3. See *Leach v. Leach*, 18 Pick. (Mass.) 68; *Cook v. Collingridge*, Jac. 607.

4. *Jackson v. Deese*, 35 Ga. 84; *Penneybacker v. Leary*, 65 Iowa 220; *Carter v. Bradley*, 58 Ill. 101; *Godfrey v. White*, 43 Mich. 171; and see *St. Clair v. Smith*, 3 Ohio 355.

The fact that there are no debts does not make the parties tenants in common so that a partition of real estate will be ordered instead of a sale, but the whole must be disposed of if any one insists upon it. *Wild v. Minle*, 26 Beav. 504.

5. *Godfrey v. White*, 43 Mich. 171; *Carter v. Bradley*, 58 Ill. 101.

6. *Lang v. Waring*, 25 Ala. 626; 60 Am. Dec. 533; *Gray v. Palmer*, 9 Cal. 616; *Hughes v. Delvin*, 23 Cal. 501; *Askew v. Springer*, 111 Ill. 662; *Patterson v. Blake*, 12 Ind. 436; *Aiken v. Ogilvie*, 12 La. Ann. 354; *King v. Wartelle*, 14 La. Ann. 750; *Way v. Stebbins*, 47 Mich. 296; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165; *Baird v. Baird*, 1 Dev. & B. Eq. (N. Car.) 524; *Pierce v. Covert*, 39 Wis. 252; *Strong v. Lord*, 107 Ill. 25; *Godfrey v. White*, 43 Mich. 171. And see *Malbec de Montjoc v. Sperry*, 95 U. S. 401; *Tenny v. Simpson*, 37 Kan. 353; *Jones v. Smith*, 31 S. Car. 527.

debts are paid may be made by the partners or their representatives.¹

The court has power to prescribe the time and manner of making the sale, and it need not conform to the statute as to sales on execution,² and all the partners should be allowed to bid.³ The final settlement is arrived at by a distribution of the fund, and if that is not sufficient then by decrees for and against each partner *in personam*,⁴ the balance due from a debtor partner to a creditor

It being found that testator bought certain lands under an agreement that on a resale thereof he and plaintiff should divide the profits or losses, the court should order a sale thereof, and a division of the proceeds according to the interests of the parties, rather than that an accounting should be taken, and the amount found which one party should pay to the other for the land. *Wing v. Bliss* (Supreme Ct.), 8 N. Y. Supp. 500.

Corporate stock may be specifically divided without sale. *Harper v. Lamping*, 33 Cal. 641; *Danvers v. Dorrity*, 14 Abb. Pr. (N. Y.) 206.

1. *Kimball v. Lincoln*, 99 Ill. 578; *Honore v. Colmesnil*, 7 Dana (Ky.) 199; *Roys v. Vilas*, 18 Wis. 169. And see *Honore v. Colmesnil*, 7 Dana (Ky.) 199.

In *Chittenden v. Witbeck*, 50 Mich. 401, where there were but few debts and a large amount of other assets to meet them, the court gave the surviving partner and the representative of the deceased partner twenty days in which to agree as to a disposition of the assets, after which, in case of failure, the receiver was to sell with permission to each party to bid.

In *Colehour v. Coolbaugh*, 81 Ill. 29, a division of assets was held proper, though there were debts where each recipient of assets was required to give security for the payment of debts to the amount he receives.

2. *Rhodes v. Williams*, 12 Nev. 20.

As to whether or not it is competent to order a private sale, see *Jones v. Thompson*, 12 Cal. 191; *Mauck v. Mauck*, 54 Ill. 281; *Taylor v. Hutchinson*, 25 Gratt. (Va.) 536; 18 Am. Rep. 699.

A sale may be ordered when necessary even before the final hearing, though it will not generally be done. *Bailey v. Ford*, 13 Sim. 495; *Crawshaw v. Maule*, 1 Swanst. 506. And

see *Buchanan v. Comstock*, 57 Barb. (N. Y.) 568.

A defect in the title to real estate is no objection to a sale of such title as the partners may have. *Waugh v. Mitchell*, 1 Dev. & B. Eq. (N. Car.) 510.

But where, in an action for the dissolution of a law partnership, the answer denies the ownership by the firm of certain abstracts of title in his possession, it is error for the court, before trial of the issues, to order the receiver to sell such abstracts. *Brush v. Jay*, 113 N. Y. 482.

3. *Godfrey v. White*, 43 Mich. 171; *Wiegand v. Copeland*, 14 Fed. Rep. 118; 7 Sawy. (U. S.) 412; *Wild v. Milne*, 26 Beav. 504; *Rowlands v. Evans*, 30 Beav. 302.

An agreement for dissolution contemplates a sale by mutual arrangement, and where the plaintiff fixed the time and place of sale, and purchased the property himself, the defendant refusing to bid, the sale was set aside. *Comstock v. White*, 31 Barb. (N. Y.) 301.

It is no objection to a sale that one partner is able to buy and therefore gets the property at half its value, leaving his co-partner in debt to him. *Wiegand v. Copeland*, 14 Fed. Rep. 118.

4. *Bouton v. Bouton*, 42 How. Pr. (N. Y.) 11; *Story v. Moon*, 3 Dana (Ky.) 331; *Savage v. Carter*, 9 Dana (Ky.) 409.

In the settlement of an account between the estate of a deceased partner and the surviving partners, where all the parties in interest are before the court, the court will not, as mere matter of form, order the balance due the estate to be paid to an administrator, instead of to the heirs directly, the latter course being more convenient, and working the same result. *Robinson v. Simmons*, 146 Mass. 167.

partner being a several claim, the proper amount being required to be decreed against each.¹

2. Injunctions. See INJUNCTIONS, vol. 10, p. 950.

3. Receivers—(See also RECEIVERS)—*a.* WHEN APPOINTED.—A court of equity has power to appoint a receiver in the settlement of partnership affairs, independent of statute, in the absence of statutory prohibition,² though the right to have a receiver appointed does not follow as a matter of course from the right to a dissolution or to a settlement after dissolution.³ The power to make the appointment is wholly discretionary,⁴ and as the object of such action must be to protect the property of the partnership from loss, no receiver will be appointed where no danger can accrue to the property, even though the partners are not able to

1. *Starr v. Case*, 59 Iowa 491; *Rhiner v. Sweet*, 2 Lans. (N. Y.) 386; *Bloomfield v. Buchanan*, 14 Oregon 181; *Portsmouth v. Donaldson*, 32 Pa. St. 202.

Where the debtor partners have combined to exclude the creditor partner from participation in the business and from sharing in the profits and have acted in bad faith, however, they may be held jointly and severally liable. *Blomfield v. Buchanan*, 14 Oregon 181.

If surviving partners have divided the assets among themselves, the executor of the deceased partner is entitled to a joint decree against them. *Bundy v. Youmans*, 44 Mich. 376.

2. *Gridley v. Connor*, 2 La. Ann. 87; *Cox v. Volkert*, 86 Mo. 505.

An order appointing a liquidator may be made in vacation. *New Orleans v. Gunthreux*, 32 La. Ann. 1126. But see *Martin v. Blanchin*, 16 La. Ann. 237.

Notice of Application.—Where a bill charges active partners with having largely overdrawn with fraudulent motives and excluding their co-partner from access and threatening to sell out the entire effects, a receiver may be appointed without notice. *Haight v. Burr*, 19 Md. 130.

Property out of Jurisdiction.—Where a partnership has assets in another jurisdiction constituting a branch business conducted by one of the partners in partnership with a third person, the receiver has no power to interfere with the rights of such third person. *Harvey v. Varney*, 104 Mass. 436. And restitution will be ordered if the receiver has possession of the private effects of one partner. *Saylor v. Mockbie*, 9 Iowa 209.

Party to Partnership Actions.—A receiver appointed to supersede a surviving partner is a necessary party to all suits by creditors to establish their claims. *Kirkpatrick v. McElroy*, 41 N. J. Eq. 439.

A receiver is not a necessary party to a bill by creditors to have judgments against the firm declared fraudulent and to have the receiver suspended. *Davis v. Michelbacher* (Wis. 1887), 31 N. W. Rep. 160.

3. *Renton v. Chaplain*, 9 N. J. Eq. 62; *Wilson v. Fitcher*, 11 N. J. Eq. 71; *Cox v. Peters*, 13 N. J. Eq. 39; *Quinlivan v. English*, 44 Mo. 46; 42 Mo. 362; *Waters v. Taylor*, 15 Ves. 10; *Oliver v. Hamilton*, 2 Anstr. 453; *Millbank v. Revett*, 2 Mer. 405. And see *Dunn v. McNaught*, 38 Ga. 179; *New v. Wright*, 44 Miss. 202; *Heflebower v. Buck*, 64 Md. 15; *Law v. Ford*, 2 Paige (N. Y.) 210; *Marten v. Van Schaick*, 4 Paige (N. Y.) 479; *Moies v. O'Neill*, 23 N. J. Eq. 207.

Failing to answer interrogatories to a bill as to the account is a sufficient ground for a receiver. *Drury v. Roberts*, 2 Md. Ch. 157.

A partner, who admits that he has in his hands money which he has drawn out of the firm, cannot hold it subject to possible claims of creditors' of the firm as against his own creditors, but may be required to deliver it to a receiver in a proceeding by creditors' bill, against whom partnership creditors may proceed. *Hamilton v. Harris*, 72 Mich. 56.

4. *New v. Wright*, 44 Miss. 201; *McNair v. Gourrier*, 40 La. Ann. 353; *Slemmer's Appeal*, 58 Pa. St. 168; *Madgwick v. Wimble*, 6 Beav. 495.

It has been held to be the duty of a creditor if he obtains an injunction

agree in reference to its management and control,¹ and until the partnership is clearly established such relief will be denied.²

Before dissolution a receiver will not be appointed because of any contention which the majority has power to determine,³ or because of mere quarrels which do not amount to a ground for dissolution,⁴ it being a general if not universal rule that a receiver will be appointed only for a cause entitling the complaining partner to a dissolution of the partnership,⁵ as where the firm is in-

against a partnership to apply at the same time for a receiver, especially if the firm property consists partly of perishable goods. *Osburn v. Heyer*, 2 Paige (N. Y.) 342.

Who May Apply.—One who has entered into partnership with another, to whom he has paid a portion of the price of his share of the partnership property, and given his notes, which are not yet due, for the balance, has sufficient interest in the firm property after the partnership has gone into operation, to maintain a bill for the appointment of a receiver thereof, and to enjoin the other partner from proceeding with the firm business. *Taylor v. Bliley* (Ga. 1890), 12 S. E. Rep. 210.

A creditor of an insolvent limited partnership, although he has not obtained judgment, may maintain an action to restrain dissipation of the assets, and have a receiver appointed. *Whitcomb v. Fowle*, 7 Abb. N. Cas. (N. Y.) 295. But he must show some sufficient reason for not proceeding against the property of the partnership. *Henry v. Henry*, 10 Paige (N. Y.) 314.

1. *Smith v. Lowe*, 1 Edw. Ch. (N. Y.) 33; *Buchanan v. Comstock*, 57 Barb. (N. Y.) 568; *Hayes v. Heyer*, 4 Sandf. (N. Y.) Ch. 485; *Loomis v. McKenzie*, 31 Iowa, 425; *Perrin v. Lepper*, 56 Mich. 351. And see *Williamson v. Monroe*, 3 Cal. 383.

Where the partners had agreed as to the disposition and control of the property, except as to one item, which, as well as the whole question, had been placed in the power of the court by the evidence, a motion to appoint a receiver to sell the good-will and lease was properly denied. *Rice v. Baggot* (Supreme Ct.), 7 N. Y. Supp. 518.

In *McCracken v. Ware*, 3 Sandf. (N. Y.) 688, a receiver was appointed, although the complaint contained no prayer for one, where it appeared that one partner had enjoined the other

from receiving or disposing of the joint effects, and where the latter had applied for an injunction, without any proof of insolvency or other special cause.

2. *Hobart v. Ballard*, 31 Iowa 521; *Guyton v. Flack*, 7 Md. 398; *Baxter v. Buchanan*, 3 Brews. (Pa.) 435; *Goulding v. Bain*, 4 Sandf. (N. Y.) 716; *Norway v. Rowe*, 19 Ves. 144.

It is not necessary that the funds be absolutely ascertained to be partnership assets. If there is a probability that they are joint, a receiver will be appointed. *Speights v. Peters*, 9 Gill (Md.) 472.

The court cannot generally undertake to decide what is partnership property as between the partners and third persons. This question must be determined by an action by or against the receiver. *Higgins v. Bailey*, 7 Robt. (N. Y.) 613.

A receivership will not be refused or vacated merely because the face of partnership is denied. *Pratt v. Peacock*, 16 Ves. 49; *Hottenstein v. Conrad*, 9 Kan. 435. And see *Wilson v. Fitcher*, 11 N. J. Eq. 71.

3. *Kennedy v. Kennedy*, 3 Dana (Ky.) 239.

4. *Loomis v. McKenzie*, 31 Iowa 425; *McElvey v. Lewis*, 76 N. Y. 373; *Sloan v. Moore*, 37 Pa. St. 217.

If the personal relations of the partners are such that a dissolution is inevitable, a disagreement as to the control and disposition of the property will be ground for a receiver. *Marten v. Van Schaick*, 4 Paige (N. Y.) 479. And see *Naylor v. Sidener*, 106 Ind. 179.

5. *Garretson v. Weaver*, 3 Edw. Ch. (N. Y.) 385; *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172. And see *Henn v. Walsh*, 2 Edw. Ch. (N. Y.) 129; *Jackson v. DeForest*, 14 How. Pr. (N. Y.) 81; *Harding v. Glover*, 18 Ves. 281; *Williamson v. Wilson*, 1 Bland. (Md.)

solvent and a partner is making an improper use of the property,¹ or in case of such fraudulent misconduct of a partner as to justly destroy all confidence in his integrity.² While a less strong case is necessary after dissolution than before, a receiver will not even then be appointed in the absence of some breach of duty or of contract,³ or other imperative reason.⁴ Thus the exclusion of a partner either before dissolution,⁵ or after a dissolution other than

418; *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Chapman v. Beach*, 1 Jac. & W. 596; 4 Beav. 574; *Smith v. Jeyes*, 4 Beav. 503.

Responsibility of Moving Partner.—

Both partners are equally bound to see that the receiver gives a bond. *Schulte v. Hoffman*, 18 Tex. 678. And if one partner enjoins another from collecting the firm assets, the firm is bound to see that a receiver is properly appointed to secure them, and is liable for neglect of the receiver to do his duty. *Terrell v. Ingersoll*, 10 Lea (Tenn.) 77.

Receiver's Sale.—A title conveyed by a receiver's sale is not affected by liens against the interest of one partner. *Foster v. Barnes*, 81 Pa. St. 377. And see *Lorch v. Aultman*, 75 Ind. 162.

1. *Williamson v. Wilson*, 1 Bland. (Md.) 418; *Haight v. Burr*, 19 Md. 130; *Shannon v. Wright*, 60 Md. 520; *Davis v. Grove*, 2 Robt. (N. Y.) 134; *Evans v. Evans*, 9 Paige (N. Y.) 178; *Brush v. Jay*, 50 Hun (N. Y.) 446; *Jacquin v. Buisson*, 11 How. Pr. (N. Y.) 385; *Geortner v. Canajoharie*, 2 Barb. (N. Y.) 625; *Phillips v. Trezwant*, 67 N. Car. 370; *Higginson v. Air*, 2 Desaus. (S. Car.) 427; *Watson v. McKinnon*, 73 Tex. 210. And see *Saylor v. Mockbie*, 9 Iowa 209.

Where a partner is continuing the business with the partnership effects upon his own account, a receiver will be appointed, even though his co-partner is indebted to him. *Harding v. Glover*, 18 Ves. 281; *Detaste v. Bordeneuve*, Jac. 516.

Where a partner has sold his interest in the establishment to a person who is using it in a way to hazard its destruction by fire and threatens to take exclusive possession, a receiver will be appointed. *Heathcot v. Ravenscroft*, 6 N. J. Eq. 113.

A receiver has been appointed on the sole ground of the defendant's insolvency. See *Randall v. Morrell*, 17 N. J. Eq. 343; *Hubbard v. Guild*, 1 Duer (N. Y.) 662; *Freeland v. Stansfeld*, 2 Sm. & G. 479.

². See *Maier v. Bull*, 44 Ill. 97; *Smith v. Jeyes*, 4 Beav. 503.

That the partner has transferred his private property and shows an intention to break up the firm and leave his co-partners to pay the losses, is a sufficient ground. *Sutro v. Wagner*, 23 N. J. Eq. 388.

3. *Wilson v. Fitcher*, 11 N. J. Eq. 71; *Harding v. Glover*, 18 Ves. 281; *Wilson v. Greenwood*, 1 Swanst. 481.

Merely that the complainant has lost confidence in his co-partners is not sufficient to warrant the appointment of a receiver, if there is no evidence of bad faith or insolvency. *Woodward v. Schatzell*, 3 Johns. Ch. (N. Y.) 412.

If a settlement is nearly at an end and no substantial benefit could be derived from the appointment of a receiver, none will be appointed in the absence of insolvency or danger of abuse of the assets. *Heflebower v. Buck*, 65 Md. 15.

4. *O'Bryan v. Gibbons*, 2 Md. Ch. 9; *Heflebower v. Buck*, 64 Md. 15; *Morey v. Grant*, 48 Mich. 326. And see *Smith v. Fitchett* (Supreme Ct.), 2 N. Y. Supp. 261.

Where continuing partners have agreed to apply the assets to the debts of the old firm and one of the partners in the new firm misappropriates them, a receiver will be appointed. *Coddington v. Tappan*, 26 N. J. Eq. 141.

5. *Maynard v. Railey*, 2 Nev. 313; *Barnes v. Jones*, 91 Ind. 161; *Heathcot v. Ravenscroft*, 6 N. J. Eq. 113; *Wolbert v. Harris*, 7 N. J. Eq. 605; *Wilson v. Greenwood*, 1 Swanst. 471; *Blakey v. Dufaur*, 15 Beav. 40; *Clegg v. Fishwick*, 1 Mc N. & G. 1009; *Steele v. Grossmith*, 19 Grant's Ch. (Up. Can.) 141.

That the partner who excludes his co-partner is solvent and able to respond in damages for the assets in his hands, is not a sufficient reason for the refusal to appoint a receiver. *Hottenstein v. Conrad*, 9 Kan. 435.

Where the exclusion and failure to account are denied, and a defendant is

by death,¹ is a good ground for the appointment of a receiver, and in case of a disagreement between partners in winding up, the appointment of a receiver is usually regarded as necessary.² A surviving partner³ or a solvent partner engaged in winding up,⁴ or a partner who has been delegated for that purpose by his co-partners,⁵ will not be deprived of his power to wind up by the appointment of a receiver except for grievous misconduct or clear breach of duty amounting to fraud or gross misconduct, though any action upon his part whereby the assets are imperiled is a sufficient ground.⁶

selling the assets under an agreement by which he is authorized to apply the proceeds to a note given him by his copartner which is not fully paid, no receiver will be granted. *Parkhurst v. Muir*, 7 N. J. Eq. 307.

1. *Terrell v. Goddard*, 18 Ga. 664; *Speights v. Peters*, 9 Gill (Md.) 472; *Drury v. Roberts*, 2 Md. Ch. 157; *Doupe v. Stewart*, 13 Grant's Ch. (Up. Can.) 637; *Wilson v. Greenwood*, 1 Swanst. 471.

But where a dissatisfied partner has withdrawn, his copartner who had advanced all the capital will not be interfered with in the entire and exclusive management of the winding up, in the absence of irresponsibility or fraud. *Cox v. Peters*, 13 N. J. Eq. 39.

Refusing to permit the administrator to inspect the books and be informed of his proceedings and winding up entitles him to an injunction and receiver. *Bilton v. Blakely*, 6 Grant's Ch. (Up. Can.) 575.

2. See *Speights v. Peters*, 9 Gill (Md.) 472; *Whitman v. Robinson*, 21 Md. 30; *Law v. Ford*, 2 Paige (N. Y.) 310; *Marten v. Van Schaick*, 4 Paige (N. Y.) 479; *Van Rensselaer v. Emery*, 9 How. Pr. (N. Y.) 135; *McElvey v. Lewis*, 76 N. Y. 373; *Richards v. Baurman*, 65 N. Car. 162; *Sloan v. Moore*, 37 Pa. St. 217; *Walker v. House*, 4 Md. Ch. 39.

If the partners have conveyed their property in trust to pay certain partnership debts and disagree as to the application of the proceeds, a receiver may be appointed. *Naylor v. Sidener*, 106 Ind. 179.

Creditors cannot, after the appointment of a receiver, acquire preferences in the partnership property by obtaining judgment against the partners or by attempting to garnish the receiver. *Jackson v. Lahee*, 114 Ill. 287; *Knode v. Baldrige*, 73 Ind. 54; *Buckingham v. Ludlum*, 37 N. J. Eq. 137; *Kirk-*

patrick v. McElroy, 41 N. J. Eq. 539; *Waring v. Robinson*, Hoffm. Ch. (N. Y.) 524; *Holmes v. McDowell*, 15 Hun (N. Y.) 585; *Manning v. Brickell*, 2 Hayw. (N. Car.) 133; *Taylor v. Gillean*, 23 Tex. 508. But see *Adams v. Wood*, 9 Cal. 24; *Ross v. Titsworth*, 37 N. J. Eq. 333.

3. *Heflebover v. Buck*, 64 Md. 15; *Barry v. Briggs*, 22 Mich. 201; *Higginson v. Air*, 1 Desaus. (S. Car.) 427; *Waters v. Taylor*, 15 Ves. 10.

In *Barry v. Briggs*, 22 Mich. 201, the appointment of a receiver in a suit for an accounting brought by an administrator against a surviving partner was said to have no analogy to an appointment in an ordinary partnership case, because in such case there is an interference with an exclusive right and title and a divesting of a vested interest.

Where the wife of an absconding partner brought a divorce suit and obtained a receiver of all his property, who took possession of the business, restitution was ordered to the partner. *Hamill v. Hamill*, 27 Md. 679.

4. *O'Bryan v. Gibbons*, 2 Md. Ch. 9; *Renton v. Chaplain*, 9 N. J. Eq. 62; *Wellman v. Harker*, 3 Oregon 253.

5. *Drury v. Roberts*, 2 Md. Ch. 157; *Walker v. Trott*, 4 Edw. Ch. (N. Y.) 38. And see *Quinlan v. English*, 44 Mo. 46.

The same rule applies to the remaining partners after one has sold his share to a third person, they being entitled to refuse to allow either the seller or buyer to interfere with the winding up. *McGlensy v. Cox*, 1 Phila. (Pa.) 787; 5 Pa. L. J. Rep. 203; *Ballard v. Callison*, 4 W. Va. 326.

6. See *Fletcher v. Vandusen*, 52 Iowa 448; *Gable v. Williams*, 59 Md. 46; *Scott v. Tupper*, 8 Smed. & M. (Miss.) 280; *Tillinghast v. Champlain*, 4 R. I. 173; *Holden v. McMakin*, 1 Pars. (Pa.) 270.

A continuance of the business by the

b. WHO MAY BE APPOINTED.—One of the partners may be appointed receiver of the partnership.¹ So may a surviving partner² or a sole solvent partner,³ or the only sane partner.⁴ But a partner who has unreasonably or inopportunistically dissolved the partnership will not be appointed.⁵ A partner thus appointed receiver, however, like a partner under ordinary circumstances, is entitled to no compensation for winding up.⁶

A partner who owns a large share of the capital is sometimes left in charge upon giving security for the payment of the shares of the others instead of appointing a receiver,⁷ and a receiver has been denied on application of an administrator, upon the surviving partner's giving security to apply the assets to the debts, to account and to pay over the balance.⁸

c. CONTINUANCE OF THE BUSINESS.—In general, the receiver has no power to continue the partnership business, the sole reason for his appointment being to preserve the partnership effects, and not to supplant the partners,⁹ but if a sudden stoppage of the busi-

surviving partner, mixing the old and new assets without keeping separate accounts is a good ground for a receiver. *Jennings v. Chandler*, 10 Wis. 21.

A receiver will be appointed if the surviving partner is attempting to transfer the benefit of the custom and good will of the old business to his own new business. *Young v. Buckett*, 51 L. J., Ch. 504.

In *Miller v. Jones*, 39 Ill. 54, a receiver was appointed for unreasonable delay of the survivor to pay debts and collect credits.

1. *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 506; *Doupe v. Stewart*, 13 Grant's Ch. (Up. Can.) 637.

2. *Berry v. Jones*, 11 Heisk. (Tenn.) 206.

The administrator of a deceased partner may be appointed receiver on giving bond as such, upon the surviving partner being suspended for bad faith. *Miller v. Jones*, 39 Ill. 54.

3. *Hubbard v. Guild*, 1 Duer (N. Y.) 662; *Wilson v. Greenwood*, 1 Swanst. 471; *Ex parte Stoveld*, 1 Glyn. & J. 303.

4. *Reynolds v. Austin*, 4 Del. Ch. 24.

5. *McMahon v. McClernan*, 10 W. Va. 419.

6. *Ex parte Stoveld*, 1 Glyn. & J. 303; *Doupe v. Stewart*, 13 Grant's Ch. (Up. Can.) 637.

In *Honore v. Colmensnil*, 1 J. J. Marsh. (Ky.) 506, the contrary rule that he is entitled to compensation was adopted.

Where partnership affairs are put into the hands of a receiver, the fact that the receiver is one of the partners, does not entitle him to additional compensation. *Lennig v. Lennig*, 15 Phila. (Pa.) 283.

7. *Popper v. Scheider*, 7 Abb. Pr., N. S. (N. Y.) 56; 38 How. Pr. (N. Y.) 34; *Keeney v. Home Ins. Co.*, 71 N. Y. 396; 27 Am. Rep. 60; *Delo v. Banks*, 101 Pa. St. 458.

But where, pending an action between partners for an accounting, defendant moved for an order directing one of plaintiffs to turn over to him money belonging to the firm, defendant being by agreement the liquidating partner, and defendant had placed the money in bank, and it had been drawn out by plaintiff, who used part of it in paying the firm debts, plaintiff being a creditor and defendant a debtor to the firm, the motion was denied. *Weston v. Watts*, 8 N. Y. S. 633.

The sureties on the bond of a partner given for the payment of any balance to his co-partner are liable only for the account actually received by him while liquidating the concern, and not for any amount afterwards collected by a receiver appointed in his stead. *Delo v. Banks*, 101 Pa. St. 458.

8. *Higginson v. Air*, 1 Desaus. (S. Car.) 427; *Foster v. Shephard*, 33 Tex. 687; *Jennings v. Chandler*, 10 Wis. 21; *Hartz v. Schrader*, 8 Ves. 317; *Burden v. Burden*, 1 Ves. & B. 170.

9. *Beach on Receivers*, § 565.

A receiver who continues to carry on

ness would cause material injury to the interests of the partners,¹ or if it is necessary to keep the good will alive and secure it to a purchaser,² the court may authorize the receiver to continue the business until it can be advantageously stopped or sold.

XXIX. PLEADING.—In actions brought by co-partners upon contracts made with them as such, or in their partnership name it is usually necessary to allege the partnership, that the plaintiffs constitute the firm and that the contract was made with them in that name.³ If the action is brought upon a note indorsed to them

the business in the interest of the partner at whose instance he was appointed, and not by the direction of the court, renders such partner liable to persons who furnish him with goods. *Curtin v. Munford*, 53 Ga. 168.

1. *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 198; *Levi v. Karrick*, 8 Iowa 150; *Jackson v. DeForest*, 14 How. Pr. (N. Y.) 81; *Marten v. Van Schaick*, 4 Paige (N. Y.) 479; *Wilcox v. Pratt* (Supreme Ct.), 5 N. Y. Sup. 361.

In *Marten v. Van Schaick*, 4 Paige (N. Y.) 479, a partner in charge of the editorial department of a political newspaper was allowed to continue to superintend it under the receiver until the sale could be had.

In *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 198, the court continued the operation of a steamboat during the litigation, but in *Crane v. Ford*, 1 Hopk. Ch. (N. Y.) 114, it refused to continue the management after the boat had been run for two years, and it was proposed to continue for another year, the boat then needing considerable repairs.

2. *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 198; *Wolbert v. Harris*, 7 N. J. Eq. 605; *Jackson v. DeForest*, 14 How. Pr. (N. Y.) 81; *Marten v. Van Schaick*, 4 Paige (N. Y.) 479; *Crane v. Ford*, Hopk. Ch. (N. Y.) 114; *Heatherton v. Hastings*, 5 Hun (N. Y.) 459.

Profits earned by a receiver after dissolution belong to all the partners. *McMahon v. McClernan*, 10 W. Va. 419. Though if the earnings are the proceeds of the capital of one partner only, he would be entitled to the profits. *Derbin v. Barber*, 14 Ohio 311.

Disposition of Partners' Interest.—The fact that partnership property is in the hands of a receiver, pending an accounting between the partners, does not prevent one of them from selling his interest, with the consent of the other. *Schurtz v. Romer*, 82 Cal. 474.

3. *Woodworth v. Fuller*, 24 Ill. 109; *Wise v. Williams*, 72 Cal. 544; *Foerster v. Kirkpatrick*, 2 Minn. 210; *Revis v. Lamme*, 2 Mo. 207; *New Brunswick Co. v. Tiers*, 24 N. J. L. 697; *Bentley v. Smith*, 3 Cal. (N. Y.) 170; *Marsh v. Chicago etc. R. Co.*, 79 Iowa 332; *Wilcox v. Woods*, 4 Ill. 51; *Wright v. Curtis*, 27 Ill. 514; *Hughes v. Walker*, 4 Blackf. (Ind.) 50; *Hubbell v. Skiles*, 16 Ind. 138; *Campbell v. Blanke*, 13 Kan. 62; *Burbaker v. Poague*, 1 T. B. Mon. (Ky.) 123; *McGregor v. Cleveland*, 5 Wend. (N. Y.) 475; *Robb v. Bailey*, 13 La. Ann. 457; *Redmond v. Stansbury*, 24 Mich. 445; *Dessaint v. Elling*, 31 Minn. 287; *Clark v. Kessell*, *Wright* (Ohio) 480; *Ege v. Kyle*, 2 Watts (Pa.) 222; *Bischoff v. Blease*, 20 S. Car. 460; *Neely v. Morris*, 2 Head (Tenn.) 595; *Barnes v. Elmbinger*, 1 Wis. 56; *Varnum v. Campbell*, 1 McLean (U. S.) 313; *Ord v. Portal*, 3 Camp. 239; *Attwood v. Rattenbury*, 6 J. B. Moore, 479; and see *Vaughan v. McGannon*, 42 Ark. 244; *Garland v. Hickey*, 75 Wis. 178; *McGregor v. Hubbs*, 125 Ind. 487; *Guidon v. Robson*, 2 Camp. 302.

Though it is provided by statute that partners need not make proof of partnership, yet proof of identity is not dispensed with. *Woodworth v. Fuller*, 24 Ill. 109.

An allegation of a bill that persons are jointly engaged as merchants is equivalent to an allegation that they are engaged as co-partners. *De Graum v. Jones*, 23 Fla. 83.

Where the title of a complaint sets out the names of the individual members of a firm, it is not necessary to repeat their names in the body of the complaint as composing the firm, but a reference to them as "plaintiffs" is sufficient. *Walter v. Godshall*, 32 S. Car. 187; *Thorne v. Fox*, 67 Md. 67; *Adams Express Co. v. Harris*, 120 Ind. 73; 29 S. Car. 258.

"That plaintiffs for several years last

in blank, however, partnership need be neither alleged nor proved.¹ And if the execution of the contract with plaintiffs as partners, is admitted, proof of partnership is not necessary.²

In actions against partners, no other or different allegations are generally required than those in an ordinary action against joint contractors, the fact that the indebtedness was incurred, being sufficient without setting forth the manner in which it was done;³ though some of the courts require an averment that the defendants were partners when the contract was made in their firm

past have been and now are co-partners, doing business under the firm name and style of "A, B & Co.," is a sufficient allegation of partnership, and if defendants desire a more specific allegation as to time, they must object by motion. *Pfister v. Wade*, 69 Cal. 133. And see *Hubbell v. Skiles*, 16 Ind. 138; *Frost v. Shackelford*, 57 Ga. 260; *Anable v. Conklin*, 25 N. Y. 470; *Reese v. Kinkead*, 18 Nev. 126; *Alpers v. Schammel*, 74 Cal. 590; *Miller v. Faulk*, 47 Mo. 262.

In Illinois, the necessity of alleging and proving partnership in the first instance is dispensed with by statute; if the question is to be raised the partnership must be specifically denied. See *Cooper v. Coates*, 21 Wall. (U. S.) 105; *Bensley v. Brockway*, 27 Ill. App. 410. So in *Missouri*. *Heysler v. Dawson*, 28 Mo. App. 531.

1. *Bell v. Crosby*, 4 Ala. 575; *Smith v. Davis*, 2 Stew. (Ala.) 224; *Smith v. Hunt*, 2 Stew. (Ala.) 222; *Boswell v. Dunning*, 5 Harr. (Del.) 331; *Dessaint v. Elling*, 31 Minn. 287; *Clark v. Kensell*, *Wright* (Ohio) 480; *Ege v. Kyle*, 2 Watts (Pa.) 221; *Neely v. Morris*, 2 Head (Tenn.) 595; *Ord v. Portal*, 3 Camp. 239.

Whether plaintiffs in a joint action are co-partners or not, is immaterial, so long as their cause of action is proved to be joint. *Wood v. Pithian*, 24 N. J. L. 33.

Describing the plaintiffs in the title of an action as partners is surplusage, where the suit is not upon a partnership matter, and an allegation of compliance with the law relative to filing and publishing notice of partnership is unnecessary. *Lee v. Orr*, 70 Cal. 398.

Under statutes providing that the plaintiff may incorporate the note sued upon instead of alleging its terms and its execution, an averment as to the identity of the defendants as members of the firm whose name appears as maker of a note, is required. *Lucas v. Baldwin*, 97 Ind. 471. And see *McCloskey v. Strickland*, 7 Iowa, 259; *King v. Bell*, 13 Neb. 409; *Norton v. Thatcher*, 8 Neb. 186.

2. *Cowan v. Baird*, 77 N. Car. 201; *Shepherd v. Frys*, 3 Gratt. (Va.) 442; *Pratt v. Willard*, 6 McLean (U. S.) 27; *Maret v. Wood*, 3 Cranch (C. C.) 2. And see *Leinkauff v. Frenkle*, 80 Ala. 136.

Where the plaintiffs allege that they were partners, and sold to defendant the goods sued for, and the defendant denied the partnership, but admitted the purchase from plaintiffs, the issue as to the partnership was held to be immaterial. *Millerd v. Thorn*, 56 N. Y. 402. It would be material, however, if the sale by plaintiffs to the defendant had not been admitted. *Irvine v. Myers*, 4 Minn. 229.

3. *Swinney v. Burnside*, 17 Ark. 38; *Hunter v. Martin*, 57 Cal. 365; *Johnson v. Buell*, 26 Ill. 66; *Mulhall v. Gillespie*, 89 Ill. 346; *Ensminger v. Marvin*, 5 Blackf. (Ind.) 210; *Pollock v. Glazier*, 20 Ind. 262; *Stephens v. Roby*, 27 Miss. 744; *Danaher v. Hitchcock*, 34 Mich. 516; *Waldo v. Beckwith*, 1 N. Mex. 97; *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Gates v. Watson*, 54 Mo. 585; *Stix v. Mathews*, 63 Mo. 371; *Maynard v. Fellows*, 43 N. H. 255; *Ward v. Dow*, 44 N. H. 45; *Beach v. Raymond*, 2 E. D. Smith (N. Y.) 496; *Mack v. Spencer*, 4 Wend. (N. Y.) 411; *Hawley v. Hurd*, 56 Vt. 617; *Nutt v. Hunt*, 4 Smed. & M. (Miss.) 702; *Findlay v. Stevenson*, 3 Stew. (Ala.) 48; *Wolf v. Strahl* (Supreme Ct.), 7 N. Y. Supp. 593; *Davis v. Abbott*, 2 McLean (U. S.) 29. But see *Pease v. Morgan*, 7 Johns. (N. Y.) 468; *Manhattan Co. v. Ledyard*, 1 Cal. (N. Y.) 192; *Fullerton v. Seymour*, 5 Vt. 249; *Jones v. Mass.*, 2 Camp. 305.

If the defendants contracted, it is immaterial whether they contracted as partners or not. *Hunter v. Martin*, 57 Cal. 365.

name.¹ A general denial puts the plaintiff's partnership in issue as a general rule when it is a material fact;² and under it the defendant can take advantage of a failure to join other partners who should have been made co-plaintiffs.³

In some States, however, a special denial under oath is required.⁴ And, in others, there are statutory provisions requiring the defense of no joint liability in an action on a written contract to be made by a denial of the execution of the instrument for the

The same rule applies to liability incurred by the violation of a statute. *Commonwealth v. Rowell*, 146 Mass. 128.

Under the general allegations of a complaint that defendants are indebted to plaintiff as partners for goods sold and delivered to them as partners, plaintiff may prove the partnership, so far as the sale is concerned, by evidence which estops them from denying the fact. *Cornhauser & Co. v. Roberts*, 75 Wis. 554.

1. See *Petrie v. Newell*, 13 Ill. 647; *Keith v. Pratt*, 5 Ark. 661; *Meacham v. Batchelder*, 3 Pin. (Wis.) 281; 3 Chand. (Wis.) 316; *Jamison v. Dearling*, 41 Ala. 283; *Champion v. Mumford*, Kirby (Conn.) 170; *Head v. Sleeper*, 20 Me. 314; *National Ins. Co. v. Bowman*, 60 Mo. 252; *Manhattan Co. v. Ledyard*, 1 Cal. (N. Y.) 192; *Tellers v. Muir*, 3 N. J. L. 749; *Wilson v. Smith*, 5 Yerg. (Tenn.) 379.

Where a partnership contract is made joint and several by statute, it is not necessary to allege that the defendant and another, who made the note sued upon, were partners. *Kent v. Wells*, 21 Ark. 411; *Burgen v. Dwinal*, 11 Ark. 314; *Hamilton v. Buxton*, 6 Ark. 24. But the declaration should not allege a partnership contract in an action against one partner only. *Barry v. Foyles*, 1 Pet. (U. S.) 311.

In **Arkansas**, in an action against partners on an account, the partnership must be proved. *Trowbridge v. Sanger*, 4 Ark. 179; *Alford v. Thompson*, 5 Ark. 347.

2. *Burk v. Morrison*, 8 B. Mon. (Ky.) 131; *Roberts v. Atwood*, 8 B. Mon. (Ky.) 209; *Norcross v. Clark*, 15 Me. 80; *Armstrong v. Robinson*, 5 Gill. & J. (Md.) 412; *Des-saint v. Elling*, 31 Minn. 287; *True v. Congdon*, 44 N. H. 48; *Haberkorn v. Hill* (Supreme Ct.), 2 N. Y. Supp. 243; *Patten v. Whitehead*, 13 Rich. (S. Car.) 156. And see *Holman v. Car-*

hart, 25 Ga. 608; *Hawn v. Seventy-six Land & Water Co.*, 74 Cal. 418; *Buckingham v. Burgess*, 3 McLean (U. S.) 364.

A denial that the defendant made the note or authorized any one to make it, is not sufficient, as a co-partner might have made it. *Collier v. Cross*, 20 Ga. 1. But such a denial was held to be sufficient in *Zuel v. Bowen*, 78 Ill. 234; *Haight v. Arnold*, 48 Mich. 512.

A denial by two partners, each for himself, is bad, if there is a third partner. *Mills v. Bunce*, 29 Mich. 364.

3. *Sims v. Ross*, 8 Smed. & M. (Miss.) 557; *Smith v. Connor*, 66 Miss. 157; *Coffee v. Eastland*, *Cooke* (Tenn.) 159; *Jordan v. Wilkins*, 3 Wash. (U. S.) 110. But see *Rarelsen v. Sun Fire Office*, 45 Hun (N. Y.) 144.

The non-joinder of a partner as co-plaintiff in replevin may be pleaded in bar, and not merely in abatement, as one partner cannot replevy part of the property. An amendment, however, may be allowed. *Fay v. Duggan*, 135 Mass. 242. But see *Garvin v. Paul*, 47 N. H. 158.

4. *Heintz v. Cahn*, 29 Ill. 308; *Hauser v. Smith*, 13 Ind. 532; *Rees v. Simons*, 10 Ind. 82; *Burton v. Bostwick*, *Brayt.* (Vt.) 195; *Anderson v. Tarpley*, 6 Smed. & M. (Miss.) 507; *Jameson v. Franklin*, 6 How. (Miss.) 376; *Ardley v. Russell*, 1 Browne (Pa.) 145; *Gay v. Waltman*, 89 Pa. St. 453; *Lewis v. Lowery*, 3 Tex. 663; *Hall v. Lyons*, 29 W. Va. 410; *Lindsay v. Jaffray*, 55 Tex. 626; *Shepard v. Frys*, 3 Gratt. (Va.) 442; *Martin v. American Express Co.*, 19 Wis. 336; and see *Wallis v. Wood*, (Tex. 1888), 7 S. W. Rep. 852.

A denial of knowledge sufficient to form a belief is sufficient. *Wales v. Chamblin*, 19 Mo. 500.

Under a general denial, evidence is inadmissible, that, at the request of plaintiff's husband, defendant had opened accounts with plaintiff's two sons and herself, but that all was really

purpose of giving notice of the nature of the defense.¹ So, in the absence of a statutory enactment, a general denial puts the partnership of the defendants in issue when it is a material allegation.² But, denying the execution of the instrument sued upon, does not deny the existence of a partnership between the obligors.³ Where title to a note is derived through the indorsement of a partnership or from a surviving partner, it is not necessary to set forth the names of the persons composing the firm.⁴ Each partner is at liberty to plead separately.⁵ But a defense made by one partner which is complete and goes to the whole consideration or execution of the claim, will inure to the benefit of the others.⁶ If a plea is required by statute to be under oath,

one account with her husband. *Field v. Knapp*, 108 N. Y. 87.

1. *Palmer v. Scott*, 68 Ala. 380; *Aultman v. Webber*, 4 Ill. App. 427; *Phaup v. Stratton*, 9 Gratt. (Va.) 615. *Cook v. Martin*, 5 Smed. & M. (Miss.) 379.

In the absence of such a statute, the contrary rule obtains. *Whitman v. Wood*, 6 Wis. 676.

A denial that the defendant was a partner is not sufficient under the statute. *Litchfield v. Daniels*, 1 Colo. 268; *Ferguson v. Wood*, 23 Tex. 177. But see to the contrary *Maritien v. Mannheim*, 80 Pa. St. 478.

The general issue is sufficient on a note made after dissolution and notice thereof. *Whitesides v. Lee*, 2 Ill. 548; *Kettelle v. Wardell*, 2 Ill. 592.

2. *Fowlkes v. Baldwin*, 2 Ala. 705; *Fetz v. Clark*, 7 Minn. 217.

An answer that the firm is dissolved is good; the mode of dissolution need not be stated. *Marlett v. Jackman*, 3 Allen. (Mass.) 287.

3. *Shufeldt v. Seymour*, 21 Ill. 524; *Geddes v. Adams*, 11 Gray (Mass.) 384; *Anable v. Conklin*, 25 N. Y. 470; *Fairchild v. Rushmore*, 8 Bosw. (N. Y.) 698. And see *Forepaugh v. Baker* (Pa. 1888), 13 Att. Rep. 465; *Porter v. Graves*, 104 U. S. 171.

A statute providing that no proof of partnership is necessary in a suit upon express or implied contracts, unless a sworn bill denying the execution of such writing is filed, does not apply to an oral contract. *Rogers v. Nuckolls*, 2 Colo. 281.

The rule of court, that a defendant, who intends to deny the signature of an instrument declared on, must file a written notice of such intention, applies to the case of a partner intending to deny the signature of the partnership

name by his co-partner, on the ground of a want of authority in him to sign the name. *Kendall v. Carland*, 5 Cush. (Mass.) 74.

4. *Smith v. Blatchford*, 2 Ind. 184; 52 Am. Dec. 504; *Cooper v. Drouillard*, 5 Blackf. (Ind.) 152; *Stout v. Hicks*, 5 Blackf. (Ind.) 49; *Childress v. Emory*, 8 Wheat. (U. S.) 642.

A right to sue must be made to appear however, whether by an assignment from the firm or as a surviving partner. *Frost v. Schackelford*, 57 Ga. 260.

In *Hubbell v. Skiles*, 16 Ind. 138, it was held that in an action brought by a surviving partner as such, he must show who composed the firm, even though the promise was made to the firm in its firm name.

5. *Plowman v. Riddle*, 7 Ala. 775; *Friend v. Duryee*, 17 Fla. 111; 35 Am. Rep. 89; *Wynne v. Millers*, 61 Ga. 343; *Machinist's Bank v. Krum*, 15 Iowa 49; *Walton v. Payne*, 18 Tex. 60.

In an action against co-partners, one partner can demur while the other answers the complaint upon the merits. *Allison Bros. Co. v. Hart*, 56 Hun (N. Y.) 282.

In an action against three as partners, the joint and several plea of *non est factum* by two is sufficiently verified by the affidavit of one of them. *Garner v. Simpson*, Minor (Ala.) 67.

6. *Fairchild v. Grand Gulf Bank*, 5 How. (Miss.) 597; *McRobert v. Crane*, 49 Mich. 483; *Pfau v. Lorain*, 1 Cin. Super. Ct. Rep. (Ohio) 73; *Smith v. Cropper*, L. R., 10 Ap. Cas. 249. And see *Vallandigham v. Duval*, 7 J. J. Marsh. (Ky.) 262.

In States where judgment cannot be taken against less than all of the defendants, who are partners, a denial of the partnership by some of them com-

whether it be the general issue or a special plea on the question of partnership, an unverified plea admits it.¹ It is never necessary to allege the authority or capacity of a partner to incur the obligation sued upon in behalf of the firm, as this is always matter of defense to be expressly alleged in the answer.²

1. Set-off.—Joint and separate debts or demands cannot, owing to the absence of mutuality, be set off against each other. Thus if a partner is indebted to an individual who is also indebted to the partnership, neither demand can be pleaded as a set-off to the other, whether the action be on the partnership, or on the individual demand,³ nor can a demand against a partnership and one

pels proof of partnership as to all. See *Yocam v. Benson*, 45 Ill. 435.

In an action against a firm on a note, if one verify his plea under oath, and the other omit to do so, the latter thereby admits that he was a member of the firm composed of himself and his co-defendant, and that the note was genuine, and the plaintiff is not bound to prove these facts as to him. *Stevenson v. Farnsworth*, 7 Ill. 715. But co-defendants are not entitled to any direct benefit from such affidavit. *Davis v. Scarritt*, 17 Ill. 202.

1. *Warren v. Chambers*, 12 Ill. 124; *Haywood v. Harmon*, 17 Ill. 477; *Parry v. Henderson*, 6 Blackf. (Ind.) 72; *Henshaw v. Root*, 60 Ind. 220; *Lobdell v. Merchants' etc. & Man. Bank*, 33 Mich. 408; *Jameson v. Franklin*, 6 How. (Miss.) 376; *Bradford v. Taylor*, 61 Tex. 508.

Under a statute providing that a signature is admitted, unless its genuineness is specifically denied, and where denial by one partner in an action on a note made by the firm admits the genuineness of the signature, his membership in the firm need not be proved. *Askins v. D'Este*, 133 Mass. 356.

Where a debt was contracted with a firm, and one of the partners sued for it in his individual name, declaring on it as a debt due to him, the defendant can avail himself of the fact of the debt having been contracted with the partnership only by plea supported by affidavit. *Anderson v. Tarpley*, 6 Smed. & M. (Miss.) 507.

2. *Vienne v. Harris*, 14 La. Ann. 383; *Carrier v. Cameron*, 31 Mich. 373; 18 Am. Rep. 192. See *Moffitt v. Roche*, 92 Ind. 96.

A Ratification of an unauthorized act relied upon by the plaintiff need not be alleged. *Johnson v. Bernheim*, 7 N. Car. 139. And see *Pattison v. Norris*, 29 Ind. 165.

Amendment.—In *Younglove v. Liebhart*, 13 Neb. 557, which was an action for services and money against a firm, an amendment was allowed changing the prayer to one for an accounting, the plaintiff being a partner. And in *Malbec de Montjoc v. Sperry*, 95 U. S. 401, a bill to wind up a partnership was treated as a bill for partition.

Where evidence as to the disposition of fixtures is not admissible under a complaint in an action for an accounting between partners, which alleges only a conversion by defendant of a stock of goods, upon a new trial an amendment should be allowed which will bring into the accounting all the partnership effects, in order to arrive at a fair adjustment of the partnership matters. *Chalmers v. Chalmers*, 81 Cal. 81.

A plaintiff, who commences an action against a firm, on a note given in the partnership name by one of its members, partly for his private debt and partly for a debt of the firm, may amend his declaration by filing new counts that embrace only the debt due from the firm, and may recover that debt on such new counts. *Barker v. Burgess*, 3 Met. (Mass.) 273.

Matter of Defense.—Failure to allege compliance with Civil Code *California*, §§ 2466, 2468, requiring partnerships doing business under a fictitious name to file a certificate giving the names of the partners under a penalty of incapacity to sue, will not make a complaint by such partnership demurrable, non-compliance with the law is matter of defense. *Phillips v. Goldtree*, 74 Cal. 151; *Phillips v. Goldtree* (Cal. 1887.), 15 Pac. Rep. 451.

3. *Thomas v. Adams*, 2 Port. (Ala.) 188; *Jones v. Blair*, 57 Ala. 457; *Watts v. Sayre*, 76 Ala. 397; *Gray v. Badgett*, 5 Ark. 16; *Collins v. Butler*, 14 Cal. 223; *Ingals v. Plumptre*, 10 Colo. 535;

in favor of a partner against the partnership creditor be set off against each other, whether in an action by the partner, or by the creditor against the partnership.¹ The actual and not the apparent status of the claims, however, will control, and if the demands are really mutual, though not ostensibly so, the set-off will be made,² and an express assent by the other partners may render their claim available as a set-off without an actual assign-

Francis *v.* Rand, 7 Conn. 221; Meeker *v.* Thompson, 43 Conn. 77; Gregg *v.* Janes, 1 Ill. 143; 12 Am. Dec. 151; International Bank *v.* Jones, 119 Ill. 407; Dawson *v.* Wilson, 55 Ind. 216; Bourne *v.* Wooldridge, 10 B. Mon. (Ky.) 492; Warder *v.* Newdigate, 11 B. Mon. (Ky.) 174; Key *v.* Box, 14 La. Ann. 502; Stevens *v.* Lunt, 19 Me. 70; Emerson *v.* Baylies, 19 Pick. (Mass.) 55; Williams *v.* Brimhall, 13 Gray (Mass.) 462; Howe *v.* Snow, 3 Allen (Mass.) 111; Brackett *v.* Sears, 15 Mich. 244; Weil *v.* Jones, 70 Mo. 560; Payne *v.* O'Shea, 84 Mo. 129; Ladue *v.* Hart, 4 Wend. (N. Y.) 583; Campbell *v.* Genet, 2 Hilt. (N. Y.) 290; McKenna *v.* Bolger (Supreme Ct.), 1 N. Y. Supp. 651; Walker *v.* Eyth, 25 Pa. St. 216; Wrenshall *v.* Cook, 7 Watts (Pa.) 464; Powrie *v.* Fletcher, 2 Bay (S. Car.) 146; Lovel *v.* Whitridge, 1 McCord (S. Car.) 7; Ward *v.* Newell, 37 Tex. 261; Scott *v.* Trent, 1 Wash. (Va.) 77; Pegg *v.* Plank, 3 Up. Can. C. P. 396. And see Daniel *v.* Wall, 80 Ga. 218.

That both claims have been reduced to judgment is immaterial. Francis *v.* Rand, 7 Conn. 221; Watts *v.* Sayre, 76 Ala. 397.

Statutory provisions that mutual debts between plaintiffs or either of them and defendants or either of them may be set off against each other do not apply, as the debts are not mutual. Meeker *v.* Thompson, 43 Conn. 77. And see Gregg *v.* James, 1 Ill. 143; 12 Am. Dec. 151.

If the members of a voluntary trading association have voted to close its business and divide its property among themselves, and the property on hand has accordingly been divided into separate parts, one for each share, but the affairs of the company are not adjusted, and debts remain due to and from it, the claim of one of the members for his part of the property is not a proper subject of set-off, in an action upon a note given by him to the treasurer of the company. Fargo *v.* Saunders, 4 Allen (Mass.) 378.

1. Trann *v.* Gorman, 9 Port. (Ala.)

456; Von Pheel *v.* Connally, 9 Port (Ala.) 452; Hoyt *v.* Murphy, 18 Ala. 316; Ingersoll *v.* Robinson, 35 Ala. 292; Duramus *v.* Harrison, 26 Ala. 326; Houston *v.* Brown, 23 Ark. 333; West *v.* Kendrick, 46 Ga. 526; Cooley *v.* Sears, 25 Ill. 501; Turk *v.* Nicholson, 30 Iowa 407; Jeffries *v.* Evans, 6 B. Mon. (Ky.) 119; Wilson *v.* Keedy, 8 Gill (Md.) 195; Reed *v.* Whitney, 7 Gray (Mass.) 533; Cockrell *v.* Thompson, 85 Mo. 510; Bowne *v.* Thompson, 1 N. J. L. 2; Williams *v.* Hamilton, 4 N. J. L. 250; Compton *v.* Green, 9 How. Pr. (N. Y.) 228; Cotton *v.* Evans, 1 Dev. & B. Eq. (N. Car.) 284; McDowell *v.* Tyson, 14 S. & R. (Pa.) 300; Kennedy *v.* Cunningham, Cheves (S. Car.) 50; Byrd *v.* Charles, 3 S. Car. 352; Ritchie *v.* Moore, 5 Muni. (Va.) 388; 7 Am. Dec. 688; Wilson *v.* Runkel, 38 Wis. 526. And see Jackson *v.* Clymer, 43 Pa. St. 79; Cunmer *v.* Butler, 45 Me. 434. But see to the contrary Jones *v.* Jones, 12 Ala. 244.

Where the debt of a partnership is joint and several by statute, as the creditor could have sued a single partner, he can set off his claim against the firm against the claim of a partner. See Allen *v.* Maddox, 40 Iowa 124; Donnell *v.* Portland etc. R. Co., 76 Me. 33; Barker *v.* Blake, 11 Mass. 16; Beauregard *v.* Case, 91 U. S. 134.

Where the statute makes debts on judgment, bond, covenant, or promise in writing joint and several, a person who is sued by a partner must allege his demand to be such a debt in order to set it off against the demand of the plaintiff. Ingersoll *v.* Robinson, 35 Ala. 292. See also Tucker *v.* Oxley, 5 Cranch (U. S.) 34.

2. See Bourne *v.* Wooldridge, 10 B. Mon. (Ky.) 492; Lamb *v.* Brolaski, 38 Me. 51; Miller *v.* Florer, 15 Ohio St. 148; Foot *v.* Ketchum, 15 Vt. 258; 40 Am. Dec. 268; Blake *v.* Langdon, 19 Vt. 485; 47 Am. Dec. 701; Evans *v.* Clover, 1 Grant's Cas. (Pa.) 164; Warren *v.* Burnham, 32 Fed. Rep. 579.

In a suit by B & Co. against M & Co., held, that the defendants might

ment.¹ So, set-off on behalf of a person who has dealt with an ostensible partner in ignorance of the existence of a dormant one, will be allowed to the same extent as though the ostensible partner had been the sole debtor or creditor.² Where the plaintiffs are a non-resident firm, the debtor has been allowed to set off his claim against a part of the partners,³ but the mere fact of the insolvency of a partner is not a ground upon which equity will allow a set-off.⁴

2. In Actions at Law between Partners.—The declaration or complaint in actions at law between partners for a balance, must show that such a settlement has been had, that the account is no longer a matter of controversy,⁵

plead in set-off a claim arising from a transaction between themselves, T & C and the plaintiffs; it appearing that T & C, although not named in the firm of M & Co., were connected with them as partners in that transaction, and also in the transaction which formed the basis of the plaintiff's claim. *Bird v. McCoy*, 22 Iowa, 549.

1. See *Dishori v. Schorr*, 19 Ill. 59; *Bates v. Halliday*, 3 Ind. 159; *Hartung v. Siccardi*, 3 E. D. Smith (N. Y.) 560; *Wrenshall v. Cook*, 7 Watts (Pa.) 464; *Tustin v. Cameron*, 5 Whart. (Pa.) 379; *Burke v. Maxwell*, 81 Pa. St. 139; *Montz v. Morris*, 89 Pa. St. 392.

All the partners having assented, the agreement is not executory, and it satisfies the debt due to the firm *pro tanto*, as an accord and satisfaction without formal release. *Davis v. Spencer*, 24 N. Y. 386.

An agreement made by two partners in consideration of a mortgage, to deduct their account with the mortgagor, does not include the right to set off subsequently incurred accounts against the individual members. *Brackett v. Sears*, 15 Mich. 244.

The assent of the co-partners to the appropriation of their demand to enable the defendant partner to use it as a set-off or its assignment to him is not available if made after the commencement of the action. *Jones v. Blair*, 57 Ala. 457; *Francis v. Rand*, 7 Conn. 221. But in *Wrenshall v. Cook*, 7 Watts (Pa.) 464, it was held that in case of a subsequent assent the costs must still fall upon the debtor partner, as he cannot by obtaining the assent throw them upon the plaintiff.

2. *Lord v. Baldwin*, 6 Pick. (Mass.) 348; *Emerson v. Baylies*, 19 Pick. (Mass.) 55; *Chandler v. Drew*, 6 N. H. 469;

Beach v. Hayward, 10 Ohio 455; *Lapham v. Green*, 9 Vt. 407; *Bryant v. Clifford*, 27 Vt. 664. And see *Wise v. Copley*, 36 Ga. 508; *Lamb v. Bro-laski*, 38 Mo. 51; *Otis v. Adams*, 41 Me. 258; *Dob v. Halsey*, 16 John. (N. Y.) 34; 8 Am. Dec. 293; *Sloan v. McDowell*, 71 N. Car. 356.

In States where a promise to one person for the benefit of another can be sued upon by the latter if one partner assumes all the debt on dissolution, a creditor of the firm may treat his claim as the separate debt of such partner and set it off against his demand, though he was not a party to the agreement. *Hoyt v. Murphy*, 18 Ala. 316.

Where A, the partner of B, assigned all his interest in the partnership effects to B, with power to settle and compromise, it was held that B might set off a debt due to the firm against a debt due by himself alone. *Craig v. Henderson*, 2 Pa. St. 261.

3. *Radcliffe v. Varner*, 55 Ga. 427; *Wallenstein v. Seligman*, 7 Bush (Ky.) 175.

4. *Watts v. Sayre*, 76 Ala. 397; *Collins v. Butler*, 14 Cal. 223; *Williams v. Brimhall*, 13 Gray (Mass.) 462; *Howe v. Snow*, 3 Allen (Mass.) 111; *Contra*, *Wrenshall v. Cook*, 7 Watts (Pa.) 464; *Sloan v. McDowell*, 71 N. Car. 356.

Nor is the mere fact of the insolvency of an individual debtor. *Jefferies v. Evans*, 6 B. Mon. (Ky.) 119. But see *Warren v. Burnham*, 32 Fed. Rep. 579.

5. *Wycoff v. Purnell*, 10 Iowa, 332.

An action for a balance is not supported by evidence of a promise to pay a certain sum if the plaintiff will leave the firm. *Crawford v. Thoroughman*, 13 Mo. App. 579. Nor by evidence that a defendant had sold

and that the subject-matter of action was a partnership contract.¹

3. In Actions for an Accounting.—The transaction of business as partners, the dissolution of the partnership, or facts entitling the complainant to a dissolution, unsettled accounts and a prayer for dissolution, if none has been had, and an accounting, are the necessary facts to be stated in a bill for an accounting, and, without which it would be demurrable.² It is not necessary to allege an indebtedness to the complainant, or that the defendant has possession of any of the assets or has any accounts to render, as the complainant is entitled to an accounting in any event and to charge the defendant with his share of any deficit which may exist,³ and an averment of willingness to do equity or to account for assets on the part of the complainant, is unnecessary, as it is

out to the plaintiff. *Whitney v. Pur-
rington*, 59 Cal. 36.

A special demand for the payment of a balance need not be alleged or proved. *Robinson v. Williams*, 8 Met. (Mass.) 454.

A complaint by partners against a co-partner, for contribution to the payment of a partnership debt paid by plaintiffs after dissolution, need not allege an express promise by defendant to pay his proportionate part. *Sears v. Starbird*, 78 Cal. 225.

1. *Bean v. Gregg*, 7 Colo. 499; *Ozeas v. Johnson*, 4 Dall. (U. S.) 434; *O'Connor v. Coats*, 79 Ind. 596. And see *Mann v. Bowen*, 85 Ga. 616.

It has been held, however, that if no objection is taken to the omission to allege or prove a final balance struck, until after judgment, it is waived. See *Smith v. Allen*, 18 Johns. (N. Y.) 245; *Williamson v. Haycock*, 11 Iowa, 40; *Whetstone v. Shaw*, 70 Mo. 575; *Tolford v. Tolford*, 44 Wis. 547.

Under a complaint which charges the transfer of property in fraud of creditors generally, but does not allege a partnership, nor that the demand of the plaintiff arose out of a partnership transaction, no question of priority of right between partnership and individual creditors can arise. *O'Connor v. Coates*, 79 Ind. 597.

2. *Young v. Pearson*, 1 Cal. 448; *Glover v. Hembree*, 82 Ala. 324; *Carlin v. Donegan*, 15 Kan. 495; *Ludington v. Taft*, 10 Barb. (N. Y.) 447; *Bracken v. Kennedy*, 4 Ill. 558; *Holladay v. Elliott*, 3 Oregon 340; *Dehority v. Nelson*, 56 Ind. 414; *Nims v. Nims*, 23 Fla. 69; *Congdon v. Aylsworth*, 16 R. I. 281; *Stern v. Harris*, 40 Minn. 209; and see *Bell v. Merrifield*,

109 N. Y. 202; *Whitney v. Cotten*, 53 Miss. 689; *Jones v. Smith*, 30 S. Car. 527.

Transactions of one partner outside the scope of the partnership business must be alleged either to be in fraud of the firm or mutually agreed upon in order to found a decree in favor of the other partner for an accounting in regard to them. *Drew v. Beard*, 107 Mass. 64.

In *Little v. Snedecor*, 52 Ala. 167, it was held that the partnership contract should be set out to enable the court to see whether there was a partnership and whether land was partnership property. See also *Groves v. Tallman*, 8 Nev. 178.

In *Cooper v. Frederick*, 4 Greene (Iowa) 403, it was held that the amount of capital, method of carrying on the business, and the facts and circumstances entitling the plaintiff to recover should appear.

The fact that the defendant has all the books and papers in his possession appearing in the complainant's pleadings, will relieve him of a degree of certainty and particularity in proof that would be required if he had access to them. *Towle v. Pierce*, 12 Met. (Mass.) 329; 46 Am. Dec. 679.

3. See *Kimble v. Seal*, 92 Ind. 276; *Carlin v. Donegan*, 15 Kan. 495; *Hunt v. Gorden*, 52 Miss. 194; *Sharp v. Hibbins*, 42 N. J. Eq. 543; *Cheeseman v. Wiggins*, 1 Thomp. & C. (N. Y.) 595.

The omission of items in the bill or answer is immaterial as relief will extend to a full accounting of the entire concern. *Copeland v. Crane*, 9 Pick. (Mass.) 73; *Tyng v. Thayer*, 8 Allen, (Mass.) 391, and see *Tennant v. Guy*, (Supreme Ct.), 3 N. Y. Supp. 697.

presumed;¹ but the defendants must be alleged to be members of the partnership, merely stating that they have an interest in the assets not being sufficient.²

Nor is a cross-bill necessary to enable a defendant to obtain an account or recover a balance due him,³ though a defendant may set out reasons in addition to those charged in the bill for desiring a dissolution and account.⁴

The prayer for relief should, in substance, demand an accounting.⁵ The absence of a prayer for dissolution is immaterial

A variance between the allegations of a bill and the proof with regard to the proportions of the partners is immaterial. *Knott v. Knott*, 6 Oregon 142.

In *Emerson v. Durand*, 64 Wis. 411, where the complainant sued his co-partner as executor, alleging that his capital was held in the capacity of executor, but in fact belonged to his daughters, the court wound up the partnership without requiring an amendment, though the defendant and his daughters denied and disproved such allegations.

1. *Craig v. Chandler*, 6 Colo. 543; *Smith v. Hazelton*, 34 Ind. 481; *Columbian Government v. Rothschild*, 1 Sim. 94.

2. *Ruffner v. Hewitt*, 14 W. Va. 737.

Demand for Liquidator's Account.—In an action by one partner against another, praying for a full and final settlement of the partnership affairs, a demand that the defendant, who had been left in charge as liquidator after the dissolution, file an account is only incidental to and not inconsistent with the main demand. *Thompson v. Walker*, 39 La. Ann. 892.

3. *Saunders v. Wood*, 15 Ark. 24; *Craig v. Chandler*, 6 Colo. 543; *Atkinson v. Cash*, 79 Ill. 53; *Felder v. Wall*, 26 Miss. 595; *Johnson v. Buttler*, 31 N. J. Eq. 35; *Scott v. Pinkerton*, 3 Edw. Ch. (N. Y.) 70; *Boyd v. Foot*, 5 Bosw. (N. Y.) 110. See *Congdon v. Aylsworth*, 16 R. I. 281.

Allegations in the bill are necessary, however, to compel a partner to account for a fraudulent use of assets, for failure of duty, or unauthorized acts. *Maher v. Bull*, 44 Ill. 97; *Levi v. Karrick*, 13 Iowa 344.

In a suit for an account of an alleged partnership, a plea denying the partnership must be supported by an answer and discovery as to every circumstance charged in the bill as evidence of the partnership, or the plea will be bad.

Everit v. Watts, 10 Paige (N. Y.) 82; 3 Edw. (N. Y.) 468.

4. *Griswold v. Hill*, 1 Paine (U. S.) 483.

An answer admitting the partnership and alleging additional terms in it, is not to be treated as a statement of an independent fact not responsive to the bill, but as a part of the facts set out in the bill. *Cresson's Appeal*, 91 Pa. St. 168.

A cross-complaint, to withstand a demurrer for want of facts, must, like a complaint, state facts sufficient to constitute a cause of action; and, in an action by a member of a firm against his partner, a cross-complaint asking a dissolution and the appointment of a receiver, which alleged, in substance, only that the firm was largely indebted and was not making money, showed no ground for relief. *Shoemaker v. Smith*, 74 Ind. 71.

A petition alleging a partnership in two railroad contracts and debts amounting to \$2,000, is not admitted as to the debts by an answer not denying the debt but denying plaintiff to be a partner in the second contract, the assertion of debt being dependent on the extent of the interest claimed. *Williams v. Hayes*, 20 N. Y. 58.

5. *Miller v. Lord*, 11 Pick. (Mass.) 11; *Pope v. Salsman*, 35 Mo. 362. And see *Bennett v. Woolfolk*, 15 Ga. 213; *Burleigh v. White*, 70 Me. 130.

The mere prayer for a dissolution has been held to be sufficient on the ground that an accounting follows as a matter of course. *Cottle v. Leitch*, 35 Cal. 434.

In *Ingraham v. Foster*, 31 Ala. 123, it was held that an amended bill asking for an accounting to the present time, and averring a sale of complainant's interest to be merely as security and not absolute, filed after a bill for an accounting to the date of the sale, was not inconsistent but merely enlarged the measure of relief asked for.

if both parties treat the partnership as at an end;¹ or, if grounds for a dissolution are set forth and an account or general relief asked for,² a sale will be ordered as part of the accounting without a specific prayer for it.³

XXX. EVIDENCE OF PARTNERSHIP—1. As Between the Partners or in Actions Between Themselves.—Where the question of partnership arises in a contest between partners and the interests of no third persons are involved, much stronger proof is required to establish it than when the question arises as between the alleged partners and third persons.⁴ A partnership being the result of an agreement between the parties, however, may be established by any competent evidence of such an agreement.⁵ Thus if the agreement was embodied in a writing it must be produced or its absence accounted for.⁶ If not in writing it may be proved by parol.⁷

1. *Fairchild v. Valentine*, 7 Robt. (N. Y.) 564.

But in *Edwards v. Remington*, 60 Wis. 33, where the complainant alleged that, on dissolution, the debts and assets were apportioned among the partners, but that he had since paid more than his share, and that the debts exceeded the estimate, the court said that if it had been shown that there was no settlement, the action must have failed, for neither the complainant nor the defendant had asked a general accounting but only an accounting to carry out the settlement.

2. *Hall v. Lonkey*, 57 Cal. 80; *Werner v. Leisen*, 31 Wis. 169; *Medwin v. Ditcham*, 47 L. T., N. S. 250; *Fairthorne v. Weston*, 3 Hare 387.

A prayer for an account of moneys received by defendant and of all other matters relating to the concern, is equivalent to a prayer for general relief. *Miller v. Lord*, 11 Pick. (Mass.) 11.

In *Harrison v. Farrington*, 36 N. J. Eq. 107, it was held that a bill of an administrator asking for an accounting and alleging fraud in the omission of items in an account rendered by the defendant, was not multifarious in asking an accounting a surcharging an account.

3. *Lyman v. Lyman*, 2 Paine (U. S.) 11.

4. *Chisholm v. Cowles*, 42 Ala. 179; *Robinson v. Green*, 5 Harr. (Del.) 115; *McMullan v. Mackenzie*, 2 Greene (Iowa) 368; *Smith v. Walker*, 57 Mich. 456; *Field v. Tenney*, 47 N. H. 513; *Kelly v. Devlin*, 47 N. Y. (Super. Ct.) 555; and see *Osborne v. Fitzgerald*, 26 Neb. 514; *Gates v. Watt*, 127 Pa. St. 20; *Breckenridge's Appeal*, 127 Pa. St. 81.

The burden of proof of the existence of a partnership is on the complainant. *Gatewood v. Bolton*, 48 Mo 78; *Atwater v. Colton*, 18 La. Ann. 226.

5. 2 Greenleaf on Ev., § 481. And see *Bush v. Bush*, 89 Mo. 360.

Evidence of a lack of means on the part of the partner alleging the partnership, does not tend to disprove it. *Howard v. Patrick*, 43 Mich. 121.

That the partners put their articles of partnership in another business in writing, creates no presumption against a partnership in the business in question, and the failure to claim a share in the profits when there is a prospect of realizing largely, does not tend to disprove it. *Randel v. Yates*, 48 Miss. 685.

6. *Chisholm v. Cowles*, 42 Ala. 179; *Campbell v. Moore*, 3 Wis. 767. And see *Freese v. Ideson*, 49 Ill. 191; *Bonnaffe v. Fenner*, 6 Smed. & M. (Miss.) 212.

An unsigned paper proved to embody the conversations between the parties is admissible as evidence of the terms of their arrangement, the testimony being conflicting as to whether or not there was a partnership. *Denton v. Erwin*, 6 La. Ann. 317; *Eager v. Crawford*, 76 N. Y. 97. But if such paper did not constitute a final adjustment of the terms of the partnership, it would be inadmissible. *Tweed v. Lowe*, 1 Ariz. 488.

Letters between partners showing their understanding of the terms of an oral agreement between them cannot be introduced in evidence to vary the terms of a subsequent written agreement. *Burgess v. Badger*, 124 Ill. 288.

7. *Randall v. Yates*, 48 Miss. 685; and see *Banchor v. Cilley*, 38 Me. 553; *Fairchild v. Fairchild*, 64 N. Y. 471;

And for this purpose the conduct and declarations of the parties¹ and entries in the firm books are competent evidence.² But hearsay evidence is not admissible.³ Nor are the declarations and acts of a party in his own favor.⁴ And proof of holding out is not sufficient as between themselves.⁵

As between the parties, equity allows the admission of parol evidence of the course of business and conduct of the partners for the purpose of showing the practical construction they have put on the articles or even of inferring that they have abandoned disused provisions.⁶ If the existence of the partnership is denied the burden of proof rests with the party alleging it.⁷

Smith v. Burnham, 3 Sumn. (U. S.) 435.

That a partnership was to continue more than a year, does not render parol evidence inadmissible, if the contract was not evidenced by writing. Smith v. Tarlton, 2 Barb. Ch. (N. Y.) 336.

An oral acceptance of an offer of partnership without payment of money or change in business, is not conclusive. Hutchins v. Buckner, 3 Mo. App. 595.

1. Seabury & Johnson v. Bolles (N. J. 1888), 16 Atl. Rep. 54; Shelmire's Appeal, 70 Pa. St. 281; Clonan v. Thornton, 21 Minn. 380; McCall v. Moschowitz, 14 Daly (N. Y.) 16; Soules v. Burton, 36 Vt. 652; and see Martin v. Ehrenfels, 24 Ill. 187; Pierce v. Whitley, 39 Ala. 172; Ratzer v. Ratzer, 28 N. J. Eq. 136.

Loose and casual remarks are not sufficient proof as between themselves. Wakler v. Matthews, 58 Ill. 196.

A mere series of transactions by which one person selects lands and another pays for them, and they divide the profits on a re-sale, does not alone prove a partnership as between themselves. Wells v. Babcock, 56 Mich. 276.

2. Frick v. Barbour, 64 Pa. St. 120; Hale v. Brennan, 23 Cal. 511; Howard v. Patrick, 38 Mich. 795.

To prove a partnership, the partnership books alone are not competent evidence, but in connection with evidence tending to prove partnership, and access to, and knowledge of them, the books are competent. Bryce v. Joynt, 63 Cal. 375; 49 Am. Rep. 94.

The books of a firm may be given in evidence to fortify or discredit a witness who swears to the partnership. Moyes v. Brumaux, 3 Yates (Pa.) 30.

3. See Boulton v. First Nat. Bank, 46 Iowa 273.

Former Partnership.—In an action for the dissolution of an alleged partnership between the plaintiff's decedent and defendants, where the existence of the partnership is denied by defendants, they cannot give evidence of a prior partnership between the plaintiff and one of them, and of a loss resulting therefrom. McCall v. Moschowitz, 14 Daly (N. Y.) 16.

4. See Bond v. Nave, 62 Ind. 505; Gay v. Fretwell, 9 Wis. 186; Dawson v. Pogue, 18 Oregon 94.

Opinion of Parties.—As parties may become partners without their knowing it, the relation resulting from the terms they have used in their contract or from the nature of the undertaking, they should not be permitted to testify as to whether they regarded each other as partners. Lintner v. Millikin, 47 Ill. 178.

5. Bennett v. Dean, 35 Mich. 306. And see Brown v. Grant, 39 Minn. 404.

6. Story on Part. 326, § 192.

Where articles of partnership were prepared, but one of the parties substituted his son's name for his own for purposes of concealment, the father acting as the real partner, a son's suit for an accounting will be dismissed, but an accounting will be granted on cross-bill to the defendant against the father. Watson v. Lovelace, 49 Iowa 558.

7. Gatewood v. Bolton, 48 Mo. 78; Kennedy v. Hall, 68 Ill. 165; King v. Haines, 23 Ill. 280; Rugley v. Gill, 15 La. Ann. 509.

Where goods are sold to a firm of which defendant is a partner, in a suit against him individually on an account stated, when plaintiffs show a partnership *prima facie*, the burden is on defendant to show that it is a corporation, and not a partnership. Clark v. Jones, 87 Ala. 474.

The onus is on a defendant partner

2. Proof by Alleged Partners of Their Own Partnership.—Partners have the means of proving their own partnership, and where the fact is material they will be held to strict proof.¹ The question being in such case who were the contracting parties, while in case of an alleged partnership between third parties it is as to whom the opposite party had a right to treat as partners.² The partnership may be shown, however, by proof, that the parties conducted their business publicly as partners, and the evidence of a partner or of clerks, agents or persons who knew them and their business is competent;³ and partnership may be proved even in favor of the partners by the acts and declarations of all the partners.⁴

The articles of co-partnership are admissible.⁵ But they need not be produced even though shown to exist unless some question is raised as to their contents or scope.⁶ A contract with a partnership in its firm name estops the other contracting party to deny the existence of the firm;⁷ but the partners must estab-

to prove his discharge from liability for the debts of the firm. *Hall v. Long*, 56 Ala. 493; *Zachary v. Phillips*, 101 N. Car. 571.

1. *McGregor v. Cleveland*, 5 Wend. (N. Y.) 477.

As to proving partnership under foreign law, see *Barrows v. Downs*, 9 R. I. 446; 11 Am. Rep. 283.

An action against the executors of a deceased partner and the surviving partner, in which the complaint alleged that they constituted a firm for the continuance of the business, and that the debt sued for was contracted by them, was properly dismissed where there was no evidence, other than a clause in the original partnership agreement that the business should be "continued by the survivor," that defendants were in partnership. *Butcher v. Hepworth*, 115 N. Y. 328.

2. See *Chisholm v. Cowles*, 42 Ala. 179; *Holmes v. Porter*, 39 Me. 157; *McGregor v. Cleveland*, 5 Wend. (N. Y.) 477; *Robinson v. Green*, 5 Harr. (Del.) 115; *Campbell v. Hood*, 6 Mo. 211; *Woods v. Quarles*, 10 Mo. 170.

3. *Gilbert v. Whidden*, 20 Me. 367; *Hadden v. Shortridge*, 27 Mich. 212; *McCarthy v. Nash*, 14 Minn. 127; *Gates v. Mauny*, 14 Minn. 21; *Lockridge v. Wilson*, 7 Mo. 560; *Field v. Tenny*, 47 N. H. 513; *Rich v. Flanders*, 39 N. H. 304; *McGregor v. Cleveland*, 5 Wend. (N. Y.) 477; *Forbes v. Davison*, 11 Vt. 660; *Alderson v. Clay*, 1 Stark 405.

A witness who testifies directly to

the fact of partnership is subject, of course, to cross-examination as to the details. *McGrew v. Walker*, 17 Ala. 824.

4. *Gilbert v. Whiddon*, 20 Me. 368; *Woods v. Quarles*, 10 Mo. 170; *Clark v. Huffaker*, 26 Mo. 264; *Galway v. Nordlinger* (Supreme Ct.), 4 N. Y. Supp. 649. But see *Lockridge v. Wilson*, 7 Mo. 560.

In an action to foreclose a lien claimed by plaintiff, against moneys retained by the city of New York under a contract to build a sewer between it and defendant, where it is claimed by the answer that plaintiff was defendant's co-partner in the contract, it is proper to show that plaintiff assisted in making the calculations upon which the bid for the contract was made, and that the work was carried on the same as if done under other contracts held by the parties as co-partners. *Healy v. Clark*, 120 N. Y. 642.

5. *Guice v. Thornton*, 76 Ala. 466; *Dix v. Otis*, 5 Pick. (Mass.) 38; *Hunn v. McKee*, 4 Ired. (N. Car.) 475.

But under a plea that two others were partners, and should have been joined with the defendants, articles showing that one only was a partner are not admissible evidence. *Kayser v. Sichel*, 34 Barb. (N. Y.) 84. And see *Solomon v. Creech*, 82 Ga. 445.

6. *Gray v. Gibson*, 6 Mich. 300; *Field v. Tenny*, 47 N. H. 513.

7. *Repley v. Colby*, 23 N. H. 438; *Griener v. Ulerey*, 20 Iowa 266; *Gor-*

lish their membership in the firm in order to render the contract admissible in evidence.¹ A third person representing the interest of the partner may resort to the same kind of proof of partnership as an actual partner.²

In order to disprove an alleged partnership the declarations of the parties alleged to compose it are inadmissible.³ Nor can a party rebut his own admissions or acts tending to show that he was a partner by proof of other acts or declarations not a part of the admissions formerly made.⁴ The declarations and admissions of a known and admitted partner, however, are competent to show that a third person is not a member of the firm,⁵ but declarations of third persons are not admissible.⁶

don v. Janney, Morris (Iowa) 182; Bissel v. Hobbs, 6 Blackf. (Ind.) 479; Whiting v. Leakin, 66 Md. 255.

Merely using the abbreviated name to describe payees in a note, as Chas. and Wm. Feichert, does not show a firm. Rhyner v. Feickert, 92 Ill. 305; 34 Am. Rep. 130.

1. Lee v. Hardgrave, 3 Mich. 77; McGregor v. Cleveland, 5 Wend. (N. Y.) 477; Barnes v. Elmbinger, 1 Wis. 56.

2. See McCarthy v. Nash, 14 Minn. 127; Price v. Hunt, 59 Mo. 258.

In Hake v. Buell, 50 Mich. 89, in an action by the assignee for the benefit of creditors, where the question was whether the defendant had acquired title to certain goods, he claiming them under a transfer from a person who he alleged to be a partner of the insolvent, it was held that the fact that such person had signed business notes or bonds as a partner was competent evidence.

3. Phillips v. Purington, 15 Me. 425; Danforth v. Carter, 4 Iowa 230; Champlin v. Tilley, 3 Day (Conn.) 303; Clark v. Huffaker, 26 Mo. 264; Young v. Smith, 25 Mo. 341; England v. Burt, 4 Humph. (Tenn.) 399; Carlyle v. Plumer, 11 Wis. 96. But see Rabby v. O'Grady, 33 Ala. 255.

A partner cannot use the declarations of the other partners to show that after an execution of the articles the partnership had been abandoned. Stoddart v. McMahan, 35 Tex. 267.

In Carmichael v. Greer, 55 Ga. 116, where it was sought to bind the defendant as a partner by holding out, evidence that his co-partner had on other occasions signed the firm name in outside transactions, was rejected.

4. Hunt v. Roylance, 11 Cush. (Mass.) 117; Sager v. Tupper, 38

Mich. 258; Johnston v. Warden, 3 Watts (Pa.) 101; Stoddart v. McMahan, 35 Tex. 267.

But in an alleged partnership relating to the nursery business, it appearing that B had carried on a nursery on a portion of the defendant's land, an agreement with regard to the land occupied by B is admissible to show that B was merely the tenant of the defendant, and that the relation of actual partnership did not exist between them. Fletcher v. Pullen, 70 Md. 205.

5. Cregler v. Durham, 9 Ind. 375; Humes v. O'Bryan, 74 Ala. 64; Robinson v. Haas, 40 Cal. 474; Williams v. Soutter, 7 Iowa 435; Danforth v. Carter, 4 Iowa 230. And see Reid v. Barnhart, 1 Jones Eq. (N. Car.) 142.

In Sager v. Tupper, 38 Mich. 258, evidence was given that a party had assumed to give directions and orders about the mill, in order to establish his partnership, and he was allowed to rebut it by showing that others confessedly not partners had given like directions.

In Brigham v. Clark, 100 Mass. 430, A was sued on a note signed B & Co., and denied that he was a member of the firm. B testified that B & Co. was the name of the partnership between himself and A. It was held that A could show that B signed B & Co. to notes not claimed to be of the partnership, thus tending to show that there was no partnership but that B used that name in his private business.

6. See McNamara v. Dratt, 33 Iowa, 385; Cook v. Slate Co., 36 Ohio St. 135; 38 Am. Rep. 568.

So the declarations of a partner, not a party to the suit, are not competent evidence of a partnership. Martin v. Kaffroth, 16 S. & R. (Pa.) 120.

3. Proof of the Partnership of Third Persons.—If a party is required to establish a partnership between third persons, while it may be proved in the same manner as a partnership is proved between the partners themselves,¹ as the adverse party has not the same means of knowledge he is not to be held to the same strictness of proof as in establishing his own partnership.² Thus the proof may be by parol, even though there are written articles.³ And a partnership may be shown by the separate admissions, acts, declarations or conduct of the parties or by the acts of one, the declarations of another and the acknowledgment or consent of the third.⁴

1. *Widdifield v. Widdifield*, 2 Binn. (Pa.) 245; *Gilpin v. Temple*, 4 Harr. (Del.) 190; *Kelleher v. Tisdale*, 23 Ill. 354. And see *Shoenberger v. Hackman*, 37 Pa. St. 87; *Janney v. Springer*, 78 Iowa, 617; *Price v. Hunt*, 59 Mo. 258.

The names of the members must be proved, but slight evidence is necessary, however, to go to the jury. *Varnum v. Campbell*, 1 McLean (U. S.) 13; and if a witness cannot recollect the names a list may be read to him and he may be asked whether those persons are members. *Acerro v. Petroni*, 1 Stark 1.

2. See *McGregor v. Cleveland*, 5 Wend. (N. Y.) 477; *Drake v. Elevyn*, 1 Cai. (N. Y.) 184; *Beach v. Vandewater*, 1 Sandf. (N. Y.) 265; *Quincey v. Young*, 5 Daly (N. Y.) 327.

The usual rule, however, as to the inadmissibility of evidence not tending to support the issues is applicable. See *Smith v. Edwards*, 2 Har. & G. (Md.) 411; *Grafton Bank v. Moore*, 13 N. H. 99; 38 Am. Dec. 478; *Thomas v. Moore*, 71 Pa. St. 193.

Testimony that a person intermeddled with the partnership business in general terms and without proof of specific acts is inadmissible. *Lewis v. Post*, 1 Ala. 65.

That a person furnished a house with goods, does not show that he is a dormant partner in the business carried on in it. *Osborne v. Brennan*, 2 Nott & M. (S. Car.) 427; 10 Am. Dec. 614. See also *Sculthorpe v. Bates*, 2 Up. Can., Q. B. 318.

That the credit of a member was very bad before a firm was formed, does not tend to prove that another had become his partner. *Dutton v. Woodman*, 9 Cush. (Mass.) 255; 57 Am. Dec. 46.

That A had advanced money to B, his partner, to invest in cattle, and B not needing all, A told him to invest it in something that will pay, and not let

it be idle, is not sufficient to show that A was a partner in crops raised by B upon land rented in his own name with the money advanced him by A. *Brown v. O'Brien*, 4 Neb. 195.

Certificate of Partnership.—In an action against a company or partnership composed of persons whose names are given in the petition, the certificate of partnership, as shown by the records of the county, is admissible to show the names of the members of such firm or partnership. *Milligan v. Butcher*, 23 Neb. 683.

3. *Griffin v. Doe*, 12 Ala. 783; *Kaskia Bridge Co. v. Shannon*, 6 Ill. 15; *Rogers v. Suttle*, 19 Ill. App. 163; *Henshaw v. Root*, 60 Ind. 220; *Bryer v. Weston*, 16 Me. 261; *McEvoy v. Bock*, 37 Minn. 402; *Campbell v. Hood*, 6 Mo. 211; *Wolle v. Brown*, 4 Whart. (Pa.) 365; *Stearns v. Haven*, 14 Vt. 540; *Cutler v. Thomas*, 25 Vt. 73; *Plano Mfg. Co. v. Frawley*, 68 Wis. 577; *Widdifield v. Widdifield*, 2 Bin. (U. S.) 245. And see *Butcher v. Hepworth*, 115 N. Y. 328.

If notice to produce their original articles of co-partnership acknowledged to exist has been served upon the opposite parties and they refuse to produce them, the jury is justified in assuming that a partnership would be shown by them. *Whitney v. Stern*, 14 Johns. (N. Y.) 215. And see *Bogart v. Brown*, 5 Pick. (Mass.) 18.

Even though the articles do not establish a partnership, it may be proven by parol evidence. *Manhattan Brass Mfg. Co. v. Sears*, 1 Sweeney (N. Y.) 426.

4. *Barcroft v. Haworth*, 29 Iowa 462; *Welsh v. Speakman*, 8 W. & S. (Pa.) 257; *Johnston v. Warden*, 3 Watts, (Pa.) 101. And see *Smith v. Cisson*, 1 Colo. 29; *McFarland v. Lewis*, 3 Ill. 344; *Demarest v. Flack*,

The use of a firm name when proved to have been by the assent of the party denying his connection with the firm is an admission of partnership.¹ But such an admission is not admissible unless such person is shown to have been a party to the use of the name.² And entries in partnership books with reference to partnership are not binding upon persons who have no knowledge of or access to them.³ So, the admissions or declarations of one

11 N. Y. Supp. 83; *McLellan v. Penneil*, 52 Me. 402; *Vance v. Funk*, 3 Ill. 263; *Callender v. Sweat*, 14 Vt. 160.

It is competent to show in order to establish that T was a dormant partner of B, and therefore liable for goods sold, that the year before he made offers to go into partnership with others in their names, stating that he had done business before in the names of others, because he was in debt and wanted to keep his property secure from attachment, as this tends to show a purpose to do business in another's name. *Butts v. Tiffany*, 21 Pick. (Mass.) 95.

The admission of an agent of the opposite party is not sufficient to establish partnership. *Campbell v. Hastings*, 29 Ark. 512.

The admission of a firm's attorney, however, in receipting for the proceeds of an action brought by the firm, would be sufficient. *Currier v. Sillo-way*, 1 Allen (Mass.) 19.

1. *McNeill v. Reynolds*, 9 Ala. 313; *Cook v. Frederick*, 77 Ind. 406; *Uhl v. Harvey*, 78 Ind. 26; *Tumlin v. Goldsmith*, 40 Ga. 221; *Barnett Line of Steamers v. Blackman*, 53 Ga. 98; *Whiting v. Leakin*, 66 Md. 255; *Crowell v. Western Reserve Bank*, 3 Ohio St. 406; *Williams v. Rogers*, 14 Bush (Ky.) 776; *Case v. Baldwin*, 136 Mass. 90; *Priest v. Chouteau*, 12 Mo. App. 252; *Drennen v. House*, 41 Pa. St. 30; *Farmers' Bank v. Smith*, 26 W. Va. 541; *Wallace v. Fleischman*, 22 Neb. 203. And see *Fletcher v. Pullen*, 70 Md. 205; *Bonner v. Campbell*, 48 Pa. St. 286; *Chidsey v. Porter*, 21 Pa. St. 390; *Clarke v. Clergue*, (Supreme Ct.), 1 N. Y. Supp. 892; *Dallmeyer v. Dallmeyer* (Pa. 1888), 16 Atl. Rep.

Packages in the store of A, marked B & Co., or A & Sons, are evidence against such of the parties so named as would be likely to see them. *Chaffee v. Rentfro*, 32 Ga. 477; *Welch v. Speakman*, 8 W. & S. (Pa.) 257; *Chapman v. Woolson*, 1 Rob. (Va.) 267. And see *McNeill v. Reynolds*, 9 Ala.

313.

Where hand bills signed M & T, advertising for labor, were posted up over the town where T lived and on his boarding-house door and in other places where he might be expected to see them, it should have been submitted to the jury as evidence of partnership. *Tumlin v. Goldsmith*, 40 Ga. 221.

When the only evidence to prove partnership between defendants in an action on a note signed by a firm name is that they had been negotiating with a view of forming a partnership, and that one of them had written to the other who signed the firm name to the note that he could not begin business until the time mentioned, later than the purchase of the goods for which the note was given, and the one denying the partnership has not suffered himself to be held out as a partner, the allegations of the complaint are not sustained. *Sipfle v. Isham*, 46 Hun (N. Y.) 366.

2. See *Campbell v. Hastings*, 29 Ark. 512; *Hudson v. Simon*, 6 Cal. 453; *Sinclair v. Wood*, 3 Cal. 98; *Farmers' etc. Bank v. Green*, 30 N. J. L. 316; *McNeill v. Reynolds*, 9 Ala. 313; *Yocum v. Benson*, 45 Ill. 435; *Wilson v. Coleman*, 1 Cranch (C. C.) 408; *Lararus v. Long*, 3 Ired. (N. Car.) 39; *Prentiss v. Kelley*, 41 Me. 436.

A sworn application for a revenue license by one partner only, setting out the names of the co-partners, is not admissible as against the other as evidence of partnership. *Boyd v. Ricketts*, 60 Miss. 62. Nor is an enrollment of a vessel by one partner in the name of the firm. *Central R. & B. Co. v. Smith*, 76 Ala. 572.

After an admission by the party that she considered herself a partner, circulars containing the firm name are admissible though not distinctly brought home to her. *Norton v. Seamer*, 3 C. B. 792.

3. *Robins v. Warde*, 111 Mass. 244; *Bryce v. Joynt*, 63 Cal. 375; 49 Am. Rep. 94; *Abbott v. Pearson*, 130 Mass. 191; *Folk v. Wilson*, 21 Md. 538; *Gan-*

person that another is his partner are incompetent evidence of partnership to charge the latter,¹ and even though the parties are partners in one business if a new and distinct business is started or if an enterprise outside of the scope of the old business is undertaken, the declarations of one partner that another is concerned

zer v. Fricke, 57 Pa. St. 316; Lindsay v. Guy, 57 Wis. 200.

Nor are those in the books of a third person. McMannis v. Drafft, 40 Iowa 413.

In Farmers' etc. Bank v. Green, 30 N. J. L. 316, it was held that E W G writing the name of E W G & Co. in the books of a bank merely for the purpose of giving P G credit there, so that he would be liable as a partner to the bank is not proof of partnership at the suit of a third person who did not know of it.

In Gilbraith v. Limeberger, 69 N. Car. 145, it was held that the fact that F had the name of L & Co. over the store managed by him was some evidence that he was their agent, but not the slightest that he was a partner.

An affidavit made by one of the parties in a bankruptcy proceeding stating that he owned the claim, does not estop his firm from proving in a subsequent suit, that they owned it. Meltzer v. Doll, 91 N. Y. 365.

1. Thornton v. Kerr, 6 Ala. 823; Cross v. Langley, 50 Ala. 8; Clark v. Taylor, 68 Ala. 453; Humes v. O'Bryan, 74 Ala. 64; Central R. & B. Co. v. Smith, 76 Ala. 572; Campbell v. Hastings, 29 Ark. 512; Etchemende v. Stearns, 44 Cal. 582; Bill v. Porter, 9 Conn. 23; Sankey v. Columbus Iron Works, 44 Ga. 228; Ford v. Kenedy, 64 Ga. 537; Flournoy v. Williams, 68 Ga. 707; Conley v. Jennings, 22 Ill. App. 547; Kaskaskia Bridge Co. v. Shannon, 6 Ill. 15; Degan v. Singer, 41 Ill. 28; Hahn v. St. Clair Sav. & C. Co., 50 Ill. 456; Gardner v. Northwestern Mfg. Co. 52 Ill. 367; Bishop v. George-son, 60 Ill. 484; Smith v. Hulett, 65 Ill. 495; Beveridge v. Hewitt, 8 Ill. App. 467; Pierce v. McConnell, 7 Blackf. (Ind.) 170; Bond v. Nave, 62 Ind. 505; King v. Barbour, 70 Ind. 35; Fleming v. Stearns, 79 Iowa 256; Evans v. Carriell, 1 Greene (Iowa) 25; Southwick v. McGovern, 28 Iowa 533; Barcroft v. Haworth, 29 Iowa 462; Brown v. Rains, 53 Iowa 81; Chambers v. Grout, 63 Iowa 342; Johnston v. Clements, 25 Kan. 376; Bevens v. Sullivan, 4 Gill (Md.) 383; Robbins v. Willard, 6 Pick.

(Mass.) 464; Jones v. Stevens, 5 Met. (Mass.) 373; Dutton v. Woodman, 9 Cush. (Mass.) 255; 57 Am. Dec. 46; Ruhe v. Burnell, 121 Mass. 450; Lea v. Guice, 13 Smed. & M. (Miss.) 656; Boyd v. Ricketts, 60 Miss. 62; Dixon v. Hood, 7 Mo. 414; 38 Am. Dec. 461; Crook v. Davis, 28 Mo. 94; Filley v. McHenry, 71 Mo. 417; Rimel v. Hayes, 83 Mo. 200; Converse v. Shambaugh, 4 Neb. 376; Grafton Bank v. Moore, 13 N. H. 99; 38 Am. Dec. 478; Johnson v. Gallivan, 52 N. H. 143; Faulkner v. Whitaker, 15 N. J. L. 438; Sweeting v. Turner, 10 Johns. (N. Y.) 216; Whitney v. Sterling, 15 Johns. (N. Y.) 215; Cordova v. Porter (Supreme Ct.), 1 N. Y. Supp. 147; Henry v. Willard, 73 N. Car. 35; Cowan v. Kinney, 33 Ohio St. 422; Porter v. Wilson, 13 Pa. St. 641; Corcoran v. Trick (Pa. 1887), 11 Atl. Rep. 677; Johnston v. Warden, 3 Watts (Pa.) 101; Nelson v. Lloyd, 9 Watts (Pa.) 22; Edwards v. Tracy, 62 Pa. St. 374; Lincoln v. Craig, 16 R. I. 564; McCorkle v. Doby, 1 Strobh (S. Car.) 396; 47 Am. Dec. 560; Tripp v. Williams, 14 S. Car. 502; Bundy v. Bruce, 61 Vt. 619; Cottrill v. Vanduzen, 22 Vt. 511; Noyes v. Cushmen, 25 Vt. 390; Hardy v. Cheney, 42 Vt. 417; First Nat. Bank v. Conway, 67 Wis. 210; Carfrae v. Vanbuskirk, 1 Grant's Ch. (Up. Can.) 539; Burpee v. Smith, 20 New Brunswick 408; Wallis v. Wood (Tex. 1888), 7 S. W. Rep. 852. And see Sherman v. Kelton, 2 R. I. 542; McFadyen, v. Harrington, 67 N. Car. 29.

In an action against A, B and C, as secret partners, the declarations and acts of A, though evidence to show that he considered himself a secret partner with B and C, are not admissible to implicate or charge B as a partner. Whitney v. Ferris, 10 Johns. (N. Y.) 66.

A receipt in writing by one in the firm name in the presence of the other without proof that he saw or knew its form or contents, is not competent evidence as against him. Ehrman v. Kramer, 30 Ind. 26.

Where there is other evidence of the existence of a firm, however, the declarations of one partner have in some in-

in the new business or enterprise are inadmissible against him.¹ The same rule applies to the admissibility of declarations and admissions of one partner to bind another as to the continued existence of a partnership, notwithstanding evidence of its dissolution.² So, also with relation to the admissibility of the declarations and admissions of a partner who has entered into a contract in his own name or on his own behalf, to charge the firm with such contract,³ or to establish a ratification of his unauthorized payment of his individual debt with the firm's note,⁴ the effect of such admissions being to extend the partnership to cover the transactions in question; though if the contract was executed in the firm name, even though it be the same as that of an individual partner, and the fact of partnership is established, or if no name was used but the transaction was within the scope of the firm's business, the contemporaneous declarations of the partner to the creditor showing that the act was for the firm in the capacity of a partner are admissible.⁵ The admission of a person

stances been admitted in corroboration of it. See *Folk v. Wilson*, 21 Md. 538; *Dutton v. Woodland*, 9 Cush. (Mass.) 255; 57 Am. Dec. 46; *Johnson v. Gallivan*, 52 N. H. 143; *McCann v. McDonald*, 7 Neb. 305; *Hilton v. McDowell*, 87 N. Car. 364. But see to the contrary *Robbins v. Willard*, 6 Pick. (Mass.) 464; *Park v. Wooten*, 35 Ala. 242.

1. *Hahn v. St. Clair Sav. etc. Co.*, 50 Ill. 456; *Thomas v. Harding*, 8 Me. 417; *Heffron v. Hanaford*, 40 Mich. 305; *Rimel v. Hayes*, 83 Mo. 200; *Kaiser v. Fendrick*, 98 Pa. St. 528. But see *Ligare v. Peacock*, 109 Ill. 94.

Where the partner gives the declaration of his alleged co-partners in evidence to disprove the partnership, their contrary declarations may be shown. *Nelson v. Lloyd*, 9 Watts (Pa.) 22; *Morgan v. Farrell*, 58 Conn. 413; and see *Fletcher v. Pullen*, 70 Md. 205.

2. *Southwick v. McGovern*, 28 Iowa 533; *Allcott v. Strong*, 9 Cush. (Mass.) 323; *Dowzelot v. Rawlings*, 58 Mo. 75; *Johnson v. Gallivan*, 52 N. H. 143; *Nichols v. White*, 85 N. Y. 531; *Fick v. Mulholland*, 48 Wis. 413.

In *Gilchrist v. Brande*, 58 Wis. 184, however, where a partner gave plaintiff a written statement on procuring his indorsement, that the plaintiff was still his partner, it was regarded as admissible in corroboration after a *prima facie* case of continuance or holding out after dissolution.

3. *Scott v. Dansby*, 12 Ala. 714; *Hurd v. Haggerty*, 24 Ill. 171; *Ostrom v. Jacobs*, 9 Met. (Mass.) 454; *Lock-*

wood v. Beckwith, 6 Mich. 168; *Campbell v. Dent*, 54 Mo. 325; *Edgell v. MacQueen*, 8 Mo. App. 71; *Uhler v. Browning*, 28 N. J. L. 79; *Thorn v. Smith*, 21 Wend. (N. Y.) 365; *Union Nat. Bank v. Underhill*, 102 N. Y. 336; *White v. Gibson*, 11 Ired. (N. Car.) 283; *Hardy v. Cheney*, 42 Vt. 417.

Although persons may be partners in real estate, the statements of one to that effect will not bind the others, with regard to charges upon their land. *Nixon v. Jenkins*, 1 Hilt. (N. Y.) 318.

4. *Scott v. Dansby*, 12 Ala. 714; *Dixon v. Barclay*, 22 Ala. 370; *Ruhe v. Burnell*, 121 Mass. 450; *Tuttle v. Cooper*, 5 Pick. (Mass.) 414; *Union Nat. Bank v. Underhill*, 102 N. Y. 336.

In *Anderson v. Norton*, 15 Lea (Tenn.) 14, where a partner executed a note in the firm name, it was held that a writing given him by his co-partner after dissolution to furnish evidence that it was authorized was competent in favor of the payee, to enable him to rank as a partnership creditor in the distribution of a joint estate.

5. *Humes v. O'Bryan*, 74 Ala. 64; *Mamlock v. White*, 20 Cal. 598; *Dodds v. Rogers*, 68 Ind. 110; *Deitz v. Regnier*, 27 Kan. 94; *Brannon v. Hursell*, 112 Mass. 63; *Lea v. Guice*, 13 Smed. & M. (Miss.) 656; *Campbell v. Dent*, 54 Mo. 325; *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466; *Thorn v. Smith*, 21 Wend. (N. Y.) 365; *Klock v. Beekman*, 18 Hun (N. Y.) 502; *Cordova v. Powter* (Supreme Ct.), 1 N. Y. Supp. 147; *Gavin v. Walker*, 14 Lea (Tenn.)

that he is a partner, however, is competent to establish a partnership as against himself,¹ and as the admission of a member proves the partnership as to him, the existence of the firm may be established by the separate admissions of each.²

643; *England v. Burt*, 4 Humph. (Tenn.) 399; *Whiship v. Bank of U. S.* 5 Pet. U. S. 529. And see *Fleming v. Stearns*, 79 Iowa 256; *Lang v. Fiske*, 11 Me. 385.

Declarations of an alleged partner, explanatory of or qualifying his possession of property, are sometimes held to be admissible. See *Humes v. O'Bryan*, 74 Ala. 64; *Robinson v. Haas*, 40 Cal. 474. But see to the contrary *Coppage v. Barnett*, 34 Miss. 621.

Declarations are admissible on behalf of a creditor to show that he believed that he was dealing with a firm. *Hicks v. Cram*, 17 Vt. 449; *Gilchrist v. Brande*, 58 Wis. 184; *Southwick v. McGovern*, 28 Iowa 533; *Austin v. Williams*, 2 Ohio, 61; *McNeish v. Hulled Oat Co.*, 57 Vt. 316. And see *Tozier v. Crafts*, 123 Mass. 480.

But where they consist only of statements as to who constituted the firm, they cannot be received to show to whom the other partner gave credit, if the partnership is in issue. *Southwick v. McGovern*, 28 Iowa 533; *Gardner v. Northwestern Mfg. Co.*, 52 Ill. 367; *Winchester v. Whitney*, 138 Mass. 549.

1. *Lewis v. Post*, 1 Ala. 65; *Murphy v. Whitlow*, 1 Ariz. 340; *Champlin v. Tilley*, 3 Day (Conn.) 303; *Bill v. Porter*, 9 Conn. 23; *Chaffee v. Rentfroe*, 32 Ga. 477; *Fleshman v. Collier*, 47 Ga. 253; *Carmichael v. Geer*, 55 Ga. 116; *Ford v. Kennedy*, 64 Ga. 537; *Gregory v. Martin*, 78 Ill. 38; *Vannoy v. Klein*, 122 Ind. 416; *King v. Barbour*, 70 Ind. 35; *Davenport Woolen Mills Co. v. Nienstedt* (Iowa 1890), 46 N. W. Rep. 1085; *Cleghorn v. Johnson*, 11 Iowa 292; *Barcroft v. Haworth*, 29 Iowa 462; *Manson v. Ware*, 63 Iowa 345; *Baring v. Crafts*, 9 Met. (Mass.) 380; *Thurston v. Horton*, 16 Gray (Mass.) 274; *Sullivan v. Murphy*, 23 Minn. 6; *Dixon v. Hood*, 7 Mo. 414; 38 Am. Dec. 461; *Farmers' Bank v. Bayless*, 35 Mo. 428; *McCann v. McDonald*, 7 Neb. 305; *Howell v. Adams*, 68 N. Y. 314; *Fenn v. Timpson*, 4 E. D. Smith (N. Y.) 276; *Wotherspoon v. Wotherspoon*, 49 N. Y. Super. Ct. 152; *Cordova v. Powter* (Supreme Ct.), 1 N. Y. Supp. 147; *Dobson v. Chambers*, 78 N. Car. 334;

Clark v. Kensall, *Wright* (Ohio) 480; *Cowan v. Kinney*, 33 Ohio St. 422; *Johnston v. Warden*, 3 Watts (Pa.) 101; *Frick v. Barbour*, 64 Pa. St. 120; *Shelmire's Appeal*, 70 Pa. St. 281; *Entwisle v. Mulligan* (Pa. 1888), 12 Atl. Rep. 766; *Stoddart v. McMahan*, 35 Tex. 267; *Levy v. McDowell*, 45 Tex. 220; *Wallis v. Wood* (Tex. 1888), 7 S. W. Rep. 852; *Cottrill v. Vanduzen*, 22 Vt. 511; *Noyes v. Cushman*, 25 Vt. 390; *Corps v. Robinson*, 2 Wash. (U. S.) 388; *Thomas v. Wolcott*, 4 McLean (U. S.) 305; *Lee v. McDonald*, 6 Up. Can. (Q. B.) 130. And see *Parker v. Broadbent*, 134 Pa. St. 322; *Balliet v. Fink*, 28 Pa. St. 266.

So an admission or declaration by one of the plaintiffs who sued as co-partners that he was not a partner at the time of the alleged contract, is admissible. *Starke v. Kenan*, 11 Ala. 818; *Smith v. Hollister*, 32 Vt. 695.

An admission by persons charged as partners that they were jointly interested is a sufficient admission of partnership. *Porter v. Graves*, 104 U. S. 171.

Where, on a bill for dissolution of a co-partnership between the parties, an order of court, entered by consent, for the appointment of a receiver to take charge of the property, in which it is stated that the parties compose such firm, though the answer denies the partnership, is conclusive of such partnership. *Russell v. White*, 63 Mich. 409.

2. *Gordon v. Bankard*, 37 Ill. 147; *Rogers v. Suttle*, 19 Ill. App. 163; *Barcroft v. Haworth*, 29 Iowa 462; *Currier v. Silloway*, 1 Allen (Mass.) 19; *Smith v. Collins*, 115 Mass. 388; *Bryer v. Weston*, 16 Me. 261; *Jennings v. Estes*, 16 Me. 323; *King v. Ham*, 4 Mo. 275; *Converse v. Shambaugh*, 4 Neb. 376; *Mershon v. Hobensack*, 22 N. J. L. 372; *Zachary v. Phillips*, 101 N. Car. 571; *Welsh v. Speakman*, 8 W. & S. (Pa.) 257; *Haughey v. Stickler*, 2 W. & S. (Pa.) 411; *Edwards v. Tracy*, 62 Pa. St. 374.

The declarations and admissions of the different partners must all be let in one at a time, although each as it goes in is not evidence except as against the partner who made it. *Jennings v.*

That a person was often present giving orders about the business in the profits of which he had a share, is admissible as evidence of partnership.¹ So, a judgment in another action against persons as partners, obtained on default, is *prima facie* evidence,² and a prior judgment between the same parties in which the issue was whether the defendant was a partner, is conclusive of partnership at that date.³

Estes, 16 Me. 323; Welsh v. Speakman, 8 W. & S. (Pa.) 257; Haughey v. Strickler, 2 W. & S. (Pa.) 411; Edwards v. Tracy, 62 Pa. St. 374.

In an action against several partners though only one has been served with process, evidence may be given by the plaintiff of the declarations of the one not served. McCoy v. Lightner, 2 Watts (Pa.) 347.

Subsequent Declarations or writings by both partners are not competent if in their own favor when made. Ruhe v. Burnell, 121 Mass. 450. And see Dixon v. Barclay, 22 Ala. 37.

As Between Creditors—Declarations or admissions of each of the partners that they are such, though admissible in favor of creditors, are not so against or between creditors some of whom have attached the property as individual creditors of the partners. Clinton Lumber Co. v. Mitchell, 61 Iowa 132.

1. Lindsey v. Edmiston, 25 Ill. 317; McGrew v. Walker, 17 Ala. 824; Perry v. Randolph, 6 Smed. & M. (Miss.) 365; Kelm v. Rathbun, 36 Mo. App. 199; State v. Wiggan, 20 N. H. 449; Farr v. Wheeler, 20 N. H. 569; Mathews v. Felch, 25 Vt. 536; Carlton v. Coffin, 28 Vt. 504. But see Bryden v. Taylor, 2 Har. & J. (Md.) 396; Nicholas v. Thielges, 50 Wis. 491; Sargent v. Collins, 3 Nev. 260.

Evidence that a person advertised for a partner, and that the defendant made some business arrangement with him, accompanied by the subsequent payment of notes given in the firm name, tends to show a partnership. Folk v. Wilson, 21 Md. 538; Wilcox v. Matthews, 44 Mich. 192.

Where the acts proved are equally consistent with a co-tenancy as with a partnership, it is a question of probability for the jury, in which capacity they were acting. Chase v. Stevens, 19 N. H. 465.

The fact that an individual appears in an action against a partnership files a plea to the merits, takes an active part in the proceedings, and takes an

appeal, is a conclusive admission that he is a member of the firm. McCaskey v. Pollock, 82 Ala. 174.

The fact that a person was often present giving orders about the business may be explained by showing that he was there for other purposes in the absence of estoppel by holding out. Tracy v. McManus, 58 N. Y. 257; and see Beckford v. Hill, 124 Mass. 588; Lincoln v. Craig, 16 R. I. 564.

2. Central R. & B. Co. v. Smith, 76 Ala. 572; Sears v. Starbird, 78 Cal. 225; Fleshman v. Collier, 47 Ga. 253; Parks v. Mosher, 71 Me. 304; Cragin v. Carleton, 21 Me. 492; Ellis v. Jameson, 17 Me. 235; Fogg v. Greene, 16 Me. 282; Jaques v. Greenwood, 12 Abb. Pr. (N. Y.) 232; City Bank v. Dearborn, 20 N. Y. 244; Latham v. Kenniston, 13 N. H. 203; Lash v. Arnold, 8 Jones (N. Car.) 206; Marks v. Sigler, 3 Ohio St. 358; Witmer v. Schlatter, 15 S. & R. (Pa.) 150.

Where a person sues one partner and judgment is rendered for the defendant, and he afterwards sues the other on the same cause of action, the judgment in the former suit is not evidence in favor of the second defendant. McLelland v. Ridgway, 12 Ala. 482. But see Sturges v. Beach, 1 Conn. 507.

A verdict, and judgment thereon, are not admissible evidence of a co-partnership, even where the fact was expressly put in issue by the pleadings, unless the action in which such evidence is offered is between both the parties to the former suit. Burgess v. Lane, 3 Me. 165.

3. Lynch v. Swanton, 53 Me. 100. And see Dutton v. Woodman, 9 Cush. (Mass.) 255; 57 Am. Dec. 46; Coville v. Gilman, 13 W. Va. 314.

On the trial of an action brought against several as partners, only one of whom has been served with process, on the question who constituted the partnership, the record of a former action against the defendant served with process, in which he pleaded in abatement the non-joinder of the

General reputation or notoriety is mere hearsay, and not competent to prove the fact of partnerships or that a particular person is a partner,¹ and the same rule governs with relation to the reports of a mercantile agency, or a city directory, unless their authorship or adoption is brought home to the party.² But where a partnership is shown to have been in existence at a certain time, general reputation of its present existence may be received in support of

present defendants, is competent evidence. *McClelland v. Lindsay*, 1 W. & S. (Pa.) 360.

1. *Tanner etc. Engine Co. v. Hall*, 86 Ala. 305; *Marble v. Lypes*, 82 Ala. 322; *Carter v. Douglass*, 2 Ala. 499; *Humes v. O'Bryan*, 74 Ala. 64; *Central R. & B. Co. v. Smith*, 76 Ala. 572; *Campbell v. Hastings*, 29 Ark. 512; *Sinclair v. Wood*, 3 Cal. 98; *Turner v. McIlhany*, 8 Cal. 575; *Brown v. Crandall*, 11 Conn. 92; *Gaffney v. Hoyt* (Idaho 1886), 10 Pac. Rep. 34; *Joseph v. Fisher*, 4 Ill. 137; *Bowen v. Rutherford*, 60 Ill. 41; 14 Am. Rep. 25; *Earle v. Hurd*, 5 Blackf. (Ind.) 248; *Macy v. Combs*, 15 Ind. 469; *Uhl v. Harvey*, 78 Ind. 26; *Brown v. Rains*, 53 Iowa 81; *Southwick v. McGovern*, 28 Iowa 533; *Bryden v. Taylor*, 2 Har. & J. (Md.) 396; *Sager v. Tupper*, 38 Mich. 258; *Atwood v. Meredith*, 37 Miss. 635; *Lockridge v. Wilson*, 7 Mo. 560; *Grafton Bank v. Moore*, 13 N. H. 99; 38 Am. Dec. 478; *Taylor v. Webster*, 39 N. J. L. 102; *Adams v. Morrison*, 113 N. Y. 152; *Smith v. Griffith*, 3 Hill (N. Y.) 333; *Halliday v. McDougall*, 20 Wend. (N. Y.) 81; *McGuire v. O'Halloran*, Hill & D. Supp. (N. Y.) 85; *Hunt v. Jucks*, 1 Hayw. (N. Car.) 173; 1 Am. Dec. 555; *Inglebright v. Hammond*, 19 Ohio 337; 53 Am. Dec. 430; *Cook v. Penrhyn Slate Co.*, 36 Ohio St. 135; *Allen v. Rostain*, 11 S. & R. (Pa.) 362; *Buzard v. Jolly* (Tex. 1887), 6 S. W. Rep. 422; *Wallis v. Wood* (Tex. 1888), 7 S. W. Rep. 853; *Hicks v. Cram*, 17 Vt. 449; *Carlton v. Coffin*, 27 Vt. 496; *Gay v. Fretwell*, 9 Wis. 186; *Benjamin v. Covert*, 47 Wis. 375; *Wilson v. Coleman*, 1 Cranch (C. C.) 408; *Metcalf v. Officer*, 2 Fed. Rep. 640; 1 *McCrary* (U. S.) 325; and see *Cross v. Burlington Nat. Bank*, 17 Kan. 336. But see to the contrary, *Gowan v. Jackson*, 20 Johns. (N. Y.) 176; *Whitney v. Sterling*, 14 Johns. (N. Y.) 215; *M'Pherson v. Rathbone*, 11 Wend. (N. Y.) 98.

General reputation of the existence of a partnership has been admitted in

corroboration of other evidence of the fact in quite a large number of cases. See *Gulick v. Gulick*, 14 N. J. L. 578; *Whitney v. Sterling*, 14 Johns. (N. Y.) 215; *Allen v. Rostain*, 11 S. & R. (Pa.) 362; *Turner v. McIlhany*, 8 Cal. 575; *Atwood v. Meredith*, 37 Miss. 635; *Gaffney v. Hoyt* (Idaho 1886), 10 Pac. Rep. 34; *Inglebright v. Hammond*, 19 Ohio 337; 53 Am. Dec. 430; *Entwisle v. Mulligan* (Pa. 1886), 12 Atl. Rep. 766; *Gay v. Fretwell*, 9 Wis. 186; *Cross v. Burlington Nat. Bank*, 17 Kan. 336; *Rizer v. James*, 26 Kan. 221.

In *Taylor v. Webster*, 39 N. J. L. 102, it was held that such reputation may be shown to have existed by the authority, assent, connivance or negligence of the person sought to be charged.

General reputation has been held to be admissible to show knowledge of the non-existence of a partnership. *Humes v. O'Bryan*, 74 Ala. 64. And to show the dormancy of one partner. *Metcalf v. Officer*, 2 Fed. Rep. 640.

Reputation of notoriety is not evidence of dissolution. *Doddard v. Pratt*, 6 Pick. (Mass.) 412; *Halliday v. McDougall*, 20 Wend. (N. Y.) 81.

After dissolution is established the probability of plaintiff's knowledge of it may be shown by general reputation. *Humes v. O'Bryan*, 74 Ala. 64; *Uhl v. Harvey*, 78 Ind. 26; *Gaar v. Huggins*, 12 Bush (Ky.) 259; *Bernard v. Torrance*, 5 Gill & J. (Md.) 383; *Halliday v. McDougall*, 20 Wend. (N. Y.) 81; *Carter v. Whalley*, 1 B. & Ad. 11.

But in a suit against defendants as partners the testimony of witnesses that they supposed defendants to be partners is inadmissible. *Rabitt v. Orr*, 83 Ala. 185.

2. *Campbell v. Hastings*, 29 Ark. 512; *Bonnell v. Chamberlin*, 26 Conn. 487; *Southwick v. McGovern*, 28 Iowa 533; *Zollar v. Janvrin*, 47 N. H. 324; *Cook v. Penrhyn Slate Co.*, 36 Ohio St. 135.

Representations made by a person to a mercantile agency as to his own standing, capital, or condition or that

the presumption of its continuance,¹ and where a partnership is established by other evidence, knowledge of its existence may be inferred from its notoriety.² A partner may testify as to who his co-partners were at a particular time,³ and it would seem by the weight of authority that a third person who has had dealings with the firm and conversations with its members may testify directly as to the fact of partnership.⁴ The mere joint purchase or ownership of property is not alone evidence of partnership.⁵ Where a partnership is once shown to exist a presumption of its continuance arises varying in strength according to the length of the intervening time; the former existence of a partnership, therefore, is evidence of its existence at a later date.⁶ Such presumption of

of his firm, are binding upon him and admissible as evidence of partnership. *Genessee Co. Sav. Bank v. Michigan Barge Co.*, 52 Mich. 164; *Eaton Coal etc. Co. v. Avery*, 83 N. Y. 31.

1. *Southwick v. McGovern*, 28 Iowa 533; *Benjamin v. Covert*, 47 Wis. 375; *Coggswell v. Davis*, 65 Wis. 191.

2. *Humes v. O'Bryan*, 74 Ala. 64; *Wood v. Pennell*, 51 Me. 52; *Boyd v. Ricketts*, 60 Miss. 62; *Atwood v. Merdith*, 37 Miss. 635; *Southwick v. McGovern*, 28 Iowa 533. And see *Central R. & B. Co. v. Smith*, 76 Ala. 572.

3. *First Nat. Bank v. Conway*, 67 Wis. 210; *Durgin v. Somers*, 117 Mass. 55; *Gates v. Manny*, 14 Minn. 21; *Walsh v. Kelly*, 42 Barb. (N. Y.) 98. And see *Atwood v. Merdith*, 3 Miss. 635; *Groth v. Payment*, 79 Mich. 290; *Galway v. Nordlinger* (Supreme Ct.), 4 N. Y. Supp. 649; *Wallis v. Wood* (Tex. 1888) 7 S. W. Rep. 852.

Where the terms of a partnership contract are before the court, it then becomes a question of construction, and the testimony of a partner as to the fact of partnership would be inadmissible. *Lintner v. Millikin*, 47 Ill. 178.

4. *Anderson v. Snow*, 9 Ala. 247; *Dearing v. Smith*, 4 Ala. 432; *McGrew v. Walker*, 17 Ala. 824; *Central R. & B. Co. v. Smith*, 76 Ala. 572; *Parshall v. Fisher*, 43 Mich. 529; *Hadden v. Shortridge*, 27 Mich. 212; *Wattles v. Moss*, 46 Mich. 52; *Gowan v. Jackson*, 20 Johns. (N. Y.) 176; *Hodges v. Tarrant*, 31 S. Car. 608; *Rankin v. Hartley*, 12 N. B. 371. But see to the contrary *Turner v. McIlhany*, 8 Cal. 575; *Joseph v. Fisher*, 4 Ill. 137; *Shepard v. Pratt*, 16 Kan. 209; *Ridenour v. Mayo*, 40 Ohio St. 9; *Carleton v. Coffin*, 27 Vt. 496. And see *Solomon v. Creech*, 82 Ga. 445; *Snodgrass v. Broadwell*, 2 Litt. (Ky.) 353.

In *Williams v. Soutter*, 7 Iowa 435, it was held that a mere statement of a witness that defendants were partners without showing a knowledge of any of the facts, is not admissible. But see to the contrary *Sankey v. Columbus Iron Works*, 44 Ga. 228; *Choteau v. Raitt*, 20 Ohio 132.

Testimony as to whom credit was given is not admissible to establish a partnership. *Dandorth v. Carter*, 4 Iowa 230. But in *Seekell v. Fletcher*, 53 Iowa 330, such testimony was held competent in order to show the state of the plaintiff's mind.

5. *Thompson v. Bowman*, 6 Wall. (U. S.) 316; *Gregory v. Martin*, 78 Ill. 38; *Boeklen v. Hardenberg*, 60 N. Y. 8; *Levy v. McDowell*, 45 Tex. 220.

Evidence or admissions that a party has an interest in the concern or in its profits, is not sufficient proof of partnership, and not even sufficient to let in the declarations of the other partner. *Campbell v. Dent*, 54 Mo. 325; *Rapp v. Vogel*, 45 Mo. 525; *Scully's Appeal*, 115 Pa. St. 141; *Pleasants v. Fant*, 22 Wall. (U. S.) 116.

That two persons sign a note jointly, is no evidence of a partnership between them. *Hopkins v. Smith*, 11 Johns. (N. Y.) 161.

Where defendants are sought to be charged as partners in a single venture only, evidence that they are not general partners, nor connected in business, is irrelevant and inadmissible. *Schollenberger v. Seldonridge*, 49 Pa. St. 83.

6. *Butler v. Henry*, 48 Ark. 551; *Buck v. Smith*, 2 Colo. 500; *Reybold v. Dodd*, 1 Harr. (Del.) 401; *Bennett v. Holmes*, 32 Ind. 108; *Currier v. Sillo-way*, 1 Allen (Mass.) 19; *Bevans v. Sullivan*, 4 Gill (Md.) 383; *Anslyn v. Frank*, 11 Mo. App. 598; *Sager v. Tupper*, 38 Mich. 258; *Wilkins v.*

continuance, however, is not retrospective—the existence of a partnership at a certain date being no evidence that it existed at a time prior thereto.¹

XXXI. JUDGMENTS AGAINST PARTNERSHIPS.—Service of process upon one partner is not notice to the others, either at common law or by statute; where an action is instituted against several persons constituting a partnership, therefore, either before or after its dissolution, and one partner is not served with process and judgment is rendered against them all, such judgment will be voidable so far as concerns the partner who was not served.² In States in which the joint debtor acts are in force, however, if all the partners are not served a judgment may be rendered against the firm to be enforced against the partnership property and the individual property of the partners served.³ But no valid

Earle, 44 N. Y. 172; Jenkins v. Davis, 54 Wis. 253. And see Given v. Albert, 5 W. & S. (Pa.) 333.

Evidence of partnership before and after the date of a note is evidence of it at that date. Gilbert v. Whidden, 20 Me. 367.

Evidence of a dissolution in April tends to prove that no partnership existed in the following June. Floyd v. Miller, 61 Ind. 224.

Where a partnership between defendants has been established in the first instance, the burden of proof rests with them to prove a dissolution and notice to the plaintiff. Howe v. Thayer, 17 Pick (Mass.) 91.

1. Butler v. Henry, 48 Ark. 551; Green v. Caulk, 16 Md. 556.

In Byington v. Woodward, 9 Iowa 360, an advertisement by the firm in a newspaper was held to be evidence of its existence at that time, but not of its existence four months previously when the note sued on was made.

But in Flesham v. Collier, 47 Ga. 253, proof of a partnership at a certain date was held to be evidence of its existence three months before to go to the jury with other proof. And in Gowan v. Jackson, 20 Johns. (N. Y.) 176, evidence that a partnership existed at one date was held to throw the burden of proof upon the other party to disprove its existence at a date six months earlier.

2. Shapard v. Lightfoot, 56 Ala. 506; Feder v. Epstein, 69 Cal. 456; Clayton v. Roberts, 84 Ga. 149; Weaver v. Carpenter, 42 Iowa 343; Dresser v. Wood, 15 Kan. 344; Rice v. Doniphan, 4 B. Mon. (Ky.) 123; Scott v. Bogart, 14 La. Ann. 258; Pittman v. Planters'

Bank, 1 How. (Miss.) 527; Demoss v. Brewster, 4 Smed. & M. (Miss.) 661; Mitchell v. Greenwald, 43 Miss. 167; Maclay v. Freeman, 48 Mo. 234; Moulson v. Wire, 1 Dow. & L. 527; Kitchin v. Wilson, 4 C. B., N. S. 483.

Where persons are sued as partners, as A & Co., a return of summons as served upon A & Co. is bad. Demoss v. Brewster, 4 Smed. & M. (Miss.) 661; Mitchell v. Greenwald, 43 Miss. 167. But see to the contrary Peel v. Bryson, 72 Ga. 331.

Service by leaving the writ at the store is bad under a statute requiring it to be personal or at the abode. Smith v. Bryan, 60 Ga. 628.

In equity, however, service of subpoena upon one partner may on notice be made to bind his co-partner abroad. Carrington v. Cantillor, Bunb. 107; Leese v. Martin, L. R., 13 Eq. 77; Coles v. Gurney, 1 Madd. 187.

The Writ itself may be in the partnership name if the petition or declaration contains the individual names. Andrews v. Ennis, 16 Tex. 45.

Statutory Judgments.—Since one partner cannot bind his co-partner by a partnership bond to which he has signed the latter's name without authority, a statutory judgment on such bond is void as to the partner not signing for want of jurisdiction. Smith v. Tupper, 4 Smed. & M. (Miss.) 261; 43 Am. Dec. 483.

3. Fowlkes v. Baldwin, 2 Ala. 705; Tarlton v. Herbert, 4 Ala. 359; Princtup v. Turner, 65 Ga. 71; Gregory v. Harmon, 10 Iowa 445; Walker v. Clark, 8 Iowa 474; Saunders v. Bently, 8 Iowa 516; Weaver v. Carpenter, 42 Iowa 343; Brooks v. McIntyre, 4 Mich.

judgment can be rendered personally against those not served.¹

So, wherever service upon one partner is sufficient to bring the firm into court an acknowledgment of service or an appearance or a waiver of summons by him is binding upon the firm so far as the common property is concerned.² But a partner has no power

316; Hubbardston Lumber Co. v. Covert, 35 Mich. 254; Rowland v. Shephard, 27 Neb. 494; Whitmore v. Shiverick, 3 Nev. 288; Flannery v. Anderson, 4 Nev. 437; Davis v. Cook, 9 Nev. 134; Simpson v. Schulte, 21 Mo. App. 639; Pardee v. Haynes, 10 Wend. (N. Y.) 631; Kidd v. Brown, 2 How. Pr. (N. Y.) 20; Stoutenburgh v. Vandenberg, 7 How. Pr. (N. Y.) 229; Leahey v. Kingon, 22 How. Pr. (N. Y.) 209; Leahey v. Kingon, 13 Abb. Pr. (N. Y.) 192; Vandevoort v. Palmer, 4 Duer (N. Y.) 677; Pruyn v. Black, 21 N. Y. 300; Neil v. Childs, 10 Ired. (N. Car.) 195; Bank of U. S. v. Broadfoot, 4 McCord (S. Car.) 30; Overstreet v. Brown, 4 McCord (S. Car.) 79; Winters v. Means, 25 Neb. 241; Alexander v. Stern, 41 Tex. 193; Guimond v. Nast, 44 Tex. 114; Burnett v. Sullivan, 58 Tex. 535; Hedges v. Armistead, 60 Tex. 276; Texas etc. R. Co. v. McCaughey, 62 Tex. 271; Patten v. Cunningham, 63 Tex. 666; Sanger v. Overmier, 64 Tex. 57; Fowler v. Bailey, 14 Wis. 136; Inbush v. Farwell, 1 Black (U. S.) 566. See Shapard v. Lightfoot, 56 Ala. 506; Kearney v. Fenner, 14 La. Ann. 883.

Service upon the partner domiciled in the jurisdiction is sufficient where a firm is made garnishee of a debtor. Parker v. Danforth, 16 Mass. 299. But service upon the wife of an absent partner at his house will not bind the firm. Brydolf v. Wolf, 32 Iowa 509.

A judgment against the firm on service on one partner by his collusion with the creditor, however, will be set aside. Griswold v. Griswold, 14 How. Pr. (N. Y.) 446.

A statute authorizing service upon one alone applies, even though the partner served is an infant. Mason v. Denison, 11 Wend. (N. Y.) 612.

The statute does not apply to suits for the foreclosure of chattel mortgages, as they are not based on a joint contract. Lippincott v. Shaw Carriage Co., 25 Fed. Rep. 577. Nor to a citation in error upon one of the partners against whom a writ of error is taken. Clark v. Thompson, 42 Tex. 128.

1. Shapard v. Lightfoot, 56 Ala. 506; Ladiga Saw-Mill Co. v. Smith, 78 Ala. 108; Ingraham v. Gildermester, 2 Cal. 88; Hibbard v. Holloway, 13 Ill. App. 101; Wright v. Boynton, 37 N. H. 9; Grieff v. Kirk, 15 La. Ann. 320; Carlon v. Ruffner, 12 W. Va. 297; Hall v. Lanning, 91 U. S. 160; Mason v. Eldred, 6 Wall. (U. S.) 231; U. S. v. American Bell Teleph. Co., 29 Fed. Rep. 17. And see Sugg v. Thornton, 132 U. S. 524.

Judgment against those served is not made erroneous by improperly including those not served. Davidson v. Knox, 67 Cal. 143.

Where partners are out of the jurisdiction and an attachment of partnership property is made, in an action against the partners' service had upon the partner within the jurisdiction will support a judgment to subject such property. Inbush v. Farwell, 1 Black (U. S.) 566; Hubbardston Lumber Co. v. Covert, 35 Mich. 254.

If the partnership is not established, service upon an alleged partner gives no jurisdiction except over the party served. Nixon v. Downey, 42 Iowa 78. And if a defendant not served was not a partner, and judgment is taken against him, its enforcement will be enjoined. Fowler v. Baldwin, 2 Ala. 705; Purviance v. Edwards, 17 Fla. 140.

2. Bowin v. Sutherland, 44 Ala. 278; Mayberry v. Bainton, 2 Harr. (Del.) 24; Wheatley v. Tuff, 4 Kan. 240; Phelps v. Brewer, 9 Cush. (Mass.) 390; 57 Am. Dec. 56; Southard v. Steele, 3 T. B. Mon. (Ky.) 435; Sanger v. Overmier, 64 Tex. 57; Bennett v. Stickney, 17 Vt. 531; Harrison v. Jackson, 7 T. R. 207.

An acknowledgment reading "I hereby acknowledge, etc.," signed T S C, one of the firm, is not an acknowledgment of service or entry of appearance on behalf of the firm. Clark v. Stoddard, 3 Ala. 366. And see Adam v. Townsend, 14 Q. B. D. 103.

An entry of appearance in the firm name when the firm is sued in that name, will not dispense with service upon the partners nor a substitution of

to enter an appearance for his co-partner to bind him personally.¹ Even after dissolution service upon one partner is sufficient to give the court jurisdiction to render a judgment against the firm which can be satisfied out of the joint property or out of the separate property of the partner served.² But an entry of appearance by one partner for all without special authority, entering an appearance not being in the ordinary course of winding up the concern, will not authorize a judgment against the others.³

A judgment against a partnership upon service upon less than all the partners, however, even if authorized by the laws of the State where it is rendered and valid there to reach joint property within the jurisdiction, will have no extra-territorial force whatever as against those not served, nor constitute a cause of action against them.⁴

1. Against Part of the Partners.—In an action against partners where the plaintiff does not seek to subject the interest of all in the

the individual names. *Marienthal v. Amburgh*, 2 Disney (Ohio) 586.

In *Mumster v. Cox*, L. R. 10 App. Cas. 680, doubts were expressed as to whether a partner could enter appearance in an action against the firm for a malicious libel, which is a crime.

1. *Phelps v. Brewer*, 9 Cush. (Mass.) 390; 57 Am. Dec. 56; *Haslet v. Street*, 2 McCord (S. Car.) 210; 13 Am. Dec. 724; *Bright v. Sampson*, 20 Tex. 21. See also *Whitman v. Keith*, 18 Ohio St. 134; *Hall v. Lanning*, 91 U. S. 160; *Corcoran v. Trich* (Pa. 1887), 11 Atl. Rep. 677; *Beatty v. Ambs*, 11 Minn. 331. The contrary rule is maintained by *Parsons on Part. 174*, note; *Collyer on Part.*, § 441; *Gow on Part. 163*.

An appearance by one partner in the presence of the other, and by his consent, is the act of both. *Freeman v. Carhut*, 17 Ga. 348.

2. *Hale v. Van Saun*, 18 Iowa 19; *Newlon v. Heaton*, 42 Iowa 593; *Hartford v. Street*, 46 Iowa 594; *Cooper v. Bailey*, 52 Me. 230; *Alexander v. Stern*, 41 Tex. 193; *Texas etc. R. Co. v. McCaughey*, 62 Tex. 271; *Sanger v. Overmier*, 64 Tex. 57.

But in *Alabama*, it is held that the statute authorizing service of process upon one partner, contemplates a continuing partnership and has no obligation after dissolution. *Duncan v. Tombeckbee Bank*, 4 Port. (Ala.) 181; *Davidson v. Street*, 34 Ala. 125; *Faver v. Briggs*, 18 Ala. 478; *Mitchell v. Rich*, 1 Ala. 228; *Beal v. Snedikor*, 8 Port. (Ala.) 523. And the

same view was taken in *Stephens v. Parkhurst*, 10 Iowa 70.

Judgment may be rendered against the partner served after dissolution on summons addressed to the firm in which judgment against each is prayed. *Montague v. Weil*, 30 La. Ann. 50.

3. *Duncan v. Tombeckbee Bank*, 4 Port. (Ala.) 184; *Beal v. Snedikor*, 8 Port. (Ala.) 523; *Demott v. Swaim*, 5 Stew. & P. (Ala.) 293; *Newlon v. Heaton*, 42 Iowa 593; *Loomis v. Pearson, Harp.* (S. Car.) 470; *Haslet v. Street*, 2 McCord (S. Car.) 311; 13 Am. Dec. 724; *Bowles v. Huston*, 30 Gratt. (Va.) 266; 32 Am. Rep. 673; *Hall v. Lanning*, 91 U. S. 160; *Atchison Sav. Bank v. Templar*, 26 Fed. Rep. 580.

In *Louisiana*, in a suit against a commercial partnership, where citation is issued, directed to and served on the firm, and an order is afterwards made for citation to issue to the individual partners, and an answer is filed by defendants, a judgment may be rendered *in solido* against the individual partners. *Mitchell etc. Furniture Co. v. Sampson*, 40 Fed. Rep. 805.

4. *Conley v. Chapman*, 74 Ga. 709; *Phelps v. Brewer*, 9 Cush. (Mass.) 390; 57 Am. Dec. 56; *Wilson v. Niles*, 2 Hall (N. Y.) 358; *Bowles v. Huston*, 30 Gratt. (Va.) 266; 32 Am. Rep. 673; *Hall v. Lanning*, 91 U. S. 160.

Sureties for the release of an attachment upon property where but one partner is in the jurisdiction, can compel all the partners to reimburse them

partnership property, he may discontinue as to those not served and take judgment against those who were served only,¹ and if several persons are sued as partners and part only are proved to be liable or are found to be partners, judgment may be rendered against them, in favor of the others.² Under common law practice, however, if the declaration is on a joint promise, proof that less than all are liable is a variance, and judgment cannot be

as they were sureties for the firm. *Inbush v. Farwell*, 1 Black (U. S.) 566.

A judgment against a firm, generally, and the resident members served with process, individually, is a final judgment as to a non-resident member of whose person the court acquired no jurisdiction. *Sugg v. Thornton*, 73 Tex. 666.

1 *Earbee v. Evans*, 9 Port. (Ala.) 295; *Clark v. Stoddart*, 3 Ala. 366; *Shapard v. Lightfoot*, 56 Ala. 506; *Ladiga Saw Mill Co. v. Smith*, 78 Ala. 108; *Ingraham v. Gildermester*, 2 Cal. 88; *Golden State etc. Works v. Davidson*, 73 Cal. 389; *Printup v. Turner*, 65 Ga. 71; *Lyons v. Jackson*, 1 How. (Miss.) 474; *Taylor v. Henderson*, 17 S. & R. (Pa.) 453; *Bull v. Lambron*, 5 S. Car. 288; *Brown v. Belches*, 1 Wash. (Va.) 9; *Barnett v. Watson*, 1 Wash. (Va.) 372; *Carlton v. Ruffner*, 12 W. Va. 297.

Partners not served ought not to be dismissed from the cause, since to bind the partnership property, the judgment should be rendered against all, the interests of those not served being as much affected as those served. *Burnett v. Sullivan*, 58 Tex. 535.

Where, in a suit against two partners as joint debtors, a final judgment is taken by plaintiff against one of them after default, and upon an issue joined by plea in bar by the other, a verdict is had against plaintiff, plaintiff cannot have a new trial as against the defendant who has pleaded—he can have but one judgment in one suit. *Pollak v. Hutchinson*, 21 Fla. 128.

2. *Johnson v. Green*, 4 Port. (Ala.) 126; *Brugman v. McGuire*, 32 Ark. 733; *Stoddard v. Van Dyke*, 12 Cal. 437; *Maynard v. Ponder*, 75 Ga. 664; *Ledbetter v. Dean*, 82 Ga. 740; *Francis v. Dickel*, 68 Ga. 255; *Kirby v. Cannon*, 9 Ind. 371; *Pollock v. Gazier*, 20 Ind. 262; *Crenshaw v. Wickersham*, 15 Iowa 154; *Poole v. Hintrager*, 60 Iowa 180; *Silvers v. Foster*, 9 Kan. 56; *Williams v. Rogers*, 14 Bush (Ky.) 776; *Cutts v. Haynes*, 41 Me. 560; *Turner*

v. Bissell, 14 Pick. (Mass.) 192; *Whiting v. Withington*, 3 Cush. (Mass.) 413; *Wiggin v. Lewis*, 12 Cush. (Mass.) 486; *Roberts v. Pepple*, 55 Mich. 367; *Anderson v. White*, 39 Mich. 130; *Town v. Washburn*, 14 Minn. 268; *Miles v. Wann*, 27 Minn. 56; *Fetz v. Clark*, 7 Minn. 217; *Whitney v. Reese*, 11 Minn. 138; *Finney v. Allen*, 7 Mo. 416; *Crews v. Lackland*, 67 Mo. 619; *Wells v. Clarkson*, 5 Mont. 336; *McCann v. McDonald*, 7 Neb. 305; *Morrissey v. Schindler*, 18 Neb. 672; *Paraker v. Jackson*, 16 Barb. (N. Y.) 33; *Witherhead v. Allen*, 28 Barb. (N. Y.) 661; *Clafin v. Butterly*, 2 Abb. Pr. (N. Y.) 446; *Zink v. Attenburg*, 18 How. Pr. (N. Y.) 108; *Brumskill v. James*, 11 N. Y. 294; *Ah Lep v. Gong Choy*, 13 Oregon 205; *Bull v. Lamron*, 5 S. Car. 288; *Tulane v. McKee*, 10 Tex. 335; *White v. Leavitt*, 20 Tex. 703; *Willis v. Morrison*, 44 Tex. 27; *Congdon v. Monroe*, 51 Tex. 109; *Brown v. Pickard*, 4 Utah 292; *Sherman v. Kreul*, 42 Wis. 33.

Where, in a suit against two partners as joint debtors, a final judgment is taken by plaintiff against one of them after default, and upon an issue joined by plea in bar by the other, a verdict is had against plaintiff, the plaintiff cannot have a new trial as against the defendant who has pleaded, because in such case he can have but one judgment in one suit. *Pollak v. Hutchinson*, 21 Fla. 128.

But One Judgment.—In *Judd Linseed etc. Co. v. Hubbell*, 76 N. Y. 543, it was held that a judgment by default against one defendant and afterwards after trial against the rest, being two separate judgments instead of one, was an immaterial error. But in *Curry v. Roundtree*, 51 Cal. 184, which was a similar case, both judgments were held to be bad.

In *Young v. Davidson*, 31 Tex. 153, a separate judgment against one and a joint judgment against all was held to be erroneous, there being two judgments for the same debt.

rendered against part except where the defense of personal incapacity has been interposed.¹

But if infancy or discharge in bankruptcy is pleaded by some of the defendants, as this is a mere personal matter and does not disprove the plaintiff's allegation of a joint contract, he may recover against the others.² In actions for tort, the partners being jointly and severally liable, judgment may be rendered against part of them even in jurisdictions where, in actions on contract, all those alleged to be liable must be proved so.³ The statute permitting a judgment against part of those served applies only when some of them are not liable at all.⁴

2. The Judgment Lien.—A judgment against a partnership for a firm debt is a lien on the separate real estate of the individual partners,⁵ as well as upon partnership real es-

1. *Champlin v. Tilley*, 3 Day (Conn.) 303; *Craig v. Smith*, 10 Colo. 220; *Campbell v. Bowen*, 49 Ga. 417; *Kimmel v. Schwartz*, 1 Ill. 278; *Yocum v. Benson*, 45 Ill. 435; *Tuttle v. Cooper*, 10 Pick. (Mass.) 281; *Homer v. Abbe*, 16 Gray (Mass.) 543; *Hammond v. Heward*, 20 Up. Can., Q. B. 36. And see *Weinreich v. Johnson*, 78 Cal. 254.

In *Gribbin v. Thompson*, 28 Ill. 61, it was held that in actions of assumption against partners, judgment must be taken against all who are served or none.

In Louisiana, where a suit is brought against persons bound jointly and severally according to law as commercial partners, a judgment rendered against them carries solidarity with it even when not expressed in it. *Bell v. Massey*, 14 La. Ann. 843.

Where there is a prayer in the petition for general relief, and the partnership sued is alleged to be a commercial one, a judgment rendered against the parties *in solido* will not be disturbed on the ground that a joint judgment was claimed in the petition. *Taylor v. Hancock*, 14 La. Ann. 704.

2. *Kirby v. Cannon*, 9 Ind. 371; *Woodward v. Newhall*, 1 Pick. (Mass.) 500; *Gates v. Mack*, 5 Cush. (Mass.) 613.

In a proceeding to subject partnership property to a partnership debt, it is no defence that one of the partners was not *sui juris* at the time the debt was contracted. *Leinkauff v. Arenkle*, 80 Ala. 136.

Under the law of Louisiana partners are not liable *in solido*, but each is liable only for one-half of the demand. In a *Mississippi* action against a

Louisiana partnership, therefore, while the Louisiana law fixes the liability of each partner, yet, under Code *Mississippi*, § 1134, providing that a judgment against one or more joint or several, or joint and several obligors, does not preclude a resort to others, against whom no judgment was rendered, a judgment against one co-partner does not operate as a bar, so long as it remains unpaid. *Scharff v. Noble*, 67 Miss. 143.

3. *Tuttle v. Cooper*, 10 Pick. (Mass.) 281; *Castle v. Bullard*, 23 How. (U. S.) 172; *Hammond v. Heward*, 20 Up. Can., Q. B. 36.

4. *Harrison v. McCormick*, 69 Cal. 616; *Zink v. Attenburg*, 18 How. Pr. (N. Y.) 108. And see *Lynch v. Thompson*, 61 Miss. 354; *Fagley v. Bellas*, 17 Pa. St. 67.

Where, in an action against three partners, all were served, if the evidence shows that there was a partnership and that all three are members, a verdict against two of them only is against evidence. *Curry v. Roundtree*, 51 Cal. 184; *Bosworth v. West*, 68 Ga. 825; *Nelson v. Lloyd*, 9 Watts (Pa.) 22.

In an action by one firm against another, where one partner common to both firms is both plaintiff and defendant, a judgment against all but him is not sustainable. *Green v. Chapman*, 27 Vt. 236.

5. *Cummings' Appeal*, 25 Pa. St. 268; 64 Am. Dec. 695; *Pitts v. Spotts*, 86 Va. 71. But see, to the contrary, *Stadler v. Allen*, 44 Iowa, 198.

In *Fox's Appeal* (Pa. 1887), 11 Atl. Rep. 228, where upon a hearing before an auditor appointed to determine the validity of certain claims against an

tate.¹ So, also, a judgment of a separate creditor against one of the partners is a lien on firm property, though subordinated to all claims against the partnership as such, and attaching only to the residuary interest of the partners in the land after the satisfaction of all claims against the partnership.²

XXXII. ATTACHMENT, GARNISHMENT AND EXECUTION—(See also, ATTACHMENT, vol. 1, p. 894; GARNISHMENT, vol. 8, p. 1096; EXECUTIONS, vol. 7, p. 117).—Actions between partners with relation to the partnership affairs, being usually equitable in their nature, will not, as a general rule, support an attachment,³ though the contrary rule by statute or resulting from statutory construction, has been adopted in some States.⁴ Process for the collection of claims against partners, however, may issue as in ordinary cases, and be enforced either against the partnership property or the individual property of the partners,⁵ levies for part-

estate, a judgment obtained against the firm of which the defendant was a member was filed, it was held that as their record did not show the names of the individual partners, the judgment could not be charged upon the individual property of the decedent.

1. *In re Coddington*, 9 Fed. Rep. 849; *Pitts v. Spotts*, 86 Va. 71.

The judgment creditor having a lien, as well on the separate estate of the surviving, as on that of the deceased partner, while the unsecured creditor has no other recourse except the estate of the latter, there being no partnership assets, equity will marshal the assets in favor of the unsecured creditor, so as to require the judgment creditor to first exhaust the estate of the survivor before resorting to that of the deceased. *Pitts v. Spotts*, 86 Va. 71.

2. See *Huskell v. Johnson*, 24 Ga. 625; *Nully v. Wood*, 71 Pa. Ann. 488; *Page v. Thomas*, 43 Ohio St. 38.

Finding of Partnership.—In order to sustain a joint judgment against defendants sued as partners, it is not necessary that there should be a finding that they were partners. It is sufficient that plaintiff sold the goods to them, relying on their representations that they were partners. *Cornhauser v. Roberts*, 75 Wis. 554.

3. *Wheeler v. Farmer*, 38 Cal. 203; *Johnson v. Short*, 2 La. Ann. 277; *Brinegar v. Griffin*, 2 La. Ann. 154; *Ketchum v. Ketchum*, 1 Abb. Pr., N. S. (N. Y.) 157; *Guilhon v. Lurdo*, 9 Bosw. (N. Y.) 601; and see *Hassie v. G. I. W. U. Congregation*, 35 Cal. 378. But see *infra*, this title, *Provisional Remedies Between Partners*.

4. See *Crouch v. Crouch*, 9 Iowa, 269; *Curry v. Allen*, 55 Iowa 318; *Clark v. Arnold*, 9 Dana (Ky.) 305; *Treadway v. Ryan*, 3 Kan. 437; *Goble v. Howard*, 12 Ohio St. 165.

5. See *Goll v. Hinton*, 8 Abb. Pr. (N. Y.) 122; *Phillips v. Cook*, 24 Wend. (N. Y.) 389; *Waddell v. Cook*, 2 Hill (N. Y.) 47; *Schrugham v. Carter*, 12 Wend. (N. Y.) 131; *Pope v. Haman*, Comb. 217; *Heydon v. Heydon*, 1 Salk. 392; *Bachurst v. Chinkard*, 1 Shower 169; *Lissard v. Warcup*, 2 Mod. 279; 12 Mos. 446; *Jacky v. Butler*, 2 Ld. Raym. 871; *Smith v. Stokes*, 1 East 367; *Eddie v. Davidson*, Doug. 650; *Morley v. Strombom*, 2 Bos. & Pul. 254.

In *Ward v. Begg*, 18 Barb. (N. Y.) 139, it was held that it is not necessary under the code that the plaintiff should have a cause of action for the payment of money merely to have an attachment. It is enough that a cause of action exists against the defendant and that the amount of the claim and the grounds therefor are stated.

A debt due to a partnership is not liable to attachment at the suit of a creditor of one of the partners, where the partnership is a continuing one, and where there has been no adjustment of partnership affairs. *People's Bank v. Shryock*, 48 Md. 427; *Lyndon v. Gorhan*, 1 Gall. (U. S.) 367; *Bulfinch v. Winchenbach*, 3 Allen (Mass.) 161; *Sweet v. Reed*, 12 R. I. 121.

Partnership property, which has been bought by one member of the firm, and afterwards assigned in trust for creditors by a valid assignment, cannot be attached by firm creditors. *Hart v. Blum*, 76 Tex. 113.

nership claims upon partnership property having priority over, though subsequent to, such levies for individual claims against the partners.¹

1. **Against the Firm.**—*a*. ATTACHMENT.—The rule has been asserted that an attachment cannot be sustained against a partnership unless the grounds therefor exist against the firm as represented by all the partners;² as in case of the non-residence of all or where all have absconded.³ The separate property of an ab-

1. *Burpee v. Bunn*, 22 Cal. 194; *Bullock v. Hubbard*, 23 Cal. 495; *Commercial Bank v. Mitchell*, 58 Cal. 42; *Filley v. Phelps*, 18 Conn. 294; *Clark v. Alee*, 3 Harr. (Del.) 80; *Switzer v. Smith*, 35 Iowa 269; *Fargo v. Ames*, 45 Iowa 491; *Commercial Bank v. Wilkins*, 9 Me. 28; *Locke v. Hall*, 9 Me. 133; *Douglas v. Winslow*, 20 Me. 89; *Pierce v. Jackson*, 6 Mass. 242; *Denny v. Ward*, 3 Pick. (Mass.) 199; *Trowbridge v. Cushman*, 24 Pick. (Mass.) 310; *Dyer v. Clark*, 5 Met. (Mass.) 562; 39 Am. Dec. 697; *Peck v. Fisher*, 7 Cush. (Mass.) 386; *Tappan v. Blaisdell*, 5 N. H. 190; *Tenney v. Johnson*, 43 N. H. 144; *Linford v. Linford*, 28 N. J. L. 113; *Crane v. French*, 1 Wend. (N. Y.) 311; *Dunham v. Murdock*, 2 Wend. (N. Y.) 553; *Fenton v. Folger*, 21 Wend. (N. Y.) 676; *Eighth Nat. Bank v. Fitch*, 49 N. Y. 539; *Ryder v. Gilbert*, 16 Hun. (N. Y.) 163; *Roberts v. Oldham*, 63 N. Car. 297; *Overholt's Appeal*, 12 Pa. St. 222; *Coover's Appeal*, 29 Pa. St. 9; *Bouge's Appeal*, 83 Pa. St. 101; *Tillinghast v. Champlin*, 4 R. I. 173; *Bowden v. Schatzell*, Bail. Eq. (S. Car.) 360; *Crawford v. Baum*, 12 Rich. (S. Car.) 75; *Christian v. Ellis*, 1 Gratt. (Va.) 396; *Flintoff v. Dickson*, 10 Up. Can., Q. B. 428; *Taylor v. Jarvis*, 14 Up. Can., Q. B. 128.

Where a sheriff with executions against a firm and also against one of the partners realized more than enough to pay the joint executions, and thereupon applied the surplus on the separate executions, it was held, in an action against the sheriff by a creditor of the firm to whom the partnership had assigned the surplus, that it was to be presumed that the entire interest of the firm had been sold, in sufficient property to pay the joint executions and the separate interest of the debtor partner in the remaining property to answer for his separate debt. *Roop v. Rogers*, 5 Watts (Pa.) 193.

Insolvency proceedings against one partner does not affect an attachment

of partnership property by a joint creditor. *Fern v. Cushing*, 4 Cush. (Mass.) 357.

If a partnership creditor attaches the interest of one partner only in the partnership name, a subsequent assignment for creditors by the firm will defeat him if the interest of such partner proves to be worthless. *Staats v. Bristow*, 73 N. Y. 264.

2. *Wiley v. Sledge*, 8 Ga. 532; *Boorum v. Ray*, 72 Ind. 151; *Williams v. Muthersbaugh*, 29 Kan. 730; *Edwards v. Hughes*, 20 Mich. 298; *Curtis v. Hollingshead*, 14 N. J. L. 402; *Faulkner v. Whitaker*, 15 N. J. L. 438; *Cowdin v. Hurford*, 4 Ohio 132; *Taylor v. McDonald*, 4 Ohio 149; *Leach v. Cook*, 10 Vt. 239. See *Faulkner v. Brigel*, 101 Ind. 329; *Staats v. Bristow*, 73 N. Y. 264. *Contra*, *Scruggs v. Blair*, 44 Miss. 406. *In re Chipman*, 14 Johns. (N. Y.) 217; 16 Johns. (N. Y.) 102.

Where there are different and distinct grounds of attachment against each partner, one being non-resident and the other about to remove, the attachment against the partnership assets will be sustained. *Starr v. Mayer*, 60 Ga. 546. See also *Sellew v. Crisfield*, 1 Handy (Ohio) 86.

An innocent partner may move to dismiss the attachment but a subsequent purchase by the innocent partner of the guilty one, will not affect the case, as he is entitled to possession of the partnership property irrespective of the purpose of the purchase, and the *bona fides* of a sale will not be examined. *Edwards v. Hughes*, 20 Mich. 289.

3. See *Williams v. Muthersbaugh*, 29 Kan. 730; *Curtis v. Hollingshead*, 14 N. J. L. 402; *Leach v. Cook*, 10 Vt. 239.

As to what constitutes a fraudulent disposition of property by a partner, see *Roach v. Brannon*, 57 Miss. 490; *Robinson v. Crowder*, 1 Bailey (S. Car.) 185; *McKinney v. Rosenband*, 23 Fed. Rep. 785.

sconding or non-resident partner cannot be attached in an action brought against him alone, as the partnership debt is a joint one;¹ and even if the action is properly brought against all the partners, the rest of whom are resident, it is doubtful whether the separate property of the absentees can be attached.² Under statutes changing joint debts into joint and several ones, however, a creditor may sue an individual partner and issue an attachment against his separate property;³ and an attachment against both, which proves to be unfounded as to one, will be sustained as to the other.⁴ Under the statutes of many of the States an attachment has been held to lie against both the partnership and individual property, although some of the members of the firm are not within the provisions of the statute.⁵ If one partner

In *Jones v. Lusk*, 2 Metc. (Ky.) 356, it was held that selling the property and paying separate debts of the partners with the proceeds, is not such a fraudulent conveyance as authorizes an injunction and attachment. See also *McKinney v. Rosenband*, 23 Fed. Rep. 785.

But the rule is different in case of the insolvency of the firm. *Keith v. Armstrong*, 56 Wis. 222.

1. *Boorum v. Ray*, 72 Ind. 151; *Curtis v. Hollingshead*, 14 N. J. L. 402; *Faulkner v. Whitaker*, 15 N. J. L. 438; *Cowdin v. Hurford*, 4 Ohio 132.

If the non-resident or absconding partner is a sole surviving member of the firm, an attachment against the partnership property will lie. *Wiley v. Sledge*, 8 Ga. 532; *Roach v. Bran-non*, 57 Miss. 490.

In *Graham v. Boynton*, 35 Tex. 712, the question whether a non-resident firm could be brought within the jurisdiction by attachment of the separate property of one partner was raised but not decided.

2. That it cannot be held, see *Edwards v. Hughes*, 20 Mich. 289; *Curtis v. Hollingshead*, 14 N. J. L. 402; *Taylor v. McDonald*, 4 Ohio 149.

Contra, that an attachment against the individual property will lie. See *Davis v. Werden*, 13 Gray (Mass.) 305; *Van Kirk v. Wilds*, 11 Barb. (N. Y.) 520; *Stevens v. Perry*, 113 Mass. 380.

In *Dow v. Sayward*, 14 N. H. 9, it was doubted whether the interest of one partner could be said to exist within the jurisdiction so as to be attachable if all the partners are non-residents and the firm's place of business in another State.

3. *Conklin v. Harris*, 5 Ala. 213;

Pearce v. Shorter, 50 Ala. 318; *Connon v. Dunlap*, 64 Ga. 680; *Williams v. Muthersbaugh*, 29 Kan. 730; *Miller v. Bay Circuit Judge*, 41 Mich. 326; *Moore v. Otis*, 20 Mo. 153; *White v. Schnebly*, 10 Watts (Pa.) 217.

Under a statute allowing an attachment against one or more joint debtors, a joint wrong must not be alleged against all, but the fact should be stated so that an innocent partner will not be subjected to rigorous treatment. *Edwards v. Hughes*, 20 Mich. 289.

4. *Williams v. Muthersbaugh*, 29 Kan. 730; *Moore v. Otis*, 20 Mo. 153.

Death of a Partner.—A writ of attachment against partners, levied upon real estate of one of them, abates by the death of that one, and cannot proceed against the others, for want of jurisdiction, and the action cannot be revived by *scire facias* against the representatives of the deceased. *Ballance v. Samuel*, 4 Ill. 380.

5. See *Hines v. Kimball*, 47 Ga. 587; *Smith v. Orser*, 42 N. Y. 132; *Goll v. Hinton*, 8 Abb. Pr. (N. Y.) 120; *Phillips v. Cook*, 24 Wend. (N. Y.) 389; *Schrugham v. Carter*, 12 Wend. (N. Y.) 131; *Burrall v. Acker*, 23 Wend. (N. Y.) 606; *Weddell v. Cook*, 2 Hill (N. Y.) 47; *Mersereau v. Norton*, 15 Johns. (N. Y.) 179; *Matter of Chipman*, 14 Johns. (N. Y.) 217; *Patterson v. Perry*, 10 Abb. Pr. (N. Y.) 82; *Kelly v. Breusing*, 33 Barb. (N. Y.) 123; *Rhoads v. Woods*, 41 Barb. (N. Y.) 477; *Skinner v. Stuart*, 39 Barb. (N. Y.) 206; *McKay v. Harrower*, 27 Barb. (N. Y.) 471; *Marshall v. McGregor*, 59 Barb. (N. Y.) 519; *Rinchey v. Stryker*, 26 How. Pr. (N. Y.) 75; *Phillips v. Bridge*, 11 Mass. 242; *Whitney v. Ladd*, 10 Vt. 165; *Welch v. Clark*, 12 Vt. 686; *Remington v.*

resides within the States, the non-residence of his co-partner is no ground for an attachment against the effects of both.¹ The attachment holds against the interest of an absconding partner only;² but if all the partners have absconded, attachment lies against the property of the firm.³

The procedure to obtain a writ of attachment differs from that in ordinary cases, only with relation to the number and status of the parties.⁴

Cady, 10 Conn. 44; Buddington v. Stewart, 14 Conn. 404; Stevens v. Stevens, 39 Conn. 474; Douglas v. Winslow, 20 Me. 89; Bradbury v. Smith, 21 Me. 117; Bryan v. Lashley, 13 Smed. & M. (Miss.) 284; Day v. McQuillan, 13 Minn. 205; Wallace v. Galloway, 5 Coldw. (Tenn.) 510; Searcy v. Platte Co., 10 Mo. 269; Morgan v. Watmough, 5 Whart. (Pa.) 125; Wilcox v. Casey, 9 Dana (Ky.) 297; Moore v. Simpson, 5 Litt. (Ky.) 49; Watts v. Griffin, Litt. Sel. Cas. (Ky.) 244; Lee v. Bullard, 3 La. Ann. 463; North West Bank v. Taylor, 16 Wis. 609; Collins v. Hood, 4 McLean (U. S.) 186; M'Carty v. Emlen, 2 Dall. (U. S.) 277. But see Wiley v. Sledge, 8 Ga. 532; Voorhees v. Hoagland, 6 Blackf. (Ind.) 232; Burgess v. Atkins, 5 Blackf. (Ind.) 337; Barber v. Robeson, 15 N. J. L. 17; Taylor v. McDonald, 4 Ohio 149; White's Case, 10 Watts (Pa.) 217; Leach v. Cook, 19 Vt. 239; Kruger v. Speith, 8 Mont. 482.

Against Surviving Partner.—An attachment on property in the hands of defendant as surviving partner cannot be dissolved on the ground that he was a trustee thereof, or a personal representative of the deceased partner. Cobb v. Spieth, 8 Mont. 494; Morey v. Spieth, 8 Mont. 494; Bozeman Nat. Bank v. Spieth, 8 Mont. 475; Ferguson v. Spieth, 8 Mont. 473.

Amendment.—An attachment suit being commenced in the ordinary way, by mentioning the names of the alleged partners, may by amendment be changed into an action against the firm or partnership as such, describing them by their firm name. McCaskey v. Pollock, 82 Ala. 174.

1. Wallace v. Galloway, 5 Coldw. (Tenn.) 510.

The non-residence of a co-debtor is no ground for attaching the resident debtor's property. Mills v. Brown, 2 Metc. (Ky.) 404; Duncan v. Headley, 4 Bush (Ky.) 45. But the residence of

one contractor within the State will not shield the property or interests of his co-contractors living out of the State from attachment. Jefferson Co. v. Swain, 5 Kan. 376.

2. Bogart v. Dart, 25 Hun (N. Y.) 395; Buckingham v. Swezey, 25 Hun (N. Y.) 84.

3. Leach v. Cook, 10 Vt. 239.

If both are residing out of the State, and the creditor finds property of one of them within the State, he may attach it as that of a non-resident debtor without mentioning the co-obligor. Dobbs v. Justices, 17 Ga. 624.

Whether partnership effects are attachable in a suit against one member of a firm, who is a non-resident, upon a debt contracted by the partnership, depends upon the character of the obligation—whether it is joint or several. If the obligation sued upon is joint, partnership effects are not attachable in such suit. Wiley v. Sledge, 8 Ga. 532; Barber v. Robeson, 15 N. J. L. 17; Wallace v. Galloway, 5 Coldw. (Tenn.) 510; but if it is joint and several, the rule is otherwise. Green v. Payne, 1 Ala. 235; Conklin v. Harris, 5 Ala. 213; Mills v. Brown, 2 Metc. (Ky.) 404; *In re* Chipman, 14 Johns. (N. Y.) 217; *In re* Smith, 16 Johns. (N. Y.) 102; Mersereau v. Norton, 15 Johns. (N. Y.) 179; Robbins v. Cooper, 6 Johns. Ch. (N. Y.) 186.

4. **The Affidavit.**—An affidavit that Day & Higgs concealed themselves is sufficient, although, not stating that the individuals concealed themselves. Guckenheimer v. Day, 74 Ga. 1.

If the name and membership of only one partner in the firm is known to the plaintiff, an affidavit alleging the debt due by the firm and these facts, is sufficient. Hines v. Kimball, 47 Ga. 587.

A **Misnomer** of one of the partners does not invalidate the attachment. See Hubbardston Lumber Co. v. Covert, 35 Mich. 254; Rushton v. Rowe, 64 Pa. St. 63. Nor does a misnomer of

b. PARTNERS AS GARNISHEES.—As a partner who is sued alone upon a debt due by the partnership, may plead the non-joinder in abatement, so if the plaintiff in an action against a person to whom a firm is indebted garnishes one member only, the debt due by the partnership will not be held by the process;¹ and if a garnishment or trustee process be issued against a firm or against persons as partners it will not reach property or money held or owed by them personally.² In States where one partner can be sued alone, however, if one partner is garnished, and admits that his firm is indebted, as the creditor could have elected to proceed against him alone, he is bound.³

the firm. *Field v. Malone*, 102 Ind. 251.

Bond.—Where partners bring a suit in their individual names and give bond in the firm name, reciting who composes the firm, the bond is valid. *Dow v. Smith*, 8 Ga. 551; *Danforth v. Carter*, 1 Iowa 546; *Gray v. Steedman*, 63 Tex. 95; *Tessier v. Crowley*, 17 Neb. 207. See *Linn v. Buckingham*, 2 Ill. 451. Or such bond may be signed by the individual partners. *Drake v. Brander*, 8 Tex. 351.

In an action in the firm name, a bond in the firm name will be presumed to have been authorized by all the partners. See *Dow v. Smith*, 8 Ga. 551; *Perkins v. Walker*, 16 Vt. 240; *Kasson v. Brocker*, 47 Wis. 79. And in an action against the firm in the firm name an attachment bond running to the firm is valid. *Caussey v. Baily*, 57 Tex. 665. And see *Mason v. Rice*, 66 Iowa 174; *Ray v. Steedman*, 63 Tex. 95. But see *Birdsong v. McLaren*, 8 Ga. 521.

In an action against D. M. Osborn and others unknown as partners, D. M. Osborn & Co., having been really the defendant and having defended the suit, can sue on the attachment bond though they were wrongfully described. *Hedrick v. Osborne*, 99 N. Y. 143. And see *Faulkner v. Brigel*, 101 Ind. 329.

A bond signed by one partner in his own name is sufficient in an action in which such partner for himself and as agent, for his co-partner sues out an attachment. *Roden v. Roland*, 1 Stew. (Ala.) 266; *Wallis v. Wallace*, 6 How. (Miss.) 254. But if the firm is the plaintiff, a bond by one partner in his own name renders the attachment void. *Jones v. Anderson*, 7 Leigh (Va.) 308.

Appearance.—Although no member of a partnership may have been properly served with notice of the levy of an at-

tachment, yet where the record shows a general appearance of one of the partners it operates as a waiver of the defect of notice. *McCasky v. Pollock*, 82 Ala. 174.

1. *Reid v. McLeod*, 20 Ala. 576; *Huskill v. Johnson*, 24 Ga. 625; *Wilson v. Albright*, 2 Greene (Iowa) 125; *Peabody v. McGuire*, 79 Me. 572; *Jewett v. Bacon*, 6 Mass. 60; *Nash v. Brophy*, 13 Met. (Mass.) 476; *Warren v. Perkins*, 8 Cush. (Mass.) Hoyt v. Robinson, 10 Gray (Mass.) 371; *Wetherwax v. Paine*, 2 Mich. 555; *Hirth v. Pfeifle*, 42 Mich. 31; *Rix v. Elliot*, 1 N. H. 184; *Hudson v. Hunt*, 5 N. H. 538; *Elliott v. Smith*, 2 Cranch (C. C.) 543; *Contra*, *Brealsford v. Meade*, 1 Yeates (Pa.) 488.

Though a number of partners are non-residents and out of the jurisdiction they must all be joined. *Atkins v. Prescott*, 10 N. H. 120; *Pettes v. Spaulding*, 21 Vt. 66. But see *Parker v. Danforth*, 16 Mass. 299.

Where a garnishment was issued against one member of a partnership as debtor of the defendant and he paid the debt after the service of the process, he will be discharged. *Nash v. Brophy*, 13 Met. (Mass.) 476; *Pettes v. Spaulding*, 21 Vt. 66.

An individual garnishee who answered that he is not indebted, but that the debt is owing by his firm, must be discharged. *Wellover v. Soule*, 30 Mich. 481; *Ellicott v. Smith*, 23 Cranch (U. S.) 543. But see to the contrary *Brealsford v. Meade*, 1 Yeates (Pa.) 488.

2. *Wart v. Mann*, 124 Mass. 586; *Coverly v. Braynard*, 28 Vt. 738.

3. *Travis v. Tartt*, 8 Ala. 574; *Speak v. Kinsey*, 17 Tex. 301.

Where less than all the partners have been garnished and the firm has paid the judgment rendered in the

Where the process is issued against all the partners for a debt owed by the firm to the defendant, service upon those within the jurisdiction is sufficient to hold funds in the hands of the firm.¹ But the service must be upon all who are within reach of process.² And in States where service upon one of the partners is sufficient to confer jurisdiction over the whole partnership service upon one of the garnishees is binding.³ But in all cases where some of the partners are out of the jurisdiction or are not served, time will be allowed to enable the partners who have been served to ascertain the state of the accounts and whether their non-resident partners have not paid the debt in ignorance of the process.⁴

An answer of one of a firm of garnishees admitting the debt is an answer for all and charges the firm.⁵ As an amendment would relate back to the beginning of the action, and as the firm may have paid the defendant since that time the writ is not amendable.⁶ In States in which an action can be brought by or against partners in their firm name they can be made garnishees in that name.⁷

case, they cannot be held to pay the amount over again to another creditor who joined them all as garnishees, on the ground that the prior garnishment could have been resisted by objecting to the non-joinder. *Hawley v. Ather-ton*, 39 Conn. 309.

1. *Parker v. Danforth*, 16 Mass. 299; *Atkins v. Prescott*, 10 N. H. 120; *Peck v. Barnum*, 24 Vt. 75.

Where all the garnishees live out of the State, the property in the hands of any of them is regarded as remaining at his residence and is not in legal contemplation within reach of the process, and his acknowledgment of service in another State, therefore, will not bind the firm. *Clark v. Wilson*, 15 N. H. 150. And see *Bowen v. Pope*, 125 Ill. 28.

2. *Warner v. Perkins*, 8 Cush. (Mass.) 518; *Macomber v. Wright*, 35 Me. 156.

If one of two partners, both of whom were garnished and both of whom appeared and answered, dies *pendente lite* the proceeding can be prosecuted to judgment against the other as surviving partner. *Gaines v. Bernie*, 3 Ala. 114.

3. *Hinkley v. St. Anthony Falls Water Power Co.*, 9 Minn. 65; *State v. Linaweaver*, 3 Head (Tenn.) 51.

A garnishment process served upon a person indebted to a single one of the defendant partners which notifies him that all credits of the firm in

his possession are levied upon, creates no lien, as it does not show that the credits of one partner were taken. See *Greentree v. Rosenstock*, 61 N. Y. 583.

4. *Parker v. Danforth*, 16 Mass. 229; *Robinson v. Hall*, 3 Met. (Mass.) 301; *Atkins v. Prescott*, 10 N. H. 120; *Peck v. Barnum*, 24 Vt. 75.

5. *Anderson v. Wanzer*, 5 How. (Miss.) 587; 37 Am. Dec. 170.

If all are garnished an answer by one that he has no property of the defendant is untrue as he is responsible for all the debts of the firm. *Macomber v. Wright*, 35 Me. 156.

It is doubtful whether this rule would apply if the domicil of the firm and some of the partners is in a foreign country where the American doctrine that full faith and credit shall be given in one State to a judgment in another, is not in force. See *Kidder v. Packard*, 13 Mass. 80; *Parker v. Danforth*, 16 Mass. 299.

6. *Knapp v. Levanway*, 27 Vt. 298.

In *Massachusetts* the objection that the garnishee's partners are not joined, must be made at an early stage of the proceedings, being a matter in abatement only. *Hoyt v. Robinson*, 10 Gray (Mass.) 371; *Sabin v. Cooper*, 15 Gray (Mass.) 532; *Parker v. Danforth*, 16 Mass. 299.

7. *Whitman v. Keith*, 18 Ohio St. 134.

c. EXECUTIONS.—The writ of execution follows the judgment, of course, in that it runs against all the judgment debtors and not against any part of them,¹ an attachment being in effect an initiatory execution against the defendant's property before judgment and issued in anticipation thereof.² Executions against the partners upon a partnership liability can be levied either upon the joint property of the firm or upon the separate property of any of the partners.³

d. EXEMPTIONS.—No exemption or homestead claims are allowed as a general rule on execution against partnership property, issued on a judgment for a partnership debt, either to the partnership as a body, or to the individual members out of the joint assets;⁴ though the contrary rule prevails in a few of the

1. Bates' Law of Part., § 1129.

Execution creditors of a partnership are subrogated to the lien which a partner has on all the assets of the firm, to pay firm debts, and such creditor's lien takes precedence of any exemption rights claimed by the partners. *Charleston v. McGraw*, 3 Wash. Ter. 344.

Where an execution was levied upon real estate of a firm which was incumbered by a mortgage by one partner upon his interest therein, the sale was held to be free of the mortgage. *Jones v. Parsons*, 25 Cal. 100; *Whitmore v. Shiverick*, 3 Nev. 288.

2. *Smith v. Orser*, 42 N. Y. 132; *McKay v. Harrower*, 27 Barb. (N. Y.) 463; *Rinchey v. Stryker*, 26 How. Pr. (N. Y.) 75.

After an attachment has been levied when an execution comes to the hands of the sheriff, he does not levy, for that has already been done by authority of the attachment, so that the attachment and execution together contain the same and no more authority than a common writ of *fi. fa.* *Smith v. Orser*, 42 N. Y. 132.

3. *Haralson v. Campbell*, 63 Ala. 278; *Leinkauff v. Munter*, 76 Ala. 194; *Clayton v. May*, 68 Ga. 27; *Porter v. Johnson*, (Ga. 1888), 7 S. E. Rep. 317; *Dean v. Phillips*, 17 Ind. 406; *Hardy v. Overman*, 36 Ind. 549; *Bray v. Seligman*, 75 Mo. 31; *Randolph v. Daly*, 16 N. J. Eq. 313; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Saunders v. Reilly*, 105 N. Y. 12; *Abbot v. Smith*, 2 W. Bl. 947.

In *Crowninshield v. Strobel*, 2 Brev. (S. Car.) 80, however, it was held that partnership property must be first exhausted.

In *Paxon v. Beans*, 3 Phila. (Pa.) 433, it was held that upon a judgment con-

fessed by one partner for a partnership debt, the interest of other partners in the goods of the firm can be as effectually sold as if the latter were parties to the judgment.

Where one of two partners removes and resides out of the jurisdiction of the court, execution against the two may go to other counties the same as if both had removed. *M'Couns v. Holmes*, 4 Litt. (Ky.) 389.

4. *Giovanni v. First Nat. Bank*, 55 Ala. 305; 28 Am. Rep. 723; *Terrell v. Hurst*, 76 Ala. 588; *Levy v. Williams*, 79 Ala. 171; *Richardson v. Adler*, 46 Ark. 43; *Bishop v. Hubbard*, 23 Cal. 514; *Kingsley v. Kingsley*, 39 Cal. 665; *State v. Bowden*, 18 Fla. 17; *Van Dyke v. Kilgo*, 54 Ga. 551; *Trowbridge v. Cross*, 117 Ill. 109; *Smith v. Harris*, 76 Ind. 104; *State v. Emmons*, 99 Ind. 452; *Ex parte Hopkins*, 104 Ind. 157; *Drake v. Moore*, 66 Iowa 58; *Hoyt v. Hoyt*, 69 Iowa 174; *Guptil v. McFee*, 9 Kan. 30; *Succession of Stauffer*, 21 La. Ann. 520; *Pond v. Kimball*, 101 Mass. 105; *Holmes v. Winchester*, 138 Mass. 542; *Baker v. Sheehan*, 29 Minn. 235; *Prosser v. Hartley*, 35 Minn. 340; *Robertshaw v. Hanway*, 52 Miss. 713; *State v. Spencer*, 64 Mo. 355; 27 Am. Rep. 244; *Julian v. Wrightsman*, 73 Mo. 569; *Lindley v. Davis*, 6 Mont. 453; *People v. Till*, 3 Neb. 261; *Wise v. Frey*, 7 Neb. 134; 29 Am. Rep. 380; *Lininger v. Raymond*, 9 Neb. 40; *Terry v. Berry*, 13 Nev. 514; *Gaylord v. Imhoff*, 26 Ohio St. 317; 20 Am. Rep. 762; 15 Am. Law Reg., N. S. 477; *Bonsall v. Comly*, 44 Pa. St. 442; *Clegg v. Houston*, Phila. (Pa.) 352; *Spiro v. Paxton*, 3 Lea (Tenn.) 75; 31 Am. Dec. 630; *Chalfant v. Grant*, 3 Lea (Tenn.) 118; *Gill v. Lattimore*, 9 Lea (Tenn.)

States.¹ But even in States where the exemption is allowed it cannot be claimed by the partners jointly or by the firm as such.²

Partnership property may be in good faith and before execution converted into separate property, however, and an exemption may then be claimed in it by the partner whose property it becomes.³ And where property is owned in severalty by each of the partners though used for the partnership business, if the joint interest is in the profits only it may be claimed as exempt from execution.⁴

2. Of the Interests of the Partners.—The interest of one partner in the partnership property may be attached or taken and sold on

381; *In re Hafer*, 1 Nat. Bankr. Reg. 547; *In re Price*, 6 Nat. Bankr. Reg. 406; *In re Handlin*, 12 Nat. Bankr. Reg. 49; *In re Toone*, 13 Nat. Bankr. Reg. 170; *In re Stewart*, 13 Nat. Bankr. Reg. 295; *In re Corbett*, 5 Sawy. (U. S.) 206; *In re Sauthoff*, 8 Biss. (U. S.) 35; 16 Nat. Bankr. Reg. 183; 5 Am. Law Rec. 173; *In re Blodgett*, 10 Nat. Bankr. Reg. 145; *In re Hughes*, 16 Nat. Bankr. Reg. 464; *In re Croft*, 17 Nat. Bankr. Reg. 324; 8 Biss. (U. S.) 188; *In re Melvin*, 17 Nat. Bankr. Reg. 543; *In re Bjornstad*, 18 Nat. Bankr. Reg. 282; *In re Boothroyd*, 14 Nat. Bankr. Reg. 223; *Commercial etc. Bank v. Corbett*, 5 Sawy. (U. S.) 543; *Short v. M'Gruder*, 22 Fed. Rep. 46; *Wooldridge v. Irving*, 23 Fed. Rep. 677.

A creditor partner has no lien in the absence of a special contract, upon a private debt, owed to him by a co-partner, and the balance owing therefor can be claimed as exempt by the creditor upon winding up. *Evans v. Bryan*, 95 N. Car. 174.

Tools and other implements of mechanics are exempt in some states by statute, although they are partnership property, and, when redelivered to the partners, they belong to them individually, and do not become partnership property if the firm is dissolved. *Wells v. Ellis*, 68 Cal. 243.

1. See *Blanchard v. Paschal*, 68 Ga. 32; 45 Am. Rep. 474; *Harris v. Visscher*, 57 Ga. 229; *Hunnicut v. Summey*, 63 Ga. 586; *Skinner v. Shannon*, 44 Mich. 86; 38 Am. Rep. 232; *Waite v. Mathews*, 50 Mich. 392; *Radcliff v. Wood*, 25 Barb. (N. Y.) 52; *Stewart v. Brown*, 37 N. Y. 350; *Burns v. Harris*, 67 N. Car. 140; *Scott v. Kenan*, 94 N. Car. 296; *Smith v. Chenault* 48 Tex. 455; *Griffie v. Maxey*, 58 Tex. 210; *Swearingen v. Bassett*, 65

Tex. 267; *Russell v. Lennon*, 39 Wis. 570; 20 Am. Rep. 70; *Gilman v. Williams*, 7 Wis. 329; *O'Gorman v. Fink*, 57 Wis. 649; 46 Am. Rep. 58; *McNair v. Rewey*, 62 Wis. 167; *In re Rupp*, 4 Nat. Bankr. Reg. 95; *In re Toone*, 13 Nat. Bankr. Reg. 170; *In re Young*, 3 Nat. Bankr. Reg. 547; *In re McKoecher*, 8 Nat. Bankr. Reg. 409; *In re Richardson*, 11 Nat. Bankr. Reg. 114.

2. *Russell v. Lennon*, 39 Wis. 570; 20 Am. Rep. 60; *McNair v. Rewey*, 62 Wis. 167; *First Nat. Bank v. Hackett*, 61 Wis. 335; *Goll v. Hubbell*, 61 Wis. 293.

3. *Burton v. Baum*, 32 Kan. 641; *Worman v. Giddey*, 30 Mich. 151; *State v. Thomas*, 7 Mo. App. 205; *Mortley v. Flanagan*, 38 Ohio St. 401; *Gill v. Lattimore*, 9 Lea (Tenn.) 381; *Griffie v. Maxey*, 58 Tex. 210; *Watson v. McKinnon*, 73 Tex. 210.

A mere division of property if the firm is insolvent other than by a *bona fide* sale by one to the other, is not sufficient to authorize a claim of exemption. *Bishop v. Hubbard*, 23 Cal. 514; *Gill v. Lattimore*, 9 Lea (Tenn.) 381; *Chalfant v. Grant*, 3 Lea (Tenn.) 118; *In re Sauthoff*, 16 Nat. Bankr. Reg. 181; 8 Biss. (U. S.) 35; 5 Am. Law Rec. 173.

When the firm is solvent such conversion of joint into separate property as will warrant a claim of exemption may be effected by the mere acquiescence of the co-partners. *Leinrich v. Koelling*, 21 Mo. App. 133; *Swearingen v. Bassett*, 65 Tex. 267.

And that the sale was made for the express purpose of enabling the buyer to claim an exemption does not invalidate it. *Mortley v. Flannagan*, 38 Ohio St. 401.

4. *Root v. Gay*, 64 Iowa 399; *Griffie v. Maxey*, 58 Tex. 210; *Smith v. Chenault*, 48 Tex. 445.

execution for his separate debt;¹ but only that portion of the partnership property which belongs to the debtor partner after paying the debts due by the firm and his own indebtedness to the firm can be sold.² The duty of the sheriff is to attach or levy upon the whole of the partnership effects, or so much of them as may be requisite to satisfy his process;³ though some of the States

The proper and most seasonable time for claiming exemption is when the sheriff is about to attach. *Sears v. Hanks*, 14 Ohio St. 208; *Frost v. Shaw*, 3 Ohio St. 270.

1. *Wilson v. Strobach*, 59 Ala. 488; *James v. Stratton*, 32 Ill. 202; *Newhall v. Buckingham*, 14 Ill. 405; *White v. Jones*, 38 Ill. 159; *People's Bank v. Shryock*, 48 Md. 427; *Sitler v. Walker*, 1 Freem. Ch. (Mis.) 77; *Broadnax v. Thomason*, 1 La. Ann. 384; *Marston v. Dewberry*, 21 La. Ann. 518; *Chopin v. Wilson*, 27 La. Ann. 444; *Lee v. Bulard*, 3 La. Ann. 462; *Dow v. Sayward*, 14 N. H. 9; 12 N. H. 271; *Nixon v. Nash*, 12 Ohio St. 647; *Place v. Sweetzer*, 16 Ohio 142; *Appeal of Dengler*, 125 Pa. St. 12; *Morgan v. Wattmough*, 5 Whart. (Pa.) 125; *Saunders v. Bartlett*, 12 Heisk. (Tenn.) 316; *Weaver v. Ashcroft*, 50 Tex. 428; *Meyberg v. Steagall*, 51 Tex. 351; *Schatzill v. Bolton*, 2 McCord (S. Car.) 478. See *Johnson v. Sanford*, 13 Conn. 461.

The creditor of a member of a co-partnership must fix a lien on the interest of his debtor, by process, before he can subject it by winding up the firm. *Lincoln Sav. Bank v. Gray*, 12 Lea (Tenn.) 459.

Co-partners cannot, in any wise, impair the rights of an attaching creditor of one of them, by agreeing after the attachment to a dissolution of the co-partnership. *Trafford v. Hubbard*, 15 R. I. 326.

The fact that the partnership real estate stands in the name of one of the partners, does not prevent a separate creditor of another partner from attaching his interest therein. *Hill v. Beach*, 12 N. J. Eq. 31.

2. *Jones v. Thompson*, 12 Cal. 191; *Witter v. Richards*, 10 Conn. 37; *Filley v. Phelps*, 18 Conn. 294; *Brewster v. Hammett*, 4 Conn. 540; *Pierce v. Jackson*, 6 Mass. 242; *Fisk v. Herrick*, 6 Mass. 271; *Doner v. Stauffer*, 1 P. & W. (Pa.) 198; 21 Am. Dec. 370; *Tappan v. Blaisdell*, 5 N. H. 190; *Gibson v. Stevens*, 7 N. H. 352; *Menagh v. Whitwell*, 52 N. Y. 146; *Williams v. Gage*, 49 Miss. 777; *Place v. Sweetzer*,

16 Ohio 142; *McCarty v. Emlen*, 2 Yeates (Pa.) 190; *White v. Dougherty*, Mart. & Y. (Tenn.) 309; *De Forest v. Miller*, 42 Tex. 34; *Merrill v. Rinker*, 1 Baldw. (U. S.) 528; *Lyndon v. Gorham*, 1 Gall. (U. S.) 367.

If an execution against one partner is levied on partnership property, and a statutory claim is interposed by his co-partner, the plaintiff is not entitled to a one-half interest in said property declared subject to his execution. *Tait v. Murphy*, 80 Ala. 440.

The sheriff has power to levy under execution upon only the tangible property of the firm. He does not sell the interest of the debtor in the accounts or good will or in anything he cannot seize. *Hibershon v. Blurdon*, 1 De G. & Sm. 121; *Helmore v. Smith*, 35 Ch. Div. 436.

Where there Are Dormant Partners.—In case of two attachment suits against a defendant who has a dormant partner the partnership assets in the name of the defendant are attachable, and one of the attachers would gain no advantage over the other by amending his pleadings so as to include the dormant partner, nor would he lose his priority by such useless amendment. *Wright v. Herrick*, 125 Mass. 154; *Lord v. Baldwin*, 6 Pick. (Mass.) 348; *French v. Chase*, 6 Me. 166. And see *Rogers v. Bradford*, 56 Tex. 630.

3. *Daniel v. Owens*, 70 Ala. 297; *Girard v. Bates*, 26 Ill. App. 300; *Branch v. Wiseman*, 51 Ind. 1; *Stumph v. Bauer*, 76 Ind. 157; *Marston v. Dewberry*, 21 La. Ann. 518; *Blanchard v. Luce*, 19 La. Ann. 46; *Levy v. Cowan*, 27 La. Ann. 556; *Sirrione v. Briggs*, 31 Mich. 443; *Sanders v. Young*, 31 Miss. 111; *Atwood v. Meredith*, 37 Miss. 635; *Marshall v. McGregor*, 59 Barb. (N. Y.) 519; *Whighman's Appeal*, 63 Pa. St. 194; *Vandike v. Rosskan*, 67 Pa. St. 330; *Rogers v. Nichols*, 20 Tex. 719; *Shaver v. White*, 6 Munf. (Va.) 110. And see *Clark v. Cushing*, 52 Cal. 617.

The individual interest of a co-partner in the firm effects is attachable by seizure of the effects, even though the

permit a levy on specific property less than the whole.¹ The creditor acquires no legal interest in the property levied upon, and until the interest of the debtor becomes a share in common in the buyer by means of a sale the title is unaffected and a purchaser from the firm would get a title unincumbered by the levy,² and even a judgment against one partner is not such a lien upon the real estate of the firm as to remain an incumbrance after a sale by it.³ These principles apply to actions brought by a creditor of the partnership against one partner or to an attachment or levy of execution by a partnership creditor against the individual interest of one partner as well as to actions upon claims against an individual partner.⁴

partner sued may have at the time largely overdrawn his account with the firm. *Trafford v. Hubbard*, 15 R. I. 326.

In levying an execution on land owned by the defendant in partnership with another person, the officer need only examine the record as to the legal ownership; it is not his duty to undertake to determine the latent, equitable rights, as between the partners. *Benton v. Bailey*, 50 Vt. 137.

Massachusetts Gen. Sts., ch. 123, §§ 87, 88, providing that personal property, which has been attached in a suit against one part-owner, shall, at the request of the other part-owner, be appraised and delivered to him upon his giving bond to the attaching officer, do not apply to an attachment of partnership property in an action against one partner. *Breck v. Blair*, 129 Mass. 127.

1. See *Hershfield v. Claffin*, 25 Kan. 166; 37 Am. Rep. 237; *New Orleans v. Gauthreaux*, 32 La. Ann. 1126; *Fogg v. Lawry*, 68 Me. 78; 28 Am. Rep. 19; *Wiles v. Maddox*, 26 Mo. 77; *Carrillon v. Thomas*, 6 Mo. App. 574; *Phillips v. Cook*, 24 Wend. (N. Y.) 389; *Uhler v. Semple*, 20 N. J. Eq. 288; *Nixon v. Nash*, 12 Ohio St. 647; *White v. Woodward*, 8 B. Mon. (Ky.) 484.

In *Fogg v. Lawry*, 68 Me. 78; 28 Am. Rep. 19, it was held that a levy could be made on the whole or a particular part of assets situated together, as the debt may be small and the assets large and scattered.

In *Nixon v. Nash*, 12 Ohio St. 647, it is held that the levy and sale must be of an undivided part of the chattel equal to the debtor's original interest in the business, the purchaser acquiring only the beneficial interest of the debtor. See also *Aldrich v. Wallace*, 8 Dana (Ky.) 287; *Sanders v. Young*,

31 Miss. 111; *Reed v. Shepardson*, 2 Vt. 120; 19 Am. Dec. 697.

2. *Robinson v. Tevis*, 38 Cal. 611; *Donellan v. Hardy*, 57 Ind. 393; *Commercial Bank v. Wilkins*, 9 Me. 28; *Hill v. Wiggins*, 31 N. H. 292; *Staats v. Bristow*, 73 N. Y. 264; *Garbett v. Veale*, 5 Q. B. 408; 13 L. J. Q. B. 98. And see *Jones v. Fletcher*, 42 Ark. 422; *Evans v. Hawley*, 35 Iowa 83; *Tenney v. Johnson*, 43 N. H. 144.

The legal title to real estate being in the partners as tenants in common, an attachment on the interest of one partner will affect his legal title by moieties, but the creditor or buyer will hold the individual share in trust to respond to the partnership liabilities. *Peck v. Fisher*, 7 Cush. (Mass.) 386. And see *Jones v. Fletcher*, 42 Ark. 422; *McCauley v. Fulton*, 44 Cal. 355.

In *McMillan v. Hadley*, 78 Ind. 590, however, it was held that a buyer without notice that it was partnership real estate would hold the undivided share against the partnership creditors.

3. *Bowen v. Billings*, 13 Neb. 439; *Kramers v. Arthur*, 7 Pa. St. 165; *Lancaster Bank v. Myley*, 13 Pa. St. 544; *Meily v. Wood*, 71 Pa. St. 488; 8 Phila. (Pa.) 517.

In *Bowen v. Billings*, 13 Neb. 439, it was held that a judgment against one partner is not an interest in partnership property but a mere right to levy, and attaches to the debtor's interest. See also *Coster v. Bank of Georgia*, 24 Ala. 37.

4. *Witter v. Richards*, 10 Conn. 37; *Denny v. Ward*, 3 Pick. (Mass.) 199; *Staats v. Bristow*, 73 N. Y. 264; *Ross v. Henderson*, 77 N. Car. 170; *Scruggs v. Burruss*, 25 W. Va. 670.

But where a firm was composed of adults and infants and upon being sued for liabilities of the firm, the minors

a. GARNISHMENT.—A debt owing to a partnership cannot be made the subject of garnishment in favor of an individual creditor, the debtor owing nothing to any one member of the firm.¹ Where the entire legal interest of a firm has become vested in a sole surviving partner, however, a debt due the firm may be garnished subject to the prior rights of firm creditors and the representatives of the deceased partners,² and where a debt is due the

pleaded infancy in some of the actions, and judgment was rendered against the adults alone, and in other cases no such defense was made and judgment was rendered against all the partners, it was held that both classes of judgments were entitled to share pro rata in the partnership assets, as their interests in the partnership are subject to its debts and all they can repudiate is their personal liability. *Whitemore v. Elliott*, 7 Hun (N. Y.) 518. And see *Gay v. Johnson*, 32 N. H. 167.

In *Martin v. Davis*, 21 Iowa 535, where judgment on a partnership debt was rendered against part of the partners only, it was held that the court would look beyond the form of the judgment and to the substance of the debt, and that such judgment would not yield to a later judgment against all. See also *Stevens v. Bank of Cent. N. Y.*, 31 Barb. (N. Y.) 200.

This doctrine is inapplicable to dormant partnerships, and the defendants need not be described as partners in the judgment. See *Trowbridge v. Cushman*, 24 Pick. (Mass.) 310.

1. *Winston v. Ewing*, 1 Ala. 129; *Pearce v. Shorter*, 50 Ala. 318; *Church v. Knox*, 2 Conn. 514; *Crescent Ins. Co. v. Baer*, 23 Fla. 50; *Branch v. Adam*, 51 Ga. 113; *Wallace v. Hull*, 28 Ga. 68; *Ripley v. People's Sav. Bank*, 18 Ill. App. 430; *Trickett v. Moore*, 34 Kan. 755; *Smith McMicken*, 3 La. Ann. 319; *Thomas v. Lusk*, 13 La. Ann. 277; *People's Bank v. Shryock*, 43 Md. 427; 30 Am. Dec. 476; *Wallace v. Patterson*, 2 Har. M. (Md.) 463; *Fisk v. Herrick*, 6 Mass. 271; *Hawes v. Waltham*, 18 Pick. (Mass.) 451; *Upham v. Naylor*, 9 Mass. 490; *Bulfinch v. Winchenback*, 3 Allen (Mass.) 161; *Foot v. Hunkins*, 14 Allen (Mass.) 15; *Tobey v. McFarlin*, 115 Mass. 98; *Ford v. Detroit Dry Dock Co.*, 50 Mich. 358; *Markham v. Gehan*, 42 Mich. 74; *Mobley v. Lonbat*, 7 How. (Miss.) 318; *Mitchell v. Greenwald*, 43 Miss. 167; *Williams v. Gage*, 49 Miss. 777; *Sheedy v. Second Nat. Bank*, 62 Mo. 17; 21 Am. Rep. 407; *Birtwhistle v. Woodward*, 17

Mo. App. 277; *Atkins v. Prescott*, 10 N. H. 120; *Barry v. Fisher*, 8 Abb. Pr., N. S. (N. Y.) 369; 39 How. Pr. (N. Y.) 521; *Reed v. McLanahan*, 47 N. Y. Super. Ct. 275; *Cook v. Arthur*, 11 Ired. (N. Car.) 407; *Myers v. Smith*, 29 Ohio St. 120; *Sweet v. Read*, 12 R. I. 121; *Johnson v. King*, 6 Humph. (Tenn.) 233; *Towne v. Leach*, 32 Vt. 747; *Lyndon v. Gorham*, 1 Gall. (U. S.) 367; *Habershon v. Blurton*, 1 De G. & Sm. 121; *Helmere v. Smith*, 35 Ch. Div. 436.

In *Lyndon v. Gorham*, 1 Gall. (U. S.) 367, it was suggested that a garnishment might be maintained by also summoning the other partner as a garnishee. See also *Fisk v. Herrick*, 6 Mass. 271.

A garnishment against a partnership debtor will not be sustained unless the plaintiff shows that there will be a balance after payment of all the partnership debts. *Robinson v. Teves*, 38 Cal. 611; *Barber v. Hartford Bank*, 9 Conn. 407; *Church v. Knox*, 2 Conn. 514; *Lyndon v. Gorham*, 1 Gall. (U. S.) 367; *Barry v. Fisher*, 39 How. Pr. (N. Y.) 521.

In *Minnesota* such a garnishment will lie, but the creditor cannot receive the debt; the firm collects it and the creditors become entitled to an interest in the collection. *Day v. McQuillin*, 13 Minn. 205; *Barrett v. McKenzie*, 24 Minn. 20. See also *Cook v. Arthur*, 11 Ired. (N. Car.) 407.

In *Thompson v. Lewis*, 34 Me. 167, a garnishment was held to be good if no other partner or any joint creditor resists, and it has been held good unless the debtor can show the firm to be insolvent. *Parker v. Wright*, 66 Me. 392; *Burnell v. Weld*, 59 Me. 423; *Shat-zill v. Bolton*, 2 McCord (S. Car.) 478.

In *Pennsylvania*, it has been held that a garnishment of a firm debtor would lie. *M'Carty v. Emlen*, 2 Dall. (Pa.) 277. But the contrary was held in *Lewis v. Paine*, 1 Pa. L. Gaz. 508.

2. *Barber v. Hartford Bank*, 9 Conn. 407; *Smith v. Cahoon*, 37 Me. 281;

members of a firm jointly but not as co-partners, as no adjustment of partnership affairs would be necessary, the right to garnish it is upheld by a preponderance of authority,¹ and that a debt which is due to several persons severally, though they are partners, is subject to garnishment is unquestioned.²

In some of the States a garnishee process has been adopted as a means of reaching an individual interest in partnership property in actions upon individual claims against a partner,³ but the reasons that prevent an action at law between co-partners for an unsettled balance apply to the garnishment of a co-partner when the balance is unliquidated.⁴

6. THE LEVY AND SALE.—In order to guard against intermediate sales and to make the levy effectual the sheriff is, as a general rule, required to take exclusive possession of the property levied upon, such possession not being deemed adverse to the partnership and the property in his hands being subject to partnership debts.⁵ In some States, however, the theory is adopted that

Thompson v. Lewis, 34 Me. 167; *Berry v. Harris*, 22 Md. 30.

In *Knox v. Schepler*, 2 Hill (S. Car.) 595, it is held that the plaintiff should be required to give security upon the garnishment of a firm creditor for the purpose of reaching a claim owed the surviving partner as such.

1. *Thorndike v. De Wolf*, 6 Pick. (Mass.) 120; *Whitney v. Munroe*, 19 Me 42; *Miller v. Richardson*, 1 Mo. 310; *Piper v. Hanley*, 48 Vt. 479. But see *Hawes v. Waltham*, 18 Pick. (Mass.) 451.

In *Kingman v. Spurr*, 7 Pick. (Mass.) 235, it was held that a garnishment upon the treasury of a joint stock company would reach the dividends of the members.

In *New Jersey*, the interest of a partner in a surplus after sale by an officer under a mortgage held in trust for the firm was held to be attachable by his separate creditor. *Hill v. Beach*, 12 N. J. Eq. 31.

2. *Locket v. Child*, 11 Ala. 640; *Thompson v. Taylor*, 13 Me. 420; *Stone v. Dean*, 5 N. H. 503; *Parker v. Guillow*, 10 N. H. 103. And see *Travis v. Tarrt*, 8 Ala. 574; *Macomber v. Wright*, 35 Me. 156; *Speak v. Kinsey*, 17 Tex. 301.

In *Pennsylvania*, where the garnishee with the assent of all parties paid half the debt to the judgment creditor, it was held to be a binding settlement on a subsequent partnership creditor who garnished the same party. *Howard v. McLaughlin*, 98 Pa. St. 440.

3. See *Patterson v. Trumbull*, 40 Ga.

104; *Willis v. Henderson*, 43 Ga. 325; *Branch v. Adam*, 51 Ga. 113; *Anderson v. Chenney*, 51 Ga. 372; *Armand v. Burrum*, 69 Ga. 758; *Pittman v. Robicheau*, 14 La. Ann. 108; *Narston v. Dewberry*, 21 La. Ann. 518; *Levy v. Cowan*, 27 La. Ann. 556; *Tobey v. McFarlin*, 115 Mass. 98; *Eager v. Price*, 2 Paige (N. Y.) 333; *Morrison v. Blodgett*, 8 N. H. 238; 29 Am. Dec. 653; *Dow v. Sayward*, 12 N. H. 271; *Myers v. Smith*, 29 Ohio St. 120; *Snell v. Crowe*, 3 Utah 26; *Lyndon v. Gorham*, 1 Gall. (U. S.) 367.

Where a party was garnished who had been a partner of the defendant and held unpaid accounts belonging to the firm, it was held that judgment should not be rendered against him absolutely for the amount of the defendant's interest in the accounts, but that he should be directed to pay over the sum to which the partner was entitled as it should be collected. *Cox v. Russell*, 44 Iowa 556.

4. See *Richards v. Haines*, 30 Iowa 574; *Cox v. Russell*, 44 Iowa 556; *Sirrine v. Briggs*, 31 Mich. 443; *Atwood v. Meredith*, 37 Miss. 635; *Birtwhistle v. Woodward*, 17 Mo. App. 277; *Burnham v. Hopkinson*, 17 N. H. 259; *Treadwell v. Brown*, 41 N. H. 12; 43 N. H. 290; *Campbell v. Pedan*, 3 Up. Can. L. J. 68.

5. *Moore v. Sample*, 3 Ala. 319; *Andrews v. Keith*, 34 Ala. 722; *Clark v. Cushing*, 52 Cal. 617; *Wright v. Ward*, 65 Cal. 525; *Stevens v. Stevens*, 39 Conn. 474; *Davis v. White*, 1 Houst. (Del.) 228; *Newhall v. Buck-*

as the debtor partner is not entitled to exclusive possession the sheriff is not, and that therefore it is sufficient to declare that there is an attachment or execution designating the property levied upon or otherwise according to local practice.¹

ingham, 14 Ill. 405; *White v. Jones*, 38 Ill. 159; *Chandler v. Lincoln*, 52 Ill. 74; *Burgess v. Atkins*, 5 Blackf. (Ind.) 337; *Branch v. Wiseman*, 51 Ind. 1; *Herschfield v. Claflin*, 25 Kan. 166; 37 Am. Rep. 237; *White v. Woodward*, 8 B. Mon. (Ky.) 484; *Watson v. Gabby*, 18 B. Mon. (Ky.) 658; *Douglas v. Winslow*, 20 Me. 89; *Bradbury v. Smith*, 21 Me. 117; *Moore v. Pennell*, 52 Me. 162; *Hacker v. Johnson*, 66 Me. 21; *Fogg v. Lawry*, 68 Me. 78; *Caldwell v. Auger*, 4 Minn. 217; *Barrett v. McKenzie*, 24 Minn. 20; *Sanders v. Young*, 31 Miss. 111; *Atwood v. Meredith*, 37 Miss. 635; *Wiles v. Maddox*, 26 Mo. 77; *Carillon v. Thomas*, 6 Mo. App. 574; *Scrugham v. Carter*, 12 Wend. (N. Y.) 131; *Phillips v. Cook*, 24 Wend. (N. Y.) 389; *Goll v. Hinton*, 8 Abb. Pr. (N. Y.) 122; *Smith v. Orser*, 42 N. Y. 132; 43 Barb. (N. Y.) 187; *Read v. McLanahan*, 47 N. Y. Super. Ct. 275; *Tredwell v. Rascoe*, 3 Dev. (N. Car.) 50; *McPherson v. Pemberton*, 1 Jones (N. Car.) 378; *Van v. Hussey*, 1 Jones (N. Car.) 381; *Latham v. Simmons*, 3 Jones (N. Car.) 27; *Nixon v. Nash*, 12 Ohio St. 647; *Stewart v. Hunter*, 1 Handy (Ohio) 22; *Randall v. Johnson*, 13 R. I. 338; *Trafford v. Hubbard*, 15 R. I. 326; *Haskins v. Everett*, 4 Sneed (Tenn.) 531; *Saunders v. Bartlett*, 12 Heisk. (Tenn.) 316; *Knight v. Ogden*, 2 Tenn. Ch. 473; *Weaver v. Ashcroft*, 50 Tex. 427; *Lee v. Wilkins*, 65 Tex. 295; *Snell v. Crowe*, 3 Utah 26; *Reed v. Shephardson*, 2 Vt. 120; 19 Am. Dec. 697; *Whitney v. Ladd*, 10 Vt. 165; *Russ v. Fay*, 29 Vt. 381; *Shaver v. White*, 6 Munf. (Va.) 110.

A levy and sale are void for uncertainty where the undivided half interest of R. & O. is levied on and sold, and R. and O. each individually own such undivided half interest. *Rogers v. Bradford*, 56 Tex. 630.

Leaving the property in the custody of the other partners is not an abandonment of the levy except perhaps as against third persons. *Nixon v. Nash*, 12 Ohio St. 647; *Stephens v. Stephens*, 39 Conn. 474; *Hill v. Wiggin*, 31 N. H. 292; *Tucker v. Adams*, 63 N. H. 361; *Morrison v. Blodgett*, 8 N. H. 238; 29 Am. Dec. 653.

In *U. S. v. Williams*, 4 McLean (U. S.) 236, this practice was recommended in view of the serious effect of a sheriff's possession upon the credit of the firm.

A subsequent execution against all the parties must be actually levied. The rule that an officer once in possession is in possession as to all subsequent rights does not apply as the seizure was of the interest of one partner only. *Johnson v. Evans*, 7 M. & G. 240.

1. *Richards v. Haines*, 30 Iowa 574; *Levy v. Cowan*, 27 La. Ann. 556; *Sandborn v. Royce*, 132 Mass. 594; *Fay v. Duggan*, 135 Mass. 242; *Sirrine v. Briggs*, 31 Mich. 443; *Haynes v. Knowles*, 36 Mich. 407; *Hutchinson v. Dubois*, 45 Mich. 143; *Gibson v. Stevens*, 7 N. H. 352; *Page v. Carpenter*, 10 N. H. 77; *Morrison v. Blodgett*, 8 N. H. 238; 29 Am. Dec. 653; *Dow v. Sayward*, 14 N. H. 9; *Newman v. Bean*, 21 N. H. 93; *Hill v. Wiggin*, 31 N. H. 292; *Treadwell v. Brown*, 43 N. H. 290; *Garvin v. Paul*, 47 N. H. 158; *Tucker v. Adams*, 63 N. H. 361; *Burrall v. Acker*, 23 Wend. (N. Y.) 606; *Jarvis v. Hyer*, 4 Dev. (N. Car.) 367; *Duborrow's Appeal*, 84 Pa. St. 404; *Deal v. Bogue*, 20 Pa. St. 228; *Whigham's Appeal*, 63 Pa. St. 194; *Knerr v. Hoffman*, 65 Pa. St. 126; *Vandike v. Roskam*, 67 Pa. St. 330; *Cropper v. Coburn*, 2 Curt. (U. S.) 465; *Burnell v. Hunt*, 5 Jur. 650; *U. S. v. Williams*, 4 McLean (U. S.) 236; *Ovens v. Bull*, 1 Ont. App. 62. And see *Wiles v. Maddox*, 26 Mo. 77; *Brande v. Bond*, 63 Wis. 140; *Fourth Nat. Bank v. Carrollton R. Co.*, 11 Wall. (U. S.) 624.

Under this rule an action for trespass is a proper remedy against the officer if he takes exclusive possession. See *Sandborn v. Royce*, 132 Mass. 594; *Haynes v. Knowles*, 36 Mich. 407; *Pierce v. Kingsbury*, 63 Mo. 259; *Cropper v. Coburn*, 2 Curt. (U. S.) 465;

Or the firm may maintain replevin against the officer, but all the partners must be made plaintiffs. *Morrison v. Blodgett*, 8 N. H. 238; 29 Am. Dec. 653; *Garvin v. Paul*, 47 N. H. 158; *Fay v. Duggan*, 135 Mass. 242.

But in *Hutchinson v. Dubois*, 45 Mich. 153, it was held that the other partners might bring the replevin alone.

A sale of the entire interest in the property or any specific part of it, as distinguished from the interest of the debtor partner, will make the officer a trespasser *ab initio*.¹ If the debtor partner has an interest in the profits alone and none in the capital the partner who is the sole owner of the capital can enjoin an interference with anything but the profits;² or he can replevy the property, if taken,³ or sue the officer as for a conversion or trespass.⁴ And in some States the others are permitted to enjoin the levy and sale until an accounting and ascertainment of the debtor's share can be had;⁵

1. *Daniel v. Owens*, 70 Ala. 297; *Spalding v. Black*, 22 Kan. 55; *Moore v. Pennell*, 52 Me. 162; *Walsh v. Adams*, 3 Den. (N. Y.) 125; *Waddell v. Cook*, 2 Hill (N. Y.) 47; *Berry v. Kelly*, 4 Robt. (N. Y.) 106; *Atkins v. Saxton*, 77 N. Y. 195; *Randall v. Johnson*, 13 R. I. 338; *Snell v. Crowe*, 3 Utah 26; *Ford v. Smith*, 27 Wis. 261; *Mayhew v. Herrick*, 7 C. B. 229.

The officer is liable to non-debtors because he has violated their rights and he is liable to the debtor partner because the joint sale has rendered it impossible to determine the proportion of proceeds belonging to him and how much should be indorsed on the writ. *Moore v. Pennell*, 52 Me. 162.

In *Lee v. Wilkins*, 65 Tex. 295, however, a levy on the entire interest instead of on the debtor's interest was held to be neither a trespass nor a conversion upon the ground that the officer could not affect any but the separate interest.

A partner who permits the separate creditors of his co-partner to set off lands on execution to satisfy such co-partner's debt, and to recover judgment in ejectment for his possession, without asking, before the levy, for an account of the partnership effects, cannot afterwards disturb the levy on the ground that the land was partnership property. *Clark v. Lyman*, 8 Vt. 290.

2. *Brewster v. Hammet*, 4 Conn. 540. And see *Stumph v. Bauer*, 76 Ind. 157; *State v. Finn*, 11 Mo. App. 546.

The interest of a partner who contributed only time, labor and skill, in the partnership property, may be levied on and sold under execution against him as an individual. *Knight v. Ogden*, 2 Tenn. Ch. 473.

3. *Gillham v. Kerone*, 45 Mo. 487; *Ford v. Smith*, 27 Wis. 261.

Where an execution against one of two partners, for his individual debt, was levied upon partnership goods, and the goods were sold at a constable's

sale and the other partner replevied the goods from the purchaser, that the measure of damages against the plaintiff in replevin is only the value of the interest of the debtor partner in the goods at the time of the sale; that is, his share of the surplus after all demands against the firm are paid. *Sutcliffe v. Dohrman*, 18 Ohio 181.

4. *Blanchard v. Coolidge*, 22 Pick. (Mass.) 151; *Bartlett v. Jones*, 2 Strobb. (S. Car.) 471; 47 Am. Dec. 606; *Smith v. Watson*, 2 B. & C. 401.

Under Pub. St. *Rhode Island*, ch. 237, § 12, an attachment of the co-partnership effects by a creditor of one of the co-partners is dissolved by the making and recording by such co-partner debtor of an assignment for the equal benefit of his creditors; and if, after such assignment, any of the co-partnership effects are carried off under the attachment, the other co-partners have a right to sue for damages. *Traford v. Hubbard*, 15 R. I. 326.

5. *Moore v. Sample*, 3 Ala. 319; *Newhall v. Buckingham*, 14 Ill. 405; *Rainey v. Nance*, 54 Ill. 29; *Hubbard v. Curtis*, 8 Iowa 1; *White v. Woodward*, 8 B. Mon. (Ky.) 484; *Watson v. Gabby*, 18 B. Mon. (Ky.) 658; *Williams v. Smith*, 4 Bush (Ky.) 540; *Thompson v. Lewis*, 34 Me. 167; *Crooker v. Crooker*, 46 Me. 250; 9 Am. Law Reg., O. S. 539; *Thompson v. Frist*, 15 Md. 24; *Sanders v. Young*, 31 Miss. 111; *Wiles v. Maddox*, 26 Mo. 77; *Cammack v. Johnson*, 2 N. J. Eq. 163; *Phillips v. Cook*, 24 Wend. (N. Y.) 389; *Turner v. Smith*, 1 Abb. Pr., N. S. (N. Y.) 304; *Place v. Sweetzer*, 16 Ohio 142; *Sutcliffe v. Dohrman*, 18 Ohio 181; *Nixon v. Nash*, 12 Ohio St. 647; *Rogers v. Nichols*, 20 Tex. 719; *Thompson v. Tinnin*, 25 Tex. Supp. 56; *Warren v. Wallis*, 42 Tex. 472; *Meyberg v. Steagall*, 51 Tex. 351; *Washburn v. Bank of Belknap Falls*, 19 Vt. 278; *Osborn v. McBride*, 3 Sawy. (U. S.) 590; 16 Nat. Bankr. Reg. 22;

but as a general rule, no injunction will be granted unless the bill alleges that the property is needed to pay debts, and that the debtor would have no interest in it after such payment.¹ The buyer at an execution sale acquires the same title that the debtor partner had subject to the partnership debts and equities between the partners,² the claim of the co-partners or any balance found

Crane v. Morrison, 4 Sawy. (U. S.) 138; *Cropper v. Coburn*, 2 Curt. (U. S.) 465; *Bevan v. Lewis*, 1 Sim. 376.

It was held that the sale might be staid by order of the court issuing the process in *Wiles v. Maddox*, 26 Mo. 77; *Phillips v. Cook*, 24 Wend. (N. Y.) 389; *Scrugham v. Carter*, 12 Wend. (N. Y.) 131.

If the other partners have allowed the debtor partner to mingle his own goods with those of the partnership so that the officer cannot identify them, an injunction will be denied. *Chappell v. Cox*, 18 Md. 513.

1. *Brewster v. Hammet*, 4 Conn. 540; *Hubbard v. Curtis*, 8 Iowa 1; *Mowbray v. Lawrence*, 13 Abb. Pr. (N. Y.) 317; 22 How. Pr. (N. Y.) 107; *Turner v. Smith*, 1 Abb. Pr., N. S. (N. Y.) 304; *Grabenheimer v. Rindskoff*, 64 Tex. 49; *Peck v. Schultze*, 1 Holmes (C. C.) 28; *Moody v. Payne*, 2 Johns. Ch. (N. Y.) 548. And see *Jones v. Thompson*, 12 Cal. 191; *Hardy v. Donellan*, 33 Ind. 501; *Wickham v. Davis*, 24 Minn. 167; *Sitler v. Walker*, 1 Freem. Ch. (Miss.) 77; *Moody v. Payne*, 2 Johns. Ch. (N. Y.) 548; *Brewster v. Hammet*, 4 Conn. 540; *Parker v. Pistor*, 3 B. & P. 288; *Holmes v. Menze*, 4 A. & E. 127.

In *Wilson v. Strobach*, 59 Ala. 488, it was suggested that the better way was for the plaintiff to file a bill for an accounting and that it was to be regretted that the legislature had not confined the creditor to this remedy.

A creditor of a firm at large cannot obtain an injunction against the levy. *Young v. Frier*, 9 N. J. Eq. 465; *Mittmigh v. Smith*, 17 N. J. Eq. 259. And see *Atwood v. Impson*, 20 N. J. Eq. 150; *Henderson v. Haddon*, 12 Rich. Eq. (S. Car.) 393. But see to the contrary *Hurlbut v. Johnson*, 74 Ill. 64; *Hubbard v. Curtis*, 8 Iowa 1; *Stout v. Fortner*, 7 Iowa 183.

Creditors may apply in case of insolvency, however, without giving security. *Shedd v. Wilson*, 27 Vt. 478; *Peck v. Schultze*, 1 Holmes (U. S.) 28; *Washburn v. Bank of Bellows Falls*, 19 Vt. 278; *De Caussey v. Baily*, 57

Tex. 665; *Brewster v. Hammet*, 4 Conn. 540.

A mere injunction asked by a partner without asking for an accounting or dissolution or receiver, will be denied even if the partnership is known to be insolvent. *Wickham v. Davis*, 24 Minn. 167. And see *Stout v. Fortner*, 7 Iowa 183; *Stewart v. Hunter*, 1 Handy (Ohio) 22.

2. *Andrews v. Keith*, 34 Ala. 722; *Wilson v. Strobach*, 59 Ala. 488; *Daniel v. Owens*, 70 Ala. 297; *Farley v. Moog*, 79 Ala. 148; *Jones v. Thompson*, 12 Cal. 191; *Wright v. Ward*, 65 Cal. 525; *Girard v. Bates*, 26 Ill. App. 300; *Newhall v. Buckingham*, 14 Ill. 405; *White v. Jones*, 38 Ill. 159; *Chandler v. Lincoln*, 52 Ill. 74; *Rainey v. Nance*, 54 Ill. 29; *Hubbard v. Curtis*, 8 Iowa 1; *Cox v. Russell*, 44 Iowa 556; *Shearer v. Francis* (Ky. 1887), 5 S. W. Rep. 559; *Wintersmith v. Poynter*, 2 Metc. (Ky.) 457; *Savage v. Carter*, 9 Dana (Ky.) 408; *White v. Woodward*, 8 B. Mon. (Ky.) 484; *Williams v. Smith*, 4 Bush (Ky.) 540; *Hacker v. Johnson*, 66 Me. 21; *Fogg v. Lawry*, 66 Me. 78; 28 Am. Rep. 19; *People's Bank v. Shryock*, 48 Md. 427; *Schalck v. Harmon*, 6 Minn. 265; *Barrett v. McKenzie*, 24 Minn. 20; *Williams v. Gage*, 49 Miss. 777; *Morrison v. Blodgett*, 8 N. H. 238; 29 Am. Dec. 653; *Renton v. Chaplain*, 9 N. J. Eq. 62; *Clements v. Jessup*, 36 N. J. Eq. 572; *Deane v. Hutchinson*, 40 N. J. Eq. 83; *Wilson v. Conine*, 2 Johns. (N. Y.) 280; *Scrugham v. Carter*, 12 Wend. (N. Y.) 131; *Phillips v. Cook*, 24 Wend. (N. Y.) 389; *Menagh v. Whitwell*, 52 N. Y. 146; *Staats v. Bristow*, 73 N. Y. 264; *Tredwell v. Rascoe*, 3 Dev. (N. Car.) 50; *Ross v. Henderson*, 77 N. Car. 170; *Latham v. Simmons*, 3 Jones (N. Car.) 27; *Place v. Sweetzer*, 16 Ohio 142; *Sutcliffe v. Dohrman*, 18 Ohio 181; 51 Am. Dec. 450; *Nixon v. Nash*, 12 Ohio St. 677; *Doner v. Stauffer*, 1 P. & W. (Pa.) 198; 21 Am. Dec. 370; *Deal v. Rogue*, 20 Pa. St. 228; *Reinheimer v. Hemingway*, 35 Pa. St. 432; *Lothrop v. Wightman*, 41 Pa. St. 297; *Smith v. Emerson*, 43 Pa. St. 456.

due them being considered as a debt in determining the debtor partner's interest.¹

If the partnership is insolvent or if the debtor's share is absorbed by the equities of his co-partners the buyer gets nothing.² And if the buyer afterwards sells or disposes of the whole property and appropriates the proceeds he is liable for conversion.³

Ward's Appeal, 81½ Pa. St. 270; Durborrow's Appeal, 84 Pa. St. 404; Randall v. Johnson, 13 R. I. 338; Knight v. Ogden, 2 Tenn. Ch. 473; Boro v. Harris, 13 Lea (Tenn.) 36; Carter v. Roland, 53 Tex. 540; McButchon v. Davis (Tex. 1888), 8 S. W. Rep. 123; Scruggs v. Burruss, 25 W. Va. 670; Clagett v. Kilbourne, 1 Black (U. S.) 346; U. S. v. Williams, 4 McLean (U. S.) 236; Gilmore v. North American Land Co., Pet. (C. C.) 460; Skipp v. Harwood, 2 Swanst. 586; Taylor v. Fields, 4 Ves. 396.

That a buyer has such a right of possession that replevin will not lie against him by the co-partners and that the debtor's interest cannot be ascertained in such case see Newhall v. Buckingham, 14 Ill. 405; Chandler v. Lincoln, 52 Ill. 74; Hacker v. Johnson, 66 Me. 21; Wiles v. Maddox, 26 Mo. 77; Scrugham v. Carter, 12 Wend. (N. Y.) 131; Sutcliff v. Nohrman, 18 Ohio 181; 51 Am. Dec. 450; Clagett v. Kilbourne, 1 Black (U. S.) 346. But on the other hand, it is held that the buyer acquires no legal title or right of possession. See Donellan v. Hardy, 57 Ind. 393; Barrett v. McKenzie, 24 Minn. 20; Reinheimer v. Hemingway, 35 Pa. St. 432.

A purchaser under an execution against one partner, in his separate capacity, becomes a tenant in common with the other partners, in an undivided share of the land which he purchases, and holds it subject to all the rights of the other partners, and can have no claim, but upon the separate interest of the individual partner in the residue which may remain after the partnership debts are paid. Gilmore v. North American Land Co., Pet. (C. C.) 460.

The purchaser of partnership property at a sale on an execution against an individual member of a firm can maintain an action in equity against the other members of such firm, to have the extent of his interest in the property purchased ascertained and declared, and to recover such interest, either by having a due part of the property set over to him, or a due proportion of the

proceeds of the sale of it paid over to him, or he may recover a personal decree in the suit, in a proper case, for the value of such interest. Cogswell v. Wilson, 17 Oregon, 31.

If the purchaser take possession, the other partners have a right to use the partnership name to recover the property or its value. Lane v. Lenfest, 40 Minn. 375.

1. See Rainey v. Nance, 54 Ill. 29; Donellan v. Hardy, 57 Ind. 393; Cox v. Russell, 44 Iowa 556; Divine v. Mitchum, 4 B. Mon. (Ky.) 488; Bryant v. Hunter, 6 Bush (Ky.) 75; Crooker v. Crooker, 52 Me. 267; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165.

The buyer's possession is not adverse and the Statute of Limitations will not begin to run until he in some manner converts the property to his own use. Wright v. Ward, 65 Cal. 525.

2. Wilson v. Strobach, 59 Ala. 488; Wright v. Ward, 65 Cal. 525; Chandler v. Lincoln, 52 Ill. 74; Hubbard v. Curtis, 8 Iowa 1; Commercial Bank v. Wilkins, 9 Me. 28; Pierce v. Jackson, 6 Mass. 242; Deane v. Hutchinson, 40 N. J. Eq. 83; Phillips v. Cook, 24 Wend. (N. Y.) 389; Staats v. Bristow, 73 N. Y. 264; Ross v. Henderson, 77 N. Car. 170; Boro v. Harris, 13 Lea (Tenn.) 36.

The purchaser must be postponed to a subsequent chattel mortgage made by all the partners to secure a partnership debt. Clements v. Jessup, 36 N. J. Eq. 572.

In Vermont, if the firm was solvent at the time of the levy by the creditor of one partner, its subsequent insolvency will not defeat his priority, the validity of the attachment being determined by the state of affairs at its date. Willis v. Freeman, 35 Vt. 44; Railroad Co. v. Bixby, 55 Vt. 235.

3. Wright v. Ward, 65 Cal. 525; Wilson v. Conine, 2 Johns. (N. Y.) 280; Latham v. Simmons, 3 Jones (N. Car.) 27. And see White v. Woodward, 8 B. Mon. (Ky.) 484; Durborrow's Appeal, 84 Pa. St. 404; Carter v. Roland, 53 Tex. 540.

The sheriff is not liable for subse

That a partnership is insolvent or that there is no surplus for the debtor partner does not make the levy a trespass.¹ The property sold continues liable for the joint debts, but the joint creditors have no claim upon the purchase money.²

quently allowing the effects to be applied to the payment of a partnership creditor. *Commercial Bank v. Wilkins*, 9 Me. 28. Nor is he liable if he releases the levy in case of the insolvency of the firm. *Wilson v. Strobach*, 59 Ala. 488.

In *Hacker v. Johnson*, 66 Me. 21, however, it was suggested that, although the partnership was insolvent the partners interest might nevertheless sell for something, and that the creditor was entitled to this chance.

1. *Hacker v. Johnson*, 66 Me. 21; *Trafford v. Hubbard*, 15 R. I. 326; *Reed v. Shepardson*, 2 Vt. 120; 19 Am. Dec. 697.

In *Massachusetts* it has been held that the sheriff is a trespasser if the debtor partner has no interest. *Blanchard v. Coolidge*, 22 Pick. (Mass.) 151; *Cropper v. Coburn*, 2 Curt. (U. S.) 465; *Peck v. Schultze*, 1 Holmes (U. S.) 28.

But even there when a levy is upon

real estate, its effects is determined by the legal title. *Peck v. Fisher*, 7 Cush. (Mass.) 389.

2. *Phillips v. Cook*, 24 Wend. (N. Y.) 389; *Ward's Appeal*, 81½ Pa. St. 270; *Gilmore v. North American Land Co.*, Pet. (C. C.) 460. And see *Doner v. Stauffer*, 1 P. & W. (Pa.) 198; 21 Am. Dec. 370.

Where partnership property is sold under separate executions against the partners individually, the proceeds represent the interest of the partners and not that of the partnership, and the fund should be distributed accordingly, *Vandike's Appeal*, 57 Pa. St. 9. See also *Cooper's Appeal*, 26 Pa. St. 262.

A judgment lien against one of the partners of a firm individually, constitutes a lien on the interest of that partner in the partnership property, which entitles the purchaser, when sold, to possession, divested of liens for firm debts not reduced to judgment. *Green v. Ross*, 24 Ga. 613.

INDEX.

- Obliteration, 5
- Obscenity, 5
 - Evidence, 12
 - In criminal law, 6
 - Indictment, 10
 - Obscene matter in mails, 7
 - Obscene matter not importable, 9
- Obstructing justice, 13
 - Evidence, 24
 - Indictment, 21
 - Obstructing attendance of witnesses, 25
 - Obstructing officers, 13
- Obstruction, 26
- Occupy, 32
 - In guaranty, 32
 - In homestead law, 33
 - In lease, 32
 - In statute, 33
 - In tax laws, 33
 - In warrant, 34
- Officers and agents of private corporations, 39
 - Acceptance of office, 54
 - Actions by and against, 172
 - Appointment, 54
 - Compensation, 166
 - Compensation of directors, 119
 - Contested elections, 51
 - Directors 81
 - Duties and liabilities generally, 170
 - Duties and liabilities of directors, 109
 - Evidence in actions by and against, 176
 - Failure to elect, 49
 - General powers of officers and agents, 135
 - Judgments and costs in actions by and against, 177
 - Meetings of directors, 83
 - Official bonds, 63
 - Particular powers of officers and agents, 144
 - Powers of directors, 87
 - President, powers of, 124
 - Procedure in actions by and against, 175
 - Qualification of directors, 81
 - Removal, 169
 - Requisites of election, 42
 - Resignation, 169
 - Right of election, 41
 - Officers and agents of private corporations—*Continued.*
 - Secretary, powers of, 134
 - Treasurer, powers and liabilities of, 132
 - Validity of election, 48
- Officers of municipal corporations, 178
- Official bonds, 178
- Oil, 178
 - Benzine, 179
 - Nitro-benzole, 179
 - Oil leakage, 179
 - Petroleum, 178
- On, 183
 - In a devise, 183
 - On account, 184
 - On behalf, 185
 - On board, 185
 - On file, 186
 - On freight, 186
 - On or about, 183
 - On or before, 184
 - On trial, 188
 - On view, 188
- One, 189
 - One and all, 189
 - One day, 190
 - One month, 190
 - One time, 190
 - One year, 190
- Onerous, 190
 - In insurance policy, 191
 - In statute, 192
 - Onerous title, 191
- Open, 192
 - Open account, 193
 - Open and notorious, 194
 - Open court, 194
- Open and close, right to, 194
 - Rules concerning, 207
 - To whom it belongs, 196
- Open commission, 209
- Opinions, 215
 - Opinions of the attorney general, 215
 - Opinions of justices, 215
 - Constitutional provisions concerning, 215
- Options, 218
- Or, 218
 - In an indictment, 219
- "Or" not read as "and," 222
- Or other, 219
- Or otherwise, 220

- "Or" read as "and," 220
- Orders, 223
 Acceptance, 227
 Acceptor's liability, 228
 Endorsee's rights, 232
 Effect as an assignment, 226
 Effect in general, 225
 Order for merchandise, 234
 When revocable, 224
- Ordinances, 235
 Evidence in enforcement, 266
 Form of, 244
 How enacted, 237
 Mode of enforcing, 260
 Modification of, 245
 Penalties for violation of, 255
 Procedure in enforcement, 260
 Repeal of, 245
 Requirements of, 246
- Ordinary, 271
 Ordinary business, 272
 Ordinary calling, 272
 Ordinary course of business, 272
 Ordinary course of things, 273
 Ordinary expenses, 273
 Ordinary repairs, 273
- Original, 274
 Original cause of action, 274
 Original contractor, 274
 Original jurisdiction, 275
 Original package, 275
- Out, 289
 Out and out, 289
 Out of the business, 289
 Out of the country, 290
 Out of the profits, 290
 Out of the rents, 290
 Out West, 290
- Out-house, 291
 Statutory meaning of, 292
- Overseer, 296
- Owner, 299
 In a homestead law, 303
 In insurance policies, 303
 Mortgagor or mortgagee as, 304
 Owner of a mine, 302
 Owner of real property, 299
 Owner's risk, 300
 With reference to personalty, 305
- Oysters, 306
 Property in, 307
 State regulation of industry, 308
- Palace cars, 309
- Parcenary, estate in, 313
- Pardon, 317
 By President, 319
 Conditional, 317, 328
 Effect of, 325
 Instrument of, 329
 In the States, 320
 Proof of, 330
- Parent and child, 331
 Claims for services, 336
- Parent and child—*Continued.*
 Commitment of child to institution, 400
 Duties of child, 394
 Duties of parents, 345
 Education of child, 346
 Emancipation of child, 395
 Gifts between, 332
 Liabilities of parents, 392
 Maintenance of child, 348
 Rights of child, 395
 Rights of parents, 362
 The quasi relation, 342
 Transactions between, 332
- Parks and public squares, 407
 Assessments for, 414
 Condemnation, 412
 Control of, 415
 Dedication of land for, 407
 Discontinuance of, 418
 Personal injuries in, 416
 Sale of, 417
 Uses and purposes of, 416
- Parlor cars, 418
- Parol agreements, 418
- Parol evidence, 419
 Exceptions to general rule concern-
 ing, 432
 General rule of inadmissibility, 420
 To aid interpretation, 450
 To annex a condition, 445
 To connect writings, 442
 To establish a trust, 446
 To explain abbreviations, 450
 To explain ambiguities, 452
 To explain circumstances, 452
 To explain illegible writing, 450
 To explain meaning of terms, 450
 To explain understanding of parties
 453
 To explain writings, 442
 To impeach validity of instrument,
 437
 To prove condition precedent, 436
 To prove contemporaneous agree-
 ment, 443
 To prove custom, 447
 To prove deed a mortgage, 454
 To prove discharge, 449
 To prove extension, 449
 To prove real consideration, 438
 To prove subsequent agreements,
 447
 To prove waiver, 449
 To rebut an equity, 453
- Partial loss, 469
- Particulars, bill of, 469
- Parties to actions, 470
 Aliens, 484
 Ambassadors, 476
 Amendment of parties, 616
 As affected by assignment of con-
 tract of employment, 537

Parties to actions—Continued.

- As affected by partial assignment, 534
- As depending on privity, 518
- Assignability of tort, 559
- Assignees, 483
- Competency as witnesses, 657
- Conflict of laws concerning, 658
- Consuls, 476
- Corporations, 481
- Counties, 476
- Defect of parties, 611
- Descriptio personæ, 493
- Effect of assignment pendente lite, 554
- Felons, 487
- In actions on bonds, 526
- Indians, 486
- In insurance cases, 522
- In penal actions, 518
- In special cases, 515
- Intervention of parties, 633
- Joinder, 561
- Joinder as affected by statute, 582
- Joinder to confer jurisdiction, 503
- Law of assignment as modified by statute, 537
- Legal title necessary, 505
- Misjoinder, 607
- Misnomer, 491
- Must be real, 488
- Must have capacity, 500
- Must have interest, 500
- Necessary and proper parties distinguished, 649
- Nominal plaintiffs, 512
- Non-joinder, 608
- Party cannot sue himself, 497
- Privity in actions ex delicto, 559
- Real party in interest, 542
- Right to use name of another, 508
- Substitution of parties, 628
- Towns, 476
- Townships, 476
- Trustee of express trust, 552
- Use plaintiffs, 512
- When assignee may sue, 531
- When third party may sue, 528
- Who may be, 474

Partition, 660

- Adjustment of equities, 753
- Agreement not to, 693
- Agreements concerning, 672
- Allowance for improvements, 758
- Appointment of commissioners, 766
- By act of parties, 661
- By arbitration, 666
- By conveyance, 665
- By judicial proceedings, 677
- By parol, 667
- Commencement of action, 715
- Compelling conveyance, 763
- Conclusiveness of judgment, 817
- Confirmation of sale, 794
- Conveyance by metes and bounds, 763

Partition—Continued.

- Costs in proceedings, 812
- Delegation of authority to make, 671
- Disposition of improvements, 758
- Distribution of proceeds of sales, 805
- Effect of, 673, 783
- Estates subject to, 690
- Evidence, 747
- Final judgment, 808
- History, 677
- How effected, 665
- Incidental equitable relief, 751
- Injunction against proceeding, 765
- Interlocutory judgment, 748
- Management of property pendente lite, 764
- Necessary defendants, 717
- Of incorporeal things, 688
- Owely, 755
- Partial partition, 752
- Pleadings, 730
- Powers and duties of commissioners, 768
- Probate court jurisdiction, 712
- Procedure, 743
- Rents and profits, 762
- Report of commissioners, 775
- Review of proceedings, 816
- Rights and obligations of purchaser at partition sales, 798
- Sale instead of division, 785
- Setting aside sale, 795
- Vacating report of commissioners, 777
- Validity of, 673
- Warranty of title in, 674
- What courts have jurisdiction, 705
- What subject to, 662
- Who may enforce, 694
- Who may make, 662

Partnership, 824

- Actions at law between partners, 1254
- Actions between partnerships having common members, 1271
- Actions by and against surviving partners, 1172
- Actions in firm name, 1250
- Actions of account, 1270
- Actual partners, 928
- Agreements not to compete, 1192
- Aliens as partners, 920
- Application of payments, 1086
- As affected by character and extent of business, 888
- As affected by intention, 832
- As agent, 1083
- As an entity, 918
- Assignments, 1090
- Associations and defective corporations, 863
- Associations not for profit, 862
- Assumption of debts by partner,

1111

Partnership—*Continued.*

As to third parties, 877
 Attachment, 1329
 Changes in, 978
 Commencement, 900
 Compensation by partner, 1223
 Consideration, 897
 Construction of articles, 904
 Construction of particular provisions, 906
 Contract as vitiated by fraud, 1101
 Contracts, acts and admissions of partner, 1074
 Contribution between partners, 1073
 Conversion of joint into separate property, 971
 Conveyance to firm, 959
 Corporations as partners, 926
 Criminal liability of partner, 1074
 Dissolution, 1093
 Dissolution by death, 1098
 Dissolution by insolvency, 1103
 Dissolution by mutual consent, 1098
 Dissolution by purchase of co-partner's interest, 1109
 Dissolution by sale of partner's interest, 1099
 Dissolution by sale of property, 1100
 Dissolution by war, 1105
 Dissolution, effect of, 1129
 Dissolution, notice of, 1117
 Dissolution, powers and rights of partners after, 1137
 Dormant partners, 928
 Duration, 902
 Effect of abandonment of business by partner, 1108
 Effect of change in, 940
 Effect of marriage of female partner, 1106
 Effect of misconduct of partner, 1106
 Equitable conversion, 952
 Evidence of, 1312
 Executions, 1335
 Executory partnerships, 873
 Exemption, 1335
 Formation, 895
 General, 889
 General powers of partners, 987
 General rights of partners, 987
 Good will, 1184
 Holding out as partner, 879
 Illegal, 891
 Incumbrance of partner's interest, 966
 Indemnity as between partners, 1213
 Independent contractors, 856
 Infants as partners, 921
 Insane persons as partners, 921
 Insurance of property by partner, 1084

Partnership—*Continued.*

Interested partners, 964
 Joint ownership, 859
 Judgment lien, 1328
 Judgments against, 1324
 Judgments against partners, 1326
 Kinds of, 886
 Legality of conversion of interest, 980
 Liability for misapplication by partner, 1070
 Liability for torts, 1065
 Liability for trust funds used by partner, 1071
 Liability on contracts, 1062
 Losses caused by partner, 1217
 Married women as partners, 923
 Matters distinct from partnership accounts, 1257
 Merger of indebtedness, 1088
 Mining partnerships, 868
 Nature of business, 989
 Nature of business as affected by usage, 991
 Non-trading, 887
 Non-trading, power of partner in, 1018
 Origin and history, 830
 Ostensible partners, 928
 Particular, 889
 Partners, actions by and against, 1236
 Partner's allowance for interest, 1227
 Partner's allowance for outlay, 1225
 Partner's duties and liabilities, 1054
 Partnership bond by knowledge of act of partner, 1080
 Partnership property, 934
 Partnerships as partners, 926
 Persons composing, 920
 Persons under guardians, 921
 Pleading in actions, 1303
 Power of majority of partners, 999
 Powers of partner, restrictions upon, 995
 Power of partner to agree to arbitrate, 1048
 Power of partner to assign, 1045
 Power of partner to borrow money, 1015
 Power of partner to collect debts, 1037
 Power of partner to confess judgment, 1042
 Power of partner to convey partnership land, 1003
 Power of partner to convey real estate, 960
 Power of partner to employ agents, 1007
 Power of partner to give notes, 1018
 Power of partner to incumber property, 1010

Partnership—*Continued.*

- Power of partner to pay debts, 1037
 - Power of partner to perform particular acts, 1001
 - Power of partner to purchase property, 1008
 - Power of partner to sell property, 1010
 - Presumption of equality* between partners, 964
 - Profits as interest, 850
 - Proof of partnership character, 962
 - Property, right to possession of, 941
 - Provisional remedies between partners, 1271
 - Provisions for continuance after death of partner, 1134
 - Purchase of co-partner's interest, 1061
 - Purchase of deceased partner's interest, 1169
 - Purposes, 890
 - Ratification of acts of partner, 1050
 - Real estate, 944
 - Real estate, legal title to, 958
 - Receivers, 1298
 - Representations as partners, 870
 - Sale of partner's interest, 966
 - Scope of business, 989
 - Secret profits of partner, 1232
 - Separate sale of partner's share, 970
 - Set-off in actions, 1307
 - Sharing gross receipts, 853
 - Sharing losses only, 855
 - Sharing profit and loss, 835
 - Sharing profits as compensation for services, 845
 - Sharing profits for rent, 849
 - Specific performance, 903
 - Statutory administrator, 1180
 - Sub-partners, 933
 - Suits in equity between partners, 1273
 - Surviving partner as executor of deceased partner, 1178
 - Surviving partners, 1154
 - Surviving partners, powers of, 1159
 - The firm name, 912
 - Trading, 886
 - Trading and non-trading, distinction between, 993
 - Trading, power of partner in, 1018
 - Use of firm name, 916
 - What constitutes, 830
 - Winding up, 1195
- Words and phrases.
- Obiter dictum, 1
 - Object, 1
 - Objection, 2
 - Obligation, 2
 - Obligation of a contract, 4
 - Obligatory writing, 4
 - Oblige, 5

Words and phrases—*Continued.*

- Obligee, 5
- Obligor, 5
- Obsolete, 12
- Obtain, 26
- Obvious, 27
- Occasion, 27
- Occupancy, 28
- Occupant, 29
- Occupation, 31
- Occupied, 32
- Occupier, 29
- Occupy, 32
- Occur, 34
- Of, 34
- Offense, 36
- Offender, 36
- Offending, 36
- Offensive, 38
- Offer, 38
- Offspring, 178
- Old, 180
- Oleomargarine, 180
- Omission, 182
- Omnibus, 182
- Once, 189
- One, 189
- Onus, 192
- Onus probandi, 192
- Open, 192
- Open commission, 209
- Opera, 212
- Operate, 213
- Operating, 213
- Operation, 213
- Operation of law, 214
- Operation of railway, 214
- Operative, 214
- Opportunity, 217
- Opposite, 217
- Oppression, 218
- Or, 218
- Ordain, 223
- Ordinary, 271
- Ore-leave, 274
- Organize, 274
- Original, 274
- Originally, 274
- Ornament, 276
- Orphan, 277
- Other, 278
- Others, 285
- Otherwise, 285
- Ounce, 289
- Ouster, 289
- Out, 289
- Outfit, 290
- Outfitter, 290
- Outgoings, 291
- Outlaw, 293
- Outlawry, 293
- Outrage, 293
- Outstanding, 294

Words and phrases—*Continued.*

Outstanding liabilities, 294
 Outward mark, 294
 Over, 294
 Over and under, 294
 Over that sum, 295
 Overdraw, 295
 Overdue, 295
 Overplus, 296
 Overrate, 296
 Overt, 296
 Overtaking vessel, 297
 Overwhelming proof, 297
 Owe, 297
 Owelty, 297
 Owing, 297
 Own, 298
 Owned, 298
 Owner, 299
 Ownership, 306
 Package, 308
 Packer, 309
 Packing jury, 309
 Paintings, 309
 Palmistry, 309

Words and phrases—*Continued.*

Pandects, 310
 Panel, 310
 Paper, 310
 Paper, commercial, 311
 Paper mills, 311
 Par, 311
 Par of exchange, 311
 Parallel, 311
 Paraphernal, 312
 Paraphernalia, 312
 Parcel, 313
 Pari delicto, 406
 Parish, 406
 Parochial church, 418
 Parol, 418
 Pars, 467
 Part, 467
 Partaker, 468
 Particeps criminis, 469
 Participate, 469
 Particular, 469
 Particular average, 469
 Particular lien, 469
 Particular services, 469

